UNITED STATES REPORTS

VOLUME 167

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.
JOSEPH McKENNA, Attorney General.[1]
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Harmon having resigned, Mr. McKenna was appointed in his place. His commission was dated March 5, 1897.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported

TABLE OF CASES

CITED IN OPINIONS

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1896.

COMPTON *v.* JESUP.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 314. Argued December 4, 1896. — Decided May 10, 1897.

In the course of the various proceedings, referred to in the Statement of the Case, below, for the foreclosure of mortgages in different States upon different railroads which constituted a part of what was known as the Wabash system, and for its reorganization, the claim of the appellant which forms the subject of this appeal was considered. His claim was for equipment bonds for equipment furnished the Ohio division. Among the proceedings was a suit in Indiana, involving the question of the lien of such bonds upon the portion of the road in Indiana, in which it was decreed that there was no lien. The various proceedings resulted on the 23d of March, 1889, in a decree of foreclosure in the several Circuit Courts in Ohio, Indiana and Illinois, by which the entire line was to be sold as a unit, and further it was provided that the rendering of that decree in advance of the trial and determination of the appellant's claim should not affect the rights of the appellant, but that they should be preserved and enforced in the manner provided for by the decree. The sale under the decree was made and confirmed. August 17, 1889, it was ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein upon and concerning said claim and lien, and reserved in the former decree herein saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson as special master," etc. The special master

reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest, in full. The Circuit Court sustained the master in holding Compton's lien valid, but decided that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Appeal was taken to the Circuit Court of Appeals. That court, after making a full statement, requested the instructions of this court upon the following questions: First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only? Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser? Third. Is the decree of the Circuit Court of the United States for the District of Indiana between the same parties and unappealed from, *res judicata* upon the foregoing questions in this court? *Held*,

(1) That the decree of sale of March 23, 1889, conferred upon Compton, in event that his claim should not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien;

(2) That, in event of such sale, and in applying the proceeds thereof, Compton would be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division;

(3) That the decree rendered in the Circuit Court of the United States for Indiana was not *res judicata* upon the foregoing questions.

This case comes to this court on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, propounding questions concerning which instructions are asked, in accordance with section 6 of the act to establish Circuit Courts of Appeals, approved March 3, 1891.

The statement of facts and questions are as follows:

This is an appeal from that part of a decree in a railroad mortgage foreclosure suit, rendered by the Circuit Court of the United States for the Northern District of Ohio, which fixes the priority of a lien of the appellant and prescribes the remedy for its enforcement. James Compton, the appellant, was a citizen of the District of Columbia. Holding equipment bonds issued by the Toledo and Wabash Railway Company, which subsequently became one of the constituent

companies of the Wabash system, he obtained a decree from the Ohio Supreme Court, declaring them to be a valid lien on that part of the main line of the Wabash system reaching from Toledo west to the Illinois line, and awarding to him, as a means of enforcing the lien, an order for sale of the portion of the line lying in Ohio. 45 Ohio St. 592. Shortly after the entry of this decree by the Ohio Supreme Court and before it was executed, upon the prayer of the complainant and a cross-complainant in the foreclosure proceedings in the court below and after the filing of the necessary affidavit, the court entered an order based on section 8 of the act of Congress of March 3, 1875, directing that Compton be served with subpœna in the District of Columbia, and required to appear and set up his lien in this cause. The order was complied with and Compton, appearing only for the purpose of objecting to the validity of the service, moved the court to set the service aside and to dismiss him from the case. The motion was overruled. He then demurred to the jurisdiction on the ground that citizens of the same State appeared on both sides of the controversy. His demurrer was overruled. The amendments to the bill and cross-bills concerning Compton denied the validity of his lien, and asserted that he was estopped by matter of record to claim a lien because of a decree of the Supreme Court of the United States to which he was in law privy, in the case of *Wabash, St. Louis & Pacific Railway Company* v. *Ham*, denying the existence of a lien in favor of the equipment bondholders. Compton in his answers which he filed after his demurrer was overruled set up his lien as declared by the Ohio Supreme Court decree and his right thereunder to have the Ohio division sold to satisfy it. Compton also claimed in his answer that his bonds were a first lien upon certain terminals of the defendant company at Toledo on the ground that the Ohio divisional mortgage did not cover this property. The court below adjudged that Compton had a valid lien on the Ohio and Indiana lines by virtue of the Ohio decree, but denied his right to a first lien on the Toledo terminals or to a separate sale of the Ohio line, and declined to afford him any relief but that of redeem-

ing the four divisional mortgages, two on the Ohio line and two on the Indiana line, by the payment of about $8,000,000. The sale under the decrees of foreclosure in the court below, against Compton's objection, took place before the validity and character of his lien were determined, and a provision was inserted in the decree saving his rights. Compton contended that the language of this saving clause entitled him to the payment of his lien by the purchaser or in default thereof a resale of the Ohio part of the railroad. At the hearing of the appeal, a motion was made to dismiss on the ground that the same decree as that here appealed from was entered by the United States Circuit Court for Indiana in a case between the same parties.

This appeal presents the questions:

1st. Had the court jurisdiction of the original bill?

2d. Had it power to make Compton party by substituted service?

3d. Was Compton estopped to assert a lien for his bonds by a decree of the United States Circuit Court for Indiana denying it for bonds of the same kind in what was claimed to be a representative suit?

4th. Did the Ohio divisional mortgages not cover certain after-acquired terminal property at Toledo so that Compton had a first lien thereon?

5th. What was the effect of the proviso in the decree of sale upon Compton's rights and remedy?

6th. What relief was he entitled to under the Ohio decree?

7th. Is Compton estopped to prosecute this appeal by the fact that a decree identical in terms with the one here appealed from was entered in the United States Circuit Court for Indiana, and has not been appealed from?

The facts of the case are quite complicated, and many of them must be stated for a clear understanding of the issues.

The Wabash, St. Louis and Pacific Railway Company, usually known as the Wabash system, comprised as its main line, a railroad which ran from Toledo, Ohio, west through Ohio, Indiana, Illinois and Missouri to Kansas City. It was the result of a consolidation of separate railroads, one in Ohio,

one in Indiana, three or four in Illinois and one or more in Missouri. First the Ohio and Indiana companies were consolidated, then the companies east of the Mississippi River, and finally in 1880 all of them were united in the Wabash, St. Louis and Pacific Company. Many of the constituent companies had issued bonds secured by mortgage upon their respective lines, and as consolidations took place the new companies assumed the obligation of the mortgage and bonded debts of their constituents. When the Ohio and Indiana companies were united in 1858 under the name of the Toledo and Wabash Railway Company, there were two mortgages on the Ohio part, one to the Farmers' Loan and Trust Company, trustee, to secure $900,000 of bonds, and a second to E. D. Morgan, trustee, to secure bonds amounting to $1,000,000. There were also two mortgages on the Indiana part, one to the Farmers' Loan and Trust Company, trustees, for $2,500,000, and a second to E. D. Morgan, trustee, for $1,500,000. The Toledo and Wabash Company in 1862 issued equipment bonds to the amount of $600,000, but gave no mortgage to secure them. It is $150,000 — par value — of the equipment bonds which is the subject-matter of this appeal. In 1865 the Toledo and Wabash Railway Company united with several Illinois companies and became the Toledo, Wabash and Western Company, with a line reaching from Toledo to the Mississippi River. It was this consolidation which the Supreme Court of Ohio held, by virtue of the Ohio statute authorizing it, to have the effect of fastening the equipment bonds as a lien on the property of the Toledo and Wabash Railway Company which passed to the new company. The articles of agreement contained the following provisions:

"Now, therefore, the said companies by their respective directors agree to consolidate their said roads, property and capital stock into one company upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads, to the stockholders thereof for ratification, to wit:

"The Toledo and Wabash Railway Company enters into said consolidation on the following basis, viz.:

"Its capital is.....	$10,000,000
Composed as follows:	
First-mortgage bonds.....	3,400,000
Second-mortgage bonds	2,500,000
Convertible equipment bonds	600,000
Convertible preferred stock	1,000,000
Common stock	2,500,000

* * * * *

"It is further agreed that, on the terms and conditions above specified, the four railroad companies hereto do agree, each for itself severally, that the several companies named shall be and they hereby are consolidated into and form one corporation, etc.

* * * * *

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The new company, the Toledo, Wabash and Western Railway Company, shortly after the consolidation offered a mortgage to Knox and Jesup, trustees, upon its entire road, known as the consolidated mortgage, with the purpose therein recited of using the proceeds of their sale to take up and refund all previous indebtedness, including the equipment bonds. The purpose was never carried out, but some $2,500,000 of bonds were issued and the proceeds expended for the use of the company. In the foreclosure of a subsequent mortgage called the gold-bond mortgage, and the consequent reorganization, the property of the Toledo, Wabash and Western Company passed, subject to all previous mortgages, to a consolidated company of the same three States, called the Wabash Railway Company, which issued bonds amounting to $2,000,000, secured by mortgage on its line to Humphreys and Lindley,

trustees. In the decree for sale and deeds under it it was provided that the sale should be without prejudice to the equipment bondholders' rights which were left open. Then the Wabash Company united with a Missouri company to make the Wabash, St. Louis and Pacific Company a consolidated company of Ohio, Indiana, Illinois and Missouri, with a line of railway extending from Toledo to Kansas City. This company issued bonds amounting to $17,000,000, and secured them by mortgage on its entire line to the Central Trust Company and James Cheney of Indiana as trustees. In 1884 the Wabash, St. Louis and Pacific Railway Company filed a bill in the Circuit Court for the Eastern District of Missouri against the Central Trust Company, a citizen of New York, and James Cheney, a citizen of Indiana, trustee under the last mortgage, averring its insolvency, praying for the appointment of a receiver, the marshalling of liens upon it, the sale of its road and a distribution of proceeds for the benefit of its creditors. A similar bill was filed in the Circuit Courts for the Northern District of Ohio and for other districts. Receivers were appointed, who took possession of the railroad, and operated it. Shortly afterward the Central Trust Company and Cheney filed a bill to foreclose their mortgage in state courts of the several States where the mortgaged property lay. These suits were removed to the proper Federal courts, and were consolidated with the insolvency bills (so called) already referred to. The consolidated causes proceeded to decrees for sale in the various jurisdictions. The property was bid off in each court to James F. Joy and others, a purchasing committee under a plan of reorganization entered into by the foreclosing bondholders. The sales were confirmed and deeds ordered to be executed. The committee took possession from the receivers of the part of the railroad west of the Mississippi River, but for some reason, not clearly disclosed in the record, the court did not order the receivers to deliver possession to the purchasers of the lines east of the Mississippi. The sale of Joy and associates in Ohio was subject to the Humphreys and Lindley mortgage, the Knox and Jesup mortgage, the Compton lien, if any he

had, and the Ohio divisional mortgages. While the railroad in Illinois, Indiana and Ohio was still in the hands of the receivers, Knox and Jesup began the proceeding in which this appeal was taken, by filing a bill against the Wabash, St. Louis and Pacific Railway Company to foreclose their mortgage in the Circuit Courts of northern Ohio, Indiana and Illinois, and for the appointment of receivers, and made parties defendant those holding mortgages on the part of the road within each jurisdiction as well as the purchasing committee at the former sale. Humphreys and Lindley and the Farmers' Loan and Trust Company filed answers, which by stipulation were taken as cross-bills, setting up their mortgage liens on the Ohio property, and praying a foreclosure and sale. The bills and cross-bills all averred that at the time of filing the same the road was in the possession of the receivers appointed by the court below in the previous foreclosure suit. Citizens of the same State appeared on both sides of the controversy thus presented. Compton was made a party in the way already stated both to the Indiana and Ohio bills and cross-bills. The litigation in the courts of the three States proceeded together. Judge Jackson, the Circuit Judge for the Sixth Circuit, and Judge Gresham, the Circuit Judge for the Seventh Circuit, sat together, heard the points in dispute argued and made the same orders in their respective jurisdictions. The pleadings in the court below are quite confusing, and do not seem to have been prepared or filed with much care to keep separate the jurisdictions of the Circuit Courts of the three districts in which the litigation was pending. The amended bill of Knox and Jesup recited that a similar bill had been filed in the Southern District of Illinois, and attached the same as an exhibit. Both bills made parties all persons having or claiming an interest in any part of the line in the three States. Among these defendants were James F. Joy, as substituted trustee under the second Ohio divisional mortgage, and also as substituted trustee under the second Indiana divisional mortgage. The cross-bill of Humphreys and Lindley, trustees under the mortgage issued by the Wabash Railway Company on the entire line east of the Mississippi River, made the

same parties as in the amended bill. The amended cross-bill of the Farmers' Loan and Trust Company, seeking to foreclose that part of the railroad lying in Ohio, only made parties defendant those having a mortgage lien on the Ohio division. Compton was made a party to this cross-bill as was also James F. Joy, as trustee under the second mortgage on the Ohio property. By some error, Joy, as an answer to the amended bill of complaint and the cross-bills of Humphreys and Lindley and of the Farmers' Loan and Trust Company, filed the same answer made by him in the Indiana suit, in which he only set up and asked to be protected in his rights as substituted trustee in the mortgage of the Wabash and Western Railway Company, and made no averment or prayer in regard to the mortgage on the Ohio part of the railroad in which he had also been substituted as trustee in place of E. D. Morgan, trustee. Other answers were filed by parties defendants, and the cause proceeded in the three different courts in Ohio, Indiana and Illinois as if the same questions were pending in each court, and the same issues were raised, without respect to the territorial jurisdiction of each court. Identically the same decree, foreclosing all the mortgages on all the railroad property east of the Mississippi River, divisional and otherwise, was entered in each district. The decree was entered March 23, 1889. Compton was not required to answer the bill and cross-bills until April following, but in fact did answer March 28, 1889, so that when the decree for sale was passed the controversy over his claim was not at issue. This decree, though entered in the Circuit Court for the Northern District of Ohio, purports to foreclose divisional mortgages in Indiana and Illinois, and to order to a separate sale property without the territorial jurisdiction of the court, although there is no prayer for such relief, and there is nothing in the decree intended to operate upon the defendant mortgagor company to compel a conveyance of property in another jurisdiction. The decree provided that each division of the road covered by an underlying divisional mortgage should be offered separately, and then the whole road east of the Mississippi River should be offered as a unit. If the sum offered

for the whole road exceeded the total of the separate bids the road was to be struck off to the one making the unit bid, and the share of each division in the amount of the unit bid was to be determined in the proportion of the separate bids. The decree provided that no bids should be received on the Ohio bid which did not equal the sum due on both the Ohio divisional mortgages, and that no bid should be received on the Indiana division which did not equal the amount due on the first Indiana divisional mortgage. Under this decree, Joy and his associates, the purchasing committee in the previous foreclosure proceedings, became the purchasers of the road on their unit bid of $15,500,000. This exceeded by several thousand dollars the sum total of the bids on the separate divisions of the road. The separate bid on the Ohio property amounted to $2,840,595.68, or a little more than enough to pay the principal and interest of the two divisional mortgages. The separate bid on the Indiana division was $3,650,000. This was about $1,300,000 less than would have been required to pay the second divisional mortgage on that division. The purchasing committee organized a new company called the Wabash Railroad Company, to which they conveyed the railroad.

The new company was made a party below to contest Compton's lien and his right to a resale or redemption of the Ohio property, and is a party to this appeal to oppose the reversal or modification of the decree, claiming to assert the rights of all mortgagees whose interests passed to the purchaser by the foreclosure proceeding. Because of the discussion of the effect of the decree for sale on Compton's right, it is necessary to make a somewhat fuller reference to it. After finding the amount due upon each mortgage and foreclosing each mortgage in default of the several payments directed to be made by the mortgagors, the decree ordered a sale at the city of Chicago, at which the mortgaged property should first be offered for sale separately, as described in each of the divisional mortgages. It was further provided that there should be deposited with the special master as security for each bid $100,000 in cash or in bonds; that after such bids

had been made they should be accepted conditionally upon the result of the offer of the entire railway as a unit; that, if the highest bid for the railroad as an entirety exceeded the sum of the highest bids for the separate divisions, the entire property should be struck off to the highest bidder for the entire road; that in such case the court would distribute to each division its share of the unit bid in proportion to the separate bids received for the separate divisions, and that in case of a sale of the property as a unit the purchaser must deposit in cash or in bonds $900,000 as a pledge that he would comply with his bid. The provision with reference to the payment was as follows:

"There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase-money as the court may direct. The remainder of such purchase price may be paid either in cash, or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the said purchase price were paid by the purchasers in cash, and in all cases in which bonds shall be received by the said special masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales, the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon, and in case of the receipt of bonds for security at the time of sale, the said special masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled."

The decree directed that upon the confirmation of the sale by the court and the full payment of the entire purchase price, and the compliance by the purchaser with the condition of the sale and orders of the court in that behalf, the special masters should convey the property by good and sufficient deed, to vest in the grantee "all the right, title, estate, interest, property and equity of redemption except as hereby re-

served of, in and to all and singular the real estate, property, premises and franchises therein described in fee simple forever, and shall entitle the grantees to the possession thereof."

All questions of account between the several different divisions of the railway as to earnings and expenses, as to payments made by the receivers on coupons or bonds secured by the mortgages upon the divisions, and all questions of the disposition of the proceeds arising from the sales under the decree, were reserved for future settlement and adjustment. The masters were required to pay the proceeds into court to remain subject to the further order of the court. The decree then proceeded:

"All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

"And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issue raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross-bill of the cross-complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overrules such objection, and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the Supreme Court of the State of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway Company and others, referred to in the pleading herein and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder

of that portion of the property sold, covered and affected by said lien or the successors in the title of said purchaser or purchasers shall pay to said James Compton or his solicitors herein within ten days after the entry of the decree herein in favor of said James Compton the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

"And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them, or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim or interest or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold, or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

"Any sale, conveyance or assignment of the railway and property hereinabove described made under this decree shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims

or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis and Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and General John McNulta, or upon intervening claims and allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said receivers or either of them, or the adjustment of any equities arising out of the same between the parties thereto, or their successors, either by this court or by the Circuit Court of the United States for the Eastern District of Missouri, or by any United States Circuit Court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis and Pacific Railway Company, or any part thereof, or by any United States Circuit Court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis and Pacific Railway Company and others in the Circuit Court of the United States for the Eastern District of Missouri, including the receivers, have been by said Circuit Court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

"Nor shall any such sale, conveyance, transfer or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sum so charged or to be charged against said property or any part thereof, or said receivers shall not be paid within a reasonable time after being required by order of this or said other courts.

Statement of the Case.

"The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts, and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors, shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands have been or may be allowed against said property of the Wabash, St. Louis and Pacific Railway Company or any part thereof, or said receivers, by order of said courts, shall be fully paid and discharged.

"The provision aforesaid shall apply to the purchasers of the same under this decree, and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation of this decree contained have the effect or be construed, nor are they or any of them intended, to give to any claims that may exist any validity, character or status superior to what they now have, nor to decide or imply that any such claims exist.

"The effect of said provisions and reservations shall be to prevent this decree operating as an additional defence to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist."

The masters reported the making of the sale in accordance with the decree, and the sale was confirmed May 18, 1889. On June 18 an order requiring the masters to execute a deed and to deliver possession was made. This order recited that the purchasers had on deposit a large number of the bonds under all the mortgages, giving the exact amount of each, and then proceeded:

"And it further appearing that the said purchasers, by their said petition, offer to deposit at such time and in such amounts as the court may direct, cash sufficient to pay the expenses that the court may require to be paid, and to pay such sums on first-mortgage bonds and funded-debt bonds not deposited

in said trust company as the court may direct to be paid in cash, and, as security for such payment, to deposit all or any part of the bonds held by said trust company as the court may direct, and to substitute cash for bonds at such time and in such amounts as the court may require, and further, to hold the said purchased property subject to be retaken by the court in the event any cash payments directed by the court shall not be made in pursuance of the court's direction.

"The court thereupon, having duly considered the premises, does order, adjudge and decree that the prayer of said petition be granted; that the said purchasers shall forthwith transfer to the said special masters, Bluford Wilson and A. J. Ricks, the bonds deposited with the Central Trust Company of New York, and hereinbefore mentioned, to be held and disposed of by said special masters as the court may direct. Notwithstanding such transfers of said bonds to said masters, said purchasing committee shall pay all such sums as may be required from them in carrying out their purchase, and in case of their failure to comply with any orders of the court with respect thereto, the court may retake the property, and all of it conveyed by said deed, and annul the title of the purchasing committee with respect thereto, and hold the same for further disposition and as security for the rights of the bondholders under the various mortgages foreclosed. Upon such transfer the said special masters shall forthwith make, execute and deliver to said purchaser a deed or deeds, conveying to them or their assigns all and singular the railways, premises and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause, and all the right, title, interest and estate of all the parties in said cause, of, in and to the same and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed therefor."

Then followed an order to deliver possession, closing with these words: "This order is made subject in all respects to the provisions of said decree of March 23, 1889."

On August 17, 1889, the court ordered "that the issues

presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien, and reserved in the former decree herein, saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson," etc.

The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest in full. The court below sustained the master in holding Compton's lien valid, but decided, as already stated, that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Compton's counsel filed affidavits at the final hearing below to show that their client was deterred from bidding by their advice that the saving clause in the decree made it unnecessary for him thus to protect his claim, because if his lien was held to be valid the purchaser was required to pay it off or let the property go to a resale, and that but for his reliance on the saving clause Compton could easily and safely have made a bid high enough to secure the payment of his claim from the proceeds of sale.

The facts on which turned the issue as to whether the divisional mortgages were a first lien on the Toledo terminals were as follows:

The first Ohio company was the Toledo and Illinois Railroad Company. Its charter of incorporation, dated April 20, 1853, provided for building a railroad from the city of Toledo through the counties of Lucas, Henry, Fulton, Defiance and Paulding, or parts of said counties, to the west boundary line of the State of Ohio, in the township of Harrison, in Paulding County. On September 8, 1853, it made a mortgage (known as the first Ohio mortgage) to the Farmers' Loan and Trust Company, to secure an issue of bonds amounting to nine hundred thousand dollars. The property covered by that mortgage was described as follows, viz.:

"Their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials

and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be purchased or paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds and buildings erected or to be erected thereon, and all franchises, rights or privileges of the said party of the first part of, in, to or concerning the same."

The habendum clause is: "To have and to hold the said premises and every part thereof, with the appurtenances unto the same party of the second part."

In June, 1856, the Toledo and Illinois Railroad Company entered into an agreement of consolidation with the Lake Erie, Wabash and St. Louis Railroad Company, and the Toledo, Wabash and Western Railroad Company was thereby formed. That agreement provided that "All mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

The Toledo, Wabash and Western Railroad Company made a mortgage which was subsequently foreclosed. By the decree of sale the purchaser of the Ohio part, Boody, took subject to the first mortgage. Boody conveyed the Ohio division to a new Ohio corporation, organized with power to construct, maintain and operate a road from Toledo to the Indiana state line, and called the Toledo and Wabash Railroad Company. This company, on October 12, 1858, gave a bond to Edwin D. Morgan, trustee, for $900,000, and secured it by mortgage of its railroad, made and to be made; all right of way and all lands occupied thereby, together with the superstructure, depots, depot grounds and buildings erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises and accessions of the party of the first part, together with all its rolling stock, machinery, furniture and equipments of its said road now and hereafter to be acquired, being the same property described in the deed of Matthew Johnson, marshal and commissioner, to A. Boody,

Statement of the Case.

Esq., and dated October 8, 1858, and by A. Boody conveyed to the party of the first part.

The habendum clause was "To have and to hold the premises and every part and parcel thereof, and all its increase, accessions and incidents unto the said Morgan and his successors," etc.

The condition of the mortgage and bond was that the Toledo and Wabash Railroad Company would pay the $900,000 of bonds issued by the Toledo and Illinois Railroad Company and secured by the first mortgage. The mortgage recites that it is executed for the benefit of the bondholders under the first mortgage. On October 15, 1858, the Toledo and Wabash Railroad Company gave a second mortgage to E. D. Morgan, trustee, for $1,000,000, in which the description of the property conveyed is the same as above, as is also the habendum clause. The true intent and meaning of this mortgage is declared to be as follows:

First. That this mortgage attaches to the property above described as subject to and subordinate to said bonds of the Toledo and Illinois Railroad Company, or said issue of nine hundred thousand dollars, whether evidenced by said bond of the party of the first part, made to Edwin D. Morgan, trustee, etc.

Second. That the party of the first part, or any railroad company into which it may become a component part by consolidation, shall be chargeable with said sum of nine hundred thousand dollars, as a prior lien and incumbrance to any other debt thereon.

The Toledo and Wabash Railroad Company of Ohio, soon after executing the foregoing mortgages, entered into articles of consolidation with the Wabash and Western Railway Company, an Indiana corporation, thereby forming the Toledo and Wabash Railway Company. It was provided in that agreement that all mortgages given by either of the parties "shall be as valid and binding upon the whole of the road, real estate, fixtures and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

This company took possession of the property and operated it. Later it acquired certain terminal property in Toledo. It issued the equipment bonds. It made no mortgage at any time.

In 1865 the Toledo and Wabash Railway Company and various Illinois companies entered into an agreement of consolidation, whereby the Toledo, Wabash and Western Railway Company was formed. It was this agreement which created the lien in favor of the equipment bonds which was adjudicated in Compton's suit.

Another issue raised by the bill and cross-bills and Compton's answers was the effect of a decree of the United States Circuit Court of Indiana denying the existence of a lien in favor of equipment bonds of the same issue as those held by Compton, upon the Ohio decree in Compton's favor. It was contended by complainant below that Compton was a party to the Indiana decree, and was thereby estopped to plead the Ohio decree. The master and the court below decided in Compton's favor on this point. The facts in respect to this issue were as follows: In 1878 one Tysen brought suit on behalf of himself and such other owners of equipment bonds of this issue as might desire to come into said suit and contribute to the expense thereof, to establish that the bonds entitled their owners to a lien on the part of the Wabash main line extending from Toledo to the Illinois state line. The cause was removed to the Federal Circuit Court and resulted in a decree sustaining the lien. *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587; *S. C.* below, *Tysen* v. *Wabash Railway*, 15 Fed. Rep. 763. It was appealed to the Supreme Court of the United States, the decree of the lower court was reversed and the bill of complaint was dismissed. To this action Compton never became a party. When he began his suit the Indiana action had been discontinued. It was subsequently revived, however, and then for the first time a lien was asserted under the consolidation statutes. Compton's counsel did file a brief in the Supreme Court, but he paid no part of the expense of the suit.

In 1880, pending the suit in the Indiana court, but prior

to the rendition of the Indiana decree, Compton began a suit in the common pleas court of Lucas County to establish and enforce a lien on the railroad extending from Toledo to the Illinois state line by virtue of his ownership of $150,000 of the par value of these equipment bonds. Compton made parties to this suit all the railway companies succeeding the Toledo and Wabash Railway Company (which issued the equipment bonds) in the ownership of the property and all the mortgagees whose mortgages were executed, after the issuance of the bonds, except the Central Trust Company and Cheney, trustees, who took their mortgage pending the appeal from the common pleas decree. Neither the Farmers' Loan and Trust Company nor E. D. Morgan, trustees of the underlying Ohio divisional mortgages, were parties.

In March, 1882, the common pleas court entered a decree sustaining the lien claimed, and ordered a sale of the part of the railroad in Ohio to pay the amount of the bonds found due, subject to the prior lien of the mortgages of the Farmers' Loan and Trust Company and E. D. Morgan, trustee on the same property. The cause was appealed to the District Court of the proper judicial district and by that court reserved for decision to the Supreme Court of the State, which in 1888 sustained the rulings of the common pleas court, *Compton* v. *Railway Co.*, 45 Ohio St. 592, found that the amount due on Compton's bonds was $339,920.40 with interest from May 1, 1888, and that this amount was a lien on the railroad in Ohio and Indiana, and ordered that on default in the payment of the amount due after ten days the Ohio part of the road should be sold to enforce the lien.

The finding and action of the Supreme Court of Ohio sufficiently appeared from the fifth and sixth paragraphs of its decree as follows:

"That upon the consummation of such consolidation, said bonds issued as aforesaid by the Toledo and Wabash Railway Company, known as equipment bonds, and all moneys due and to grow due thereon, and among them such of said bonds as are now owned, as aforesaid, by the plaintiff, and the moneys due and to grow due thereon, became an equitable

lien upon all of the said railroad and real property and the structures thereupon, and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo and Wabash Railway Company at the time of said consolidation, and which through said consolidation passed to and vested in the said Toledo, Wabash and Western Railway Company, and which afterwards passed to and vested in the defendant, the Wabash, St. Louis and Pacific Railway Company, which last-named company was, at the time of the commencement of this suit, in possession of the same, being all of its railroad and property connected therewith, commencing in the city of Toledo in the State of Ohio and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance and Paulding in said State, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain and Warren in the State of Indiana, to and terminating at a point in the west line of State Line City in said last-named county, and that said bonds are now a lien on such railroad and property, and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates, claims and liens of the defendants in this action and each of them, in and upon said railroad and property upon which said lien is hereby declared, and is prior and superior to the rights, interests, estates, claims and liens of all persons and corporations who have derived any such rights, estates, claims and liens from, by or through the said defendants, or any of them, since the commencement of this action or otherwise; but as to all that part of said railroad and property which is situate within the State of Ohio, such lien is inferior and subject, but inferior and subject only to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company on the eighth day of September, 1853, for the security of the bonds of that company, amounting to $900,000, due as extended August 1, 1890, and bearing interest at the rate of seven per cent per annum, payable semi-annually on the first day of February and August in each year, and the other

of which was executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan, trustee, on the fifth day of October, 1858, for the security of the bonds of that company, amounting to $1,000,000, due on the first of November, 1878, and bearing interest at the rate of seven per cent per annum, payable semi-annually on the first day of May and November in each year.

"6. That the said defendants or any of them pay to said plaintiff the said sum of $339,820.40 now due on said bonds owned by the plaintiff as aforesaid within ten days from the entry of this decree, and if default shall be made in such payment that an order of sale issue for the sale as upon execution at law of all said railroad and real property, together with the structures thereupon, and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds, known as equipment bonds, is hereby declared to exist, which is situated in the State of Ohio and the jurisdiction of this court, subject, however, but subject only to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company and the Toledo and Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the costs of this action as taxed be paid, and the residue of such proceeds be brought into court to abide its further order herein on the footing of this decree. That before offering the property, hereby directed to be sold, for sale, the officer conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property subject to the incumbrance and lien of the two mortgages hereinbefore mentioned, as executed, respectively, by the Toledo and Illinois Railroad Company and the Toledo and Wabash Railroad Company, subject to which it is directed to be sold and over and above the lien of such mortgages according to the amount of the indebtedness secured thereby, as the same shall be ascertained by the officer

conducting such sale, with interest computed to the time of the sale."

After this case had been appealed to this court and before the hearing, a motion was made by appellees to dismiss the appeal or affirm the decree of the court below on the ground that since the rendition of the decree herein a decree had been rendered in the United States Circuit Court for Indiana on the same cause of action limiting Compton's remedy to a redemption of the four senior mortgages, two in Ohio and two in Indiana, and no appeal had been taken from that decree — and the record of the Indiana suit was filed to establish ground for the motion. The record shows that the Indiana decree was exactly like that from which this appeal was taken, and contained the same provision in respect to Compton's lien requiring him to redeem the Ohio and Indiana divisions by payment of the amount due on both the Ohio and the Indiana divisional mortgages, with interest within ten days, and in default of such payment he should be taxed with the costs of all the matters in connection with his intervention.

"Because the court find difficulty in reaching a conclusion with reference to the following questions, it is ordered that upon the foregoing statement of facts the following three questions, concerning which this court requests the instruction of the Supreme Court of the United States for its proper decision, be certified to that court in accordance with section six of the act to establish Circuit Courts of Appeals, approved March 3, 1891. The said questions are:

"First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only?

"Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?

"Third. Is the decree of the Circuit Court of the United States for the District of Indiana between the same parties and unappealed from *res judicata* upon the foregoing questions in this court?

"It is further ordered, for the convenience of the Supreme Court of the United States, that the opinions of Judge Taft and Judge Lurton in this cause be also certified to the Supreme Court of the United States.

"It is also further ordered, that all proceedings of the cause be stayed until the instructions of the Supreme Court upon these questions shall be received by this court."

Mr. Attorney General Harmon and *Mr. John G. Milburn* for appellant. *Mr. John H. Doyle* was on their brief.

Mr. Rush Taggart and *Mr. Henry Crawford* for appellees.

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

When by virtue of the decrees of foreclosure in the several Circuit Courts of Ohio, Indiana and Illinois, entered March 23, 1889, the entire line in the three States was, on May 15, 1889, sold as a unit to the purchasing committee, and when that committee organized a new company, called "The Wabash Railroad Company," to which, on August 1, 1889, was conveyed the entire line so purchased, it would seem that all questions and disputes pending between the several mortgage trustees were settled and arranged upon the terms fixed by that decree. At all events, no appeal appears to have been taken by any party except Compton.

What are Compton's rights under the saving clause of the decree for sale; whether he is entitled, in case of a sale or redemption, to have the principal and interest of the prior mortgages reduced by the net earnings received by the purchaser since the sale, and what effect is to be given to the decree of the Circuit Court of the United States for the District of Indiana, are the questions certified to us by the Circuit Court of Appeals. It is true that the form in which the first question is put in the certificate would seem to go on the assumption that Compton's only right is to redeem, and that the disputable matter is whether the redemption is to cover

as well the Indiana as the Ohio division. In the view, however, that we take of the subject, we prefer to read the certificate as propounding the question of the real meaning and effect of the decree of sale as affecting Compton's rights, and to thus enable the Circuit Court of Appeals to finally determine the controversy. It is, indeed, contended in the appellees' brief that this court is precluded, by the form of the question, from going back of the decree of the Circuit Court, requiring Compton to redeem, but the Circuit Court of Appeals has certified to us for our consideration, in connection with the questions propounded, the entire decree of the Circuit Court, a full statement of the history of the whole case, and copies of the opinions of the Circuit Judges, in which are fully discussed the various questions that arise under the appeal to the Circuit Court of Appeals; among others the very question whether Compton's right is or is not a right to have a resale. And this alleged right of Compton is considered at length, in every aspect, in the briefs of the respective counsel.

It may be well to have before us the very language of that portion of the decree which we are asked to construe:

"And the defendant James Compton, having in open court, on the final hearing herein, objected to the rendering or entry of any decree in this cause at this time, on the ground that the issue raised by the amendment to the complainant's amended and supplementary ancillary bill and to the cross-bill of the cross-complainants, Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant, James Compton, to be filed herein, have not been tried and determined, the court overrules such objection, and the defendant, James Compton, duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If, upon the determination of such issues, it shall be adjudged by this court that the decree rendered by the Supreme Court of the State of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis and Pacific Railway

Company and others, referred to in the pleading herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers, at any sale or sales hereunder of that portion of the property sold, covered and affected by said lien, or the successors in title of said purchaser or purchasers, shall pay to the said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the Supreme Court of Ohio in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in this suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

"And it is further ordered and adjudged that, notwithstanding the entry of this decree, the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title or interest in said property affected by such lien, from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul or abridge any right, claim or interest, or lien which the said James Compton may have in, to or upon the premises hereby directed to be sold, or any part thereof, or in, to or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto."

The masters reported the making of the sale in accordance with the decrees, which sale was confirmed May 18, 1889, and on June 18 an order requiring the masters to execute a deed and to deliver possession was made. On August 17, 1889, the court ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein upon and concerning said claim and lien, and reserved in the former decree herein saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson as special master," etc.

The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest, in full. The Circuit Court sustained the master in holding Compton's lien valid, but decided that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. In refusing Compton a right to a resale of the Ohio property, and in restricting him to a redemption of the Ohio and Indiana divisions in favor of the divisional mortgages thereon, we think the Circuit Court erred.

The language of that court was as follows:

"There is nothing in the reservations of the decree of March 23, 1889, which requires the court to order a resale of the property covered by Compton's equitable lien. That lien was in fact discharged by the foreclosure of the four mortgages ahead of it, which foreclosure Compton had no right to interfere with or delay. The reservations in the decree of sale were not intended to and cannot affect the purchaser's title acquired under those mortgages. We cannot properly, therefore, direct a resale without disregarding the prior right of said mortgagees and of the purchasers who have succeeded thereto. If we had the discretion to do so, it should not be exercised in his favor, for it does not appear that any larger sum could be obtained on a resale; it is not shown that it sold for an inadequate price, and Compton offers no guaranty or security that a resale will bring a larger amount and realize a surplus to which he would be entitled. It is not proper for

the court to order resales as a matter of experiment, and thereby cast clouds upon the title of the purchasers or present owner. As stated by the Supreme Court in *Robinson* v. *Iron Mountain Railway*, 135 U. S. 522, his failure to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale. Besides he was as free to bid at the sale already made as he would be upon a resale. Under such circumstances we give full effect to his equitable lien by allowing him to redeem the property upon the terms indicated."

We think that these observations show a plain oversight or disregard by the learned court of the terms and obvious meaning of the decree of March 23, 1889. When the terms of that decree were fixed, all parties to be affected thereby agreed to the same. The issues raised by the pleadings as to Compton's claim were still pending and undetermined. It was evidently the wish and the interest of all the other parties to have the sale effected at once, and, in order to avoid the further delay that would be occasioned by awaiting the determination of those issues, the provisions or reservations in Compton's favor were put in the decree.

Substantially those provisions were that the entry of the decree of sale should not foreclose Compton's claim, but that the issues concerning it should be inquired into and determined; "that if upon the determination of such issues it shall be adjudged by the court that the decree rendered by the Supreme Court of Ohio, in the suit brought by said James Compton, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continues in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered or affected by said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars, with interest at six per cent per annum from May 1, 1888, . . . and in default of such

payment this court should resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct."

When the report of the special master finding the issues in Compton's favor, that his lien was a valid one, and that he was entitled to have the Ohio division resold if the purchaser did not pay off his bonds as provided in the decree, was sustained by the court so far as the validity of Compton's lien was concerned, we do not think it was open for the court, consistently with the terms of the decree of March 23, 1889, to deprive Compton of the rights and remedies therein conferred. The various questions and equities arising out of the dates of the mortgages, etc., which are discussed by the court, were all waived and removed from consideration, so far as Compton was concerned, by the express provisions of the decree. It is suggested that because it was said that the decree in Compton's favor should be enforced by a resale of the property or *otherwise* as the court might direct, that thereby it was intended that the court should have as full power to determine and regulate Compton's rights and remedies as if the reservations in the decree had never been made. This we think a strained and unnatural interpretation to put upon the phrase mentioned. We do not understand it as intended to enable the court to disregard its decree of March 23, but rather as a provision in Compton's favor — as, for instance — that the court might empower Compton to take possession of the property covered by his lien, instead of resorting to a sale.

When the Circuit Court speaks of a resale as inequitably affecting the rights of the prior mortgagees and of the purchasers who have succeeded thereto, it is evident that the court overlooked those provisions of the decree which, in express terms, subjected such purchasers to Compton's rights to a resale, if they do not choose to pay him the sum awarded by the decree. So, when the court says that Compton could as well have been a bidder at the sale as at a resale if one be ordered, it omits to notice that when the sale took place under

the decree Compton's claim was still undetermined, but that provision had been made for him in the event that his claim was held valid. He could not safely bid because he could not foresee whether his claim would be allowed, and the arrangement made relieved him, very properly, from the perplexity to which he would have been subjected if the sale had been unconditionally made, when the fate of his claim was still uncertain.

It was well said by Mr. Chief Justice Waite, speaking for this court in *Fosdick* v. *Schall*, 99 U. S. 252, that "railroad mortgages . . . are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect. That portion of said decree which established Compton's rights was in its nature final; the only matter which was kept in reserve as respects Compton was the awaiting the determination of the validity and amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the Circuit Court at a subsequent term to disturb the rights of Compton defined and adjudicated at a previous term in the final decree of sale. In several particulars the case of *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, would seem to be applicable. That was a case like the present one, of several suits brought to foreclose mortgages in two or more of the Circuit Courts of the United States having jurisdiction over distinct railroads which had been consolidated. Two such suits were brought in the Circuit Court for

the Southern District of Ohio, and a receiver was appointed. While the proceedings were pending the Grant Locomotive Works intervened by petition in both suits, and set up claims arising out of the use by the receiver of certain locomotive engines belonging to the intervenor. Upon a hearing and on the 22d day of December, 1883, of the October term, orders were entered in each of said causes in favor of the intervening petitioner, by which the receiver was ordered to pay certain considerable sums to the Grant Locomotive Company by way of rent and purchase money of the engines, and further declaring that the said several amounts with interest thereon should be a charge upon the earnings, income and all the property of the Toledo, Cincinnati and St. Louis Railroad Company (the consolidated company), and especially of the Ohio division, prior to the first mortgage or other bonded debt of said railroad or of said division thereof, and that any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or division should be a first lien thereon, and the said sale should be made subject thereto. On March 7, 1884, the same being one of the days of the February term, these orders were suspended by an order of the court, the petitioner objecting. On March 15, 1884, the Central Trust Company, complainant, filed an answer to the intervening petition, and also a petition for a rehearing and review of the orders of December 22, 1883, which it further asked should be annulled and set aside.

On April 10 of the April term, 1884, the court ordered and decreed that the said decrees of December 22, 1883, be set aside and annulled. In June, 1884, the two Ohio divisions of the railroad were sold, and the sales were confirmed by an order made July 9, 1884. The decrees for sale contained provision for the payment into the court by the purchasers at these sales of certain amounts of cash, and also provided that the decrees of confirmation of the sale should be subject to the terms and provisions of the decrees of sale theretofore made; and the court reserved the right to resell said railroad property upon failure by the purchasers to comply with such terms and provisions.

On the 8th day of February, 1887, the Grant Locomotive Works and R. S. Grant severally filed petitions in said causes, setting forth the matters hereinbefore detailed, and alleging that the orders of April 10, 1884, purporting to annul the decrees of December 22, 1883, were void, and that those decrees were still in force. The Central Trust Company answered, and the purchasers of the Ohio divisions demurred; and on June 11, 1887, the court adjudged and decreed that the order of April 10, 1884, be set aside, and that the said orders of December 22, 1883, be restored. January 28, 1889, on motion of the intervening creditors that the purchasers of the railroad property be required to pay into the registry of the court, for the use of the intervenors, the amounts due under the decrees, and that in default thereof the said railroad property be resold for the benefit of the intervenors, decrees so prayed for were entered over the objections of the Central Trust Company and of the purchasers. The court also refused to entertain bills of review on the part of the Central Trust Company and of the purchasers, seeking to have said orders of December 22, 1883, reconsidered.

From these orders and decrees an appeal was taken on the part of the Central Trust Company and the purchasers to this court, where the action of the Circuit Court was approved, and it was *held* that if the decree of sale in a suit for foreclosing a railroad mortgage provides that the purchaser shall pay down a certain sum in cash when the sale is made and do certain other acts prescribed, the purchaser is bound by the decision of the court as to such other claims, and has no appealable interest therein; that a decree, in a suit for foreclosing a railroad mortgage, that the claim by an intervening creditor of an interest in certain locomotives in the possession of the receiver and in use on the road was just and entitled to priority over the debt secured by the mortgage, is a final decree upon a matter distinct from the general subject of the litigation, and it cannot be vacated by the court of its own motion after the expiration of the term at which it was granted.

In the opinion in this case, *Swann* v. *Wright's Executor*,

110 U. S. 590, was cited. There Swann had purchased a railroad under a decree which provided that the sale should be subject to the liens already established, or which might be established on references then pending, as prior and superior to the lien of the mortgage, and the claim of Wright was one of this class. It was pending before the master and reported on after the sale, when the purchaser applied to oppose its confirmation, and was not allowed to do so; and Swann afterwards filed a bill to set aside Wright's claim for fraud in its inception, which bill was dismissed, and the dismissal was on appeal affirmed on the ground that the property was purchased expressly subject to all established claim or claims which might be established on references then pending, which included Wright's, and it was decided that as neither the purchaser nor his grantee proposed to surrender the property to be resold for the benefit of those concerned, such purchaser had no standing in court for the purpose of relitigating the liens expressly subject to which he bought and took title.

The apprehensions expressed in their brief by the learned counsel of the appellees, that because of the absence of the other holders of the equipment bonds, the purchasers or their successor, the Wabash Railroad Company, may yet be subjected to their claims, are without foundation. It would seem that their claims were disposed of by the decree of this court in the case of *Wabash, St. Louis & Pacific Railway* v. *Ham*, 114 U. S. 587, where it was held that the property sold under the decree of foreclosure is not subject to any lien in favor of the holders of the equipment bonds. We think it quite plain that Compton is the only party having an interest in and a right to enforce the decree of the Ohio Supreme Court. The provision contained therein assessing the amount of his claim at the amount of the bonds held by him shows that the decree was intended to operate solely for his benefit, and the direction that the proceeds of sale should be brought into court, to abide its further order on the footing of the decree, is the order usually made when a sale is made by an officer appointed by the court. Such a sale might result in a sum in

excess of Compton's claim, and, in such event, there would be room for a further order of the court.

This view of the import of the decree of March 23, 1889, relieves us from a consideration of the difficult questions that would arise if Compton were compelled to proceed by way of redemption. Those questions are discussed with learning and ability in the respective opinions of the Circuit Judges, furnished us in connection with the certificate, and also in the elaborate briefs of the appellees' counsel. *Compton* v. *Wabash Railroad*, 31 U. S. App. 486.

But, as we have already said, all parties who have had the benefit of the decree of sale are precluded from going back of it, and from now raising questions that might otherwise have arisen. Not only were those who were parties to the proceedings in the Ohio court bound by the decree, therein reached, that Compton had a right to sell the Ohio line in satisfaction of his lien, but the Ohio divisional mortgagees who were not parties to that decree, but who procured, or, at least, have acquiesced in, the decree of March 23, 1889, and have participated in the benefits of the early sale thus secured, have no right now to object to the enforcement of Compton's lien in the manner pointed out in the decree. *The Stephen Morgan*, 94 U. S. 599; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514.

No objections were taken by any of the parties to the decree of sale of March, 1889, either for want of parties or for any other reason. Indeed, it was plainly a conventional decree. Any inconvenience that would be occasioned by a resale of a portion of the entire line can be avoided by complying with the decree and making payment accordingly. If the Wabash Railroad Company be regarded simply as an outside purchaser, it cannot be heard to object to the terms of the decree of sale. If, what is apparently its real character, it be regarded as a company formed by an arrangement between the parties controlling the sale, it has even less right to disregard the rights of Compton as stipulated for in the decree.

The next question put is whether Compton is entitled to have the prior mortgages on the Ohio division reduced by the

net earnings received by the purchasers since the receivers turned over possession of the road to them.

If the Wabash Railroad Company, as the successor of the purchaser at the sale, is to be regarded as the Ohio mortgagees in possession, it is liable to account for the rents and profits or net earnings of the mortgaged property. Such, certainly, is the general rule when property is redeemed, either by the mortgagor or by a junior incumbrancer having a right to redeem, and we see no reason why that rule should not be applied in a case like the present. Jones on Mortgages, 5th ed. vol. 2, § 114.

But we think the better view is that the Wabash Company should be regarded as a party in possession under the express terms of the order of sale, and as representing all parties in interest, including Compton; and hence cannot claim to be an absolute purchaser of the rights of a mortgagor not subject to account for rents and profits. In that point of view there is a trust relation, which involves an accounting until Compton is disposed of.

Whether the decree of the Circuit Court of the United States for the District of Indiana between the same parties and unappealed from, and which, while recognizing Compton's lien, declares his remedy to be a redemption of the railroad in Indiana and Ohio, estops Compton from enforcing his lien or claim against the Ohio division only, is the third question put to us.

This question should be answered in the negative, and, indeed, is covered by the view which we take of the real nature of Compton's remedy, as entitling him to a sale of the Ohio division if his debt should not be paid by the purchaser under the decree of sale. Compton's claim, in its present status, consists of the decree of the Ohio state court in his individual favor, fixing the amount of his debt, and decreeing a sale of the Ohio property, and of the decree of sale of the Circuit Court of the United States affirming the decree of the Ohio court as to the validity and amount of the claim, and providing that if it should not be paid by the purchaser, Compton should have a right to a sale of the Ohio road or to some equivalent remedy.

Opinion of the Court.

Upon the theory of the mortgagees themselves, the suits in the Circuit Courts of Ohio and Indiana were two distinct proceedings, having in view the sale of two distinct portions of the road, and while the decree of the Circuit Court of the Indiana district may restrict Compton from proceeding in that court and district, so as to affect property in Indiana, except on the terms of that decree, such decree cannot, as we view it, be used by the purchaser to affect or defeat Compton's rights in the Circuit Court of the United States for the Ohio district. This contention overlooks the distinction between Compton as one of a class of bondholders and Compton recognized in the decree as the owner of a final judgment or decree of the state court of Ohio.

Upon the whole, we answer the questions propounded thus:

1*st*. *That the decree of sale of March* 23, 1889, *confers upon Compton, in event that his claim shall not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien.*

2*d*. *That, in event of such sale, and in applying the proceeds thereof, Compton will be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division.*

3*d*. *That the decree rendered in the Circuit Court of the United States for Indiana is not* res judicata *upon the foregoing questions.*

Let it be so certified.

In re HALL, Petitioner.

ORIGINAL.

No. 17. Original. Submitted April 12, 1897. — Decided May 10, 1897.

A judgment in the Court of Claims against the District of Columbia recovered under the act of February 13, 1895, c. 87, was reversed in this court because interest on the original claim had been improperly allowed, and the case was remanded to that court for further proceedings not inconsistent with the opinion of this court. The mandate of this court was filed in that court, and application was made for judgment in accordance with the opinion of this court, waiving interest. Pending the decision upon this application, the said act of February 13, 1895, authorizing the original judgment was repealed by Congress, and the Court of Claims declined to enter judgment as prayed for. The plaintiff thereupon made application to this court for a mandamus, to require the Court of Claims to enter judgment as requested. *Held*, that the effect of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in any case founded upon the repealed act; but that this court did not intimate by this decision that that court would not have jurisdiction to entertain and grant a motion on the part of the petitioner to reinstate the original judgment.

THE case is stated in the opinion.

Mr. Edwin Forrest for petitioner.

Mr. Assistant Attorney General Dodge opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is an original application to this court for a writ of mandamus to the judges of the Court of Claims commanding them to cause to be entered a judgment in favor of petitioner and against the District of Columbia for the sum of $8644.19, as of March 2, 1897, the date of the filing of a mandate from this court with the Court of Claims in the case of *District of Columbia* v. *Hall*. The record now before us gives the history of that case since it was decided by this court in February last.

The facts in the original litigation out of which this applica-

tion grows are to be found in the report of the cases of *District of Columbia* v. *Hall*, 165 U. S. 340, and *District of Columbia* v. *Johnson*, 165 U. S. 330. It appears therein that this petitioner, under the provisions of the act of Congress approved February 13, 1895, had recovered a judgment in the Court of Claims, which was entered June 22, 1896, against the District of Columbia, for the above-named sum of $8644.19, with a declaration contained in the judgment that such amount became due and payable on the 1st of January, 1877, the effect of which was to grant interest thereon from the last-named date. Upon appeal this court determined that the Court of Claims erred in the matter of granting interest, and therefore the judgment of that court was reversed and the cause remanded. On the 1st day of March, 1897, the mandate from this court was issued, in which it was "ordered and adjudged by this court that the judgment of said Court of Claims in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to said Court of Claims for further proceedings not inconsistent with the opinion of this court." The mandate was filed with the Court of Claims on the 2d day of March, 1897, and on the opening of the court on that day application was made for judgment in accordance with the mandate and the opinion of this court, the petitioner waiving any interest on the judgment. This motion was consented to by the attorney representing the District of Columbia, but the Court of Claims refused to immediately grant the motion, and soon thereafter adjourned to the 8th of March. On the 15th of March the court entered an order declining to take any further proceedings in any suits based on the act of Congress, among them being the petitioner's claim, for the reason that the act had been repealed. The repealing act was enacted one day after the filing of the mandate in this case in the Court of Claims and the making of the motion by the petitioner for judgment.

The judges of the Court of Claims have made return to the order to show cause why the mandamus should not issue, and in that return they state:

"That on the 2d day of March, 1897, that not being a motion day according to the practice of said court, was presented in open court the mandate of the Supreme Court reversing the judgment in favor of Joseph T. H. Hall, which is described and set forth in the petition, together with a motion for entry of judgment for the sum of $8664.19; that said motion was presented upon a day when the court was engaged in the regular trial of cases, and according to the practice of the court was received without argument and taken under advisement for decision thereafter; that at or about the same time the attention of the court was called to the pendency of the various motions for new trial from the numerous judgments, embodying the same characteristics which had been held to be erroneous by the Supreme Court, and on the said 2d day of March, 1897, mandates from the Supreme Court reversing the three other judgments appealed from as aforesaid and heard together with that of Joseph T. H. Hall, and in the same form as the mandate set forth in the petition, were filed.

"That on the said 2d day of March, 1897, and before the court in the ordinary course of its business had been able to take up for consideration the motion for judgment in favor of said petitioner, or to examine the opinion of the Supreme Court, referred to in the mandate and set forth in the petition, the court adjourned to the 8th day of March, and while so adjourned, Congress enacted and the President approved the act of March 3, 1897, entitled 'An act making appropriations to provide for the expenses of the District of Columbia for the fiscal year ending June 30, 1898, and for other purposes,' which said act contained, amongst other things, the following provision: 'That the act approved February thirteenth, eighteen hundred and ninety-five, entitled "An act to amend an act, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction upon the Court of Claims to hear the same, and for other purposes,' approved June sixteenth, eighteen hundred and eighty," be and the same is hereby repealed, and all proceedings pending shall be vacated

and no judgment heretofore rendered in pursuance of said act shall be paid.'

"That at the time of the passage of said act the judgment in favor of the petitioner, as also of said three other appellants, had been by the action of the Supreme Court reversed and set aside. The judges of the Court of Claims, upon conference and due consideration, reached the conclusion that said act of Congress had taken away the power of the court to render judgment or take any step or proceeding in the said case, or in any of the other cases pending, or with reference to any of the judgments theretofore rendered under and by virtue of the jurisdiction conferred by said act of February 13, 1895; wherefore on the 15th day of March, 1897, that being the first motion day after the court resumed its sittings on the 8th of March, and the regular day upon which, according to the practice of the Court of Claims, judgments and decisions are rendered and entered, the said Court of Claims made the order set forth on page 7 of the petition in the following words, to wit:

"'The act of 13 February, 1895, 28 Stat. 664, having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments and all other papers in such suits be restored to and retained upon the files of the court without further proceedings being had.'"

The petitioner now insists that he has the legal right to a judgment in the Court of Claims for the original sum of $8644.19, because he says the judgment of that court originally awarding him that sum was not in effect wholly reversed by this court, but only in part in regard to interest, and that as to all other matters the judgment, under the opinion of this court, substantially remained and was in full force on the 2d day of March, at the time of the filing of the mandate and of the making of his motion to the Court of Claims; he therefore further insists that he was, when he made that motion, entitled at once to the judgment he asked for, and that if it had then been given, he would have been enabled to obtain payment of the judgment prior to the repeal of the act upon

which the judgment was originally founded. He asks, therefore, that this court direct the Court of Claims to enter a judgment *nunc pro tunc* as of March 2, 1897.

In this case the judgment was, in form at least, absolutely reversed and the case remanded to the Court of Claims for further proceedings not inconsistent with the opinion of this court. Confessedly, further proceedings by virtue of the mandate and under the direction of the Court of Claims were necessary to be taken before any judgment could be entered in such court and thereafter enforced, and before any proceedings were taken by way of the entry of any judgment Congress interfered by repealing the statute. When the mandate was filed in the Court of Claims and the motion made for judgment, that court was engaged in the regular trial of causes; it was not a motion day according to the practice of the court, and the court received the mandate and heard the request, and took the same under advisement for decision thereafter. The court was not bound, upon the simple presentation of the mandate and the statement of counsel, even if there were no opposition on the part of the attorney for the District of Columbia, to immediately drop all other business and grant the motion; it had the right, and it was its duty in the due and orderly progress of its work, to take the motion into consideration if it thought it necessary, so that it might examine the opinion and come to an intelligent conclusion as to what action was required of it for the purpose of complying with the terms of the mandate. The fact that the court had already heard of the decision of this court and had casually seen the opinion, did not alter the case.

The effect of the passage of the repealing act was to take away the jurisdiction of the Court of Claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had power to do. *Merchants' Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544; *Ex parte McCardle*, 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85; *Baltimore & Potomac Railroad* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141.

This court had just decided that the act of February 13, 1895, 28 Stat. 644, simply conferred a gratuity upon the per-

sons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the act so repealed. If there had been no repeal, and the Court of Claims had, after the filing of the mandate from this court, proceeded to a new trial of the whole merits of the original judgment, the case cited by the petitioner, *Gaines* v. *Rugg*, 148 U. S. 228, might be in point. It does not touch the case upon the facts here presented.

In this case, however, the record originally before us showed that the petitioner had at one time obtained a judgment for over a thousand dollars against the District of Columbia upon a cause of action not founded upon the act of Congress just repealed. This judgment had been vacated. We do not intimate by this decision that the Court of Claims would not have jurisdiction to entertain and grant a motion on the part of petitioner, if he should be so advised, to reinstate that original judgment. That question is not before us, and we allude to it simply for the purpose of stating that our decision herein should not be taken as any expression of opinion adverse to the granting of a motion such as is above mentioned.

The application for a writ of mandamus is

Denied.

DAVIS v. MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF SUFFOLK COUNTY, MASSACHUSETTS.

No. 229. Argued and submitted March 25, 1897. — Decided May 10, 1897.

The ordinance of the city of Boston which provides that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit from the mayor," is not in conflict with the Constitution of the United States and the first section of the Fourteenth Amendment thereof.

Statement of the Case.

It was charged against the plaintiff in error, in the municipal court of the city of Boston, that "in and upon certain public grounds of said city, within said district, called the 'common,'" he "did make a public address, the same not being then and there in accordance with a permit from the mayor of said city, against the peace of said Commonwealth, the form of the statute of said Commonwealth and the revised ordinance of said city in such cases made and provided."

The ordinance claimed to be violated was section 66 of the revised ordinances of the city of Boston, (1893,) and reads as follows:

"Sec. 66. No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor."

The proceedings were removed to the Superior Court of the county of Suffolk, where the accused renewed a motion which he had interposed in the municipal court to quash the complaint. The grounds assigned in support of this motion were seven in number, and, among other objections, it was substantially asserted that the ordinance violated rights alleged to be secured to the accused by the constitution of the State and by the Fourteenth Amendment to the Constitution of the United States. The motion to quash being overruled and an exception noted, the accused was tried before the court and a jury.

At the trial the government put in evidence the ordinance heretofore referred to, and called the attention of the court to sections 35 and 39 of c. 448 of the acts passed by the legislature of Massachusetts in the year 1854, which sections are as follows:

"Sec. 35. All other powers heretofore by law vested in the town of Boston or in the inhabitants thereof as a municipal corporation, or in the city council of the city of Boston, shall be and hereby are continued to be vested in the mayor, aldermen and common council of the said city, to be exercised by

concurrent vote, each board, as hereby constituted, having a negative upon the proceedings of the other, and the mayor having a veto power as hereinafter provided.

"More especially they shall have power to make all such needful and salutary by-laws and ordinances not inconsistent with the laws of this Commonwealth as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties not exceeding fifty dollars for the breach thereof, which by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited without the sanction or confirmation of any court or other authority whatsoever."

"SEC. 39. The city council shall have the care and superintendence of the public buildings, and the care, custody and management of all the property of the city, with power to lease or sell the same except the common and Faneuil Hall. And the said city council shall have power to purchase property, real or personal, in the name and for the use of the city, whenever its interest or convenience may in their judgment require it."

In behalf of the accused, eleven instructions were requested to be given to the jury, all of which were refused, and exceptions were reserved to such refusal. But one of these requested instructions set up alleged rights under the Constitution of the United States, as follows:

"10. That said ordinance, and the proceedings under said ordinance, and in enforcement thereof, are in conflict with the Constitution of the United States, and the first section of the Fourteenth Amendment thereof; that the power given to the mayor of the city of Boston by said ordinance is in derogation of the rights secured to the defendant by said amendment, and said ordinance is null and void."

There was a verdict of guilty. The exceptions taken during the trial were certified to the Supreme Judicial Court of the Commonwealth, where they were overruled. 162 Mass. 510. The Superior Court sentenced Davis to pay a fine and the costs of the prosecution, and the cause was brought here for review.

Mr. James F. Pickering for plaintiff in error submitted on his brief.

Mr. Hosea M. Knowlton, Attorney General of Massachusetts, for defendant in error. *Mr. George C. Travis* was on his brief.

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

In the brief of counsel for plaintiff in error many presumed errors are elaborately discussed, all of which when analyzed rest on the assumption that there was a right in the plaintiff in error to use the common of the city of Boston free from legislative or municipal control or regulation. It is argued that —

"Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the gospel there has been, from time immemorial to a recent period, one of these ways. For the making of this ordinance in 1862 and its enforcement against preaching since 1885, no reason whatever has been or can be shown."

The record, however, contains no evidence showing the manner in which the ordinance in question had been previously enforced, nor does it include any proof whatever as to the nature of the ownership in the common from which it can be deduced that the plaintiff in error had any particular right to use the common apart from the general enjoyment which he was entitled, as a citizen, to avail of along with others and to the extent only which the law permitted. On the contrary, the legislative act and the ordinance passed in pursuance thereof, previously set out in the statement of facts, show an assumption by the State of control over the common in question. Indeed, the Supreme Judicial Court, in affirming the conviction, placed its conclusion upon the express ground that the common was absolutely under the control of the legislature, which, in the exercise of its

discretion, could limit the use to the extent deemed by it advisable, and could and did delegate to the municipality the power to assert such authority. The court said:

"There is no evidence before us to show that the power of the legislature over the common is less than its power over any other park dedicated to the use of the public or over public streets the legal title to which is in a city or town. *Lincoln* v. *Boston*, 148 Mass. 578, 580. As representative of the public it may and does exercise control over the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes. See Dillon Mun. Corp. secs. 393, 407, 651, 656, 666; *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234, 243, 244.

"If the legislature had power under the constitution to pass a law in the form of the present ordinance, there is no doubt that it could authorize the city of Boston to pass the ordinance, and it is settled by the former decision, *Commonwealth* v. *Davis*, 140 Mass. 485, that it has done so."

It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control, *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Minneapolis & St. Louis Railway Co.* v. *Beckwith*, 129 U. S. 26, 29; *Giozza* v. *Tiernan*, 148 U. S. 657; *Jones* v. *Brim*, 165 U. S. 180, 182, and does not have the effect of creating a particular and personal right in the

citizen to use public property in defiance of the constitution and laws of the State.

The assertion that although it be conceded that the power existed in the State or municipality to absolutely control the use of the common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding of the court of last resort of the State of Massachusetts being that no particular right was possessed by the plaintiff in error to the use of the common, is in reason, therefore, conclusive of the controversy which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor in order to effectuate the purpose for which the common was maintained and by which its use was regulated. *In re Kollock*, 165 U. S. 526, 536, 537. The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law.

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* POIRIER.

ERROR TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 295. Argued April 27, 28, 1897. — Decided May 10, 1897.

A brakeman on a regular train of a railroad and the conductor of a wild train on the same road are fellow-servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter, and by his disregard of the rules of the company.

Statement of the Case.

THIS was an action originally brought in a court of the State of Washington, and which was removed into the Circuit Court of the United States for the District of Washington.

The plaintiff in his complaint alleged that, on the 7th day of December, 1892, while in the employ of the Northern Pacific Railroad Company as a brakeman, he received personal injuries of a severe character occasioned by the negligence of the defendant company. The plaintiff recovered a verdict in the sum of $21,600, which was reduced, upon the election of the plaintiff, to avoid a new trial, to the sum of $7500, for which judgment was entered. The case was taken to the Circuit Court of Appeals of the Ninth Circuit, where the judgment of the trial court was affirmed. The case was then brought to this court on a writ of error to the judgment of the Circuit Court of Appeals. The principal facts of the case are thus stated in the opinion of the Circuit Court of Appeals:

"The collision occurred about midnight. The first train was a regular local freight train, running on schedule time, under the management, control and direction of the conductor. The second train was running under telegraphic orders, without any schedule or time card, known in railroad parlance as a 'wild train.' At Moscow, a station on the railroad, the second train was standing upon the track when the first train left that station. At Vollmer, another station, the first train stopped to drop some cars. It was detained about ten minutes, when it resumed its course over the mountain grade. The second train was then in sight, standing on the track, a short distance in the rear, with its lights plainly visible. Clyde Spur, where the collision occurred, is about six miles from Vollmer. It is a place on the road where there is a spur track running out to a logging camp where saw logs and cordwood are loaded on the cars. There is a side track or switch upon which cars are left to be run out on the spur track. It is not a regular station, and the regular freight train only stops there when there are empty cars to be left or loaded ones to be taken away. The first train, on

the night in question, had certain cars to be left at this place, and stopped there for that purpose. There were three brakemen on the train. The head brakeman, when the train was slowing up, left his place and started forward to open the switch. The rear brakeman, at this time, saw the second train rounding a curve in the road, and immediately signalled it to stop, and at the same time shouted as loud as he could. The second train was then about one quarter of a mile behind the first train. The first train had barely come to a full stop when the second train, moving at a speed of about four miles an hour, struck it by running the cow-catcher of its engine under the rear end of the caboose on the first train. The conductor of the first train had been lying down, but was in his seat in the lookout of the caboose, and passed out of the rear end just before the collision occurred. The conductor of the second train had not been informed that the first train would stop at Clyde Spur."

By the shock caused by the collision of the two trains the plaintiff, who was acting as middle brakeman, was thrown from the car on which he was standing, and received severe injuries.

In the plaintiff's complaint it was alleged "that the said defendant, the Northern Pacific Railroad Company, was guilty of carelessness and negligence in this, that the conductor of said first train well knew that said second train was following said first train and failed to leave a flagman in the rear of said first train before and at the time said first train stopped at said Clyde Spur, to hold and stop said second train, as he was in duty bound to do; that the place where said collision occurred was on a mountain grade, and the said defendant, the Northern Pacific Railroad Company, was guilty of carelessness and negligence in allowing said second train to follow the first train closely, and was guilty of carelessness and negligence in running the second train into said first train, whereby the plaintiff was injured as aforesaid." The defendant, answering, denied negligence on its part, and alleged that plaintiff's injuries were owing to and caused by his contributory negligence and by the carelessness and negligence of his

fellow-servants. It is admitted in the brief of the plaintiff in error that the defence of contributory negligence on the part of the plaintiff was not made out, and the controversy resolves itself into the question whether the plaintiff's injuries were caused by the negligence of his fellow-servants within the rule on that subject.

Before the trial, and on the application of the attorneys for the plaintiff, it was ordered that Thomas F. Oakes, Henry C. Paine and Henry C. Rouse, the receivers of the defendant company, be, and they were thereby, made parties defendant in the action.

Mr. C. W. Bunn for plaintiffs in error.

Mr. S. C. Hyde for defendant in error.

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

At the close of the evidence the plaintiff moved the court to give the following instruction:

"In this case there is no evidence that the defendant, the Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that if there was any negligence it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

The refusal of the trial court to give this instruction was assigned for error in the Circuit Court of Appeals, and the ruling of the latter court in affirming such refusal is complained of in the first assignment in this court.

This request assumes that there was no evidence of negligence on the part of the conductor of the first train sufficient to submit to the jury. The trial court said as to this question: "The particular negligence charged against the railroad com-

pany is that the conductor of the first train, the one upon which the plaintiff was employed as a brakeman, when he brought his train to a stop at Clyde station, neglected his duty by failing to place a flagman a sufficient distance back on the track to warn the following train, which is called the second train in this complaint, of the danger of coming too close to that station while the first train was stopped there." The Circuit Court of Appeals made no observation on this part of the case. Both the courts discuss the case chiefly upon the question of the liability of the company arising out of the negligence shown in the management of the second train.

The counsel for the defendant in error contends, in his brief, that the conductor of the first train was guilty of negligence in not obeying the following rules of the company, put in evidence by the plaintiff:

"Rule 133. When a train is stopped by an accident or obstruction, the rear brakeman must immediately go back with danger signals to stop any train moving in the same direction. At a point fifteen telegraph poles from the rear of his train he must place one torpedo on the rail; he must then continue to go back at least thirty telegraph poles from the rear of his train and place two torpedoes on the rail, ten yards apart, when he may return to the point where first torpedo was placed, and he must remain there until recalled by the whistle of his engine; but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedo nearest the train, but the two torpedoes must be left on the rail as a caution signal to any following train. If it becomes necessary to protect the front of the train, the front brakeman must go forward and use the same precautions. In case of necessity the fireman will be required to act as flagman.

"Rule 134. When a flagman is sent out to signal any approaching train, he must, if possible, avoid stopping on a curve, or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train, for at least

one fourth of a mile. The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs from want of any precaution which could have been taken."

"RULE 156. When any section of a train is unable to make the specified time, the conductor will drop a man with danger signals to warn the following train. It is the duty of the conductor of every train, when the train stops for any cause, to immediately protect the rear end of his train as per Rule 133. No understanding with the conductor of the following train will relieve from this duty."

It is difficult to perceive that these rules had any applicability to a case like the present. They seem plainly intended to meet the exigency of a train stopped by an accident or obstruction, or unexpectedly compelled to stop between stations. It can scarcely be supposed that their directions are to be followed every time a train stops at a station.

Moreover, in the present case, it appears, from the testimony of the plaintiff's witnesses that no time was afforded for the use of such precautions. The second train was following so closely that the collision took place almost at the instant the first train had come to a stop, and before the rear brakeman could do more than to signal with his lantern and to call out. The conductor of the first train is not shown to have had any reason to suppose that the second train would run into him when stopping at a station, in utter disregard of the company's rules.

We are inclined to think that, if the plaintiff's case depended wholly on his being able to convict the conductor of the first train of negligence, there was not sufficient evidence adduced at this trial to have justified the trial judge in submitting the case to the jury on that issue.

It is, however, further contended on behalf of the defendant in error, and upon this the stress of the case is mainly put, that, under the facts disclosed in the record, the trial court was justified in submitting to the jury and the jury in finding that the defendant company was liable for the results of the negligence in the management of the second train.

There is no effort to call into question the numerous decisions of this court, whereby it has been firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. Indeed, it is conceded in both the opinion of the Circuit Court of Appeals, *Northern Pacific Railroad* v. *Poirier*, 29 U. S. App. 583, and in the brief of the defendant in error that the conductor of the second train was a fellow-servant with the plaintiff, and that if the collision was caused solely by his negligence the defendant would not be liable.

The argument to maintain the liability of the defendant company, notwithstanding this concession, is based upon the evidence that tended to show that the second train was a "wild train," running on telegraphic orders, without any schedule or time table, and that the conductor of that train was not notified that the first train would stop at Clyde Spur.

One of the plaintiff's witnesses, Allen, the rear brakeman on the first train, testified that the second train was "running by telegraphic orders and had no schedule orders or time card." This was doubtless true, as it is true of every "wild" or extra train; but such a fact by no means warrants the inference drawn by the trial court and given in the charge to the jury that "the train was running under special orders as to the time it was to make, where it was to go and when it should reach the different stations." It cannot be justly inferred from the mere fact that the second train was a "wild train" that its conductor was relieved from obeying the laws of the company. Among those rules, put in evidence by the defendant company, is:

"Rule 120. A train must not leave a station to follow a passenger train until five minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending, under any circumstances, until such trains are duly reported at next telegraph station. Freight trains must not follow each other descending mountain grades. They may ascend in sections when handled with mountain power in the

rear. Descending passenger trains may follow freight trains as per Rule 121. Ascending passenger trains will not leave station at foot of mountain until track is known to be clear."

"Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting or passing points), unless some form of block signal is used."

Assuredly more evidence must be given than the mere fact that the second train was a "wild" train, not running on schedule time, to justify an inference, by either court or jury, that the conductor was relieved by such fact from regarding the rules of the company regulating the running of its train. Nor does the statement of the conductor of the second train, that he had not been notified that the first train was to stop at Clyde Spur, show that he had any right to dispense with the rules. While he did say that he had not been notified that the first train would stop at Clyde Spur, he does not say that he did not know of such intention. At all events, it was clearly shown by the plaintiff's witnesses that the trains were in immediate proximity to each other at Vollmer, the last station before reaching Clyde Spur; that the second train followed the first so closely that the collision occurred almost immediately after the leading train had come to a stand; and that the rear brakeman, who saw the second train approaching before his own train had fully stopped, did not have time to warn his fellow-brakeman, nor himself get to the ground, before the collision took place.

These facts disclose a palpable disregard by the conductor and engineer in charge of the second train of ordinary prudence and of the rules which it was their duty to observe. We see no ground for the assertion that their conduct was directed or controlled, in these particulars, by orders from some agent or dispatcher of the defendant company, "clothed with the duty of sending out the second train and having the control, management and direction of its movements." Such conjectures did not constitute evidence to be submitted to the jury.

Accordingly we think that the defendant was entitled to

have had the following instructions given to the jury: "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train, in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train in proper control, or by any other act or neglect of the conductor or engineer of the first train, then I instruct you that the defendants are not liable, and that you shall return a verdict for the defendants." But this prayer was refused.

So, too, we think the following instruction asked for should have been given: "In determining the question of whether the defendant the Northern Pacific Railroad Company was guilty of negligence in the management of their trains, or either of them, the jury are instructed that they may consider the rules of the company, which have been read in evidence, and that if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants." This instruction was modified by the court adding the following words: "Unless it appeared that the conductor of the train, or some one under whose orders he was acting, had authority in the special case to deviate from the rules." This modification was not warranted by any evidence disclosed in this record. The only orders shown, controlling the conductor and engineer in the management of the second train, were those contained in the rules of the company. As we have already said, to instruct the jury that they might infer, from the mere fact that the second train was a "wild" train, not running by schedule time, that some one in authority had dispensed with the rules in this special case, was to submit mere matter of conjecture as evidence on which they might base a verdict.

The same error vitiates portions of the general charge, which were duly excepted to and assigned for error; but we do not deem it necessary to discuss those assignments in detail. They are disposed of by the observations already made.

Upon the whole, we are of opinion that, giving to the plaintiff's evidence its utmost effect, it did not make a case which should have been submitted to the jury.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to set aside the verdict and award a new trial.

WALKER v. COLLINS.

ERROR TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 59. Argued and submitted March 3, 1897. — Decided May 10, 1897.

Chappell v. *Waterworth*, 155 U. S. 102, affirmed to the point that a case not depending on the citizenship of the parties nor otherwise specially provided for, cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's own statement; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

THE case is stated in the opinion.

Mr. W. E. Brown for plaintiffs in error.

Mr. A. P. Jetmore for defendants in error. *Mr. C. S. Bowman* and *Mr. Charles Bucher* were on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

The action below was commenced in April, 1890, in the District Court of Harvey County, Kansas, by Collins and Bretch, to recover damages from the present plaintiffs in error for an alleged unlawful seizure of goods and chattels, the property of the plaintiffs. In their answer the defendants averred that during the times mentioned in the complaint the defendant Walker was the marshal of the United

States for the District of Kansas, and the other defendants were his deputies, and that the seizure complained of was made under the authority of an order of attachment issued out of the Circuit Court of the United States for the District of Kansas, in an action therein pending, in which E. H. Van Ingen & Co. were plaintiffs and H. Cannon was defendant, and it was averred that the goods were liable to be seized by virtue of said order of attachment as the property of said Cannon. Thereafter the defendants made application for the removal of the cause into the Circuit Court of the United States for the District of Kansas, upon the ground that the action and the defence thereto arose under the laws of the United States. The application was denied, but subsequently, on application of the plaintiffs, the court reconsidered its decision, rescinded its former action, and allowed the application, the order entered reciting "the plaintiffs interposing no objection thereto."

On June 4, 1890, after the removal of the cause into the Federal court, a motion was filed by the attorneys for plaintiffs to remand the cause to the District Court of Harvey County, Kansas, for the reason that the record and petition for removal showed no sufficient ground for such removal, and that the record and petition did not set up and show sufficient facts and allegations to give the Federal court jurisdiction over the cause by removal. The record does not show that any action was taken by the court upon this motion.

A judgment recovered by the plaintiff was reversed by the Circuit Court of Appeals for the Eighth Circuit. 4 U. S. App. 406. Upon a second trial, in November, 1892, the plaintiff again recovered judgment, which, on error, was affirmed by the appellate court. 19 U. S. App. 307. A writ of error was allowed, the cause was brought to this court, and it is now sought to obtain a reversal of the judgment of affirmance rendered by the Circuit Court of Appeals.

Various specifications of error are assigned in this court. We need, however, only consider the first specification discussed in the brief of counsel for the plaintiff in error, to wit,

that the Circuit Court and Circuit Court of Appeals were without jurisdiction over the controversy, and the judgments rendered were erroneous, by reason of the fact that the cause was improperly removed from the state court. This objection must be sustained upon the authority of *Chappell* v. *Waterworth*, 155 U. S. 102. That was an action of ejectment brought in a state court, both plaintiff and defendant being residents of the same State, the declaration merely describing the land and alleging an ouster of the plaintiff by the defendant. The cause was removed into a Circuit Court of the United States upon the petition of the defendant setting forth that the United States owned and held the land for a light-house, and that the defendant was holding possession as the keeper thereof under the authority of the United States. This court declined to consider the question presented by the record and argued at the bar, because the cause was removed into the Circuit Court of the United States without authority of law, holding that under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred, the case comes directly within the operation of the ruling cited. In reversing the judgments, however, as the cause was removed from the state court upon the application of the present plaintiffs in error, all the costs from the time of such removal must be borne by them. *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 488, and cases cited.

The judgments below are reversed, and the cause is remanded to the Circuit Court of the United States for the District of Kansas with directions to remand the cause to the District Court of Harvey County, Kansas.

MR. JUSTICE HARLAN dissented.

CROSS *v.* EVANS.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 268. Argued and submitted April 2, 1897. — Decided May 10, 1897.

Under the judiciary act of 1891 a Circuit Court of Appeals has no power to certify the whole case to this court, but can only certify distinct questions or propositions, unmixed with questions of fact or of mixed law and fact; and the questions certified in this case are clearly violative of this settled rule.

THE case is stated in the opinion.

Mr. James Hagerman, *Mr. F. C. Dillard* and *Mr. T. S. Miller* for plaintiffs in error submitted on their brief.

Mr. Rush Taggart for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The action below was commenced in September, 1890, by Evans in a Texas state court against Cross and Eddy as receivers of the Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas, to recover damages for personal injuries sustained within the State of Texas while acting as brakeman upon a train running over a branch line of said railway system while it was being operated by the receivers. On the petition of the receivers, the cause was removed into the Circuit Court of the United States for the

Eastern District of Texas. Subsequently the railway properties were returned to the Kansas company, and in the fall of 1891 that company transferred its lines of railroad to a new corporation, styled the Missouri, Kansas and Texas Railway Company of Texas. The receivers were finally discharged in the month of July, 1892. In August, 1893, service was had on the Texas company under a second amended petition, in which the Texas company was made a co-defendant with the receivers, its liability to the plaintiff being asserted to arise from the terms of the order of the Circuit Court directing the receiver to surrender the property to the Kansas company, and upon the provisions of a special act of the legislature of Texas authorizing the sale by the Kansas company of its properties and subjecting the purchaser to the payment of all the liabilities of the Kansas company. Demurrers to the jurisdiction as also to the merits of the amended petition were filed and overruled, and an answer was interposed by the Texas company, which was adopted by the receivers, by way of amendment, the latter then setting up for the first time their discharge in bar of further proceedings.

The cause was tried upon the issues made by the second amended petition and the answers thereto, and a verdict was returned against the Texas company for the sum of $7500. By direction of the court, the jury found in favor of the receivers. The cause was then taken by writ of error to the Circuit Court of Appeals for the Fifth Circuit, and, on the hearing, that court certified to this court, under the judiciary act of 1891, a statement, declared to consist of matter appearing in the transcript of record filed in that court, and the instructions of this court were requested upon four propositions of law, as being desired "for the proper disposition of the questions arising herein." Following the questions propounded was a direction that "certified copies of the printed record and briefs on file in this case be transmitted with this certificate to the honorable the Supreme Court of the United States."

What may be termed the statement of facts embraces a recital of the various steps in the litigation, and what pur-

ports to be the substance of the contents of the various pleadings filed in the cause, and the assignments of error (ten in number) filed by the defendants in error in the Circuit Court of Appeals, the latter document being set out *in extenso*, and being followed by the recital that "all of the questions presented by the assignments of error were duly made in the Circuit Court, and the adverse rulings thereon are duly shown by exceptions made and saved on the trial."

In the statement, attention is called to the fact that the plaintiff in his original petition asserted that the wreck which occasioned his injury was caused by a defective drawhead, while in the amended petition, filed more than a year after the injury was sustained, it was alleged that the roadbed and track at the place and time where and when the derailment happened were in a defective and unsafe condition.

It was also specifically stated that the pleadings of the plaintiff contained no allegation that any betterments had been put upon the road by the receivers while they were in charge, and that at the trial no evidence was offered on the subject.

The assignments of error reiterated in various forms the objections taken prior to the trial to the sufficiency of the second amended complaint, also the objections taken to the refusal of the trial court to sustain exceptions to its jurisdiction based upon the fact that the plaintiff and the Texas company were citizens of the same State, and that the action had abated by the discharge of the receiver, and objections raised by the plea of the statute of limitations. The fifth assignment of error was to the refusal of the court to return a verdict for the defendants, among other reasons, because the plaintiff did not allege or prove that earnings had been applied by the receivers to betterments upon the road, or that the road had been returned to the Kansas company enhanced in value by said betterments. The questions propounded read as follows:

"I. Under the facts of the case, as shown by the pleadings and hereinbefore recited, was the Missouri, Kansas and Texas Railway Company of Texas properly made a co-defendant with the receivers Cross and Eddy?

"II. Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the Circuit Court of the United States for the Eastern District of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant the Missouri, Kansas and Texas Railway Company of Texas, and give judgment accordingly?

"III. If the first and second questions or either of them are answered in the negative, has this court, under the writ of error jointly sued out by the receivers Cross and Eddy, and the Missouri, Kansas and Texas Railway Company of Texas, jurisdiction and authority to reverse *in toto* the judgment of the Circuit Court and direct a dismissal of the case as against the Missouri, Kansas and Texas Railway Company of Texas and award a new trial as against Eddy and Cross, receivers?

"IV. In case this court is without authority to reverse the judgment of the Circuit Court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the Circuit Court and remand the cause with instructions to remand the whole cause back to the state court from which it was originally removed?"

In *Graver* v. *Faurot*, 162 U. S. 435, it was held that a Circuit Court of Appeals has no power under the judiciary act of 1891 to certify the whole case to this court, but can only certify distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact. The questions certified in the case at bar are clearly violative of this rule, as, in effect, the entire record is sent up, and, by the general questions propounded, the labor is imposed upon this court of determining the whole case and all questions of law which may be lurking in the record.

Thus, in the briefs filed in this court and in the court below, counsel discuss the effect of sections 2 and 6 of an act of the legislature of Texas approved March 19, 1889, which it is claimed

affected pending receiverships, whether created by a court of the State of Texas or by a Federal court, and absolutely fixed the liability both of the Kansas company and the Texas company to pay any valid claims which might be asserted against the receivers, and also authorized the joinder of the Texas company as a co-defendant with the receivers in any pending suit. Whether such was the effect of the statute would seem to be a question or proposition of law entering into a consideration of the general questions propounded. The certificate, however, contains no allusion to the point. So, also, in briefs filed here and below, the question is presented of the effect of a general statute of Texas enacted in 1891, which authorized the formation of corporations for the purchase of railroads, under which statute the Texas company was organized. It is argued in the briefs that upon a proper construction of that law it imposed upon the Texas company a liability to the plaintiff irrespective of any order of the Federal court in the foreclosure suit, and it is further contended that this statute was competent authority for the joinder of the Texas company in the pending suit against the receivers. This is clearly a separate and distinct proposition of law, essential to be passed upon in considering the general questions certified, though the point is not expressly referred to in the certificate. So, also, there is no mention in the statement of facts that plaintiff in his second amended petition averred that the Texas company was liable to pay plaintiff's claim, by reason of the order of the Federal court in the foreclosure suit directing the surrender of the property by the receivers to the Kansas company. That order is not set out in the statement, but the sections of the order upon which the plaintiff relied below were introduced in evidence at the trial and appear in the record filed in the Circuit Court of Appeals. Thus another distinct proposition of law, viz., as to the legal meaning and effect of that order, is plainly latent in the record. So, also, the general questions certified might call for a consideration of whether in the event that a liability was not imposed upon the Kansas company by the order of the Federal court, a liability resulted by reason of the character of the claim of plain-

tiff, and the fact that the property of the Kansas company was returned to it by its procurement without actual foreclosure, irrespective of the fact whether or not betterments had been put upon the property with moneys earned during the operation of the road by the receivers. Again, a distinct proposition of law results from the record, dependent upon an affirmative answer to the last proposition, as to whether the cause of action against the receivers abated by their discharge, and whether the claim against the Texas company was a new and independent cause of action to be tried and disposed of in a distinct action, or was a claim in the nature of a demand against a purchaser *pendente lite*, and a mere continuance of the pending action.

These illustrations clearly show that the questions propounded are general in their nature, and amount simply to submitting the whole case upon the entire record to this court for decision, and therefore that the questions certified can in no sense be treated as stating distinct propositions of law. From this conclusion it follows that the certificate does not comply with the rules of law controlling the subject, and it must, therefore, be dismissed, and

It is so ordered.

MR. JUSTICE BROWN dissented, and MR. JUSTICE BREWER, not having heard the argument, took no part in the decision of this case.

SPOKANE FALLS AND NORTHERN RAILWAY COMPANY *v.* ZIEGLER.

ERROR TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 211. Submitted March 12, 1897. — Decided May 10, 1897.

A complaint which alleges that the plaintiff was preëmptor of public land in Washington Territory under the laws of the United States, on which he had lived sufficient time to entitle him to a patent, and that the defendant railroad company, a corporation organized under the laws of

that Territory entered upon and seized a strip of said land and appropriated it for railroad purposes without plaintiff's consent and without having compensated him therefor, discloses a case of a contest between a settler claiming title under the laws of the United States, and a railroad company claiming title under an act of Congress, and makes a case of which the Circuit Court of the United States for that Circuit had jurisdiction.

A railroad company whose road is laid out so as to cross public lands cannot take a part thereof in possession and occupation of a settler who is entitled to claim a preëmption right thereto, and who has made improvements thereon, without making him proper compensation.

Such a preëmption settler, who has paid to the United States the price of the preëmpted land is entitled to recover damages as owner of the fee, although the patent may not be acquired till after the seizure.

This case arose under § 2456 of the code of Washington Territory which required compensation to be made to the owner of the land irrespective of any increased value by reason of the proposed improvement.

This action was commenced in the Superior Court of Spokane County, State of Washington, wherein William H. Ziegler, on October 5, 1891, filed his complaint against the Spokane Falls and Northern Railway Company, a corporation organized under the laws of the Territory of Washington, seeking to recover the value of a certain piece of land taken by the company for its roadbed and right of way, and also to recover damages for the alleged diminution in value of the tract of land through which the strip extended, caused by the construction of the road and the use of the same as a steam railway. Upon petition of the defendant company, alleging that the suit arose under the laws of the United States, and that the rights of the parties depended upon the construction thereof, the case was removed into the Circuit Court of the United States for the District of Washington, Eastern Division.

In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession as a preëmptor, under the laws of the United States, of the east half of the southeast quarter of section four, township twenty-five north, range forty-three east, Willamette meridian, in the said county, containing about eighty acres, and had then made all such improvements, had lived on the land for such length of time, and had done all

Statement of the Case.

such acts as were necessary to entitle him to a patent to the land from the United States upon making final proofs and paying the purchase price required by statute, and had then made final proofs and filed the same in the land office of the United States at Spokane Falls, and had tendered the purchase price of the land, or two dollars and a half per acre, to the receiver of that office, and had demanded from the register and receiver of the office a final receipt evidencing the plaintiff's entry of the land and payment therefor; that the defendant company was authorized by its articles of incorporation to build, equip, maintain and operate a line of steam railway from the city of Spokane Falls (now the city of Spokane) in a northerly direction to the Columbia River; that on the said date the company, acting in pursuance of the laws of the Territory of Washington authorizing railway companies to appropriate lands for railway tracks, entered upon and seized, without making compensation to the plaintiff, and without his consent, a strip of land fifty feet wide, extending through the said land, and built thereon its tracks, and had ever since been using the same as a line of steam railway. The plaintiff averred that the said land was in close proximity to the city of Spokane, and at the time of the taking of the same by the company was very valuable for the purpose of being divided into blocks and lots; that the company's road extended diagonally across the land, and prevented the portions of the land abutting on the road from being platted advantageously; that the operating of a line of steam railway through the land largely diminished its value for residence purposes, or for any purpose; that the road was built upon a grade which was higher at some places and lower at others than the natural surface of the land, by reason whereof cuts and fills were made, which diminished the value, for residence purposes, of the land abutting on the road, and made it necessary that all streets laid out across the road should conform to the grade thereof. It was further averred by the plaintiff that since the taking of the said strip of land and the building of the road thereon by the company, the final proofs made by him and filed in the land office, as aforesaid, had

been passed upon and accepted as satisfactory by the proper officers; that the money tendered, as aforesaid, had been accepted, and that a patent for the land had been duly executed and delivered to him by the United States. The plaintiff demanded judgment for $30,000, asserting that the value of the said strip of land taken was $5000, and that the tract of land through which it extended was damaged by the construction and operation of the road to the extent of $25,000.

The defendant company filed its answer on February 19, 1892, wherein it denied the essential allegations of the complaint as to the damage to the said tract of land caused by the construction and operation of the road through the same, and, in defence of the plaintiff's demand of compensation for the strip of land taken, alleged that on June 5, 1888, the company filed in the office of the Secretary of the Interior of the United States a copy of its articles of incorporation, and due proof of its organization under the same, which were duly approved by the Secretary on that date, and that thereupon the defendant became entitled to survey, locate, construct and maintain its railroad through and over all lands between the termini of the road which were public lands of the United States at the time of the filing of said copy of the articles of incorporation, and proof of organization, and became the owner of a right of way through the public lands to the extent of one hundred feet on each side of the central line of the road upon such route as it might select, and also acquired the right to take from the public lands adjacent to the line of the road, material, earth, stone and timber necessary for the construction of the road, as granted by the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, and that by the filing of the said copy of the articles of incorporation, and proof of organization, and the approval thereof as aforesaid, the grant in the said act became operative and applied to the defendant company to the same extent as if it had been a special grant in the name of that company; that afterwards, and in the month of March, 1889, the company, acting under the provisions of the said act, and as authorized by its articles

Statement of the Case.

of incorporation, commenced the construction of its road between the city of Spokane Falls and the Columbia River, and between March 8 and April 8, 1889, surveyed the definite line of its road from a point in that city to a point twenty miles in a northerly direction therefrom, and caused such survey to be marked on the ground in the manner customary in surveying and marking lines for railways, and that the line so surveyed and marked ran through and over the land described in the complaint; that in June, 1889, the defendant had fully constructed and completed its road, upon the said line of survey, through the said land, and within the year 1889 had fully completed the road from the city of Spokane Falls to the Columbia River, and had ever since operated the same; that at the time of the filing of a copy of the articles of incorporation, and proof of organization, with the Secretary of the Interior, and during all the time thereafter until the completion of the road, the lands described in the complaint were public lands of the United States, and the title thereto was in the United States, and the lands were subject to the grant contained in the said act of Congress; that on August 3, 1889, within twelve months after the location of the road over the said land, the company filed with the register of the land office where the land was located a profile of its road, which profile was duly approved by the Secretary of the Interior in December, 1889; that the plaintiff's entry of the land was made and the patent thereto issued long subsequent to the construction of the road and the approval of the said profile; and that the sale and conveyance of the land by the United States to the plaintiff was subject to the defendant's said right of way. The defendant asked for a judgment quieting its title.

All of the foregoing allegations of the answer tending to show title to the said strip of land in the defendant were denied by the plaintiff in his replication, filed March 11, 1892.

The case was tried in the said Circuit Court before the court and a jury. At the close of the testimony the defendant requested the court to give the jury the following instruction:

"It appearing from the uncontroverted proof in this case that

at the time the defendant filed its articles of incorporation, and proofs of its organization, with the Interior Department, on the 5th day of June, 1888, the plaintiff was a preëmption claimant to the land in controversy, and did not pay for said land until after that date nor until after the construction of said road over the premises, he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

This instruction was refused, to which refusal the defendant excepted. The court then, of its own motion, gave the jury certain instructions, and the defendant excepted to the portion thereof following:

"He [the plaintiff] is in any event to have the full value of the land they have taken for the right of way, and if the land that is left to him is injured at all, then he is entitled, in addition to that, to have the difference between the value of the whole tract and the value of what is left of it, taking the value as it was when the road was built, and the market value, irrespective of the effect on the market value by reason of the building of the road."

Exceptions were also taken by the defendant to the rejection of certain testimony offered on its behalf, and to the admission of certain testimony for the plaintiff.

On April 27, 1892, the jury rendered a verdict in favor of the plaintiff, assessing his damages at the sum of $7500, and also returned a special finding as follows: "We, the jury, in the case of William H. Ziegler against the Spokane Falls and Northern Railway Company, defendant, find specially that the defendant has appropriated for its right of way a strip of land twenty-five feet in width on each side of the centre line of its track, extending across the plaintiff's land described in the complaint, and no more, and that the area of plaintiff's land so appropriated is one and eight-tenths acres, and no more; and the amount of damages awarded by our general verdict is computed upon the basis of the land appropriated for said right of way, being a strip fifty feet in width and containing one and eight-tenths acres."

Judgment in the said amount was entered April 29, 1892.

The defendant moved for a new trial, and upon the denial of his motion, took the case on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. That court affirmed the judgment of the court below, and the defendant, after having been denied a rehearing, sued out a writ of error from this court.

Mr. A. T. Britton, *Mr. A. B. Browne* and *Mr. Albert Allen* for plaintiff in error.

Mr. George Turner for defendant in error.

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

This action was brought by William H. Ziegler against the Spokane Falls and Northern Railway Company in the Superior Court for Spokane County, Washington, and was, on the petition of the railway company, removed into the Circuit Court of the United States for the District of Washington. The trial there resulted in a verdict and judgment in favor of Ziegler. That judgment the railway company by a writ of error took to the Circuit Court of Appeals of the Ninth Circuit. 15 U. S. App. 472; 29 U. S. App. 69. The judgment of the Circuit Court was there affirmed. The case is before us on a writ of error to the judgment of the Circuit Court of Appeals, sued out by the railway company.

The plaintiff in error now contends that the judgment should be reversed and the record sent back to the Circuit Court, with directions to remand the case to the state court whence it was taken on the petition of the plaintiff in error. The ground of this contention is that the plaintiff's statement in the state court did not disclose either that the parties were citizens of different States or a cause of action involving a right claimed under the Constitution or laws of the United States.

Whether it would be competent for the plaintiff in error, in the circumstances stated, to challenge the jurisdiction of

the Circuit Court at this stage of the controversy we need not consider, because we think that the plaintiff's statement did disclose a cause of action arising under the laws of the United States and cognizable by the Circuit Court.

In his complaint the plaintiff alleged that, on May, 1, 1889, he was in possession, as a preëmptor under the laws of the United States, of a tract of land containing about eighty acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the Territory of Washington, on said date entered upon and seized a strip of said land fifty feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the Territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.

We have judicial knowledge that the authority of the Territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, 18 Stat. 482, whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any State or Territory.

The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the Circuit Court for the District of Washington clearly had jurisdiction. *Doolan* v. *Carr*, 125 U. S. 618, 620; *Cooke* v. *Avery*, 147 U. S. 375.

Passing from the question of jurisdiction, we come to the contention of the plaintiff in error that Ziegler, as a mere settler upon lands of the United States, although with an

intention to obtain a title to the same under the preëmption laws, did not have such a vested interest in the land as would avail against the railway company in asserting its right of way conferred by the act of Congress.

An answer to this question is furnished by the case of *Washington & Idaho Railroad Co.* v. *Osborn*, 160 U. S. 103, where it was held that a railroad company whose road is laid out so as, under the provisions of the act of March 3, 1875, to cross a part of the public lands, cannot take part thereof in the actual possession and occupation of a settler who is entitled to claim a preëmption right thereto when the proper time shall come, and who has made improvements on the land so occupied by him, without making proper compensation therefor.

The court based its conclusion in that case upon the language of the third section of the act, which is as follows: "That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, and when such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean,' etc., approved July 1, 1862."

And it was held that the right of a settler in possession of unsurveyed lands of the United States, who had made improvements with the intention of procuring a title under the preëmption laws as soon as the same should be surveyed by the government, was a possessory claim within the meaning of the statute, for which compensation must be made by a railroad company seeking to appropriate a part of it for its tracks.

The final contention on behalf of the plaintiff in error is that the trial court erred in holding and deciding that the words "possessory claims," used in said act of Congress, were intended to protect more than the improvements of a settler, and thus, in effect, holding and deciding that the settler was entitled to receive pay for the land as though he was the owner in fee.

Even if it were the law, as is assumed in this contention, that the plaintiff, as the holder of a possessory claim, was not entitled to the same measure of compensation as if he had secured his patent from the United States, it would be difficult to convict the trial judge of any error in that respect. In the charge the judge instructed the jury as follows: "As I have said, the court holds the plaintiff to be the owner of the land, but I do not wish to be understood by that as saying that he was then the owner in fee; that he had a title in fee or other rights than such as belonged to a settler under the preemption law of the United States, which gave him a possessory right and a vested interest in the property, so that no part of it could be lawfully taken from him without compensation being paid for it; and in determining the amount of damages to be awarded to him, you will take into consideration the condition the title was in at the time the road was built and award him the value of the property as you find it to be, considering the title to be involved as it was by reason of the matter being undetermined in the land department as to his right to it, and there being a contest, and that he was obstructed in obtaining his patent to it by reason of a dispute as to its right. Now, taking that into account, you will award him such amount of damages as will compensate him for so much of the land as the railroad company has appropriated for the right of way and for whatever injurious effect the road may have caused to the land which he owned, the balance of the eighty-acre tract described in his complaint."

Under this instruction the railroad company would seem to have received the benefit of any distinction that could be fairly made between a possessory title and one that had matured into a patent. But upon the facts disclosed by this record, we do not think that the railroad company was entitled to the benefit of such a distinction. While it is true that, at the time when the company took possession of the plaintiff's land, the latter had not yet received his patent, but had only made the final proofs and filed the same in the land office of the United States and had tendered the purchase price thereof, and had demanded from the register and re-

ceiver of said land office a final receipt evidencing his entry of and payment for said land, yet it further appears that before the plaintiff brought this suit his purchase money had been accepted and a patent from the United States for the said tract of land had been duly executed and delivered to him. The plaintiff, then, having been in possession of the land in question, and having done and performed all that the law required to give him a right to a patent, before the railroad company seized the land, we think the grant of the patent, subsequent to such seizure, but before the bringing of the suit, operated to confer upon the plaintiff the right to demand and recover damages as the owner of the fee. The railroad company having taken possession without the consent of the owner, and not having instituted proceedings to condemn, was a trespasser, and liable to indemnify the plaintiff in respect to his possession and title, as they were shown to exist at the time the suit was brought.

To avoid possible misunderstanding, it may be observed that, as mentioned by the Circuit Court of Appeals, this case arose under § 2456 of the code of Washington Territory, which authorized any corporation, organized for the construction of a railroad, canal or bridge, to take lands, but required "compensation to be made to the owner thereof, irrespective of any increased value thereof by reason of the proposed improvement by such corporation." See 15 U. S. App. 472.

The judgment of the Circuit Court of Appeals is

Affirmed.

WILLIS *v.* EASTERN TRUST AND BANKING COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 802. Argued April 29, 1897. — Decided May 10, 1897.

In this suit the matter in dispute was the right of present possession of real estate in the District of Columbia, whose value was agreed to be over $5000, but there was nothing in the record to show that the value of the right of possession reached the jurisdictional amount, and the case was accordingly dismissed.

This was an action of forcible detainer brought September 17, 1894, by the Eastern Trust and Banking Company against Willis and Johnson, before a justice of the peace in and for the District of Columbia, to obtain possession of certain real estate in said District. The defendant filed a plea of title, whereupon the case was certified to the Supreme Court of the District for trial. Rev. Stat. D. C. c. 19, §§ 677, 691.

The plaintiff, in compliance with the rules of that court, filed therein October 5, 1894, "a declaration making demand for the premises, and with a description thereof as in ejectment."

The parties submitted the case to the court for its determination without a jury upon an agreed statement of facts in writing. It therefrom appeared in substance that the Eastern Trust and Banking Company was a body corporate, organized under the laws of the State of Maine, and having its principal place of business in the city of Bangor, in that State. The American Ice Company, also a body corporate organized under the laws of the State of Maine, and doing business therein and also in the District of Columbia, on December 2, 1889, executed and delivered to the Trust Company a certain deed of trust in the nature of a mortgage, upon certain real estate described therein, a part of which was situated in the State of Maine, and the remainder in the city of Washington, to secure the payment of its bonds of various

denominations, aggregating $40,000, payable to the Trust Company or bearer in equal instalments of $5000 each, in three, four, five, six, seven, eight, nine and ten years after date, with interest at the rate of six per cent, evidenced by certain coupons. The deed of trust was duly recorded in the records of the District of Columbia. It bore the impress of the corporate seals of the American Ice Company and of the Trust Company, and it was admitted that the seals were affixed thereto before the execution and delivery thereof, but that the recorder of deeds failed to note the same upon the records. The bonds were executed and delivered in due form of law to the Trust Company, and by it delivered to certain parties, who took them for value in the regular course of business before maturity, and who now held and owned them, except so far as the first instalment thereof, and interest had been paid. The instalment of bonded indebtedness which became due in 1893 was not paid, nor was the interest then falling due, nor had either of said sums or any part of them been paid or satisfied in any manner. The parties holding the bonds had not, nor any of them, waived their rights to payment in accordance with the tenor and effect of the bonds and deed of trust, by the terms of which the residue of the bonded indebtedness, to wit, the sum of $35,000, together with accrued interest thereon, was at the commencement of the suit due and payable.

On October 13, 1893, the Ice Company made an assignment of all its property for the benefit of its creditors to Johnson, who accepted the trust and entered upon its discharge. Subsequently, as such an assignee, he leased that portion of the real estate situated in Washington to Willis, who entered and took possession thereunder and retained possession at the time of the trial.

This lease was in writing and bore date January 29, 1894, and was for a period of one year from that date at a rental of $130 per month. After the default in the payment of the second instalment of bonds and of the interest had continued for a period of more than ninety days, the bondholders, or those holding more than fifty per cent of the value thereof,

directed the trustee to proceed in the execution of the trust in accordance with its terms and provisions, in pursuance of which direction the Trust Company on July 30, 1894, caused a thirty days' notice to quit to be served upon Johnson and Willis on the theory that they were statutory tenants by sufferance under the law, and that the instrument securing the indebtedness created the relation of landlord and tenant between the Trust Company and them; and thereafter, namely, September 17, 1894, the Trust Company caused the proper summons to be issued by a justice of the peace against Willis and Johnson, who appeared in response thereto as before stated.

After the default and in pursuance of the direction of the bondholders and of the powers conferred upon and vested in the Trust Company by the deed of trust, the Trust Company advertised the real estate for sale in accordance with the requirements of the deed of trust, and exposed the same for sale at public auction in the city of Bangor, at which sale a committee, acting for the bondholders, purchased the lands embraced in the deed of trust for the benefit of the bondholders; but the terms of the sale had not yet been complied with and no deed had been made to the purchasers, because it was understood and agreed between them and the Trust Company that the Trust Company should first obtain possession of the property.

Judgment was rendered in favor of Willis and Johnson by the Supreme Court of the District, and the case being carried to the Court of Appeals for the District of Columbia, that judgment was reversed and judgment in favor of the Trust Company directed, 6 App. D. C. 375, whereupon Willis and Johnson brought the case to this court on writ of error.

Mr. Calderon Carlisle and *Mr. William G. Johnson* for plaintiffs in error.

Mr. B. F. Leighton for defendant in error.

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

Opinion of the Court.

The matter in dispute in this suit was the right of present possession of the real estate described in the declaration. Recovery of possession would not extinguish the indebtedness secured by the trust deed, nor bar the right of redemption if the alleged sale were invalid, nor would the title to the land be determined by the litigation.

In respect of procedure in the Supreme Court of the District, we do not understand the correctness of the observations of Cox, J., in *Jennings* v. *Webb*, 20 D. C. 317, to be questioned, that "while our rule requires the plaintiff to file a declaration, as in ejectment, that does not convert the proceeding into an action of ejectment at all, in which the plaintiff recovers upon the strength of his title. In this proceeding, unless he establishes the relation of landlord between himself and the defendant, no matter what the form of the declaration is, he is not entitled to recover. . . . It is still a landlord and tenant proceeding."

Here Johnson, as assignee, held the title of the American Ice Company, and had no greater rights than that company had, and these were subordinate to those of the Trust Company as trustee in the deed of trust made by the American Ice Company before its assignment. The action was sustained by the Court of Appeals on the authority of *Loring* v. *Bartlett*, 4 App. D. C. 1, wherein it was held that "after foreclosure of a deed of trust in which there is a reservation to the grantor of the right to the possession and enjoyment of the premises and to the receipt of the rents and profits until default made, the purchaser at the sale may maintain a landlord and tenant proceeding against the grantor under §§ 680, 681 and 684, Rev. Stat. D. C., to obtain possession of the premises. Such a reservation has the effect of a redemise of the premises to the mortgagor or grantor."

This rule was applied here as between the mortgagee and the assignee of the mortgagor after condition broken. The trust deed was, in legal effect, a mortgage with power of sale, and vested the legal title to the mortgaged property in the Trust Company, subject to be defeated by the payment of the money, and the right of possession would have vested in

the Trust Company from the date of the deed, save for the express provision whereby the Ice Company was allowed to retain the possession until default. But it was provided that, on default in the payment of the indebtedness as prescribed, it should "be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be and to take possession of the whole or any part thereof."

Plaintiffs in error, however, insist that the conventional relation of landlord and tenant must exist in order to bring a case within the landlord and tenant act of the District, and that no such relation was created by the deed of trust.

Under the circumstances we are unable to see how we can entertain jurisdiction. It is true that it has been stipulated that the value of the real estate exceeds $5000, but the right of possession was the matter in dispute, and there is nothing in the record from which we can conclude that the value of that reaches the jurisdictional amount. The property was rented in January, 1894, for $1560 per annum for one year, and it is to be assumed that the assignee obtained what it was reasonably worth. The judgment appealed from was rendered in the Court of Appeals June 3, 1895, and the record was filed in this court on the 22d of July succeeding. It is clear that the matter in dispute in the Court of Appeals had not the value of $5000 when the writ of error was sued out. 27 Stat. 434, c. 74, § 8.

In *Harris* v. *Barber*, 129 U. S. 366, which was a writ of error to reverse the judgment of the Supreme Court of the District of Columbia quashing a writ of *certiorari* to a justice of the peace, we had some difficulty in maintaining jurisdiction. But it was sustained on the grounds there stated by Mr. Justice Gray as follows: "The petition for the writ of *certiorari* alleges, upon the oath of the petitioner, that he is in the possession of the premises under a lease having nearly a year to run, with a privilege of extension for four years more; and that he has expended $15,000 in permanent improvements upon the leased property, of which he will be deprived, if the judgment of the justice of the peace, which he alleges to be void for want of jurisdiction, is not set aside

by writ of *certiorari*. The reasonable inference from this is, that the possession of the premises, with the right to use these improvements, throughout the lease and the extension thereof, would be worth more than $5000, showing that the matter in dispute is of sufficient pecuniary value to support the jurisdiction of this court."

No such inference can be drawn from anything in this record, and the result is that the writ of error must be

Dismissed.

LATTA *v.* GRANGER.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 303. Argued April 29, 1897. — Decided May 10, 1897.

By its decision in *Goode* v. *Gaines*, 145 U. S. 141, the court did not intend to be understood as holding that the rental value after the date of the rendition of the decree had not been satisfactorily determined, and had in mind in that regard only the exclusion from the decree of November 10, 1887, of the amount found due plaintiffs for rent prior to that date, together with interest thereon; nor that the finding by that decree of the then value of the improvements should be disturbed.

The reversal of that decree amounted to nothing more than a vacating of the accounting so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion; and it might well be held that the Circuit Court had no power, under the mandate, to again go into the questions of rental rate and value of improvements, which had been determined, and that an accounting was only required to bring the amounts, including subsequent taxes, if any, paid by defendant, and interest down to date.

Apart from that, the rent prescribed by the lease did not appear from the extrinsic evidence to be unreasonable or excessive; nor does the additional evidence, when carefully analyzed, all the evidence being taken together, compel to any other conclusion.

It is clear that, under the circumstances, this is not a case for the application of the principle of the acceptance by an appellate court of the conclusions of a master, concurred in by the trial court, when depending on conflicting testimony; and this court cannot permit its views to be overcome by presumptions in favor of the second report and decree.

Opinion of the Court.

THE case is stated in the opinion.

Mr. G. B. Rose for appellants. *Mr. U.M. Rose* and *Mr. W. E. Hemingway* were on his brief.

Mr. John McClure for appellees.

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

W. H. Gaines leased a tract of ground now included in lot sixteen, block sixty-eight, Hot Springs, Arkansas, in 1875, for one year, with the right of renewal from year to year, until the title to the Hot Springs quarter section was settled, to Perry Huff at a rental of $160 a year, payable in monthly instalments. The lot was described in the lease as sixteen feet in width and the rate was, therefore, $10 per front foot. In 1876 the United States took possession of the lot, and, it is alleged, subsequently leased it to Huff through a receiver appointed by the Court of Claims, though no such lease is in the record. Afterwards Huff sold all his right, title and interest in the lot to Vina Granger and Eva M. James, who took with knowledge of the derivation of Huff's interest.

The general history of the litigation, of which this case is a branch, will be found in the *Hot Springs cases*, 92 U. S. 698, and *Rector* v. *Gibbon*, 111 U. S. 276.

This was a bill filed May 23, 1884, in the Circuit Court of the United States for the Eastern District of Arkansas by W. H. Gaines and wife against Perry Huff, Eva M. James and Vina Granger for a decree that the legal title of the lot was held by defendants in trust for plaintiffs, for possession, and for an accounting. The case in its progress was discontinued as against Huff and James, and executors were substituted as plaintiffs. A decree was rendered on March 2, 1887, transferring title from defendant Granger to plaintiffs, and directing defendant to make a deed accordingly; and the case was referred to a special master to ascertain and report the value of the rents of the lot since the award made by

the commissioners appointed under the act of Congress of March 3, 1877, 19 Stat. 377, c. 108; the amount of taxes paid by defendant on the lot since that award; and the value of the improvements made upon the lot before the award, and afterwards. This decree placed the then value of the lot at $5500. The master filed his report April 9, 1887, in which he found the rental value of the lot without improvements to be ten dollars per front foot per annum, and that the frontage was 21.2 feet; that the present value of the improvements was $1800; and the amount of taxes which had been paid.

On November 10, 1887, a final decree was rendered, overruling exceptions to the master's report, and stating an account between the plaintiffs and defendant as follows: The amount due to plaintiffs for rent "according to the terms of the lease, from the date of award to the date of filing of the bill in this case and interest"; the amount due plaintiffs "since said date and until the filing of the master's report, the rental value of the property, and interest annually," and the "amount of rent to date of this decree"; and, on the other hand, the amount due defendant for taxes paid and interest; the amount of purchase money paid by her to the Government for the lot and interest; and the present value of the improvements fixed at $1800. The account, as stated, left a balance due defendant of $555.12, for which recovery was decreed; and it was further decreed that plaintiffs be put in possession. From this decree an appeal was prayed to this court and the decree reversed. *Goode* v. *Gaines*, 145 U. S. 141.

We reversed that decree because, in view of the circumstances detailed in the opinion, we thought that the accounting should not be carried back of the filing of the bill, May 23, 1884, except as to one item. And it was said: "We are of opinion that the accounting between the parties should be stated both as to debit and credit from the 23d of May, 1884, with the exception of the credit for the amounts paid to the Government for the lots, of which payments we regard appellees as getting the entire benefit, and that no increased rent should be allowed on account of the improvements, as

appellees are only to be held to their value as of the date of the decrees. In other words, appellants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest, and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amounts paid the Government for the different parcels, with interest from the dates of payment, as well as with the value of the improvements, in each instance, at the time of the rendition of the decrees."

That decision was rendered in several cases considered and disposed of at the same time.

Our mandate having gone down to the Circuit Court "for further proceedings to be had therein in conformity to the opinion of this court," that court held that the defendant was entitled to enter upon her defence as if the whole matter was again at large. Thereupon plaintiffs made an application to this court for a writ of mandamus commanding the judge of the Circuit Court to carry out the decree heretofore made in the cause by this court. The mandamus was granted and the case is reported, *Gaines* v. *Rugg*, 148 U. S. 228, 240. Mr. Justice Blatchford, delivering the opinion of the court, said: "It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force. Whatever there is to impair that decree must be sought for only in the opinion, decree and mandate of this court. This court held that no objection could be sustained to the provisions of the decree of the Circuit Court as to the title. It found error only in the rules prescribed by the Circuit Court for the taking of the account, and the decree of that court was reversed only for the purpose of taking an account according to the principles laid down by this court. As the decree of the Circuit Court in regard to the title was not invalidated by the action of this court on the appeal, the Circuit Court had no right to set aside that decree as respected the title nearly five years after it was rendered. The decree was beyond the control of the Circuit Court, unless on a bill of review duly filed, and the

time for filing a bill of review had long ago elapsed. The Circuit Court could do nothing to affect the decree, except in obedience to the mandate of this court."

After the mandamus was granted the Circuit Court entered the decree as ordered; and appointed another special master, directing him "to proceed to state an account between said parties according to the terms of this decree, and to that end he shall take testimony in writing of all witnesses produced, and shall report the same with all his proceedings and findings herein to this court."

The statement of the account was in itself as the case stood a mere matter of computation, and the record does not show that there had been any surrender of possession or any other act after the decree of November 10, 1887, which would affect the final result. The master, however, instead of restating the account, corrected in the particulars indicated by us, proceeded to take new proofs as to rental value and the value of the improvements; and thereupon found the value of the improvements to be $2625, and cut down the rents to six dollars per front foot. The report was excepted to, the exceptions overruled, and a decree rendered January 23, 1894, that plaintiffs pay defendants the sum of $2316.23. From this decree plaintiffs prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, the decree was affirmed, and the case was then brought to this court. 32 U. S. App. 342.

In these proceedings in the Circuit Court there was error and its decree must be reversed. It is true that in *Goode* v. *Gaines* we said that defendants "should be charged with rental value from the date of the filing of the bills to the rendition of the decrees with interest," but we did not intend to be understood as holding that the rental value after that date had not been satisfactorily determined, and had in mind in that regard only the exclusion from the decree of November 10, 1887, of the amount found due plaintiffs for rent prior to that date, together with interest thereon. Nor did we intend that the finding by that decree of the then value of the improvements should be disturbed.

The reversal of that decree amounted to nothing more than

a vacating of the accounting so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion, and it might well be held that the Circuit Court had no power, under our mandate, to again go into the questions of rental rate and value of improvements, for they had been determined, and an accounting was only required to bring the amounts, including subsequent taxes, if any, paid by defendant, and interest down to date.

But, apart from that, the rent prescribed by the lease was at the rate of ten dollars per front foot, and this did not appear from the extrinsic evidence to be unreasonable or excessive. Nor does the additional evidence, when carefully analyzed, all the evidence being taken together, compel to any other conclusion.

So that, without being absolutely controlled by the terms of the lease, and without attributing conclusive effect to the first report and the decree thereon, we remain of opinion that the rental value per annum of ten dollars per front foot, and the sum of eighteen hundred dollars as the value of the improvements, should be decreed. As to this last item, the lapse of time would not increase the value, and there is no evidence in the record of additional improvements since the filing of the bill, if subsequent improvements could in any aspect be allowed for.

And it should be observed that it is clear that, under the circumstances, this is not a case for the application of the principle of the acceptance by an appellate court of the conclusions of a master, concurred in by the trial court, when depending on conflicting testimony. We cannot permit our views to be overcome by presumptions in favor of this second report and decree.

The decree will be reversed at appellees' costs and the cause remanded to the Circuit Court with directions to enter a decree to the effect that all the right, title, claim and interest of defendant in and to lot sixteen, block sixty-eight, in the city of Hot Springs, Arkansas, be and the same is divested out of her and vested in said plaintiffs, and that defendant convey said lot to plaintiffs, or that a master do it for her; that plain-

tiffs have and recover of defendant the possession of said lot sixteen in block sixty-eight; and that a writ of possession issue, or that a copy of said decree be served upon her, which shall operate as such writ; that an account between plaintiffs and defendant be stated, and in doing so that defendant be charged with the rental value of the lot at ten dollars per front foot per annum from May 23, 1884, down to date of decree, with interest on the same from the end of each year at the rate of six per cent per annum; that plaintiffs be charged with all taxes paid by defendant on the lot since May 23, 1884, with interest on the same from time of payment until date of decree, at the rate of six per cent per annum; also with $1800, adjudged to be the value of improvements placed by defendant on said lot; also with the sum paid by defendant to the United States for the lot and interest thereon at the rate of six per cent per annum from the date of payment to date of decree; and that judgment be entered for the balance; and that plaintiffs recover their costs in the court below.

Decree of the Circuit Court of Appeals reversed; decree of Circuit Court reversed, and cause remanded to that court with directions to enter a decree in conformity with this opinion.

LATTA *v.* NEUBERT, No. 304; LATTA *v.* COHN, No. 326; LATTA *v.* RUGG, No. 327; LATTA *v.* GARNETT, No. 328; LATTA *v.* SUMPTER, No. 329. Appeals from the Circuit Court of Appeals for the Eighth Circuit.

THE CHIEF JUSTICE: The parties having stipulated that these cases shall abide the event of *Latta* v. *Granger*, just decided, the decrees of the Circuit Court of Appeals therein are severally reversed, and the decrees of the Circuit Court are also severally reversed, and the causes remanded to that court with directions to enter decrees in conformity with the opinion in *Latta* v. *Granger*, *ante*, 81.

Ordered accordingly.

WABASH RAILROAD COMPANY *v.* DEFIANCE.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 239. Argued March 25, 26, 1897. — Decided May 10, 1897.

In 1887, the municipal authorities of Defiance authorized the erection of bridges over the Wabash Railroad, and about eighteen feet above its track, by the railroad company, to take the place of two existing bridges. In 1893, the common council of Defiance changed the grade of the streets crossing on said bridges to the level of the railroad, and changed the approaches to it by causing them to descend to the level of the railroad. *Held*, that the common council acted within its powers in changing the grade of the streets in question, and that the railroad company had no legal right to complain of its action.

The legislative power of a city may control and improve its streets, and a power to that effect, when duly exercised by ordinances, will override any license previously given, by which the control of a certain street has been surrendered.

In this case, it was purely within the discretion of the common council to determine whether the public exigencies required that the grade of the street be so changed as to cross the railroad at a level

THIS was a petition, in the nature of a bill in equity, originally filed in the Court of Common Pleas for Defiance County, Ohio, to enjoin the city of Defiance from proceeding with a contemplated improvement of North Clinton street and Ralston avenue, by which those streets would be so graded as to necessitate the removal of certain bridges erected by the plaintiff over its roadway, where it crosses those streets, and also the approaches constructed by the plaintiff to those bridges.

The material facts were that, in the year 1887, the Wabash, St. Louis and Pacific Railway Company, then operated by one McNulta as receiver, crossed two public streets or highways in that city, known as the Holgate pike and the Brunersburg road, respectively, at a grade about eighteen feet below the grade of said streets, where the same crossed the railway, and that there were two overhead wooden bridges at about that distance above the track of the railway.

On December 20, 1887, the city council of Defiance passed

an ordinance permitting this railway to erect new bridges over and across its track, where the same crossed these two highways, provided said bridges should be of good and substantial construction, placed in the centre of the street, with eighteen feet wide roadway, good and substantial sidewalks, eight feet on each side of said bridges, and with proper railings on each side of said walks, which bridges and walks were to be kept in good repair by the company. The railway was further required to allow a distance of twenty-one feet in the clear between the tops of its rails and the bottom of the floor beams of the bridges, and also to construct approaches at not exceeding one and one quarter inches to the foot grade, and to make the same solid by either stone or gravel, etc.; all to be done to the approval of the city and to be kept in repair by the company. This ordinance is printed at length in the margin.[1]

---

[1] An ordinance permitting Wabash, St. Louis and Pacific Railway to construct bridges at Holgate pike and Brunersburg road.

Be it ordained, by the council of the city of Defiance, Ohio:

SEC. 1. That the Wabash, St. Louis and Pacific Railway Company is hereby authorized to erect new bridges over and across the track of the railway of said company where the same crosses the public streets in the Third ward of said city, known as the Brunersburg road and Holgate pike, provided said bridges shall be of good and substantial construction, placed in the centre of said street, be eighteen feet wide roadway, with good and substantial sidewalk eight feet wide on each side of said bridges, with proper railings on each side of said walks, said bridges and sidewalks to be at all times kept in good order and repair by said company. And said railway company is hereby further authorized to construct each of said bridges of sufficient height to give a distance of twenty-one feet in the clear between the tops of the rail of said railway at its present grade and the bottom of the floor beams of said bridges, provided always that said company shall provide and construct good and sufficient approaches and grade to each of said bridges, and extend the same to sufficient distance to give a grade of not to exceed one and one fourth inches to the foot, and to conform to the width of the present street, said grade to be made firm and solid, by either stone or gravel, at the option of said company, provided that if gravel be used, said city will permit it to be taken from their gravel bed without charge, and to construct and keep in constant repair good and proper approaches to said sidewalks, and brought to the proper level of the present walk by broad, safe steps where the grade would be too great for a safe incline; and all to be done to the approval of the city, and all to be kept in

Statement of the Case.

Thereupon McNulta, acting as receiver, caused these overhead bridges to be constructed with their approaches, at a cost of more than $2300.

The terms and conditions imposed by the ordinance seem to have been faithfully kept and performed by him and by the plaintiff, since it was placed in possession of said railway property, which was sold under a decree of the United States Circuit Court, to the plaintiff as purchaser, whereby it became vested with the railway, and all its rights arising under this ordinance.

On February 7, 1893, the common council of the city passed two ordinances applicable to North Clinton street, formerly known as the Holgate pike, and Ralston avenue, formerly known as the Brunersburg road, changing the grade of that part of each of said streets where they crossed the railway track to the level of the railway, and so changing the approaches as to cause them to descend to the level of the road; and further providing that the cost and expense of such improvements should be paid out of the general fund, and levied and assessed upon the general tax list upon all real and personal property in the corporation.

Plaintiff averred, in this connection, that the sole purpose of these ordinances was to cause the overhead bridges and the approaches thereto to be destroyed and removed, and the crossing of said highways reduced to a crossing of the same grade as the railway tracks; that if the city is allowed to carry out its purpose, such crossings will be extremely dangerous

---

repair to the extent of said company's right of way at all times by said company.

SEC. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges.

SEC. 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Done at the council chamber in regular session this 20th day of December, 1887.

Attest: JAS. A. KITCHEL, *City Clerk.*

to all persons having occasion to use the same, by the fact that the roads will approach the tracks at a steep, downward decline on both sides; that the railway track at these points is on a heavy grade, which renders it very difficult to control the speed of trains, and that the danger of a grade crossing will be vastly increased. Plaintiff further averred that since the year 1856 its railway track had been crossed by said highways by overhead crossings, consisting of bridges about eighteen feet in the clear above the level of the tracks. "That said highways then, as now, crossed the railway track at points near together, to wit, about 196 feet, and converge so as to meet at a distance of 70 feet from the railway right of way. That the railway track at said crossings lies in a deep cut, about eleven or twelve feet below the natural surface of the ground, and is on a heavy down grade and curve, and on one of said highways buildings are so located as to almost, if not entirely, cut off the view of approaching trains from persons approaching said track from the southerly side of the same. That, if said crossings are reduced to grade, as proposed by said ordinances, the approaches to said track will be down a steep inclined plane on both sides of said track, on both said highways; so that at said crossings the said highways will be cut to a depth of about eleven and one half feet below the adjacent lands. That it will be almost if not quite impossible for heavily loaded teams to stop for trains when approaching said track; and that by reason of the deep cuts both of said railway and highways in which said crossings will be located and of the curve and grade of said railway at said points, the sound of any signal and the sound and sight of approaching trains will be cut off, and said crossings will be excessively difficult and dangerous to the lives of persons crossing plaintiff's track along said highways, and to the lives, limbs and property of its passengers and patrons, being carried on the trains of the plaintiff, on account of unavoidable accidents and collisions there happening, and that thereby there will be cast upon the plaintiff an additional burden and liability to its said passengers and the public. That the natural conformity of the lands at said

crossing is such as to make overhead bridge crossings of said public highways over plaintiff's said track absolutely essential to the public safety."

The answer admitted most of the allegations of the petition, and averred that notice was duly published of the proposed improvements in a newspaper of general circulation in the city of Defiance, and written notice was duly served upon the plaintiff; but that the plaintiff did not, at any time, file any claim for damages by reason of such improvements, whereby it has waived the same, and is barred from claiming such damages.

Upon a hearing upon pleadings and proofs in the Court of Common Pleas, the petition was dismissed. Plaintiff appealed to the Circuit Court, and applied for an interlocutory injunction, which was granted, but was subsequently dissolved upon final hearing, and the petition again dismissed. 10 Ohio Circt. Ct. 27. The case was carried by writ of error to the Supreme Court of the State, and the judgment of the Circuit Court affirmed. 52 Ohio St. 262. Whereupon plaintiff sued out a writ of error from this court.

Mr. Alexander H. Smith and *Mr. Henry Newbegin* for plaintiff in error.

Mr. W. H. Hubbard for defendant in error.

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

Plaintiff's right to an injunction was urged in the state courts upon several grounds, but the only questions presented to us are whether the ordinance of December 20, 1887, permitting the railway to construct the bridges and their approaches, constituted a contract between the railway company and the city for the perpetual maintenance of such bridges; and whether the subsequent ordinances of February 7, 1893, impaired the obligation of such contract, or deprived the plaintiff of its property, or the use and enjoyment thereof, without compensation or without due process of law.

Opinion of the Court.

We have found some difficulty in evolving any contract at all from the ordinance of December 20, 1887, which, upon its face, is a permission or authority to construct these bridges under certain requirements and specifications, and to keep them in repair. It seems that, in the original construction of the railroad in 1855, a deep cut of eleven to twelve feet was made at and between these highway crossings, and in restoring the highway to a passable condition, as the company was required to do under the law of Ohio, wooden bridges were constructed over the railroad track and distant from it in the clear about sixteen feet. After the construction of the railroad, and some time prior to the year 1876, this territory was brought within the limits of the village of Defiance, and remained within such limits until the village was organized as a city.

In 1876, the village, wishing a sidewalk or foot bridge constructed over the track of the company, entered into an agreement with the company, embodied in a village ordinance, by which the latter gave permission to the village to erect and maintain a foot bridge across its track, which the village agreed to keep and maintain forever in safe condition and good repair at its own cost. It was further agreed that the maintenance of such foot bridge or sidewalk should be subject to the inspection and approval of the railroad company's engineer, and should be built, renewed and repaired from time to time as directed by such engineer, the village agreeing to be responsible for its safe repair and maintenance.

About the year 1880, the village was organized into a city, and in the year 1887, the railroad company, in order to prevent accidents, decided to elevate the bridges, and for that purpose applied to the city council for authority to do so. This authority was given by the ordinance of December 20, 1887.

The language of this ordinance is rather that of a license than that of a contract: the railway is authorized to erect new bridges of a certain construction, provided that the company shall also build sufficient approaches and grade to each of said bridges, and keep them in good repair. The city itself

agrees to do nothing, except to permit gravel to be taken from its gravel bed, without charge, for the construction of such approaches. It does not agree that the bridges or their approaches shall remain any particular length of time, or that it shall not make new requirements as the growth of the city may seem to suggest. The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, if the city should, in the growth of its population, become thickly settled in the neighborhood of these bridges, they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable. It is incredible, in view of the language of this ordinance, that the city could have intended, or the railroad company have expected, that the former thereby relinquished forever the right to improve or change the grade of these streets.

If it were possible that a city could make such a contract at all, it could only be done by express authority of the legislature and in language that would admit of no other interpretation. It is claimed that the construction of the sidewalks by the railroad company was a consideration, since it had been the duty of the city up to that time to keep them in repair; but it surely could not be a consideration for the perpetual maintenance of the bridges. If it were a consideration for anything it would simply be for the permission given to the railway to build the bridges — a permission obtained upon a special application of the railway company. Properly construed, this ordinance was simply a license to the company to build these bridges, and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing.

That the city, in the absence of a statute permitting it, would have no authority to enter into such a contract with the railroad company is admitted; but it is claimed that such authority is found in section 3283 of the Revised Statutes of Ohio, which, so far as the same is material, is as follows: "If it be necessary in the location of any part of a railroad to

occupy any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, *may agree upon the manner, terms and conditions* upon which the same may be used or occupied," etc. By the next section (3284), whenever in the construction of a railroad a public road or stream of water is crossed or diverted from its location or bed, the company is required, without unnecessary delay, to place such road or stream "in such condition as not to impair its former usefulness."

Reading these two sections together, it is open to doubt whether section 3283 is not confined to cases where the railroad runs along and upon the street, road or alley, in which case some kind of contract or agreement with the municipality would seem to be almost necessary for the mutual accommodation of the railroad and the public, who desire to retain the use of the street for ordinary travel. The matter of *crossing* the street, however, is treated by section 3284 as one of the necessary incidents of railroad construction; and all that is required is that the company, after having made the crossing, shall replace the road in such condition as not to impair its usefulness. This appears to be the construction put upon these sections by the Ohio courts. *Lawrence Railroad Co.* v. *Cobb*, 35 Ohio St. 94; *Lawrence Railroad Co.* v. *Williams*, 35 Ohio St. 168; *Little Miami Railroad* v. *Commissioners*, 31 Ohio St. 338; *Pittsburgh, Fort Wayne &c. Railway Co.* v. *Maurer*, 21 Ohio St. 421; *State* v. *Dayton &c. Railroad*, 36 Ohio St. 434.

But conceding, for the purposes of this case, all that is claimed by the railroad company from its construction of section 3283, the fact still remains that the ordinance of December 20, 1887, was not adopted in pursuance of the power to contract, but in pursuance of the legislative power vested in the city by section 2640 of the Revised Statutes, which enacts: "That the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause

the same to be kept open and in repair and free from nuisance."

We are also pointed to section 2 of the ordinance as indicating that a contract was within the contemplation of the parties. This section is as follows:

"SEC. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges."

This section, however, does not change that which, in its nature, is a license into a contract that these bridges shall remain for any particular length of time. The entering upon the work of construction might well estop the railroad company from objecting to the requirement that the bridge should be constructed in the manner specified in the ordinance; and might also estop the city from making any farther or different requirements in that connection; and to this extent there may be said to have been a contract; but when it is claimed that the city thereby agreed that the bridges so constructed should remain forever, and that it thereby waived its rights to change the grade or the method of crossing, we are importing into the contract by construction something which is not found there; which the parties have not agreed to, and which, if the city had any power at all to stipulate, should have been expressed in the clearest language.

In the case of the *Philadelphia, Wilmington &c. Railroad's Appeal*, 121 Penn. St. 44, relied upon by the plaintiff in error, the legislature conferred upon the mayor and the council of the city of Chester express authority to grant to certain railroad companies "the use and occupation of the streets, lanes, courts and alleys lying within three hundred feet of the said railroads, . . . to be used and occupied by the said railroad companies, respectively, only so long as the said streets . . . shall remain open to public use and travel," etc. Pursuant to this authority, and to a city ordinance, a formal agreement was entered into between the city and the railroad company that a certain street should be open to public use and travel; its

grade established and fixed for the purpose of having the street cross the railroad at such a height above the track as would permit the free operation of the railroad under the street, and prevent the dangers of a level crossing. The railroad on its part contracted to build a bridge over its track. It was held that the city had power to make the contract; that the rights conferred by the contract upon the railroad company were inviolable; that there was no question as to its performance of the contract, and the question as to the right of the municipality to grant away the control of its streets was foreign to the discussion. The city having enacted an ordinance altering the grade of the street in such manner as to cross the railroad at a level, and thereby destroy the overhead crossing, it was held that this was a violation of the contract.

There is no necessary conflict between that case and the position here assumed, as the act of the legislature gave the city express permission to grant to the companies the use and occupation of its streets, "so long as the said streets . . . shall remain open to public use and travel," and declared that such grant should be "as valid and effectual to transfer the rights and privileges therein contracted for to the said railroad companies, or any of them, . . . as if made between individuals." If the court, however, is to be considered as holding that an agreement or license to construct bridges, which is silent as to time, should be construed as an agreement that they are to remain in perpetuity, we should find ourselves confronted with too many authorities to the contrary to accept it as a sound exposition of the law.

Indeed, the general principle that the legislative power of a city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several States, that a reference to the leading authorities upon the subject is sufficient. Indeed, the right of a city to improve its streets by regrading or other-

wise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants.

In the early case of *Goszler* v. *Georgetown*, 6 Wheat. 593, it was held that the power given to the corporation to grade the streets of the city was a continuing power, and the corporation might from time to time alter the grade so made. It was said by Mr. Chief Justice Marshall "that the power of graduating and levelling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves who elect the corporate body, and who may therefore be expected to consult the interests of the town. . . . There may be circumstances to produce a general desire to vary the graduation, to bring the streets more nearly on a level, than was contemplated in the first ordinance; and if this may occur, we cannot say that the legislature could not intend to give this power of varying the graduation when the words they employ are adapted to the giving of it."

In *Transportation Co.* v. *Chicago*, 99 U. S. 635, which was an action to recover damages sustained by the construction of a tunnel under the Chicago River along the line of La Salle street, it was held that as the city was authorized by law to improve the street by building a bridge over or a tunnel under the river where it crossed the street, it incurred no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability were imposed by statute; that if the fee of the street be in the adjoining lot owners, the State has an easement to adapt it to easy and safe passage over its entire length and breadth; and that when making or improving the streets, in the exercise of an authority conferred by statute, the city is the agent of the State, and if it acts within that authority, and with due care, dispatch and skill, it is not at common law answerable for consequential damages.

In the recent case of *Baltimore* v. *Baltimore Trust & Guarantee Co.*, 166 U. S. 673, it was held that, where the

legislature of Maryland had given the mayor and city council of Baltimore power to regulate the use of the streets, lanes and alleys in said city, by railway and other tracks, and the city council had by ordinance authorized the railway company "to lay down and construct double iron railway tracks for the purpose of doing business . . . on Lexington street westwardly to Charles street from North street," the city council might repeal such ordinance so far as the existence of double tracks in that portion of Lexington street, lying between North and Charles streets, would be inconsistent with the reasonable use of the street at that point by the public and other vehicles.

In *Presbyterian Church* v. *City of New York*, 5 Cowen, 538, the corporation of the city had conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment, and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery. It was held that a corporation could not by contract abridge its legislative power, and that this was not a breach of the covenant which entitled the party to damages, but was a repeal of the covenant. See also *Coates* v. *New York*, 7 Cowen, 585.

The case of *N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, has an important bearing upon the point in issue here. In that case an act of the legislature of Connecticut, abolishing grade crossings as a menace to public safety, was held to be an exercise of the police power of the State and applicable to the charter of a railroad corporation, which was subject to alteration and amendment by the legislature. The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad companies affected by it; that as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done, and that all general laws and police regulations affecting corporations were binding upon them without their assent. This

court affirmed the ruling of the Supreme Court of Connecticut, saying that "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." See also 2 Dillon on Municipal Corp. §§ 685, 716; 2 Beach on Pub. Corp. §§ 1068, 1208; *Davis* v. *The Mayor*, 14 N. Y. 506; *Milhau* v. *Sharp*, 27 N. Y. 611; *Coleman* v. *Second Ave. Railroad*, 38 N. Y. 201; *Detroit* v. *Fort Wayne & Elmwood Railway*, 66 Michigan 642; *Chicago, Burlington &c. Railroad* v. *Quincy*, 139 Illinois, 355; *Roanoke Gas Co.* v. *Roanoke*, 88 Va. 810; *Louisville City Railway* v. *Louisville*, 8 Bush, 415.

While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them, *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674; *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S. 557; *Indianapolis* v. *Indianapolis Gas Light Co.*, 66 Indiana, 396; *Indianapolis* v. *Consumers' Co.*, 140 Indiana, 107, the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the State. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract or otherwise upon individuals or corporations in such manner as to be beyond revocation. Whatever construction be given to the ordinance of December 20, 1887, it cannot be held to stand in the way of a power to make such changes as the growth of population may seem to require.

In the *Matter of Opening First Street*, 66 Michigan, 42, it was held that the laying out and opening of streets by the

common council of the city is an exercise of legislative functions, and that any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend its streets in any particular place or part of the city, is an abnegation of its legislative power, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of a municipality, and is void. See also *Hood* v. *Lynn*, 1 Allen, 103; *Backus* v. *Lebanon*, 11 N. H. 19; *Brimmer* v. *Boston*, 102 Mass. 19.

But aside from the general power of municipalities to care for and improve their streets, an express power is given by section 2640 of the Revised Statutes of Ohio to the common council to care for, supervise and control "all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation," and "to keep the same open and in repair and free from nuisance." Under a similar power granted by Congress to the corporation of the city of Washington it was held by this court, in *Smith* v. *Washington*, 20 How. 135, that it included the power to alter, grade or change the level of the land on which the streets by the plan of the city were laid out. It was said that although "the plaintiff may have suffered inconvenience and been put to expense in consequence of such action, yet, as the act of the defendants is not unlawful or wrongful, they are not bound to make any recompense. It is what the law styles *damnum absque injuria*. Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city and require the grade of the street to conform to his convenience at the expense of that of the public." To the same effect are *Callender* v. *Marsh*, 1 Pick. 418; *Green* v. *Reading*, 9 Watts, 382; *O'Connor* v. *Pittsburg*, 18 Penn. St. 187.

If the duty required by the statutes in those cases can only be adequately performed by removing obstructions in or changing the grade of streets, this must be regarded as fairly incidental to the power conferred, and individual proprietors are bound to acquiesce in the measure thus taken for the general good of the public. The Ohio courts seem also to

have acted upon the same principles. Nor does the fact that the city has given its permission to a railway company to lay its rails upon or across a certain street deprive it of the power to improve and control such street, and adopt all needful rules and regulations for its use and management. *Chicago, Burlington &c. Railroad* v. *Quincy*, 136 Illinois, 563.

The ordinances of February 7, 1893, were not beyond the powers of the common council with respect to the improvement of its streets. While in 1887, overhead bridges might have seemed a better and safer plan of crossing the railway, than crossing at grade, the subsequent growth of the city may have demanded a different policy in 1893. It is hardly possible that the approaches required to reach an overhead bridge, which was some ten or twelve feet above the general level of the ground, should not have affected, to a certain extent, the value of the adjoining property as city lots; but whether this were so or not, it was purely within the discretion of the common council to determine whether the public exigencies required that the grade of the street be so changed as to cross the railroad at a level. *Dunham* v. *Hyde Park*, 75 Illinois, 371. While the modern policy of railway engineering usually tends to the abolition of grade crossings, there is no hard and fast rule upon the subject, and it may well be that the exigencies of a certain street or locality may demand that travel shall descend to the level of the railway rather than ascend to a bridge built over the track. But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised; or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt.

Assuming, but not deciding, that the railway company was entitled to compensation for the bridge so taken or rendered useless, it appears from the record that resolutions declaring the necessity for improving these streets by changing the grade were duly published for two consecutive weeks in a newspaper published and of general circulation in the city of Defiance, and written notice of such resolutions were also duly served upon the plaintiff; and that the plaintiff did not, at any time, file a claim in writing with the clerk of the city for damages by reason of such improvements, as was required by the terms of the resolution. By Rev. Stat. Ohio, § 2315, persons who claim that they will sustain damages by reason of such an improvement are required to file their claim with the clerk of the corporation within two weeks after such service or the completion of the publication of the notice; and persons failing to so file their claim "shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages." The Supreme Court held that these statutes had been in force and acted upon for many years; that their constitutionality had never been called in question; that they were applicable to the street improvements in question, and that under them the plaintiff's claim for compensation, if it had any, was waived and barred by failing to file it within the time required. "The plaintiff," said the court, "is charged with knowledge of the law, and, in the absence of any showing to the contrary, must be presumed to have voluntarily withheld its claim for compensation and damages, and thus prevented an inquiry into and assessment of them; and it seems clear that an owner, who has been afforded an opportunity of having compensation and damages assessed him, in the constitutional mode, for property taken or injured in the making of a street improvement, and has failed to avail himself of that opportunity, cannot, after having thus waived his right, enjoin the improvement on the ground that compensation has not been paid or tendered him."

Upon the whole, we think it clear that the common council acted within its powers in changing the grade of the street in

question, and that the plaintiff has no legal right to complain of its action. The decree of the Supreme Court of Ohio is, therefore,

Affirmed.

BRYANT *v.* UNITED STATES.

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

No. 779. Argued April 26, 1897. — Decided May 10, 1897.

Ornelas v. *Ruiz*, 161 U. S. 502, followed, to the point that if, in extradition proceedings the committing magistrate had jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*.

This was an appeal from a final order of the Circuit Court for the Southern District of New York, dismissing writs of *habeas corpus* and *certiorari* sued out by the appellant to obtain his release from the custody of the marshal of that district, and the warden of the jail of the city and county of New York.

The proceedings were originally instituted by a complaint made before a commissioner of the Circuit Court, duly authorized to act in cases of extradition, by Her Britannic Majesty's consul general at the city of New York, who charged the appellant with the crimes of forgery, larceny, embezzlement and false entries, committed in the city of London, and demanded his extradition under article X of the treaty of November 10, 1842, and article I of the treaty supplemental thereto of March 25, 1890.

The commissioner held that the evidence clearly showed that the appellant had been guilty of a crime specifically mentioned in the treaty stipulations between the two countries, and accordingly held him to await the action of the Sec-

retary of State and the final warrant of delivery. Appellant thereupon sued out from the Circuit Court writs of *habeas corpus* and *certiorari;* but that court, holding that there was legal evidence upon which the commissioner could properly exercise his judgment as to the guilt or innocence of the accused, dismissed the writs and remanded the prisoner to the custody of the marshal for the Southern District of New York. From that order petitioner appealed to this court.

Mr. Lorenzo Semple for appellant. *Mr. T. D. Semple* was on the brief.

Mr. Charles Fox for appellee.

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

The question before the commissioner in this case was whether, in the language of the treaty of 1842, article X, 8 Stat. 572, 576, there was "such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed." In other words, whether, according to our laws, there was probable cause to believe him guilty of the crimes charged. Rev. Stat. § 5270; *Benson* v. *McMahon*, 127 U. S. 457, 462. The question before us is even narrower than that, viz.: Whether there was any *legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition; or, as stated in *Ornelas* v. *Ruiz*, 161 U. S. 502, 508, "if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offence charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*." See also *In re Oteiza*, 136 U. S. 330.

The evidence before the commissioner tended to show that Bryant was employed by the firm of Morrison & Marshall of London as bookkeeper and assistant cashier from January to October, 1896, at a salary of £104 per annum; that he had under his control the cheque books of the firm and the paid cheques returned from the bank, although he was not authorized to sign the firm's name to cheques; that the firm kept an account with the London office of the Commercial Bank of Scotland, and that such account was charged with the three following cheques, viz.: June 23, £500; August 14, £500; September 1, £720. These cheques purported to be drawn on the bank and to be signed by Morrison & Marshall, and were presented for payment by the Provincial Bank of England, and were paid and debited to Morrison & Marshall.

It further appeared that Bryant kept an account with the Provincial Bank, in which he deposited on June 22 a cheque for £500; on August 13, a cheque for £500; and on September 9, a cheque for £720, which were credited to his account. It appeared that the three cheques paid by the Commercial Bank were abstracted from two cheque books which were not in use at the time, and were accessible to Bryant. No entry was made upon the counterfoils, or, as they are called in this country, the "stubs," of the cheque books from which they were taken; nor was any memorandum of such cheques anywhere entered; nor were these cheques among those received back from the bank in the ordinary way.

It further appeared that Morrison & Marshall had a sum exceeding £5000, carried to the credit of a "suspense account" in their ledgers, with which account, however, Bryant had no authority to interfere. He did, however, bring a credit of £2000 from such "suspense account" to a fictitious account, which he opened in the ledger in the name of T. H. North. Against this credit of £2000 he debited two items of £780 and £1220. The £780 was posted in the ledger from the cash book, and consisted of £280 and the £500 represented by the first cheque paid June 23. The £1220 was represented by the cheques paid August 14, £500, and September 10, £720. These amounts Bryant did not carry

out in the cash column of the cash book, but in order that the balances of the cash book, ledger and banker's pass book should agree, he added the sum of £1220 to the total at the bottom of the page, notwithstanding that amount was not in the column, nor was there any entry in the cash book relating to the £1220, which could be posted to North's fictitious account.

Upon this evidence the appellant contended, first, that there was no testimony before the commissioner tending to show that he had been guilty of forging the three cheques; second, that if it were shown that he had made false entries upon the books of Morrison & Marshall, this would not constitute an offence for which he could be extradited, for the reason that when the treaty of 1842 was executed, the making of false entries was not forgery; third, that as to the additional sum of £280, which the relator was charged with embezzling, there was no evidence of criminality; fourth, that if there were evidence sufficient to hold appellant upon the charge of forgery of the three cheques, he could not be held as for larceny or embezzlement, and that if he were held for embezzlement from Morrison & Marshall he could not be also held for obtaining the same money from the bank upon the forged cheques; fifth, that, as he could only be tried for the particular offence for which he is surrendered, the demanding government and the commissioner should have elected, and if the latter deemed the evidence sufficient to commit upon the one charge, he should not have been committed upon the other.

We think there was legal evidence against the prisoner upon which the commissioner was authorized to act, and that is sufficient for the purposes of this case. If it were true that three cheques were missing from the cheque books of Morrison & Marshall to which the prisoner had access, and no corresponding memoranda were made on the stubs; that three cheques were presented to the Commercial Bank by a bank at which the appellant kept a personal account, and this account showed a credit of three cheques, which upon the following day were presented and paid by the

Commercial Bank, and that the appellant had no authority to sign cheques for Morrison & Marshall, the inference is at least a reasonable one that these cheques were forged by the appellant. The commissioner was of opinion that, if the moneys of the firm were not actually obtained by forgery, they were obtained by embezzlement or larceny, or, at least, there was probable cause to believe that they were so obtained. So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny or embezzlement. That is a matter of practice with which we have nothing to do. While the original treaty of 1842 authorized the surrender only for the crime of forgery, or the utterance of forged paper, the supplemental treaty of March 25, 1890, 26 Stat. 1508, included both embezzlement and larceny.

The order of the Circuit Court is

Affirmed.

ENTERPRISE MINING COMPANY *v.* RICO-ASPEN CONSOLIDATED MINING COMPANY.

CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 267. Argued April 7, 8, 1897. — Decided May 10, 1897.

The clear import of the language of Rev. Stat. § 2320 is to give to a tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length in that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a surface patent before the discovery of the vein.

This case involves the construction of Rev. Stat. § 2323, which reads as follows:

Statement of the Case.

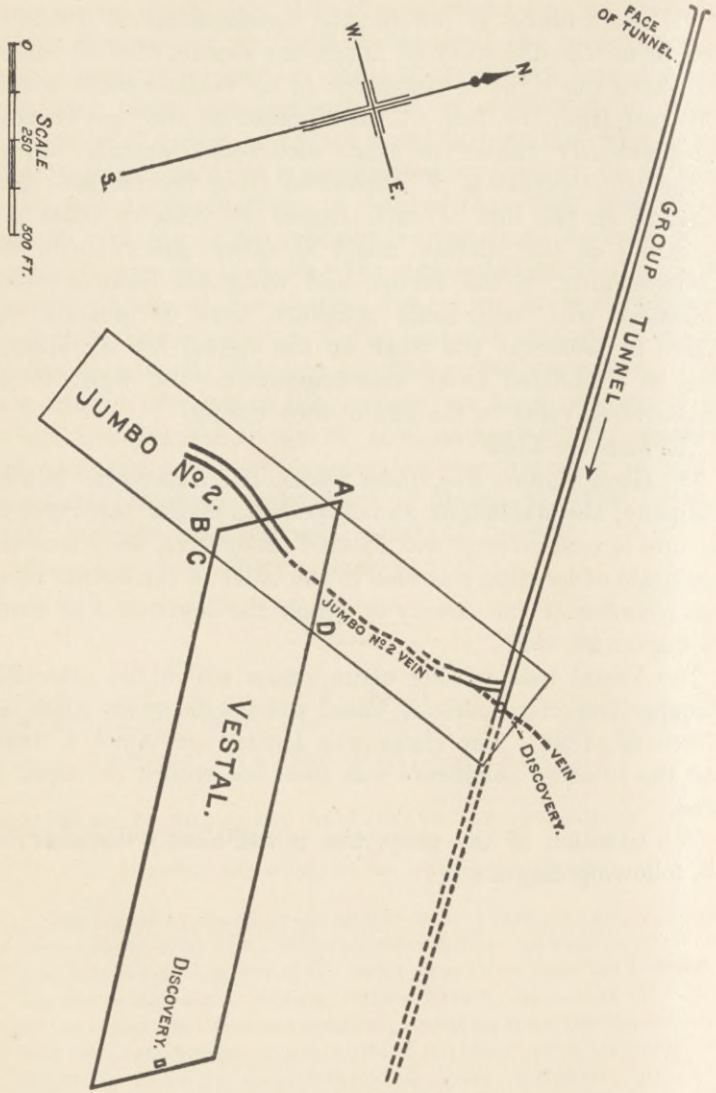
"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The facts are these:

The Group tunnel site, under which the Enterprise Mining Company, the defendant and appellant, claims the right to the ores in controversy, was located on July 25, 1887, and the certificate of location was filed in the office of the county clerk and recorder of the county in which the location was made on August 29, 1887.

The Vestal lode mining claim, under which the plaintiffs, the appellees, claim title is based upon a discovery made on March 23, 1888. The claim was located on April 1, 1888, and the location certificate was filed for record on April 3, 1888.

The situation of the properties is sufficiently disclosed by the following diagram:



The ore in controversy is within the limits of the tract A, B, C, D. As to this tract, the two locations, the Vestal and Jumbo No. 2, conflict. The owners of the Vestal claim made application in 1890 for a patent. No adverse proceed-

ings were instituted by the defendant, and a patent for the claim was issued on February 6, 1892. At the time of these proceedings no discovery of a vein in the tunnel had been made. But on June 15, 1892, a vein was discovered 1920 feet from its portal at the place marked "discovery" on the diagram. Immediately thereafter the defendant caused the boundaries of the claim Jumbo No. 2 to be located upon the surface of the earth, and a certificate of location to be duly recorded, in which it claimed 54 feet along the vein to the northeasterly of the tunnel and 1446 feet southwesterly. The position of this claim appears sufficiently on the diagram. The portion of this vein within the limits of the Vestal claim is about 750 feet from the line of the tunnel. This suit was commenced in the Circuit Court of the United States for the District of Colorado, on September 3, 1892, and was decided by that court in favor of the plaintiffs. 53 Fed. Rep. 321. On appeal to the Court of Appeals this decision was reversed, 32 U. S. App. 75, and the case remanded for further proceedings. Thereupon the case was brought here on a writ of certiorari.

Mr. R. S. Morrison for appellees. *Mr. Charles J. Hughes, Jr.*, and *Mr. Charles S. Thomas* were on his brief.

Mr. Charles H. Toll and *Mr. Joel F. Vaile* for appellant. *Mr. Henry M. Teller* and *Mr. Edward O. Wolcott* were on their brief.

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

It will be observed that so far as the mere location of the two claims, Vestal and Jumbo No. 2, the former was prior in time to the latter, and would, if there were no other facts, give priority of right to the ore within the limits of the conflicting territory. The tunnel was, however, located some eight or nine months before the discovery and location of the Vestal claim, and the statute gives to the owners of

such tunnel the right to "all veins or lodes within 3000 feet from the face of such tunnel on the line thereof, not previously known to exist." By virtue of this section, therefore, the right of the defendant to this vein was prior to that of the plaintiffs to the mineral in their claim. In this respect the Circuit Court and the Court of Appeals agreed. The matters now in dispute are the extent of that right and the effect of a failure to "adverse" the application for a patent.

The right to this vein discovered in the tunnel is by the statute declared to be "to the same extent as if discovered from the surface." If discovered from the surface, the discoverer might, under Rev. Stat. § 2320, claim "one thousand five hundred feet in length along the vein or lode." The clear import of the language then is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length of that vein. When must he indicate the particular fifteen hundred feet which he desires to claim? Counsel for plaintiffs contend that it should be done when in the first instance the tunnel is located, and that if no specification is then made the line of the tunnel is to be taken as dividing the extent of the claim to the vein, so that the tunnel owner would be entitled to only 750 feet on either side of the tunnel; while counsel for defendant insist that he need not do so until the actual discovery of the vein in the tunnel. We think the defendant's counsel are right. In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 provides: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery — whether such discovery be made on the surface or in the tunnel. The case of *Erhardt* v. *Boaro*, 113 U. S. 527, is not in point, for there the preliminary notice, which was made upon a discovery from the surface, simply claimed "1500 feet on this mineral bearing lode," without further

specification as to boundaries or direction. And it was held that that was equivalent to a claim for 750 feet in each direction from the discovery shaft.

It may be true, as counsel claim, that this construction of the statute gives the tunnel excavator some advantages. Surely it is not strange that Congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to blind veins, as they may be called, veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length, 3000 feet, beyond which he might not go in his search for veins and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed. Such is the import of the letter, to which counsel refer, from Commissioner Drummond, of date September 20, 1872. Land Office Report, 1872, p. 60; 3 Copp's Land Owner, 130. It may be also noticed that in this letter the commissioner affirmed the right of location on either side of the tunnel, in these words: "When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side of the point of discovery or intersection, or partly on one and partly upon the other side thereof."

We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site, and also that the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

It was well said by the Court of Appeals in its opinion in this case: "The striking characteristic of this section of the act is, that it gives the right to the possession of certain

veins or lodes to the diligent owner of a tunnel before his discovery or location to any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (§§ 2, 5, acts of May 10, 1872; §§ 2320, 2324, Rev. Stat.); but this section declares that the owners of a tunnel by simply locating and diligently prosecuting it, without the discovery of any vein or lode whatever, 'shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.'"

In *Hope Min. Co.* v. *Brown*, 11 Montana, 370, 383, the Supreme Court of that State observed: "But has he [the tunnel owner] not an inchoate right in such veins, which right is kept alive by prosecution of work on the tunnel, according to law? This seems to be implied by the last clause of the statute, that 'failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel.' The fact that said non-action on the part of the tunnel claimant should constitute an abandonment shows that it was the intent of Congress to reserve such lodes from the commencement of the tunnel, while it was prosecuted according to law." See also *Back* v. *Sierra Nevada Con. Min. Co.*, 2 Idaho, 386.

The plaintiffs further contend that an act passed by the territorial legislature of Colorado in 1861, Sess. Laws Col. 1861, p. 166, Mills' Ann. Stats. § 3141, limits the right of the tunnel owner to veins discovered in the tunnel to 250 feet on each side of the tunnel. That section reads:

"Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered."

But if that section has not been in terms repealed by the legislature of Colorado, it was superseded by the legislation of

Congress, as found in the Revised Statutes. *Ellet* v. *Campbell*, 18 Colorado, 510.

The remaining question is whether the failure to "adverse" the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. Sections 2325 and 2326, Revised Statutes, contain the legislation in reference to adverse claims. These provisions are substantially that when a party makes his application for a patent, if no adverse claim is filed within sixty days from publication of notice, it shall be assumed that the applicant is entitled to a patent; that when an adverse claim is filed, "it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim, and all proceedings . . . shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, runs parallel to the line of the tunnel, and is distant therefrom some five hundred feet. The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation, and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent on a mere possibility which might never ripen into a fact. The obvious contemplation of the

law in respect to these adverse proceedings is that there shall be a present, tangible and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to "adverse." And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do.

These are all the questions in the case. We are of opinion that the decision of the Court of Appeals is right, and it is

Affirmed.

CAMPBELL *v.* ELLET.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 44. Submitted May 4, 1896. — Decided May 10, 1897.

Enterprise Mining Co. v. *Rico-Aspen Mining Co.*, 167 U. S. 108, affirmed and applied, and the court further decides that the failure of the tunnel owner to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed does not destroy his right to the veins he discovers in the tunnel.

On September 18, 1872, George C. Corning and other citizens of the United States located a tunnel site. They diligently prosecuted the work of excavation, expending therein one hundred thousand dollars.

On February 3, 1875, the Corning Tunnel Company, a corporation duly organized, was the owner of this tunnel location by sundry mesne conveyances from the locators thereof, and said tunnel company, while prosecuting the work of excavation, cut and discovered within the tunnel and upon the line thereof, at a distance of 594 feet from its face, a vein of mineral-bearing rock in place, which was named the Bonanza lode, and on said February 3 it posted at the face

of the tunnel a plain sign and notice, giving the name of said vein, the point of discovery within the tunnel, the general course of the vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of the tunnel; this Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to its discovery by the Corning Tunnel Company, as above stated.

On February 9, 1875, the tunnel company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered and the company as the locator thereof, the point in the line of the tunnel at which the lode was discovered, and claiming seven hundred and fifty feet of the vein upon each side thereof; also stating the general course of the vein. The location certificate was as follows:

"TERRITORY OF COLORADO, }
COUNTY OF BOULDER. }

"Know all men by these presents that we, the Corning Tunnel Company, claim, by right of discovery and by right of location, 1500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations and angles, together with the amount of surface necessary for working the same and allowed by law, 750 feet of said lode so located lying and being easterly of the discovery on said lode and 750 feet being westerly of said discovery, said load being more particularly described as follows, to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel and extending from said point 750 feet easterly and 750 feet westerly. The bearing of said lode is about north 78 degrees east. This lode was discovered in the Corning tunnel and it is claimed under the provisions of section 4 of an act of Congress approved May 10, 1872, in Gold Hill mining district; said lode was discovered and was located on the 3d day of February, A.D. 1875.

"(Signed) FREDERICK A. SQUIRES, *Pres.*
"DANIEL A. ROBINSON, *Sec'y.*"

Subsequently the title to the tunnel and the lode passed to the defendant in error. After the discovery of said Bonanza lode the owners of the tunnel continuously and diligently prosecuted the work on the lode and expended each year thereon the sum of one hundred dollars. On July 10, 1886, more than eleven years after the discovery of the Bonanza lode, the plaintiff in error, Campbell, and one Cyrus Taylor, with full knowledge of the tunnel claim, and of the discovery and location of the Bonanza lode aforesaid, made a location of a certain lode, called by them the J. L. Sanderson lode. This location is on the same lode and vein as that described in the Bonanza location, and the discovery cut by which it was discovered by Campbell and Taylor is within 200 feet of the tunnel line. Campbell and Taylor did everything required to be done by the statutes of the United States in discovering and marking the point of discovery of the Sanderson lode, and in marking the boundaries of the claim on the surface of the ground, and thereafter did the requisite annual labor thereon. Having made application for a patent the defendant in error filed an adverse claim and commenced a suit, as required by the statute. Rev. Stat. § 2326. This, after a trial in the District Court of Boulder County, Colorado, was taken to the Supreme Court of the State, and by that court a judgment was entered in favor of the defendant in error, on the ground that the proceedings in respect to the tunnel, the discovery of the Bonanza lode and the location thereof, vested in him a title to that lode to the distance of 750 feet from the line of the tunnel. 18 Colorado, 510. To reverse which judgment Campbell sued out this writ of error.

Mr. L. C. Rockwell for plaintiff in error.

Mr. Platt Rogers and *Mr. John F. Shafroth* for defendant in error.

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

In the case just decided of *Enterprise Mining Co.* v. *Rico-*

Aspen Consolidated Mining Co., *ante*, 108, we have considered the law in respect to mining tunnels. Beyond what was there disposed of only a single question requires consideration, and that is, does the failure to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed destroy the right of the tunnel owner to the veins he has discovered in the tunnel?

It will be noticed that the tunnel company posted at the mouth of the tunnel a notice of its discovery of this lode, and the extent of its claim thereon, and also that it caused to be filed in the office of the recorder of the county a location certificate, as required by the local statute. Mills Ann. Stats. §§ 3150, 3151. It will also be perceived that § 2323, Rev. Stat., gives to the tunnel discoverer the right of possession of the veins. It in terms prescribes no conditions other than discovery. The words "to the same extent" obviously refer to the length along the line of the lode or vein. Such is the natural and ordinary meaning of the words, and there is nothing in the context or in the circumstances to justify a broader and different meaning. Indeed, the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim in accordance with other provisions of the statute. It may be true, as suggested in Morrison's Mining Rights, 8th edition, page 182, that before a patent can be secured there must be a surface location. Rev. Stat. § 2325. But the patent is not simply a grant of the vein, for, as stated in the section, "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." It must also be noticed that § 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes and ledges, the tops or apexes of which are inside such lines. So that a location gives to the locator something more

than the right to the vein which is the occasion of the location. But without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim — in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute.

We are of opinion, therefore, that the question considered must be answered in the negative. There is no error in the judgment of the Supreme Court of Colorado, and it is

Affirmed.

In re JOHNSON, Petitioner.

ORIGINAL.

No. 13. Original. Submitted April 26, 1897. — Decided May 10, 1897.

On July 24, 1896, a warrant was issued by a commissioner for the Southern District of the Indian Territory to arrest Johnson upon the charge of rape, alleged to have been committed upon one Pearl McCormick on the same day. Subsequently, and on the 9th of October, at a regular term of the United States court for that district, he was indicted, and on the 17th of October was arraigned, tried and convicted by a jury, and is now under sentence of death. On July 25, the day following the commission of the offence, a warrant, issued by a commissioner for the Eastern District of Texas, charging him with the same crime, was placed in the hands of the marshal for that district, who demanded of the marshal of the

Statement of the Case.

Southern District of the Indian Territory the surrender of the petitioner in obedience to said writ, but the same was refused. It does not appear when this demand was made, or whether it was before or after the 1st day of September. It further appeared that, at the time of the commission of the offence, the United States court for the Eastern District of Texas was not in session, and that no term of said court was held until the third Monday of November, after petitioner had been tried, convicted and sentenced to death. *Held*, that if the petitioner was actually in the custody of the marshal on the 1st of September, his subsequent indictment and trial were valid, though in the first instance he might have been illegally arrested.

It is the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody and possession.

This was a petition for a writ of *habeas corpus* to obtain the release of the petitioner from the custody of the marshal of the Southern District of the Indian Territory, who now holds him under sentence of death for the crime of rape.

From the petition, and the return to the rule to show cause, it appears that on July 24, 1896, a warrant was issued by a commissioner for the Southern District of the Indian Territory to arrest Johnson upon the charge of rape, alleged to have been committed upon one Pearl McCormick on the same day; that subsequently, and on the 9th of October, at a regular term of the United States court for that district, he was indicted, and on the 17th of October was arraigned, tried and convicted by a jury, and is now under sentence of death.

It further appears that on July 25, the day following the commission of the offence, a warrant, issued by a commissioner for the Eastern District of Texas, charging him with the same crime, was placed in the hands of the marshal for that district, who demanded of the marshal of the Southern District of the Indian Territory the surrender of the petitioner in obedience to said writ, but the same was refused. It does not appear when this demand was made, or whether it was before or after the 1st day of September. It further appeared that, at the time of the commission of the offence, the United States court for the Eastern District of Texas was not in session, and that no term of said court was held until

the third Monday of November, after petitioner had been tried, convicted and sentenced to death.

Upon this state of facts the petitioner claimed that the United States court for the Southern District of the Indian Territory had no jurisdiction of the case; but that, under the provisions of an act of Congress, cited in the opinion, the court for the Eastern District of Texas retained jurisdiction of all offences committed within the Southern District of the Indian Territory, where the punishment was death or imprisonment at hard labor, until September 1, 1896, and that the United States court for the Eastern District of Texas had sole and exclusive jurisdiction over his offence.

Mr. John J. Weed for petitioner.

Mr. Solicitor General opposing.

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

This case raises the question whether the United States court for the Southern District of the Indian Territory had jurisdiction to try and condemn the petitioner under the circumstances above set forth.

The following statutes are pertinent in this connection: By the fifth section of the act "to establish a United States court in the Indian Territory," etc., approved March 1, 1889, c. 333, § 5, 25 Stat. 783, it is enacted "that the court hereby established shall have exclusive original jurisdiction over *all offences* against the laws of the United States, committed within the Indian Territory as in this act defined, *not punishable by death or imprisonment at hard labor*"; by the seventeenth section "that the Chickasaw Nation, and the portion of the Choctaw Nation" within certain described boundaries (including the *locus* of this crime), "and all that portion of the Indian Territory not annexed to the district of Kansas by the act approved January 6, 1883, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of

this act, be annexed to and constitute a part of the Eastern Judicial District of the State of Texas, for judicial purposes."

The eighteenth section provides that sessions of said court shall be held twice in each year at Paris; "and the United States courts, herein provided to be held at Paris shall have exclusive original jurisdiction of all offences committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory."

Taking these sections together, it is clear that jurisdiction was vested in the new court, created by the act, over all minor offences against the laws of the United States committed within the Indian Territory; but that jurisdiction of all offences punishable by death or by imprisonment at hard labor was conferred upon the United States court for the Eastern District of Texas over that portion of the Indian Territory described in section seventeen.

This jurisdiction was expressly continued by section thirty-three of the act of May 2, 1890, 26 Stat. 81, "to provide a temporary government for the Territory of Oklahoma."

On March 1, 1895, an act was passed "to provide for the appointment of additional judges of the United States court in the Indian Territory," etc. 28 Stat. 693. The ninth section of that act reads as follows:

"SEC. 9. That the United States court in the Indian Territory shall have exclusive original jurisdiction of all offences committed in said Territory, of which the United States court in the Indian Territory now has jurisdiction, and after the first day of September, 1896, shall have exclusive original jurisdiction of all offences against the laws of the United States, committed in said Territory, *except such cases* as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, *shall have acquired jurisdiction of before that time.* . . .

"All laws heretofore enacted conferring jurisdiction upon United States courts held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory, as defined by

law, as to offences committed in said Indian Territory, as herein provided, are hereby repealed, to take effect on September 1, 1896; and the jurisdiction now conferred by law upon said courts is hereby given from and after the date aforesaid to the United States court in the Indian Territory: *Provided*, That in all criminal cases where said courts outside of the Indian Territory shall have, on September 1, 1896, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases."

The case evidently turns upon the construction of this last section. This section had three purposes: *First*, to enable the United States court in the Indian Territory to retain the jurisdiction it then had under the fifth section of the act of March 1, 1889, of all offences against the laws of the United States, not punishable by death or by imprisonment at hard labor; *second*, to give it jurisdiction after September 1, 1896, of all offences whatever, except of such cases as the courts in Texas, Arkansas and Kansas had acquired jurisdiction of before that time; *third*, to repeal all laws conferring jurisdiction upon these courts after that date, and to vest jurisdiction of the same upon United States courts in the Indian Territory, with a proviso repeating the exception above indicated.

Now, if the United States court for the Eastern District of Texas had "acquired jurisdiction" of this case, manifestly it was entitled to try the petitioner, but otherwise not. The fact that the crime was committed on the 24th of July had no bearing upon the question, since jurisdiction was vested in the United States court in the Indian Territory, not of crimes or offences committed after September first, but of all offences in that Territory, of which the Texas court had not acquired jurisdiction before that date. In this view the date when the crime was committed is wholly immaterial, and the case of *Caha* v. *United States*, 152 U. S. 211, is inapplicable. Jurisdiction is acquired under this statute, not by the commission of an offence, but by service of process upon the person. *Herndon* v. *Ridgway*, 17 How. 424; *Chaffee* v. *Hayward*, 20 How. 208, 215; *Boswell's Lessee* v. *Otis*, 9 How. 336, 348; *Pennoyer* v. *Neff*, 95 U. S. 714; *Mexican Central Railway*

v. *Pinkney*, 149 U. S. 194. In this connection jurisdiction of the "case," *i.e.* the crime, is undistinguishable from jurisdiction of the person who is charged with the crime.

We know of no reason why the rule, so frequently applied in cases of conflicting jurisdiction between Federal and state courts, should not determine this question. Ever since the case of *Ableman* v. *Booth*, 21 How. 506, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. This rule was reaffirmed in *Tarble's case*, 13 Wall. 397; in *Robb* v. *Connolly*, 111 U. S. 624; and *In re Spangler*, 11 Michigan, 298, and with reference to personal property has been so often restated as to have become one of the maxims of the law. *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Ellis* v. *Davis*, 109 U. S. 485; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Byers* v. *McAuley*, 149 U. S. 608; *Moran* v. *Sturges*, 154 U. S. 256; *In re Chetwood*, 165 U. S. 443.

The material facts of the case, upon which the petitioner relies, are: That on July 25, a warrant was issued by a United States commissioner for the Eastern District of Texas, charging him with the crime for which a warrant had already been issued against him by a commissioner of the Indian Territory, and upon which he seems to have been arrested by the marshal. A demand was made by the Texas marshal upon the marshal of the Indian Territory, but neither the petition nor the return to the rule to show cause shows that the demand was made before September first. Assuming that the commissioner for the Southern District of the Indian Territory exceeded his authority in issuing and the marshal in executing his warrant of arrest, it does not follow that the subsequent indictment and conviction were void. If the petitioner was in the actual custody of the marshal on September first, his subsequent indictment and trial were valid, though in the first instance he might have been illegally arrested.

Thus in the *Ship Richmond* v. *United States*, 9 Cranch, 102, an illegal seizure of a vessel was made in the waters of a foreign power by a vessel belonging to the navy for a violation of the embargo act, and it was held that, although the seizure within the territorial jurisdiction of a foreign power was an offence against that power, this court could take no cognizance of it, and the majority of the court was of opinion that the law did not connect that trespass with the subsequent seizure by the civil authorities under the process of the District Court, so as to annul the proceedings of that court against the vessel. This ruling was approved in *The Merino*, 9 Wheat. 391, 402. Indeed, there are many authorities which go to the extent of holding that, *in criminal cases*, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. *Kerr* v. *Illinois*, 119 U. S. 436, 444; *Ex parte Scott*, 9 B. & C. 446, (1829); *Lopez & Sattler's case*, 1 Dearsly & Bell's Crown Cases, 525; *State* v. *Smith*, 1 Bailey So. Car. Law, 283, (1829); *State* v. *Brewster*, 7 Vermont, 118, (1835); *Dows' case*, 18 Penn. St. 37, (1851); *State* v. *Ross & Mann*, (1866) 21 Iowa 467. Although it has been frequently held that if a defendant *in a civil case* be brought within the process of the court by a trick or device, the service will be set aside and he will be discharged from custody. *Union Sugar Refinery* v. *Mathiessen*, 2 Cliff. 304; *Wells* v. *Gurney*, 8 B. & C. 769; *Snelling* v. *Watrous*, 2 Paige, 314; *Williams* v. *Bacon*, 10 Wend. 636; *Metcalf* v. *Clark*, 41 Barb. 45; *Stein* v. *Valkenburg*, 3 B. & E. 65; *Williams* v. *Reed*, 5 Dutcher, 385; *Carpenter* v. *Spooner*, 2 Sand. 917; *Pfiffner* v. *Krapfell*, 28 Iowa, 27; *Moynahan* v. *Wilson*, 2 Flippen, 130; *Small* v. *Montgomery*, 17 Fed. Rep. 865; *Kauffman* v. *Kennedy*, 25 Fed. Rep. 785. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

Syllabus.

But in this case there was nothing of the kind. The crime was committed and the prisoner arrested within the Territory, and within the local jurisdiction of the territorial court. Had he been arrested without warrant by the marshal, or even by a private individual, and detained in custody until after the first of September, he might then have been indicted, although, perhaps, an action might have lain against the person so arresting him for false imprisonment. If the jurisdiction of the Texas court had attached, or, in the language of the statute, had been "acquired," before September first, that would have been a good defence; but, as already stated, all that had been done was to issue a warrant which was never served, and there is nothing to show that a demand was made for the petitioner before the first of September. Whether, if such demand had been made, that would have itself vested the Texas court with priority of jurisdiction, is a question we are not called upon to discuss. It is clear that the mere issue of a warrant was not sufficient.

The petition must be

Denied.

BURDON CENTRAL SUGAR REFINING COMPANY *v.* PAYNE.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 722. Submitted April 12, 1897. — Decided May 10, 1897.

P. and P., owners of three sugar plantations in Louisiana, leased the sugar-house on one of them with all its machinery, and such defined land in that plantation as might be found necessary for its use, to F. and F. for a term of years. The lessees agreed to buy during the term, and the lessors agreed to sell and deliver to them during that time, the sugar-cane grown on the three plantations. Elaborate provisions were made respecting the conduct of the business, and the manner of fixing from time to time the price of the cane. The thirteenth article was as follows: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during

the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid." The twentieth article was as follows: "The parties of the first part agree to keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The lessees, with the consent of the lessors, transferred their rights and their interests under the lease to a corporation which assumed their obligations thereunder. This corporation became involved and a receiver was appointed in an equity suit brought by the Burdon Company. The lessors intervened in this suit, claiming that their claim for the balance due on the purchase price, and also their claim for cane delivered to the lessees were secured by a lessor's privilege, under Louisiana law, on the property of the lessees at the sugar-house, and the latter also by an equitable lien on any bounty that might thereafter be collected by the receiver. The Circuit Court decided that the intervenors were entitled to the lessor's privilege, and to an equitable lien on the bounty. An appeal having been taken from this decision, the Circuit Court of Appeals certified the facts to this court and propounded the following questions: "*First.* It being shown that the cane sold by appellees, J. U. Payne & Company et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane? *Second.* Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar-cane sold and delivered under said contract, have the appellees H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit? *Third.* If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?" To these several questions the court now make answer as follows:

(1) The first question is answered in the negative;

(2) The second question is answered in the affirmative;

(3) The third question is answered in the affirmative.

Statement of the Case.

THE Circuit Court of Appeals for the Fifth Circuit, desiring the instruction of this court for the proper decision of certain questions arising in the above entitled cause, certified the statement of facts set out in full in the margin,[1] and thereon propounded the following questions:

---

[1] "1. H. M. Payne, J. U. Payne and J. U. Payne & Company, a commercial firm composed of J. U. Payne, J. U. Payne, Jr. and R. W. Foster, all residents of New Orleans, La., were the owners of three contiguous plantations in St. Landry Parish, Louisiana, known as Barbreck, St. Peter's and Anchorage.

"2. On June 16, 1892, they entered into the following contract with L. Murray Ferris and Wm. L. Ferris, of Poughkeepsie, New York, which was duly recorded:

"This indenture made by H. M. Payne, J. U. Payne and the firm of J. U. Payne & Co., all residents of the city of New Orleans, State of Louisiana, as the parties of the first part, and L. Murray Ferris and William L. Ferris, both residents of the city of Poughkeepsie, State of New York, as the parties of the second part, witnesseth: That whereas the said H. M. Payne, J. U. Payne and the firm of J. U. Payne & Co., parties of the first part, as aforesaid, are the owners and proprietors of three certain plantations, to wit: the Barbreck, St. Peter's and Anchorage places, their respective interest in the said three plantations being of record in the said parish, and

"Whereas, the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, for a lease of the Barbreck sugar-house, and the purchase of the crops of the three aforesaid plantations:

"Now, therefore, the said parties of the first part, each for and as regards his respective interest in the said plantations, and the said parties of the second part jointly and severally, hereby contract, obligate and bind themselves as follows, to wit:

"Article first. The parties of the first part grant to the parties of the second part, upon the terms and conditions hereafter provided, a lease for a period of ten years, of the sugar-house situated on the Barbreck plantation, together with all the machinery and appurtenances thereto belonging, it being understood and agreed that this lease shall cover and include all the present enclosure around the Barbreck sugar-house and so much in addition towards the Anchorage plantation as may be necessary to provide space for handling cars, and, further, the land between the cane yard and the bayou, except the public highway, which shall be used in common by the parties hereto, provided, that the lease shall not include any cabins or dwelling-houses which may be situated on the aforesaid premises, the parties of the first part reserving to themselves the right to remove any and all such cabins or dwelling-houses off the said premises which the parties of the second part shall have the right at their option to require.

"First. It being shown that the cane sold by appellees, J. U. Payne & Company et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the

---

"And it is agreed and understood that the lease shall further cover and include the right to make such additions, alterations or modifications, to or in said sugar-house, as the parties of the second part may desire to make, using, at their option, all the brick and other material now on the aforesaid premises, the right being further reserved to the said parties of the second part to drain the aforesaid leased premises into the regular plantation ditches and drains.

"But the parties of the second part hereby covenant and bind themselves to make, at least, and, in any event, such additions and alterations to and in said sugar-house, as will enable it conveniently and in suitable time to take off the crops of the Barbreck, St. Peter's and Anchorage plantations.

"Article second. The consideration of the aforesaid lease shall be the sum of twenty thousand dollars ($20,000), or two thousand dollars ($2000) per annum, which the parties of the second part bind and obligate themselves to pay in semi-annual instalments of one thousand dollars ($1000) each, the first instalment to be due and payable on the first day of January, 1893, and the others every six months thereafter.

"And it is understood and agreed that while all the terms and stipulations of this contract shall be absolutely and irrevocably binding from the date of its execution, the rent, as above stipulated, shall not begin to run until the first day of October, 1892.

"Article third. It is further understood and agreed that there shall be built immediately, or as soon as practicable after the execution hereof, a tramway and bridge from the Barbreck sugar-house through the St. Peter's plantation, on the Barbreck side of the bayou, to the boundary line of the Prosser plantation, for the purpose of conveying the crops of the said plantation to the sugar-house.

"The parties of the first part contract and agree, on their part, to grade the beds of the said tramways and to haul all the necessary materials for their construction, the parties of the second part covenanting and agreeing on their part to furnish all the material and to complete the tramways and build the bridges, after the grading and hauling aforesaid shall have been done.

"And, after the first crop season after the execution hereof, the parties of the second part bind and obligate themselves to build, on the same terms and conditions as are provided above, a branch tramway from the main tramway on the Barbreck plantation, hereinabove provided for, across the St. Peter's bridge and through the St. Peter's field on that side of the bayou up to the line of the Morgan railroad. And the parties of the second part shall have the privilege of carrying the tramways entirely through all or either of the said three plantations, so as to be able to extend them beyond.

Statement of the Case.

limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?

"Article fourth. The parties of the second part shall further have the right of way for a railroad to connect the Barbreck sugar-house with the Morgan railroad, including the consent of the parties of the first part to their building a railroad bridge across the bayou at the grade level of the Barbreck cane yard, and the further right to construct and operate telegraph and telephone lines along all the aforesaid tramways and railroad.

"The parties of the second part shall further have, during the lease, a full and complete right of way over the road connecting the Barbreck sugar-house and the railroad depot, and the further right to establish and operate during the lease at some suitable place on one of the three aforesaid plantations a kiln for burning brick.

"Article fifth. But it is distinctly understood and agreed that the aforesaid tramways and railroad must be so constructed as not to interfere with the drainage facilities of the aforesaid three plantations or either of them.

"And as the courses of the aforesaid tramways and railroad are not definitely fixed herein, it is further understood and agreed that as soon as the said courses shall have been mutually agreed upon and the tramways and railroad built, they shall *ipso facto* become the courses contemplated herein, and neither of the parties hereto shall have the right to change the same, or either of them, without the other's consent.

"Article sixth. The parties of the first and second part hereto further covenant and agree mutually to sell and purchase respectively upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, viz.: the Barbreck, St. Peter's and Anchorage plantations, except such as may be needed each season as seed for the following year.

"Article seventh. The parties of the first part shall cultivate the plantations in case, or so much thereof as would be justified by usual and improved agricultural methods.

"Article eighth. The cane shall be delivered at the sugar-house or at the tramways, at the option of the parties of the first part, to cars furnished by the parties of the second part, the said cars to be loaded to their full capacity by the parties of the first part.

"Article ninth. The parties of the first part shall have the absolute right to deliver, on and after the fifteenth day of October of each season, and the parties of the second part shall be bound and obligated to accept, unless hereinafter provided to the contrary, so much cane each working day as shall represent the average amount necessary to be delivered per day, to complete the delivery by the twenty-fifth day of December following, the said average to be based upon the number of working days between the

"Second. Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar-cane sold and delivered under said contract, have the appellees, H. M. Payne, J. U.

---

fifteenth of October and the twenty-fifth of December and the total estimated tonnage of the three plantations.

"The said estimate shall be made on the first day of each October by the parties of the first part and shall be submitted in writing to the parties of the second part, who shall have the right to make a personal inspection of the crop; and, in case of a disagreement between the parties hereto as to the tonnage, they shall agree upon an umpire, whose decision and estimate shall be final and binding on all parties hereto.

"Article tenth. The parties of the second part shall not be bound to accept cane frozen standing more than eight days after a freeze, but windrowed cane uninjured by freeze shall be paid for on the same basis as uninjured standing cane.

"And all cane must be cut as close to the ground as practicable and not above the first red joint; and it must be delivered promptly after cutting, freed from trash, as is customary in Louisiana. Nor shall the parties of the second part be bound to accept any cane the juice of which shall test less than 9 per cent sucrose.

"Article eleventh. The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane, as expressed at the mill and the average market price as determined by the New Orleans quotations of prime yellow clarified sugar, during each delivery week, plus the bounty, this price to be estimated on a basis of four dollars per ton for cane when the sucrose content of the juice is 11 per cent and the average market price of prime yellow clarified sugar plus the bounty is five and a half cents per pound, or 6.6 cents for every one per cent of sucrose in the juice, thus:

"11 per cent x 6.6 x $5\frac{1}{2}$, equals $4.00.

"Article twelfth. The parties of the first part shall have the right to appoint a representative, who shall have access to the mill at all times, for the purpose of testing the juice or for any other purpose, legitimately and reasonably pertaining to the interests of the said parties of the first part under this contract.

"The juice shall be tested daily or as often as either party may desire, and immediately or as soon as practicable after it is expressed. And in case more than one determination is made during a day, the average result shall be taken as the basis of payment for that day. And in case of disagreement between the parties hereto as to the percentage of sucrose content, Dr. W. C. Stubbs, of New Orleans, shall be the umpire, and his decision and figures shall be binding.

"Article thirteenth. The price of cane as above determined shall be paid as follows:

Payne and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit?

"Third. If the second question shall be answered in the

"Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid.

"Article fourteenth. But, whereas, there is recorded against the premises hereinabove leased, a mortgage to secure the payment, at maturity, of four promissory notes, each note being for the sum of four thousand one hundred and sixty-six dollars and sixty-six cents and bearing interest at the rate of four per cent per annum from the first day of January, 1890, until they respectively mature; and

"Whereas, the said notes mature on the first of January, 1893, the first of January, 1894, the first of January, 1895 and the first of January, 1896, respectively:

"Now, therefore, in order to secure the parties of the second part in the quiet enjoyment of the said leased premises and the prompt payment of the said notes, principal and interest, as they respectively mature;

"It is understood and agreed that the parties of the second part shall have the right and privilege of reserving each season until all the aforesaid notes shall have been paid, the rent which may be due under the terms of this contract on the first day of January of each season, and, in addition, so many of the cash weekly payments for cane, hereinabove provided for, next preceding the first day of January of the said season, as will together with the rent as aforesaid, aggregate the amount, principal and interest, of the note falling due on the first of January of that season.

"The amount so reserved shall be held by the said parties of the second part in trust for the parties of the first part, and in case the said note is not promptly paid at maturity by the parties of the first part, then, for their own protection, the parties of the second part shall have the right to apply the amount reserved as above provided, to the payment of the note, principal and interest, charging the amount so applied to the account of the parties of the first part.

"But, if the parties of the first part shall promptly pay at maturity the note falling due on the first of January of any season then in that event the amount reserved, as above provided, by the parties of the second part for the payment of that note, shall immediately become due and payable to the parties of the first part.

"The parties of the first part further covenant and agree to remove all

affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?"

---

other liens and privileges on the leased premises and to keep the same free from all other liens and privileges during the term of this lease.

"Article fifteenth. In the event of a temporary closing and shutting down of the mill, as the result of fire, explosion, breakage or other purely fortuitous cause, the parties of the second part shall not be bound to receive cane during such time and shall not be liable in damages to the parties of the first part for such non-receipt, but during such temporary shutting down of the mill, the parties of the first part shall have the right to dispose of so much cane, as the parties of the second part would otherwise have been compelled, under the terms of this contract, to receive, in any way they may see fit and they shall furthermore have the right to use for such purpose, free of charge, all the tramways, cars and other transportation facilities of the parties of the second part.

"And the parties of the second part stipulate and agree to use every reasonable effort to repair and make all such delays as short as possible.

"Article sixteenth. In case of total loss of the sugar-house, mill and machinery, by fire or otherwise, this contract may be terminated, at the option of the parties of the second part.

"Article seventeenth. It is agreed and understood that the value of the Barbreck sugar-house machinery and appurtenances, as they stand at the date of this contract, shall be estimated by three appraisers to be appointed as follows: One by each of the parties hereto, and the third by these two.

"And the parties of the second part covenant and agree to take out thereon, in the name and for the benefit of the parties of the first part, and to keep in force during the term of this contract, a policy of insurance against fire, for the full value as above determined, provided, that this valuation shall not exceed the sum of ten thousand dollars, and to pay the premium on the said policy for the benefit of the parties of the first part, during the term of this contract.

"Article eighteenth. The parties of the second part further covenant and agree to pay during the term of this contract any and all extra taxes which may result from increased assessment of the leased property on account of the improvements put upon it by the said parties of the second part.

"Article nineteenth. On the termination of this contract, by limitation or as otherwise provided therein, the parties of the second part shall have the right to remove and take away all the improvements, of whatever kind or description, including tramways, which they may have put upon the leased premises, on condition, however, of paying, before such removal, to the parties of the first part an amount which shall represent the depreciation in value of the sugar-house, machinery and appurtenances belonging to the said

Counsel for Parties.

Mr. John S. Blair, *Mr. Walter H. Saunders*, *Mr. J. D. Rouse* and *Mr. William Grant* for appellants.

Mr. Charles E. Fenner for appellees.

---

parties, as a means of manufacturing sugar from cane, the present value to be that determined by the appraisement hereinabove provided for, and the value at the termination of this contract to be determined by a similar appraisement, it being understood and agreed that the latter appraisement shall be made solely with reference to the relative efficiency and value of the said sugar-house, machinery and appurtenances for the manufacture of sugar from cane, without regard to the profits of the industry or the depreciation in value of as the result of the introduction of new and improved machinery or methods of manufacture.

"Article twentieth. The parties of the first part agree to keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights.

"Article twenty-first. Nothing in this contract shall be construed as to authorize the establishment or conduct of a store of any sort or description upon the leased premises, by the parties of the second part or others.

"Article twenty-second. It is further mutually understood and agreed that in case the bounty now paid upon sugar by the United States Government is removed during the term of this contract, then, and in that event, either of the parties hereto may at their option terminate the contract, but as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned, the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated upon the same terms and conditions, except as hereinabove provided.

"Article twenty-third. And whereas, the parties hereto recognize that despite the genuine and earnest efforts of the parties of the second part to construct and put in operation the contemplated mill in time for the next grinding season, after the execution hereof, such a consummation may be rendered practically impossible by events absolutely beyond the control of the said parties hereto, it is therefore understood and agreed that if by reason of such unforeseen events it shall become practically impossible to construct and put into operation the said contemplated mill in time for the next grinding season after the execution hereof, then, and in that event the said parties of the second part shall be bound to receive under the terms and conditions of this contract, during said next grinding season, only the cane grown on the Barbreck plantation, and the parties of the first part shall have the right to dispose of the St. Peter's and Anchorage crops

Mr. Frank McGloin and *Mr. James David Coleman* filed a brief for the Reading Iron Co., appellees.

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

---

during said season, in any way they may see fit with the privilege of using for such purpose, free of charge, any and all the transportation facilities of the parties of the second part.

"But nothing in this section shall be so construed as to relieve the parties of the second part from their obligation under this contract to purchase the crops of the three aforesaid plantations in case of their failure to construct and put in operation the said contemplated mill in time for the next grinding season, if such failure shall result from the financial inability of the said parties of the second part to meet their engagements or from a want of exercise by them of all due caution, prudence and foresight to that end.

"Article twenty-fourth. It is further understood and agreed that the parties of the second part shall have the right and privilege of subrogating to their rights and liabilities under this contract at any time during the term thereof a corporation duly organized, provided, it be satisfactorily shown that the said corporation be legally organized and competent to contract, that it is the absolute owner and proprietor of the property, machinery, rights and effects of every kind and description which shall have belonged to the parties of the second part hereto and shall be situated upon the three aforesaid plantations or either of them, and that the said property, machinery, rights and effects are free from any and all liens and incumbrances except the lien of the lessors under this contract, and on this condition, the parties of the first part covenant and bind themselves to accept the aforesaid corporation as the substitute of the parties of the second part hereto and to release the said parties from any and all subsequent liability hereunder.

"Article twenty-fifth. It is finally understood and agreed that this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other.

"In witness whereof, the aforesaid parties have hereunto affixed their hands on this 16th day of June, 1892.

(Signed) H. M. Payne.
J. U. Payne.
(Signed) L. Murray Ferris. J. U. Payne & Co."
Wm. L. Ferris."

3. Under article twenty-four (24) of said contract, the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities, under said contract, to the Ferris Sugar Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

By Article 3183 of the Civil Code of Louisiana, it is provided: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors

---

4. The McKinley tariff act, passed October 1, 1890, which provided for a bounty to sugar-producers, was repealed on August 28, 1894, and on September 3, 1894, it was stipulated between the parties to said contract that the provisions of articles eleven and thirteen thereof should be extended so as to apply to any bounty that might thereafter be granted by Congress to sugar produced from the crop 1894.

5. The Ferris Sugar Manufacturing Company, Limited, operated the Barbreck sugar-house under the terms of said contract from October, 1894, to January 4, 1895, and the said parties of the first part, J. U. Payne & Company et als., delivered to the said Ferris Sugar Manufacturing Company during that season, under said contract, ten thousand three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purchase price of four thousand five hundred and sixty-four and $\frac{73}{100}$ dollars ($4564.73) on the contract basis of $2.75 a ton, and a further sum of six thousand five hundred and seventy-nine and $\frac{30}{100}$ dollars ($6579.30) in the event that the bounty should be collected.

6. In the fall of 1894 the Ferris Sugar Manufacturing Company, Limited, became heavily involved in financial difficulties, and prior to this a number of creditors, among them the Reading Iron Works Company and John H. Murphy, recorded vendors' privileges upon the machinery sold by them to the said Ferris Sugar Manufacturing Company, Limited, and erected by it in the said Barbreck sugar-house.

7. On January 4, 1895, the Burdon Central Sugar Refining Company, Limited, a corporation organized under the laws of New York and an unsecured creditor of the Ferris Company to the extent of forty thousand four hundred and four and seventy-four one-hundredths dollars ($40,404.74), its entire debt, filed a bill in equity in the Circuit Court of the United States for the Eastern District of Louisiana, alleging that the Ferris Sugar Manufacturing Company, Limited, was heavily indebted and insolvent, and that its assets would be sacrificed by numerous creditors who were about to bring suit. The bill prayed for the appointment of a receiver to take charge of all the assets of said company. On the same day the defendant company filed an answer, with a resolution of its board of directors annexed authorizing such action, admitting all the facts charged in the bill, and uniting in the prayer for a receiver. A receiver was thereupon appointed.

8. On March 25, 1895, H. M. Payne, J. U. Payne and J. U. Payne & Company filed a petition of intervention in this suit, stating, among other things not relevant to this certificate, the said balance of $4564.73 and of $6579.30 due them for cane delivered to the said Ferris Sugar Manufacturing Company, Limited, and claiming that both sums were secured by a

some lawful causes of preference"; by Article 3184: "Lawful causes of preference are privilege and mortgages"; by Article 3185: "Privilege can be claimed only for those debts to which it is expressly granted in this code"; by Article 3186: "Privilege is a right, which the nature of a debt gives to a creditor." Article 2705 provides: "The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased." . . . And by Article 3263 this privilege is made superior to the privilege of a vendor.

Judge Parlange, holding the Circuit Court, was of opinion that under the terms of the contract the purchase price of the

---

lessor's privilege on the property of the defendant company at the Barbreck sugar-house, and that the latter sum, namely, $6579.30, was also secured by an equitable lien on any bounty that might thereafter be collected by the receiver. The receiver and the Ferris Company filed an answer to this petition, admitting the correctness of the amounts claimed, but denying that they were secured as averred. The Burdon Central Sugar Refining Company adopted the answer of the receiver. Issue was joined by replication and the matters in issue were referred to a master to report upon the law and the facts. The master allowed the amounts claimed by interveners, but rejected their claims both to a lessor's privilege to secure these amounts and to an equitable lien on the bounty. Upon exceptions to the master's report the court decreed that interveners were entitled to a lessor's privilege upon the movable effects of said Ferris Company and of third persons upon leased premises to secure both said sums due for the unpaid price of the sugar cane, in addition to an equitable lien on the bounty to secure the said sum of $6579.30, in preference to all other creditors of the said Ferris Sugar Manufacturing Company, Limited.

9. From this decree the Burdon Central Sugar Refining Company, complainants, the Reading Iron Company and John H. Murphy, interveners in this suit, as creditors of the Ferris Sugar Manufacturing Company, Limited, for large amounts, took an appeal and made the following assignment of errors:

First. Said court erred in decreeing that said interveners, J. U. Payne et al., are entitled to a privilege and right of pledge as lessors upon the movable effects of the defendant on the leased premises to secure the sums due said interveners for cane sold and delivered by them to said defendant amounting to $4564.73 and $6579.30.

Second. Said court erred in decreeing that said interveners are entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said interveners and taken off by the defendant or its receiver."

cane delivered by the sellers, the lessors, to the purchasers, the lessees, was secured by the lessors' privilege, because under the contract the obligation to pay the price of the cane was one of the essential obligations of the lease, and, therefore, covered by the words "other obligations of the lease."

Counsel's contention is that by reason of these words the privilege extends to every obligation created by a contract of lease, and *Warfield* v. *Oliver*, 23 La. Ann. 612; *Fox* v. *McKee*, 31 La. Ann. 67; and *Henderson* v. *Meyers*, 45 La. Ann. 791, are cited as maintaining that view. In the first of these cases it was held that the obligation resulting from a clause in a lease providing that the lessee should repair and keep in repair the leased premises was secured by the lessor's privilege. In the two other cases, it was decided that when a contract of lease provided for an attorney's fee in the event of suit to recover the rent, the amount of the stipulated fee was also so secured. But it may be observed that repairs to be made to leased property are in their very nature incidental to a lease of the property, and that such a stipulation as to an attorney's fee is a mere accessory to the rent itself.

It is further contended that the Code Napoleon and the Louisiana Code on the subject of the lessor's privilege are substantially alike, and that the French commentators and the decisions of the French courts support the proposition that the lessor's privilege secures not only the rent but also advances made during the course of the lease for the execution of the lease; that the meaning of the Louisiana law should be regarded as settled by this construction; and that as the price of the cane delivered under this contract would be secured by the privilege of the lessor under the law of France, the same conclusion follows here.

Article 2102 of the Code Napoleon provides that the lessor shall have a privilege for "the repairs which the tenant is bound to make (*réparations locatives*), and for everything that concerns the execution of the lease." Many French commentators are referred to as establishing that under this provision the privilege of the lessor extends to and secures advances made by him to a lessee, and they undoubtedly maintain that

under the French law the amount due for raw material delivered by a lessor to the lessee of a manufacturing establishment for the purpose of being worked at the factory, under the terms of the lease, would be secured by the lessor's privilege.

Laurent, Droit Civil Français, vol. 29, 4th ed. 1887, §§ 407 and 408, states the principle thus:

"By execution of the lease we understand all the obligations which the law or the contract imposes on the lessee; those which the law establishes are considered as agreed between the parties; all, therefore, concern the execution of the contract. . . . Are advances which the lessor makes under the contract of lease to the lessees secured by his privilege? The affirmative is adopted by jurisprudence. It is incontestable when the advances concern the lease, that is to say, the rights and obligations which result from it. In this case, both the letter and spirit of the law are applicable. But if a loan of money were made to the lessee, in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance; it would be an ordinary loan, and the law gives no privilege for such a loan. Jurisprudence adopts this view: for if it grants a privilege to the lessor for the advance which he makes, it is because these advances concern the lease. The owner of an iron furnace stipulates to furnish to the lessee of his furnace the wood necessary to operate it; it has been adjudged that such an advance is privileged. Such is also the case when the lessor furnishes beets to the lessee of a sugar factory. The lessor furnishes 10,000 francs to the lessee of a mill as a fund to be used in operating it. The advance being intended to operate the mill, therefore its object was the execution of the lease and the claim is privileged."

The only decision of the French courts cited in argument is referred to by Laurent, and is the case of *Vanderaghen* c. *Decocq*, decided 18th of April, 1850, by the Court of Appeals of Douai (not by the Court of Cassation as inadvertently stated by counsel), and reported in Journal du Palais, vol. 56, (1851) 395.

The following statement made by the court of original

jurisdiction was adopted by the Court of Appeals in affirming the judgment:

"Considering that, as regards the claim of 6800 francs for rentals, the privilege of Decocq is not contested by the defendant and is besides expressly established by Art. 2102 of the Civil Code; that according to Par. 1 of that article, the same privilege takes effect for repairs chargeable to the tenant and for everything that concerns the execution of the lease; that it is by virtue of a clause of the lease and for the execution of that clause and in order to insure the operation of the factory leased, that the Decocqs have delivered and furnished to Blanquart beets to the value of 8086 francs; that Article 9 and following of said lease required them to plant beets on 53 hectares and 19 acres and to furnish and deliver to the factory the entire product of the crop at the price of 16 francs per 1000 kilos. of beets and under a penalty of 150 francs damages for each 35 acres of beets not delivered; that all the authors and jurisprudence grant the privilege of Art. 2102 to the lessor, who has made advances and furnished commodities, as in this case, by virtue of a clause of the lease and for the execution of the lease; it is held that under the terms of Art. 2102, the claim of Decocq is privileged as well for the beets furnished as for rentals."

Whether the language of the Louisiana Code, "every obligation of the lease," may not justly be held to be narrower than the words "everything that concerns the execution of the lease," as found in the Code Napoleon, and, therefore, whether the latter would secure by the lessor's privilege an advance made by the lessor, which would not be so secured under the Louisiana law, we need not discuss, for even conceding that the two codes are alike, and that the provisions of both support the theory relied on, yet we think that under the provisions of this contract the price of the cane was not secured by the lessor's privilege. The test applied by the French writers to ascertain whether the particular obligation is secured by the lessor's privilege, is whether the obligation created by a particular clause in a contract of lease is really a part of the contract of lease proper, or an obligation necessary

for its execution. Thus Laurent, as we have just seen, says: "But if a loan of money were made to the lessee, in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance; it would be an ordinary loan, and the law gives no privilege for such a loan."

And the conclusion of the Court of Appeals of Douai, in the case cited, rested on the fact that the particular contract there considered made the price of the beets a part of the contract of lease, and intended for the execution of the lease.

It is clear, then, that though we concede the view of the Louisiana law contended for by appellee, the question still remains: Did the obligation to pay for the cane as stipulated in this contract make such obligation a part of the lease itself, or did the duty to pay under the contract result not from the lease but from another and distinct contract, namely, one of sale, not contemplated by the parties to be considered as a part of the lease as such, and, therefore, not secured by the lessor's privilege? The learned District Judge proceeded on the ground that there was an identity between the French and the Louisiana law; that the interpretation of the one was persuasive in respect of the other; and that under both laws the privilege claimed should be allowed; but to reach this result he also held that the contract was brought within this view of the law because the sale of the cane as between the parties to the contract was "an essential consideration of the lease, both on the part of the lessors and lessees."

We should remember that the contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof. Civil Code, Art. 1951. And that as privileges under the law of Louisiana are in derogation of common right, they cannot rest on implication, and can only result from express terms or from clear and irresistible intendment. *Shaw* v. *Grant*, 13 La. Ann. 52; *Citizens' Bank* v. *Maureau*, 37 La. Ann. 857.

In *Case* v. *Taylor*, 23 La. Ann. 497, the Supreme Court of

Louisiana said: "It matters not what name the parties have given to the instrument, its character is determined by its constituent elements." Article 2063 of the Civil Code (an article not found in the French Code) provides: "A *conjunctive* obligation is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately"; and Article 1883, that "every contract has for its object something which one or both of the parties oblige themselves to give, or to do, or not to do."

The writing before us embodies, in fact, two contracts, a contract of lease and a contract of sale. If we were compelled to treat it as a single indivisible contract, what would be its proper denomination? The sale of the cane was manifestly more important to Payne & Company than the lease of the sugar-house. By the contract they severed their lands into two parcels, leasing, for a time and price fixed, one part thereof with the sugar-house, and retaining the remainder, which they were to cultivate, and the crop upon which the Ferrises agreed to purchase. Apparently the lease was the inducement to the sale rather than the sale the inducement to the lease. So that if there was a loss of identity, which form of contract absorbed the other? We do not think, however, the effect of the document was to fuse the two into one, but that a contract of sale and a contract of lease were both provided for. The preamble recites: "Whereas the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, *for a lease* of the Barbreck sugar-house and *the purchase* of the crops of the three aforesaid plantations." And articles one to five regulate, in substance, the relations between the parties as landlord and tenant, while articles six to thirteen govern the sale of the crops.

Article six says: "The parties of the first and second part

hereto further covenant and agree mutually *to sell and purchase respectively* upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, viz.: The Barbreck, St. Peter's and Anchorage plantations, except such as may be needed each season as seed for the following year." Article eleven: "The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane," etc.

Article thirteen: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house," etc.

We do not see how it can be successfully denied that there was a contract of sale as well as a contract of lease, and, this being the fact, it is impossible to so read the writing as to destroy the one in order to give effect to the other. And, in interpreting the contracts, if all the obligations which they created, excepting those essentially necessary to the existence of the contract of sale, should be attributed to and treated as obligations of the lease, this would not make the duty to pay for the cane an obligation of the lease, because price is of the essence of the contract of sale under the law of Louisiana, and without price there can be no sale. Civil Code, Art. 2439. This conclusion is strengthened when we consider that the contracting parties themselves sedulously separated the obligation to pay the price of the cane from the other obligations by stipulating that the price should be secured by a privilege and lien entirely independent of the lease. Thereby the duty to pay for the cane was treated as resulting from a sale and secured by a privilege specially provided for upon the bounty money, which is inconsistent with the view that the contracting parties contemplated that the duty to pay for the cane resulted not from a sale but purely from a lease. It is true

that the mere taking of security for the obligations of the lease would not import that the lessor's privilege created by law in favor of these obligations was abrogated, yet when the necessary effect of the contract under consideration is to separate the duty to pay for the cane from the obligations of the lease as such, and to secure it separately, the stipulation as to security is entitled to great weight as tending to show that the parties regarded the obligations of the lease as one thing and the obligation to pay the price separately secured as another.

Privilege, says the Code, is the right "which the nature of the debt gives to the creditor." Now the stipulation was that the price of the cane should be secured by a *privilege on the bounty money*, and this clearly justifies the assumption that the parties proceeded on the theory that the price of the cane arose from a different consideration and created a different obligation from the obligations created by the lease.

Again, the twenty-second article of the contract expressly provided for the continuance of the lease at the option of the lessee, the manufacturing company, even after the lessors had been discharged from all obligation to cultivate or deliver cane to the company. That article is:

"It is further mutually understood and agreed that in case the bounty now paid upon sugar by the United States Government is removed during the term of this contract, then, and in that event, either of the parties hereto may at their option terminate the contract, but as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned, the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated under the same terms and conditions, except as hereinabove provided."

How can it be concluded that the cultivation, delivery and sale of the cane on the one hand, and the payment of the price therefor on the other, was an essential and necessary part of the continuance of the contract of lease, when the contracting

parties themselves declared that, although all obligation to cultivate and deliver cane and to pay for the same should be dispensed with, the lease itself might continue to exist for its full term? And it may be observed, in this connection, that the contingency as to the bounty had happened before any delivery whatever had been made under the contract. If, in the year following, the vendor had exercised his option to cease delivering cane and the vendee had continued to lease, could it have been said that there was no lease because the obligation to deliver cane had disappeared, when the contract itself provided that this should not be the case? As the contract of lease provided for the erection by the lessor of new machinery in the sugar-house, and therefore must be considered to have contemplated a debt as arising from its execution, it appears to us that it was the plain duty of the lessors, if their intention was that the purchase price of the cane should be an obligation of the lease secured by a lessor's privilege, to have so stipulated in unambiguous terms. And, as this was not done, but on the contrary, as the obligation to pay for the cane was stated in the contract as arising from the sale, and was separated from the obligations of the lease by the reservation of a privilege and lien on the bounty money, the rule of strict interpretation precludes us from so reading the contract as to enlarge its terms to import a privilege not necessarily resulting therefrom.

Nor do we think that the twenty-fifth article, providing that "this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other," tends to impair the conclusions we have indicated. The parties treated the written agreement as embodying both a sale and a lease as independent contracts. (Code, Art. 1769.) The contract of lease is essentially commutative (Code, Art. 2669), and Article 1768 of the Code defines such contracts thus: "Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given or promised by the other." It was because the parties considered the agreement as embodying independent stipulations that the

provision before quoted was inserted, for it would otherwise have been superfluous; while considering them as independent contracts, the stipulation making them interdependent created the right to rescind the one in case of the violation of the other.

We hold, then, that the price of the cane delivered under the contract was not secured by the lessors' privilege, and that the first question must be answered in the negative.

2. The thirteenth article of the contract reads as follows:

"The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid."

If it was within the power of the contracting parties to create an equitable lien upon the bounty collected, the terms of the contract effectuated that purpose. *Walker* v. *Brown*, 165 U. S. 654, and cases cited.

The right of the parties, however, by the contract to create an equitable lien and the power of a court of equity to enforce such lien is denied upon the ground that, as by the provisions of the law of Louisiana equality of distribution is the rule among creditors, and preferences can only result from privileges and mortgages, and as the subject-matter from which the lien here arose was not one of the cases to which the law of Louisiana gives a privilege, therefore an equitable lien could not be created by contract or enforced in violation of the terms of the statutes of Louisiana. But, without passing on the correctness of this proposition, we think it has no relation to the matter under consideration. The bounty on sugar was derived wholly from the act of Congress of October 1, 1890, providing therefor, (26 Stat. 567, c. 1244,) and the act of

March 2, 1895, making a partial allowance for the repealed bounty (28 Stat. 910, c. 189); *United States* v. *Realty Company*, 163 U. S. 427. The bounty was given by the terms of the act of 1890, not to the manufacturer of sugar manufactured within the United States, but to the producer of such sugar from "beets, sorghum and sugar-cane grown within the United States." In this way the law in conferring a bounty created a link between the manufacturer of the sugar and the grower of the beets, sorghum or cane from which it was manufactured. And this connection between the manufacturer and the grower being created by the act of Congress in conferring the bounty only for sugar manufactured from cane grown within the United States, the relation between the grower and the manufacturer was one arising from the laws of the United States, and not from the local law of the State of Louisiana. As a transfer of the claim against the United States derived from the bounty could not have been given by the manufacturer who received the cane of the grower without a violation of section 3477 of the Revised Statutes, the contention of appellants denies to the grower of cane on its delivery to a manufacturer any security whatever; but this would be incompatible with the purposes and objects of the acts of Congress, and would cause the statutes of Louisiana to operate upon, and in a measure render nugatory, laws of the United States. The parties to the contract had in view in making it the necessary relation between them accorded by the act of Congress, for the contract stipulated that the parties of the first part should "keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The right to collect the bounty having arisen from a law of the United States, and the provisions of that law creating a necessary relation between the grower and the manufacturer, making them in effect joint producers of the sugar, the right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana, even although as a gen-

eral rule, and in regard to this we express no opinion, the effect of that law would be to deprive contracting parties, except when expressly allowed, of the right to contract for an equitable lien; and to deny to courts of equity the power to enforce the same.

These considerations lead to an affirmative answer to the second and third questions.

The first question is answered in the negative and the second and third questions in the affirmative, and it will be so certified.

LONDON ASSURANCE *v.* COMPANHIA DE MOAGENS DO BARREIRO.

CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 280. Argued April 20, 21, 1897. — Decided May 10, 1897.

A cargo of wheat shipped on a British steamer at New York, for Lisbon, was insured by an English assurance company through its agents in Philadelphia "free of particular average unless the vessel be sunk, burned, stranded or in collision"; all losses to be paid in sterling at the offices of the corporation in London; "claims to be adjusted according to the usages of Lloyds." The cargo was loaded and the lines were cast off, ready to sail, when it was found that there was a defect in the machinery, which detained them a few hours. During the detention a lighter, being towed out of the dock, ran into the steamer, breaking two plates in the bulwarks and doing other damage. This resulted in a farther detention of two days. After sailing, the steamer encountered heavy gales and seas. She took large quantities of water on her decks, some of which came through the cracks caused by the collision, and was so strained that the water got into the wheat. The machinery becoming strained the captain made for Boston, and on arrival there had a survey made, which resulted in the taking out of the cargo, and its sale for the benefit of all concerned. This libel was then filed by the owners of the cargo to recover for their loss. The District Court gave judgment in favor of the owners, and referred it to a commissioner to assess the damages, and gave judgment accordingly. The Court of Appeals having affirmed that judgment, it was brought here by writ of certiorari, for review. *Held,*

Statement of the Case.

(1) That under the circumstances the contract of insurance was to be interpreted according to English law;
(2) That, if a ship be once in collision during the adventure, after the goods are on board, the insurers are, by the law of England, liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and, but for the collision, would have been within the exception contained in the memorandum, and free from particular average as therein provided;
(3) That the question whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and no opinion is expressed on that question;
(4) That under the facts stated in the opinion of the court, the cargo was necessarily sold at the port of refuge, and the loss, under such circumstances, should be adjusted as a salvage loss.

The respondents herein duly filed their libel in admiralty against the appellant, the London Assurance, in the United States District Court for the Eastern District of Pennsylvania, in a cause of marine insurance, to recover upon a policy of insurance issued by the company upon some 33,000 (being part of a cargo of about 80,000) bushels of wheat, of which the respondents were the owners, the 33,000 bushels being valued in the policy at $40,887. The policy was dated December 8, 1890, was issued for $20,000, and covered the wheat when shipped on board the steamer Liscard, at New York, bound for Lisbon, Portugal. There was another policy upon the same wheat as that covered by the policy in suit, issued by another company, for $20,887, the total of the two making up the value of the wheat as mentioned in the policy. The policy now before the court contained the usual language as to the adventures and perils the assurers were contented to bear, among them being "perils of the seas, . . . and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof." As representing the policy, the insurers issued what is termed "its certificate" or "memorandum," wherein it was stated that the certificate "represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims), as fully as if the property was covered by a special policy, direct to the holder of this certifi-

cate." It certified that on the 8th of December, 1890, the corporation insured under policy No. 427, for Lawrence Johnson & Co. (who were the agents for the libellants), $20,000 in gold on 33,000 bushels of wheat, valued at $40,887, shipped on board the steamship Liscard, at and from New York to Lisbon, Portugal. In the body of the certificate and directly under the subject of the insurance (33,000 bushels of wheat), stamped in red ink, are the words:

"Free of particular average unless the Vessel be sunk, burned, stranded or in collision."

On the face of the certificate and on the right-hand side thereof, and at a right angle with the body of the certificate, the following language is printed:

"It is hereby Understood and Agreed that in all cases of loss or damage to the interest insured under this Certificate, the same shall be reported to the Corporation in London as soon as known or expected, and be paid in Sterling at the offices of the Corporation, No. 7 Royal Exchange, London, at the rate of four dollars and ninety-five cents ($4.95-100) Gold to the Pound Sterling. Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance."

Immediately underneath and also printed in red ink is the following:

"Notice: To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom."

The certificate is signed by the agents of the company at the Philadelphia agency.

The cargo was received on board the steamship in New York harbor, and the loading of the vessel had been completed and she was ready on December 12, 1890, to proceed on her voyage; the lines had been cast off and the steamer would have then left the dock, but that at the last moment some little derangement to her machinery occurred and she was temporarily delayed in order to remedy the difficulty, which was accomplished in a very short time — some few

hours. While thus fully loaded and in readiness to proceed on her voyage a collision occurred, which is thus described by the chief officer and entered in the log-book by him:

"At 8.15 P.M. a lighter, being towed out of the dock by the tug George Carnie, ran into us breaking two plates in the bulwarks, bending stanchions, starting main rail, etc. Anchor watch kept all night."

The two plates referred to were of iron half an inch thick. The damage to the ship was surveyed before she left New York by one of Lloyd's surveyors, who made a written report in regard to it. The break in the bulwarks caused by the collision was on the port side of the steamer about abreast of her mainmast. As described by a witness: "The break was of an irregular shape and eleven feet six inches long, where the measurements followed in the line of the break. The break was a continuous one in two of the iron plates of the bulwarks." "It began a little above a fore and aft line, half way between the deck and the top of the bulwarks, and descended to about eight inches above the deck at its lowest point. For the first two feet, beginning from the forward end of the break, it showed an opening of from one half an inch to one inch; for the next three feet the break was open one and a half inches; for the next four feet the break was open from one half to one and a quarter inches, and the after end of the break for one foot and six inches was open but slightly. A spur extended from about the middle of the break upwards for one foot."

Another witness said: "The broken plates showed signs at the time I examined them of having been pressed, driven or pounded together in such a way as to reduce the size of the opening, and the carpenter of the ship stated to me at the time that such had been in fact done. The collision break was in the bulwarks of the vessel, and in my opinion, as the deck of that ship is arranged, the bulwarks form an important and essential part of the hull of the steamer. In some cases the bulwarks are dispensed with and an open rail used, but those are cases of flush-deck vessels, the entire length of whose deck stands well out of the water. Such

vessels have, as a rule, but a comparatively small portion of their houses, engine rooms, galleys, etc., above deck, but in the case of a vessel like the Liscard, where all her houses are upon the deck, and her main deck is, comparatively speaking, low, and I mean low as compared with the upper deck of flush-deck vessels, the bulwarks form an important part of and a protection to the ship in keeping the water off the decks and protecting the houses and seamen. . . . Among other things, a large quantity of water in a gale accompanied by high seas would go through the break in the steamer's bulwarks which I inspected, and with the break open to the extent shown in the survey and drawing made by Mr. Candage, many seas which would not be high enough to go over the rail would send a large quantity of water through this break, and if the storm were extraordinarily severe would overtax the capacity of the scuppers to relieve the deck. Except in such case of extraordinary weather the break would be unimportant; it would not render the ship unseaworthy."

Other witnesses called by the company gave their opinion that the bulwarks were sometimes a detriment to the ship in relation to her safety, as they kept the water on the deck longer than would be the case in their absence, and sometimes that might be a very serious occurrence.

There seemed to be a general agreement, however, among the witnesses, that in steamers built as the Liscard was the bulwarks were necessary in heavy weather for the safety of the crew that was working her. The bulwarks are a part of the hull of the vessel, and are built by the shipwright in constructing the hull, and are a part of the design of the vessel when she is modelled. In the class of vessels to which the Liscard belonged the testimony seems to show that the bulwarks are indispensable.

A claim for damages to the amount of $250 was made by the captain of the Liscard and paid by the offending vessel.

The steamer was detained by reason of the collision, and sailed a couple of days thereafter. She encountered very heavy gales soon after leaving port; the seas continuously

swept over her, and finally started the seams in her decks, washed off the tarpaulins which had been placed over the hatches and battened down, and resulted in great damage to the wheat from the sea water pouring over it through the deck seams and hatches of the ship. Her seams opened on account of the excessive straining of the ship, caused by the heavy gales of wind. Some of the water that came on her decks came through the cracks in the plates constituting a portion of the bulwarks already mentioned. After experiencing very heavy weather for a number of days, the high-pressure engine became disabled, and, proceeding then with the low-pressure engine, the captain decided to make for the nearest port, which was Boston. When they arrived at that port and examined the machinery, it was found that the high-pressure piston had been bent, and the bending was caused by the excessive straining of the ship, caused by her laboring and rolling in the seas. Upon his arrival in Boston the captain requested a survey to be made, which was done, and the cargo taken out and a written report and recommendation made. It was found that the wheat had been damaged by sea water in all the holds of the ship, and after considerable negotiation between the agents of the ship, the owners of the cargo and the insurers, an agreement was made for the breaking up of the voyage at Boston, and part freight on the cargo was paid the steamer with the written assent of the insurance company.

The cargo was sold for the benefit of all concerned, and a claim made upon the insurers under the policy, who denied any liability whatever. The owners of the wheat thereupon filed their libel in admiralty in the District Court to recover for the loss sustained by reason of the facts above mentioned. The District Court gave judgment in favor of the owners of the wheat, 56 Fed. Rep. 44, and referred it to a commissioner to assess the damages, who adopted a rule for the adjustment of the loss, which is referred to in the following opinion. The company appealed to the United States Circuit Court of Appeals for the Third Circuit, which court affirmed the judgment of the District Court. 28 U. S. App. 439. The insurance

company then applied to this court and obtained a writ of certiorari to review the judgment.

Mr. W. W. MacFarland (with whom was *Mr. William Parkin* on the brief) for the London Assurance.

Mr. John F. Lewis for the Companhia de Moagens do Barreiro.

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

Two questions arise in this case in regard to the liability of the insurers upon the policy in suit: the one being whether what took place before the vessel left her berth in New York amounted to a collision within the meaning of the policy; the other being whether, in case there was a collision, the company is liable for a subsequent loss which did not in any way occur by reason or arise out of the collision.

As to the first, we think that the vessel was "in collision" within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. We see no distinction, so far as this question is concerned, between a vessel at anchor and one at the wharf fully loaded and in entire readiness to proceed upon her voyage, with steam up and simply awaiting the regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, we should certainly, in the ordinary use of language, say that she had been in collision. How important or material were the results of the collision in regard to the condition in which the vessel was left, would be a matter of further and more detailed description. The ordinary meaning of the words "in collision,"

when applied to a vessel, does not require that the result of the impact shall be so far reaching as to impair her seaworthiness. Very serious results, in the matter of expense of repairing, at least, might follow from the impact, wherein the seaworthiness of the vessel would not be at all impaired, and yet no one would doubt that, within the ordinary meaning of the words, such a ship had been in collision.

It is impossible, as we think, to give a certain and definite meaning to the words "in collision," or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy. The difficulty of limitation or description is much the same in kind as that pertaining to another expression in the same memorandum in regard to when a vessel is "burned." It is, however, obvious that a vessel would be said to have been in collision when the effect upon the vessel, or the evidence of such collision, might be very much less than would be necessary to exist in a case of fire before one would describe a vessel as a *burned* vessel. In the case of *The Glenlivet* (1893, Prob. 164; same case on appeal, 1894, Prob. 48), the question arose as to whether the vessel was "burned" within the meaning of this language in the memorandum. There had been a fire on three several occasions among the coals in the bunkers of the ship, and some small damage to the ship by fire took place on two voyages, and the question was whether, under the circumstances, the ship was burnt within the meaning of the memorandum. Lord Justice Smith, in the Court of Appeals, in the course of his judgment, said:

"Suppose the cabin curtains were burnt, he should have told the jury that that did not constitute a 'burnt' ship; but suppose the after part of the ship was burnt altogether, and the fore part was not burnt at all, I think he should have told them that they might, if they liked, find that was a 'burnt' ship, although there was only a partial burning.

"It seems to me impossible to lay down absolutely in the affirmative or the negative as to whether a partial burning does constitute a 'burnt' ship or not within this policy; it

may or may not, according to the actual facts appertaining to the partial burning."

Further on in the course of his judgment, in speaking in regard to the directions to be given to the jury, he said:

"My own view is that you would have to tell the jury what I have already said about partial burning, and then you would have to tell them that a partial burning may, under some circumstances, constitute a 'burnt' ship, and may not under other circumstances, and having given that direction you would have to ask them, Has the fire been such as to bring the ship to such a condition that you consider her a 'burnt' ship within the ordinary meaning of the English language?

"This, in my judgment, is the nearest direction which can be given as to what is meant by a 'burnt' ship in the memorandum; it is not possible to lay down any hard and fast rule upon the subject."

Lord Justice Davey said:

"Counsel for the plaintiffs says that the clause applies if a fire breaks out in any part of a ship or stores, although it is got under before any great amount of damage is done to the ship.

"I cannot bring myself to think that any person would, either in the accurate use of language or in ordinary parlance, say that in such a case as that the ship has been 'burnt.'"

The learned judge also said: "I think that it is really a question to be answered by the jury, Has the ship in the circumstances of this case been burnt?"

The English court took the view that as to a burnt vessel, it must be such a burning as would constitute the vessel a burnt vessel within the ordinary meaning of the English language. The language is used in regard to the vessel as a whole. "The company is to be free from average unless the ship be burnt." That language would seem clearly to indicate some essential burning of the vessel itself and not such a case, as put by one of the judges, of the burning of the cabin curtains. The case is referred to for the purpose of showing that the English court held the expression was to be defined according to the ordinary meaning of the English language.

This leaves each case to be decided with reference to its own peculiar facts.

We perceive the same difficulties which confronted the English court, in the case mentioned, in defining and in accurately and precisely limiting the meaning to be given to the words "in collision," and we agree with those judges that the words contained in the memorandum are intended to be used, as Davey, Lord Justice, said, "in accordance with the ordinary use of language," or, as said by Lord Justice Smith, "within the ordinary meaning of the English language." Taking the meaning of the words in that sense, while we cannot state in advance and in all cases what shall amount to a collision, but must leave each case for determination upon its own facts, yet it seems to us there can be no doubt that the vessel in this case had been in collision, although her seaworthiness was not impaired in the slightest degree as a result thereof. Being run into by another vessel, as a result of which cracks were made from half an inch to an inch and three quarters wide in the iron plating of her bulwarks (which were half an inch thick) for a distance of eleven feet, certainly shows a somewhat serious impact — what would be called in plain English a collision; it shows that there was no mere "grazing," but that a force sufficient to crack iron half an inch thick was exerted upon the hull of this steamship, and that it was sufficiently serious in its nature to cause the captain to have an examination of it made and a claim for damages asserted, resulting in the delay of the vessel in proceeding on her voyage of two days, and the payment of $250 as damages occasioned by such collision. In the ordinary use of the English language, would it not be proper and appropriate to describe the results to the steamship as arising from a collision? We think it would.

So in relation to the use of the word "stranded" in the same memorandum. It is said that if a ship "touches and goes" she is not stranded; *McDougle* v. *Royal Exchange Assurance*, 4 Camp. 282; but if she "touches and sticks" she is. That is, in places in which she, in the ordinary course of her navigation, is not suffered to touch. A distinction be-

tween what is regarded as a stranding and what is held not to be a stranding has been in many cases held to be a very narrow one.

In the above-cited case, decided in 1815, where a ship in the course of her voyage in going out of the harbor of New Grimsby, with a pilot on board, struck upon a rock about a cable and a half's length from the shore, and remained there on her beam end for a minute and a half, Lord Ellenborough held that it was not a stranding, and added: "There has been a curiosity in the cases about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily."

Taking what seems to us to be the common-sense view, we should say that this steamer had, as a matter of fact, been in collision, although the consequences of the collision were not serious enough to affect the seaworthiness of the steamship. It is enough if within the ordinary use of language the circumstances could be fairly described as amounting to a collision. We think this is the case here. If anything more than that is required, if it must be a collision of so serious a nature as to impair the seaworthiness of the vessel, or such as might naturally lead to further injury to the ship or cargo, it is at once seen how large and broad is the field of investigation in order to determine whether the vessel has in fact been in collision within the meaning of the policy. If this be its true meaning, it is neither fairly nor reasonably expressed by the words used. It leaves open for construction in each case a question that may require long and expensive investigation to determine whether it be covered by or is outside of the policy. If the company by the use of the expression found in the policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. *National Bank* v. *Insurance Company*, 95 U. S. 673.

In the case cited Mr. Justice Harlan, in delivering the opinion of the court, uses this language at page 679: "The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we

shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

If a serious collision only were meant, the company could say so. We do not think it did intend to so limit the meaning of the words. We solve the problem, therefore, in regard to the construction to be given to the language used in the policy by holding that within the fair meaning of that language the steamship was in collision after the risk had attached under the policy.

The next question is whether the subsequent damage to the wheat caused by the perils of the sea and in no wise resulting from the collision can be recovered from the insurers under this policy.

Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, section 280, says: "But where the contract is, either expressly or tacitly, to be performed in any other place there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice. . . . The rule was fully recognized and acted on in a recent case by the Supreme Court of the United States,

where the court said, that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

The case referred to in the above section is *Andrews* v. *Pond*, 13 Pet. 65, in which Mr. Chief Justice Taney, in delivering the opinion of the court, said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance — and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In *Bell* v. *Bruen*, 1 How. 169, a letter of guaranty was written in the United States and addressed to a house in England, and this court held that "It was an engagement to be executed in England, and must be considered and have effect according to the laws of that country," citing *Bank of the United States* v. *Daniel*, 12 Pet. 54, 55.

In *Scudder* v. *Union National Bank*, 91 U. S. 406, the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of the performance of a contract regulated matters connected with its performance, and that matters bearing upon the execution, interpretation and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think, the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyd's. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & Great Western Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 446, 453.

It appears in evidence also that there were in use two well-

known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, "free of particular average *unless caused* by stranding, sinking, burning or collision"; the other clause reads, as in this case, "free of particular average unless the vessel be stranded, sunk, burned or in collision." The clause in use in this certificate was termed the English clause. Many agents of English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the "caused by" clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case.

Referring then to the English law upon the question as to the meaning of this language, the English courts, many years ago, decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, "free of particular average unless the vessel be stranded," meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy.

Lord Mansfield, in one or two decisions, at *nisi prius*, had stated that it meant that the loss should arise out of the stranding. These cases were subsequently referred to in the leading case in the King's Bench of *Burnett* v. *Kensington*, decided in 1797, and reported in 7 T. R. 210. The case was as much considered as almost any in the books. It was four times tried, and upon the last occasion of its appearance in the court in banc judgments were delivered by Lord Chief Justice Kenyon, Mr. Justice Ashhurst, Mr. Justice Grose and Mr. Justice Lawrence. The Chief Justice referred to the case of *Cantillon* v. *The London Assurance Company*, tried in 1754, where the jury was formed of merchants and the trial was presided over by Lord Chief Justice Ryder. In that case, it was held that if the ship stranded the insurer was let in to claim his whole partial average loss without regard to the fact that the loss was not occasioned by the stranding. It was said that the great insurance companies in London altered

the form of their policies in consequence of the decision in the *Cantillon case*. Subsequently the words were restored. The Chief Justice, in the course of his judgment in the *Burnett case*, continued: "If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, 'unless for losses arising by stranding.'" And he held, and the court agreed with him, that the meaning of the memorandum "free from average unless general, or unless the ship be stranded," was that in case the ship were stranded the insurers were to be answerable for the average loss, although the loss did not occur in the slightest degree by reason of the stranding.

Mr. Justice Ashhurst stated that the memorandum was certainly couched in doubtful words, and that it was difficult to determine when the ship was stranded, or whether or not the damage to the cargo arose from the stranding, or how much the damage was owing to that cause, and he said that "it seems as if this memorandum were introduced to avoid that inquiry, and that when the ship had been stranded the underwriters' consent to ascribe the loss to that cause. . . . Those authorities having decided the point, there is now not only no reason to overset them but a very strong reason to induce us to support them, namely, that this construction of the policy will tend to prevent litigation."

Mr. Justice Grose said: "And that brings it to the true construction of the memorandum and of the exception to it, whether the underwriters be or be not liable for an average loss where there is a stranding, though no part of the loss arise from the stranding of the ship. I have had great difficulties in bringing my mind to decide this, because the consequence of considering this as an exception to the memorandum, as the words import, is this, that if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather and the cargo sustains an average loss of 90 per cent, the underwriters are answerable for the whole of that average loss when it is admitted that no

part of it happened in consequence of the stranding. . . . If we were to determine that the assured could only recover for the loss that happened by the stranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it seems to me best to decide this case on the plain import of the words, notwithstanding the absurdity which I at first pointed out will follow. Besides, if the parties had intended that the insurers should not be liable to the average loss unless part of the loss happened by the stranding, they would have added words to this effect, 'unless part of the loss happen by the stranding'; and the omission of such words strongly induces me to determine strictly according to the words that are inserted in the memorandum."

Mr. Justice Lawrence said that "in a case where the words of the policy are inaccurate, and where there are inconveniences attending each construction, if the case has ever been decided, I think that we ought to be guided by it." He then refers to the case of *Wilson* v. *Smith*, 3 Burrow, 1550–1556, in the King's Bench, in which Lord Mansfield considered that the loss must arise by reason of the stranding, and he said that Lord Mansfield in that case went beyond the facts of the case then before the court. Continuing his judgment, he referred to the case already mentioned of *Cantillon* v. *The London Assurance Company*, in which the point had been decided, and he said in conclusion: "Therefore as the very question has once been decided, I think it ought to govern our decision in this case, especially as the question arises on the construction of an instrument so inaccurately penned as a policy of assurance."

It thus appears that the learned judges of the court of King's Bench a hundred years ago deliberately decided that the damage need not be the result of the stranding of a vessel. It also appears, from the report of the case, that they were fully alive to what Mr. Justice Grose called the absurd result of the construction in one aspect of the case, and while appreciating the fact, they held that, taking all things into consideration, the true meaning of the language of the memorandum

permitted a recovery, provided there were a stranding, though the loss was not occasioned by it.

Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, "free of particular average unless the vessel be sunk, burned, stranded or in collision." The same rule applies to all, and if the vessel be either sunk, burned, stranded or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom.

In *Harman* v. *Vaux*, 3 Campbell, 429, Lord Ellenborough held that the stranding is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation.

In *Barrow* v. *Bell*, 4 B. & C. 736, decided in 1825, the insurer was held liable, although the cargo was not injured by the stranding, the injury having resulted from striking upon an anchor in the harbor. Abbott, Chief Justice, Bailey, Holroyd and Littledale, Justices, held the case of *Burnett* v. *Kensington*, above cited, as entirely controlling, and that the insurers were liable.

In *Kingsford* v. *Marshall*, 8 Bingham, 458, Common Pleas, decided in 1832, although the court held that in that case there was no stranding, yet Tindal, Chief Justice, recognized the general rule, and said: "The question is whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum by reason of the ship being stranded; inasmuch as it has long been settled that the words 'if the ship be stranded' are words of condition, and that if such condition happens it destroys the exception and lets in the general words of the policy. . . . For if the ship was *stranded* in *Dunkirk* harbor, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time or any other place in the course of the voyage insured." And he referred to *Burnett* v. *Kensington* as authority.

In *Thames & Mersey Marine Insurance Co.* v. *Pitts*, 1 Q. B. (1893) 476, the court in giving judgment said: "It is clear

law that it is immaterial whether the actual mischief can be traced to the stranding. . . . If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average loss, whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but is abundantly supported by authority." And he quotes from the judgment of Tindal, Chief Justice, in *Roux* v. *Salvador*, 1 Bing. N. C. 526, in which the Chief Justice said: "The general principle laid down in *Burnett* v. *Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed; the policy, after the stranding, must be construed as if no such warranty had been written on the face of it."

In the *Thames & Mersey case*, *supra*, however, the court decided that where the stranding took place before the cargo was laid and the risk commenced, and the loss occurred after the loading, that the insurer was not liable. In other words, the court held that the stranding must take place in the course of the adventure, and that where it occurred before the goods were loaded and when the cargo was not at risk in the ship, the insurer was not liable.

In *The Glenlivet*, 1894, Prob. p. 48, the rule as stated by the former cases is recognized, but the court held that the clause referring to a burnt ship meant that the injury by fire was such as to constitute a substantial burning of the ship as a whole.

The English text writers on marine insurance recognize the rule to be as above stated. See 1 Marshall on Insurance, (2d Amer. from 2d London ed.) pp. 222, 234; Lowndes on Marine Insurance, secs. 317, 319; McArthur on Marine Insurance, p. 245.

It is further urged in argument that such a collision as occurred in this case ought not to be held as included in the words of the memorandum, because if it were, the greater and more serious the collision might be, extending possibly so far as to render the vessel unseaworthy, the more certainly it would appear that the company would be liable for the

subsequent loss, and hence the underwriter might be held for a loss happening by reason of the unseaworthiness of the vessel existing at the time she commenced her voyage, which would overturn the well-settled rule in such case. The answer to this argument is that the warranty that the ship is seaworthy applies to every insurance for a voyage, including insurance on cargo, notwithstanding the owner of the cargo has no power to make the ship seaworthy. The warranty is absolute, and a breach of this implied condition makes the policy wholly void, so that it is immaterial whether the loss claimed was in any way connected with the unseaworthiness or totally independent of it. (Lowndes on Marine Insurance, sec. 170; McArthur on Marine Insurance, p. 24; Marshall on Insurance, 153, 160.)

From this review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided. It is not material now to inquire as to the course of reasoning by which this construction of the language of the memorandum was reached. Having decided, more than a hundred years ago, what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use, under such circumstances, shows that they have adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word "stranding," but subsequently, and at different times, the words "burned, sunk or in collision" were added to it, and they must all be given the same construction, as an exception, that has been given to the word "stranding," and, if any of them

occur, the memorandum is struck out and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question.

Our conclusion is, that the underwriters are liable for the loss, under proper rules of adjustment.

The remaining question relates to the correctness of the method for the adjustment of the loss which has been adopted by the courts below. This depends upon the special facts which will now be referred to in some detail. The cargo consisted of about 80,000 bushels of wheat, all owned by the libellants. Of that total, the underwriters named in this action had insured 33,000 bushels, as already stated. After the arrival of the vessel at the port of Boston, in distress, the wheat was discharged into lighters for examination. A formal survey was made, and the wheat was found badly damaged by sea water, and unfit for reshipment in its then condition. The owners of the cargo gave notice of abandonment to the underwriters, which was not accepted by them, and the care of the cargo was assumed by the owners. A second survey was made on the 16th of January, 1891, and after it was made it was recommended that none of the grain be reshipped in its then condition, and it was also recommended that, as there were no facilities for reconditioning the grain at the port of Boston, it ought to be promptly sold for the benefit of all concerned. Nevertheless arrangements were entered into with persons at Boston, and such of the grain as was capable of being so treated was cleaned, separated and generally reconditioned, so far as possible, and a survey made on the 21st of February showed that as the result of this treatment the wheat had been considerably improved and saved from further deterioration, making it of greater market value than before the treatment. On February 28 another and last survey was held on the cargo, from which it appeared that about 50,000 bushels were in fair merchantable condition, though slightly damp and having a slight smell. About 17,000 bushels were slightly damp and had a smell caused by slight mixture of

damaged grains. The opinion of the surveyor was that "constant care is required to keep the property from further deterioration; therefore, should a shipment to Lisbon be contemplated, would advise that the above-mentioned lots be kept in separate holds or bins while in transit, and think by so doing would carry to Lisbon without further deterioration."

From the time of the arrival of the ship at Boston negotiations had been carried on between the agents of the libellants and the agents of the ship and also with the insurers, for breaking up the voyage at Boston, on the theory that the disaster which had overtaken the vessel had so damaged the cargo with reference to the port of destination that the venture was practically frustrated, and that it would cost more to carry the grain to Lisbon after being reconditioned and paying all the charges upon the cargo than the whole grain would be worth upon its arrival. The agents of the ship had been disinclined to permit the voyage to be broken up without full payment of freight. On February 20, 1891, all the underwriters on the cargo, including this company, agreed in writing that the payment of a certain amount of freight on the damaged cargo and the acceptance and sale of the cargo by the owners should be without prejudice to any of the rights or claims the shippers of the cargo might have against the insurers, and should not be considered a waiver or acceptance of an abandonment, nor should it prejudice any defence that the insurers of the cargo might have under their contract of insurance. It was also agreed that the amount of the freight agreed upon was to be a recoverable item in any claim except for general average; but that, notwithstanding, the cargo owners might demand its allowance in general average. On the 27th of February, 1891, the agents of the ship entered into an agreement with the agents of the owners of the cargo to surrender the cargo to its owners free from liens in consideration of the payment of $3600 as full freight on the cargo. Some other conditions were imposed not material.

It also appears that the condition of affairs in relation to the shipment of wheat to Portugal was very peculiar. There was a very high duty on wheat imported into that country,

which apparently applied as well to damaged as to sound wheat. Damaged grain was unsalable there, and in many cases the authorities have not permitted it to be landed. It was difficult to establish a market price in Portugal, because but little wheat was sold there in open market, most of it being imported by millers to be ground into flour, and millers were only allowed to import and grind a certain fixed quantity of foreign wheat. Other ports of Europe, such as Liverpool and Antwerp, to which some of this wheat was subsequently shipped by its purchasers, were not subject to the same conditions. In them it seems that damaged grain might be disposed of and that it possessed a market value.

Of the wheat covered by the policy issued by this particular company there were sold at Boston for the benefit of all concerned, 32,740 8-60 bushels, the net proceeds of which amounted to $28,554.15, which, being deducted from the value of the 33,000 bushels, as named in the policy, $40,887, left $12,332.85 as the amount of the loss claimed by the libellants, as covered by the two policies upon this particular wheat, about one half of which was claimed under the policy in suit, to which were added several other charges, and then some deductions were made, making the total amount of the claim against this company $10,451.34.

The commissioner to whom it was referred, by the District Court, to assess the damages sustained by the libellants, held upon the facts given in evidence before him (most of which are above set forth) that it was proper to break up the voyage and sell the cargo in Boston, and that it was also proper to adjust the loss by deducting the amount for which the wheat sold at Boston from the value as named in the policy, and he held the insurers liable for the difference, and added other items not necessary at this time to state in detail. The commissioner treated the loss as one which is technically called a salvage loss. He found that while it was not certain that the whole cargo after being reconditioned would have been seriously deteriorated or have been wholly spoiled in a physical sense if reshipped to Lisbon, because it had been greatly improved by the reconditioning process, and possibly

might have arrived without further serious deterioration, yet in consideration of the facts applicable to this case, including all the circumstances surrounding it and above stated, the cargo should in fact be regarded as wholly spoiled in that practically it would have been almost valueless at Lisbon owing to the peculiar laws governing that port, and he adds: "Taking the decisions of the cases and the definitions of the text writers together, a fair statement of the law applicable to this case would seem to be that the whole cargo, having been necessarily sold in Boston, for the benefit of all concerned, the underwriters are liable for the differences between the sums realized at the sale and the valuation in the policies."

The insurance company claims, if liable at all, that its liability should be adjusted with reference to the rules which obtain in cases of a particular average loss; that although in most cases that kind of a loss is adjusted at the port of destination, yet as in this case the wheat was sold in Boston at the urgent request of its owners, and the voyage broken up at that port, Boston should, therefore, be treated the same as if the policy had named that place as the port of destination instead of Lisbon, for all purposes of the risk, and in such case, where the port of destination has been reached and only a part of the cargo is damaged, the rule of adjustment must be that which obtains in the case of a particular average loss.

The rule for computing a technical particular average loss has been in existence for over a hundred years and is well known and understood. The case of *Lewis* v. *Rucker*, 2 Burrows, 1167, was decided by the court of King's Bench, Lord Mansfield delivering the judgment, in 1761, and the case of *Johnson* v. *Sheddon*, 2 East, 581, was decided by the same court in a judgment delivered by Mr. Justice Lawrence. Those cases hold that the damaged goods upon reaching their destination must be at once sold for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the

sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value. See 2 Marshall on Insurance (2d Am., from 2d London ed.) 623; Lowndes on Marine Insurance, sec. 269 *et seq.*; McArthur on Marine Insurance, 207.

The company also insists that the libellants, at the time they filed their libel, did not claim as for a constructive total loss, or in other words did not claim a salvage loss, but that in their libel they described their loss as a partial one, and the company says that it was upon such issue that the question was tried before the commissioner, and that it appeared from the evidence taken before him that it was a case for the application of the strict technical rule adopted in the adjustment of a particular average loss.

We think there is no substantial ground for the contention that the libellants had not claimed a salvage loss in their libel. It is true that in the fourth clause of the libel filed by the libellants, they described the loss for which the company were bound to pay as a partial as well as a total loss, but in the third paragraph they allege an abandonment by them after the damage to the wheat and its arrival at the port of Boston, and the refusal to accept such abandonment by the company, and in the sixth paragraph of the libel they claim the right to recover the difference between the amount realized upon the sale of the wheat and the value of the wheat as stated in the policy, which they allege amounts to the sum of $10,451.34, together with claims for general average and special charges as therein stated. This is in substance a claim as for a salvage loss. In their claim before the commissioner the libellants also showed their purpose to obtain damages upon the same theory.

In regard to these conflicting claims as to the proper theory upon which the loss should be adjusted, we think, under the peculiar facts of this case, that the method adopted by the commissioner was proper. It is not denied that if a ship at an intermediate port sells a part of her cargo which has been so injured by perils insured against as that it is unfit to be carried farther, it may be sold at that port and the loss be adjusted

as a salvage loss; that is, the value of the goods stated in the policy is to be paid after deducting the amount realized on the sale of the damaged goods.

The case here presented, however, is one where the whole cargo has been sold by the assured, the cargo owner, in an intermediate port (where the voyage was broken up by common consent), and where the sale was for the benefit and with the consent of all concerned, and for the purpose of preventing greater loss. Boston cannot and ought not to be regarded as the port of destination, for any purpose. It was a port of refuge, where the whole cargo was sold instead of but a part, and it was sold in order to make the loss as small as possible. Under such circumstances is the rule of adjustment to be the same as where a part of the cargo has been damaged and necessarily sold at an intermediate port, or must the loss be adjusted by reference to the rule adopted in cases of particular average?

The voyage, it must be recollected, was not broken up or the cargo delivered to its owners for their sole benefit. Very probably they were the prime movers in proceedings for its sale, that is, in obtaining the consent of all parties interested in the cargo for its sale at Boston, but it is evident that the sale was in fact made for the mutual benefit of all. The peculiar law in relation to the importation of damaged wheat into Portugal and the seeming certainty that to carry it there under the circumstances would result in a greater loss to the insurers than to sell the wheat in Boston, renders it quite clear that it was to the interest of the insurers, as well as the owners, to terminate the voyage and sell the wheat for the benefit of all concerned at Boston.

Under these facts, it would seem to be true that this cargo, being partly damaged, was necessarily sold at the port of refuge, and that in making such sale the insurers sustained no damage, but, on the contrary, received benefits. In this state of the case we see no reason why the sale of the whole cargo should not be made upon the same principles that obtain in case of the sale at a port of refuge of that portion of the cargo which has been damaged and is unfit for transportation to

the port of destination. In other words, we think a loss under such facts should be adjusted as a salvage loss. The court below, speaking by Acheson, Circuit Judge, in this case said:

"We have carefully examined the evidence and the legal authorities cited and are not convinced that the commissioner erred either in his findings of fact, or in his method of estimating the loss on the cargo. The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsalable there. The finding of the commissioner is, that the Liscard's wheat would have been almost valueless at Lisbon. The evidence certainly warrants the conclusion that the loss to the appellant would have been greater had the cargo gone on to Lisbon. We agree with the commissioner and the court below in the view that the adventure was practically frustrated, and hence justifiably abandoned; and that, under the special circumstances, the sale of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned. Mr. Parsons (2 Marine Insurance, 411) says that if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss. Mr. Phillips (2 Insurance, sec. 1480) says, speaking of an adjustment as upon a salvage loss: 'The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to the port of destination, it would be greatly diminished in value or be of no value, on arriving there.' We think that the present case falls within the rule even as thus laid down, and that the appellant is justly chargeable with the difference between the valuation in the

policy and the sum realized by the sale, and that the adjustment upon that basis was correct."

We agree with the views thus expressed and hold that the method of adjustment pursued by the commissioner, and affirmed by both courts below, was, under the special circumstances of this case, a proper and correct one.

We have examined the other objections taken to the commissioner's report and are of opinion that they are not well founded. The decree must be

Affirmed.

LEVY *v.* SUPERIOR COURT OF SAN FRANCISCO (Department 9).

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 294. Argued April 26, 1897. — Decided May 10, 1897.

Oxley Stave Co. v. *Butler County*, 166 U. S. 648, followed to the point that "the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

The case is stated in the opinion.

Mr. William A. Maury for plaintiff in error.

No appearance for defendant in error.

Mr Justice Harlan delivered the opinion of the court.

The plaintiff in error filed in the Supreme Court of the State of California a petition, praying, for the reasons therein stated, that a writ of prohibition be granted against the Superior Court of the city and county of San Francisco and the judge thereof, commanding that court and judge to refrain from trying or examining further into the allegations and issues of fact in a certain pending proceeding therein

relating to the estate of Morris Hoeflich, deceased. An alternative writ of prohibition having been issued in accordance with the prayer of the petition, the defendants filed an answer as well as a demurrer upon the ground that the facts stated in the petition did not entitle the plaintiff to a writ of prohibition.

Upon final hearing the writ was denied. From that order the present writ of error was prosecuted.

From the opinion of the Supreme Court of California it appears that the proceedings in the Superior Court of San Francisco, which were called in question by the application for the writ of prohibition, were taken under and in pursuance to sections 1459 and 1460 of the Civil Code of Procedure of that State. The opinion says: "Petitioner contends that these provisions of the code are unconstitutional and void, and that the proceeding in the Superior Court is, therefore, without warrant of law. His position is that they are obnoxious to several features of the constitution of the State, and more particularly to section 3 of article I, which provides that 'No person shall . . . be compelled in any criminal case to be a witness against himself'; and to section 19 of the same article, which provides that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated.'

"These two provisions of the constitution are of well-understood significance; they involve like principles, and in considering the objection made may be regarded as one.

"The argument of petitioner is that these sections of the code referred to are distinctly penal in character, and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the constitution; that being a criminal proceeding, petitioner is protected by the constitution from being compelled to testify against himself or submit his books and papers in evidence.

"There is no question that if petitioner's premises are correct his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this

court directly at variance with that put upon them by petitioner. Sections 1458 to 1461 of the Code of Civil Procedure were, prior to the adoption of the codes, a part of the old probate act, as sections 116 to 119; they are a part of the same article and relate to the same subject which is expressed in the title as 'embezzlement and surrender of property of the estate.'" 105 California, 600.

It appears also from the opinion of the Supreme Court of the State that the petitioner relied largely in support of his position upon *Boyd* v. *United States*, 116 U. S. 616, and *Counselman* v. *Hitchcock*, 142 U. S. 547.

This writ of error must be dismissed for want of jurisdiction in this court to reëxamine the final judgment of the Supreme Court of California. The plaintiff claimed, in the state court, that certain provisions of the state enactment referred to were repugnant to the constitution of California. But he did not, in the state court, draw in question any statute of the State upon the ground that it was repugnant to the Constitution of the United States, nor specially set up or claim in that court any right, title, privilege or immunity under the Constitution of the United States. Rev. Stat. § 709. He insists, in this court, that the enforcement of the above statutory provisions was a denial of the equal protection of the laws — a denial forbidden by the Fourteenth Amendment of the Constitution of the United States. But the record does not show that he made any such claim in the state court. The reference in the opinion of that court to the cases of *Boyd* v. *United States* and *Counselman* v. *Hitchcock* was for the purpose of ascertaining the proper construction of certain provisions of the constitution of California, not as defining rights asserted by the plaintiff under the Constitution of the United States. From the pleadings in the cause the state court had no reason to suppose that the plaintiff specially claimed that the statute in question deprived him of any right secured by the Constitution of the United States. We said in *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, that "the jurisdiction of this court to reëxamine the final judgment of a state court cannot arise from inference, but only from averments so dis-

tinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also *Louisville & Nashville Railroad Co.* v. *City of Louisville*, 166 U. S. 709. If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared.

Writ of error dismissed.

STONE *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT FOR THE NINTH CIRCUIT.

No. 265. Submitted April 2, 1897. — Decided May 10, 1897.

The United States court in the District of Washington has jurisdiction of an action brought by the United States against a defendant, found there, to recover for timber unlawfully cut from lands of the United States in Idaho.

It is no defence against such action that the defendant was indicted criminally for cutting such timber and was acquitted.

The ruling of the court about the challenges are without merit.

The provision in the act of March 3, 1875, c. 152, that the railroad companies therein provided for have "the right to take from the public lands adjacent to the line of said road material," etc., means lands in proximity, contiguous to, or near the road.

As between the Government and a settler, the title to public land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected.

The fact that claimants to lands under the homestead and preëmption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful.

A general verdict is not a nullity by reason of its being received or recorded on Sunday.

Opinion of the Court.

THE case is stated in the opinion.

Mr. C. W. Bunn and *Mr. John R. McBride* for plaintiff in error.

Mr. Solicitor General for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the District Court of the United States for the District of Washington, Eastern Division, to recover the reasonable value of certain timber and railroad ties manufactured from trees alleged to have been unlawfully cut by the defendant Stone from certain lands in Idaho of which, it was averred, the United States was the owner.

The answer put the United States upon proof of all the material allegations of the complaint.

But the defendant made two special defences —

1. That at a term of the United States District Court for the District of Idaho, held in April, 1891, the trespasses and wrongs complained of were presented by the United States to the grand jury for investigation, and such proceedings were then and there taken that the grand jury returned into court true bills of indictment, in which each and all of the wrongs and trespasses complained of herein were included; that the defendant was charged thereby with the commission of an offence against the statutes, forbidding the cutting or removal of timber from the lands of the United States; that on all the charges involving the acts of the defendant as set forth in the complaint filed herein, he was tried and acquitted and discharged therefrom by the judgment of that court; and that judgment was duly entered against the Government, "the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf." The defendant, therefore, alleged that the issues tendered by the plaintiff herein have been heard, tried and adjudged for defendant and against the plaintiff by a court of competent jurisdiction, and that such judgment and determination precluded the maintenance of this suit.

2. That between the dates mentioned in the complaint, to wit, between the months of August, 1888, and November, 1890, he had contracts with various customers for supplies of railroad ties and timber for the manufacture of lumber at points along the line of the Northern Pacific Railroad Company in the State of Washington, and adjacent to the region mentioned in the complaint; that he procured his supplies of timber for the purposes aforesaid from lands embraced in the grant made by acts of Congress passed to aid in the construction of the Northern Pacific Railroad, and by contracts with that company; and that at no time did he cut timber on any lands except such as belonged to that company; that during said time he purchased from other parties, who delivered ties and timber suited for lumber on the railroad, both ties and timber not cut by himself, for which he paid the market price, and which were either cut from the railroad lands or were lawfully cut by the parties who sold and delivered them to him; that no part or portion thereof were cut or taken from lands of the United States, or were unlawfully cut or taken from any lands; that the railroad ties so purchased from other parties, and which were not cut by himself from the lands of the railroad company, were for the use of and were used in the construction of the Spokane and Palouse Railway Company and the Central Washington Railway Company's railroads, respectively, both corporations being organized and constructing their roads under and in compliance with grants made by the act of Congress of March 3, 1875, authorizing the use of timber, etc., for construction to be taken from the public lands of the United States; and that the taking for such purpose was not unlawful, but was by authority of law.

The defence based on the criminal prosecution in the United States District in Idaho was adjudged on demurrer to be insufficient in law.

The United States also brought an action against John H. Stone, Edward Noonan and W. G. Kegler, as partners doing business under the name of the Spokane Fuel Company, to recover the value of 3545 cords of wood alleged to have been

made from trees unlawfully cut from the public lands of the United States in the same State, and to have been unlawfully converted and disposed of by the defendants to their own use. Noonan answered denying each and every allegation of the complaint. Stone answered separately, and alleged that "he was indicted upon a charge of cutting timber unlawfully from the same lands and premises, upon which the alleged trespasses complained of in this action are founded, at the April term, 1891, of the United States District Court for the District of Idaho; that he was thereafter arrested on that indictment and appeared in said court; that such proceedings were afterwards had, a judgment was duly given and rendered in favor of the defendant, and he has been fully acquitted and discharged of said offence and of said trespass thereby." That judgment was pleaded in full discharge of the plaintiff's cause of action and in bar of all right of action on account thereof. As further special defence, Stone denied that the defendants were or had ever been partners in any business. The defence based upon the indictment, trial and judgment referred to was on demurrer adjudged to be insufficient in law. Stone then filed an answer denying each and every allegation of the complaint. Noonan denied all the allegations of the complaint. Kegler was not served with process and did not appear.

The two actions were tried before the same jury, having been previously consolidated by order of court. In the first case there was a verdict and judgment in favor of the United States against Stone for $19,000. In that case the jury, in answer to special questions propounded by the court, stated that Stone had received saw-logs unlawfully taken from the lands described in the complaint, and that $15,000 were awarded as damages on that account. They also stated, in response to a special question put by the court, that Stone had received railroad ties unlawfully taken from the lands, and that $4000 were awarded on that account. In the case against Stone, Noonan and Kegler, as partners, there was a verdict against Stone for $3000, but the judgment was arrested and the verdict set aside.

The judgment against Stone for $19,000 was affirmed by the Circuit Court of Appeals. 29 U. S. App. 32.

1. It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to that State, and the District Court of the United States for the District of Washington was without jurisdiction. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, is cited as an authority for this proposition. But that case proceeded upon the theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the Government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the Government's denial of the ownership of the land made it necessary for it to prove its ownership, the action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process. And a suit could have been brought to recover the property wherever it could be found. In *Schulenberg* v. *Harriman*, 21 Wall. 44, 64, it was said: "The title to the land remaining in the State, the lumber cut upon the land belonged to the State. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the

law affords in other cases of the wrongful removal or conversion of personal property." If a suit like this cannot be maintained, then persons depredating on the public lands may escape civil liability by simply removing from the State in which the depredation occurred; whereby the Government would be compelled to rely altogether upon a criminal prosecution in which it could not succeed except by proving the guilt of the defendant beyond all reasonable doubt.

2. The indictment against Stone in the Circuit Court of the United States for the District of Idaho charged that he unlawfully, wilfully and feloniously cut and removed and caused and procured to be cut and removed from the lands described fifty thousand timber trees growing on such lands, such trees being the property of the United States. It was based upon § 2461 of the Revised Statutes, which provides as follows: "If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live oak or red cedar trees, or other timber standing, growing or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live oak or red cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the Navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live oak or red cedar trees, or other timber on, or shall remove, or cause, or procure to be removed, or aid, or assist, or be employed in removing any live oak or red cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with the intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the Navy of

the United States; every person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed or removed, and shall be imprisoned not exceeding twelve months."

Did the court below err in adjudging that the defence in this action based upon an acquittal of the criminal charge was insufficient in law?

In our opinion the record of the criminal proceedings in the court in Idaho was not evidence to establish or disprove any of the material facts involved in the civil action.

In support of the contrary view counsel have cited *Coffey* v. *United States*, 116 U. S. 436, 443, 444. That was a libel on behalf of the Government, in the Circuit Court of the United States for the District of Kentucky, against certain personal property as being *forfeited* to the United States *on account of the violation of certain statutes.* It contained three counts, based, respectively, on §§ 3257, 3450 and 3453 of the Revised Statutes, Title, "Distilled Spirits." Coffey filed a claim to most of that property, as well as an answer to the information, in which he denied the allegations of each count. He made defence also on these specific grounds: That before the institution of the proceedings for forfeiture of the personal property, a criminal information was filed against him in the same court, the counts of which information were based upon §§ 3256, 3257, 3296, 3450 and 3453 of the Revised Statutes, or on some one or more of them; that such counts contained the same charges, in substance and effect, and embraced the same matters, things and frauds, that were set out and charged in the libel against the personal property therein described; and that upon the trial of the criminal information he was found not guilty, and by the judgment of the court was acquitted of the charges of fraud and attempts at fraud therein alleged, which were the same frauds as were alleged in the libel. To this part of the answer a demurrer was sustained upon the ground that the facts stated were not sufficient to constitute a defence. But this court held that as the demurrer to the answer admitted that the fraudulent acts and attempts to defraud, alleged in the criminal information and covered by the verdict

and judgment in the criminal case, embraced all the acts, attempts and intents averred in the libel for the forfeiture of Coffey's personal property, the judgment of acquittal in the criminal case was a bar to the proceeding by libel. This court said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule required to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all this is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. When an acquittal in a criminal prosecution in behalf of the Government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason, that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same."

After referring to the case of *Gelston* v. *Hoyt*, 3 Wheat. 246, —in which it was adjudged that a sentence of acquittal, accompanied by a denial of a certificate of probable cause, in a proceeding by libel against a vessel for an alleged offence, was

conclusive evidence that no forfeiture was incurred, and that the same question could not be reëxamined in an action of trespass against the collector and surveyor for seizing the vessel, — the court said: "This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of the proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex* v. *Dutchess of Kingston*, 20 Howell's State Trials, 355, 538, and which were formulated thus: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the parties, upon the same matter, directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved, and between the same parties."

We are of opinion that the present case is not covered by the decision in *Coffey* v. *United States*. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." In the *Coffey case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the court

referred to *United States* v. *McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground "that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*."

The present action is unlike that against Coffey. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant. The proceeding by libel against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment, denounced by statute, was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding. The nature of the proceeding against Coffey, and the scope of the decision in that case, were recognized in *Boyd* v. *United States*, 116 U. S. 616, 634, where the court said: "As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *United States*, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the *forfeiture* of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the

Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose." Again, in *Lees* v. *United States*, 150 U. S. 476, 480, which was an action to recover a penalty for importing an alien under contract to perform labor, this court said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself."

In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's case* can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the Government sought to punish a criminal offence, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offence charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the Government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action; but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. *Regina* v. *Cohen*, 8 Cox C. C. 41; *Regina* v. *James*, 8 Car. & P. 131; *United States* v. *Pearce*, 2 McLean, 14; *Cutter* v. *State*, 36 N. J. Law, 125, 126. But the present action for the conversion of the timber would be supported by proof that it was in fact

the property of the United States, whether the defendant knew that fact or not. *Wooden-ware Co.* v. *United States*, 106 U. S. 432. An honest mistake of the defendant as to his title in the property would be a defence to the indictment, but not to the civil action. Broom's Leg. Max. (5th ed.) 366, 367. It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offence with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property.

3. As heretofore stated, the two actions were consolidated by an order of the trial court. After twelve jurors were selected (the challenges for cause having been determined) the court directed the respective parties to proceed with their peremptory challenges. Thereupon Stone and Noonan, claiming that they were entitled to challenge peremptorily, in each case, three jurors, and announcing that they desired to challenge Giffin in the case against Stone, Noonan and Kegler, peremptorily challenged him as a juror, although they had already challenged three jurors in the consolidated cases. The court denied the challenge, and the defendants excepted. This ruling of the court is now assigned for error. But there is no merit in the objection. The case here is the one against Stone alone. In that case the defendant had the benefit of the three peremptory challenges made before the challenge of Giffin. In the other case the judgment was arrested and the verdict was set aside. If the court committed any error in not allowing the challenge of Giffin in the case against Stone, Noonan and Kegler, that error did not prejudice Stone in the present case.

4. By the act of March 3, 1875, 18 Stat. 482, c. 152, Congress granted the right of way through the public lands of the United States to any railroad company duly organized under the laws of any Territory, except in the District of Columbia, or by the Congress of the United States, which shall have

filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of the road; "also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad."

At the trial the defendant offered as evidence the appointment of the plaintiff in error, John H. Stone, as agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, claiming that said corporations having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, the proof showing "that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads." This evidence was excluded and its exclusion is assigned for error. It appears from the record, as stated in the opinion of the Circuit Court of Appeals, that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region almost entirely destitute of timber, and that the timber was cut from lands along the line of the Northern Pacific Railroad about fifty miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The trial court, in its charge, thus interpreted the above act of 1875: "The act of Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, that the railroad company has a right to require the United States to provide them with material, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that adjacent lands

means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad and mentioned as lands in Kootenai County, Idaho, where it is claimed that railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration and releases you from any consideration in regard to it."

We concur with the Circuit Court of Appeals in adjudging this to be a sound interpretation of the act of 1875. It is substantially the view expressed in *Denver & Rio Grande Railroad* v. *United States*, 34 Fed. Rep. 838, 841, in which Mr. Justice Brewer said: "I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the land is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands — lands fifty or a hundred miles away." Under this interpretation of the act of Congress, and under the facts of this case, it is clear that the timber was not taken from lands which, within the true meaning of that act, were adjacent to either of the roads in the construction of which it was used.

5. One of the principal matters contested at the trial was whether the lands were public lands of the United States in any sense that would entitle the Government to claim that it owned the timber taken from them. The defendant introduced evidence to show that certain individuals had acquired the lands under the laws of the United States, and were in the exercise of their rights when cutting timber from them.

Upon this general subject the court instructed the jury, in substance, that the United States was the primary source of title to all of the lands in the State of Idaho, and where individuals have acquired ownership they have done so by grant or conveyance from the Government; that in a case where there was no evidence of transfer from the United States of

title it is to be taken that the title is still in the United States; that as to all the lands in which the title is in the Government the timber and trees standing and growing on them are part of the land, the title of the United States to the trees being the same as its title to the soil; that when trees on such lands are cut down without authority of law the right of property in the timber after it is severed from the realty still remains in the Government, and if any one without license from the Government or without authority of law takes the timber from the land he commits a trespass against the Government; that no person can acquire title to the timber so cut by buying it from an individual, unless it appears that that individual in cutting and removing it from the lands had license or lawful authority to do so; that under the laws in force during the time referred to in the pleadings and evidence, any person desiring any part of the lands known as public lands must prove that it was for his own exclusive use and benefit and for the purpose of residing upon and cultivating it, thus carrying into effect the policy of the Government in giving public lands to the people who need them and would cultivate and use them, so as to cause the greatest benefit to the country; that any settler going upon a tract of land with that intention goes by invitation of the Government, and with the authority to improve the land and make it fit for use; that he is authorized to cut down the timber which he finds standing there (if it encumbers the ground) so far as was necessary to do so in order to make the land fit for cultivation; that any timber that he does so cut down in good faith and for the purpose of improving the land, he being a *bona fide* settler intending to acquire title in accordance with the laws, is not the property of the United States, but becomes his property after being so cut down, and that he may burn it up or he may sell it for money, and if he sells it under the conditions named the man who buys it from him gets a good title and is not required to pay the United States for it afterwards; that the converse of that proposition was true, and where a man cuts timber off the public lands, unless he is a *bona fide* settler intending to acquire title to the lands by

obedience to the laws of the United States, he does so unlawfully, and does not make himself the owner of the timber by cutting it; and that even a settler who takes up a claim on public lands intending to perfect his right to it, has no right, until he has perfected his claim, to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.

The court proceeded in its charge: "A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plough shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered by timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the preëmption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation. As between the Government and the settler, the title to the land until the conditions of the law are fulfilled remains in the United States,

but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and preëmption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful."

It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applicable to the matters referred to by the trial court. They are in accord with the views of this court as expressed in *Shiver* v. *United States*, 159 U. S. 491, 497, 498. See also *United States* v. *Cook*, 19 Wall. 591. The objections made at the trial (and repeated here) to what was said to the jury on this part of the case were not well taken. They could not be sustained without encouraging depredations upon the public lands under the guise of establishing settlements upon them in accordance with the liberal policy of the Government.

6. The only other question that we deem necessary to consider is that presented by the assignment of error, which states that the court erred "in giving any instructions to the jury on Sunday, because it had no power to do any judicial act save to receive the verdict and discharge the jury, and all such instructions given to the jury were without authority."

The facts upon which this assignment was made were these: The jury retired on Saturday, April 22, 1893, to consider of their verdict. On the succeeding day, Sunday, in

conformity with the order of the judge, without any request by the jury and without any consent asked or given by the defendant, they came into court, both parties being present by counsel. The court then read the special questions to which reference has been made in the statement of this case, and requested the jury to answer them in addition to their general verdict. Although asked by counsel to do so, the court declined to instruct the jury upon matters covered by its charge of the previous day. A juror having inquired whether the jury were allowed to sign a verdict on Sunday, the court replied: "Yes; and when you have come to an agreement, send for me, and I will receive your verdict." The verdict was returned into open court on the same day. On the succeeding day the defendant asked to have the benefit of an exception to the jury having been sent out and to the receiving of the verdict on Sunday. The court did not directly allow the exception, but expressed its willingness to sign a bill of exceptions, reciting facts as they occurred. The judgment on the verdict for $19,000 was entered on the Friday succeeding the day on which the verdict was returned.

There is no statute of the United States making Sunday *dies non juridicus*. But by the statutes of the State of Washington, where this case was tried, it is provided that the common law, so far as it was not inconsistent with the Constitution and laws of the United States, or the State of Washington, nor incompatible with the institutions and conditions of society in that State, shall be the rule of decision in all its courts. 2 Hill's Anno. Stat. and Codes, § 108. This statute is applicable in the courts of the United States sitting in the State of Washington, and furnishes a rule of decision in trials at common law in cases where it applies. Rev. Stat. § 721. Tested by the principles of the common law, was the judgment under review void because the verdict of the jury was received by the court on Sunday? Whatever may be said as to the right of the court on Sunday to have delivered to the jury special questions to be answered by them, the general verdict was not a nullity by reason of its being

Counsel for Defendant in Error.

received or recorded on Sunday. While many cases hold that a *judgment* entered on Sunday is absolutely void, the receiving and entering of a verdict cannot be questioned upon the ground that those things occurred on Sunday. It was substantially so held in *Ball* v. *United States*, 140 U. S. 118, 131, citing *Mackalley's case*, 5 Reports, 111; *Swann* v. *Broome*, 3 Burrows, 1595; *Baxter* v. *People*, 3 Gilman, 368, 386; and *Chapman* v. *State*, 5 Blackford, 111. See also *Pearce* v. *Atwood*, 13 Mass. 324; *Frost* v. *Hull*, 4 N. H. 153, 156; *Nabors* v. *The State*, 6 Alabama, 200, 201; *Story* v. *Elliot*, 8 Cowen, 27; *Ex parte White & Pergue*, 15 Nevada, 146; *Hoghtaling* v. *Osborn*, 15 Johns. 119.

Having noticed all the matters in the record that we deem important, and perceiving no error of law to the prejudice of the substantial rights of the defendant, the judgment is

Affirmed.

TWIN CITY BANK *v.* NEBEKER.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 202. Argued and submitted April 21, 1897. — Decided May 10, 1897.

Section 41 of the National Banking Act imposing certain taxes upon the average amount of the notes in circulation of a banking association, now found in the Revised Statutes, is not a revenue bill within the meaning of the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills."

Whether in determining such a question the courts may refer to the journals of the two Houses of Congress for the purpose of ascertaining whether the act originated in the one House or the other is not decided.

The case is stated in the opinion.

Mr. John J. Crawford for plaintiff in error.

Mr. Solicitor General filed a brief for defendant in error, but the court refused to hear further argument.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an action by the plaintiff in error to recover from the defendant in error the sum of seventy-three dollars and eight cents alleged to have been paid by the former under protest to the latter, who was at the time Treasurer of the United States, in order to procure the release of certain bonds, the property of the bank, which bonds, the declaration alleged, were illegally and wrongfully withheld from the plaintiff by the defendant.

The plaintiff went into liquidation in the manner provided by law on the 23d of June, 1891, and on the 25th of August, 1891, deposited in the Treasury of the United States lawful money to redeem its outstanding notes, as required by section 5222 of the Revised Statutes of the United States. After making such deposit, the bank demanded the bonds which had been deposited by it to secure its circulating notes, and of which defendant had possession as Treasurer of the United States. The defendant refused to deliver them, unless the bank would make a return of the average amount of its notes in circulation for the period from January 1, 1891, to the date when the deposit of money was made, viz., the 25th of August, 1891, and pay a tax thereon. The bank then made a return of the average amount of its notes in circulation for the period from January 1 to June 30, 1891, and paid to the defendant $56.25, protesting that he had no authority to demand the tax, and delivered to him a protest in writing setting forth that in making the return and in paying the tax it did not admit the validity of the tax or defendant's authority to exact or collect it, but made the return and payment solely for the purpose of procuring the possession of the United States bonds belonging to it, which defendant had refused to release until such return and payment were made, and further protesting that it was not liable to the tax or any part of it. The bank's agent then made another demand upon defendant for the bonds; but he refused to deliver them until a return should be made of the average amount of its notes in circulation for the period from July 1 to August 25, 1891, and a tax paid

thereon. Its agent then delivered such return to defendant and paid him $16.83, at the same time delivering a written protest in the same form as the one above mentioned. These transactions were with the defendant himself, and the money was paid to him in person.

The journals of the House of Representatives and Senate of the United States for the first session of the 38th Congress were put in evidence by plaintiff. The bank claims that these journals show that the National Bank Act originated as a bill in the House of Representatives; that when it passed the House it contained no provision for a tax upon the national banks, or upon any corporation, or upon any individual, or upon any property, nor any provisions whatever for raising revenue; and that all the provisions that appear to authorize the Treasurer of the United States to collect any tax on the circulating notes of national banks originated in the Senate by way of amendment to the House bill.

A witness on behalf of the defendant testified, against the objection of plaintiff, that the money paid by it to him was covered into the Treasury, and applied to the payment of the semi-annual duty or tax due from the bank. But it did not appear whether this was done before or after the present action was brought.

At the close of the evidence counsel for the bank moved the court to direct the jury to return a verdict in its favor, which motion the court overruled, and counsel for the bank excepted. On motion of the defendant the court instructed the jury to return a verdict for him. To that ruling of the court counsel for plaintiff excepted.

Such is the case which the bank insists is made by the record.

The taxing provisions contained in the National Bank Act are found in its forty-first section. That section is as follows:

"The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the provisions of this act respecting the procuring of such notes, and all other

expenses of the bureau, shall be paid out of the proceeds of the taxes or duties now or hereafter to be assessed on the circulation, and collected from associations organized under this act. And in lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one half of one per centum each half year from and after the first day of January, eighteen hundred and sixty-four, upon the average amount of its notes in circulation, and a duty of one quarter of one per centum each half year upon the average amount of its deposits, and a duty of one quarter of one per centum each half year, as aforesaid, on the average amount of its capital stock beyond the amount invested in United States bonds; and in case of default in the payment thereof by any association, the duties aforesaid may be collected in the manner provided for the collection of United States duties of other corporations, or the Treasurer may reserve the amount of said duties out of the interest, as it may become due, on the bonds deposited with him by such defaulting association. And it shall be the duty of each association, within ten days from the first days of January and July of each year, to make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as he may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding said first days of January and July as aforesaid, and in default of such return, and for each default thereof, each defaulting association shall forfeit and pay to the United States the sum of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States; and in case of such default the amount of the duties to be paid to such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital

stock, to be ascertained in such other manner as the Treasurer may deem best: *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided, further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes to the same extent, according to its value, as other real estate is taxed." 13 Stat. 99, 111, c. 106.

The provision relating to taxation which, it is alleged, was inserted by way of amendment in the Senate, appears as section 5214 of the Revised Statutes. Other provisions of the act of 1864 are reproduced in sections 5217 and 5218 of the Revised Statutes.

By section 5222 of the Revised Statutes it is provided: "Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States and placed to the credit of such association upon redemption account."

In *Field* v. *Clark*, 143 U. S. 649, 672, — in which the constitutionality of the act of Congress of October 1, 1890, 26 Stat. 567, c. 1244, was questioned upon the ground that a

certain provision which was in it upon its final passage was omitted when the bill was signed by the Speaker of the House of Representatives and the President of the Senate, — this court said: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the Government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the Government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

Referring to the above case, it was said in *Harwood* v. *Wentworth*, 162 U. S. 547, 560, that if the principle announced in *Field* v. *Clark* involves any danger to the public, it was competent for Congress to meet it by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress or of a territorial Legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it was committed by statute, may be shown

not to be in the form in which it was when passed by Congress or by the territorial Legislature.

The contention in this case is that the section of the act of June 3, 1864, providing a national currency secured by a pledge of United States bonds, and for the circulation and redemption thereof, so far as it imposed a tax upon the average amount of the notes of a national banking association in circulation, was a revenue bill within the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills," Art. I, § 7; that it appeared from the official journals of the two Houses of Congress that while the act of 1864 originated in the House of Representatives, the provision imposing this tax was not in the bill as it passed that body, but originated in the Senate by amendment, and, being accepted by the House, became a part of the statute; that such tax was, therefore, unconstitutional and void; and that, consequently, the statute did not justify the action of the defendant.

The case is not one that requires either an extended examination of precedents, or a full discussion as to the meaning of the words in the Constitution, "bills for raising revenue." What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives. Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.

1 Story on Const. § 880. The main purpose that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.

This interpretation of the statute renders it unnecessary to consider whether, for the decision of the question before us, the journals of the two Houses of Congress can be referred to for the purpose of determining whether an act, duly attested by the official signatures of the President of the Senate, the Speaker of the House of Representatives and the President, and which is of record in the State Department as an act passed by Congress, originated in the one body or the other. And for the reasons stated, it is not necessary to inquire whether, in any view of the case, the defendant would have been personally liable for the tax collected by him pursuant to the act of Congress, and subsequently covered into the Treasury.

Judgment affirmed.

Mr. Justice White concurs in the result.

Lumberman's Bank *v.* Huston. Error to the Court of Appeals of the District of Columbia. No. 203. Argued and submitted April 21, 1897. Decided May 10, 1897.

Mr. Justice Harlan delivered the opinion of the court.

The most favorable view of this case for the plaintiff in error is to regard it as presenting the same question that was determined

in *Twin City National Bank* v. *Nebeker*, just decided. For the reasons stated in the opinion in that case the judgment is

Affirmed.

MR. JUSTICE WHITE concurred in the result.

Mr. John J. Crawford for plaintiff in error.

Mr. Solicitor General for defendant in error.

TINDAL *v.* WESLEY.

CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 231. Argued March 25, 1897. — Decided May 10, 1897.

This was a suit by citizens of New York against citizens of South Carolina to recover the possession of certain real property in that State, with damages for withholding possession. One of the defendants in his answer stated that he had no personal interest in the property, but as secretary of state of South Carolina, had custody of it, and was in possession only in that capacity. The other defendant stated that he was watching, guarding and taking care of the property under employment by his co-defendant. Both defendants disclaimed any personal interest in the property, and averred that the title and right of possession was in the State. *Held*, That the suit was not one against the State within the meaning of the Eleventh Amendment of the Constitution of the United States declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State." Whether a particular suit is one against the State within the meaning of the Constitution depends upon the same principles that determine whether a particular suit is one against the United States.

United States v. *Lee*, 106 U. S. 196, and other cases, examined and held to decide that a suit against individuals to recover the possession of real property is not a suit against the State simply because the defendant holding possession happens to be an officer of the State and *asserts* that he is lawfully in possession on its behalf. The Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law; and when such officers or agents assert that they are in rightful possession, they must make that assertion good, upon its appearing, in a suit against them as individuals, that the legal title and right of possession is in the plaintiff.

Opinion of the Court.

The judgment in this case does not conclude the State unless it becomes a party to the suit. Not having submitted its rights to the determination of the court, it will be open to the State to bring any action that will be appropriate to establish and protect whatever claim it has to the premises in dispute.

THE case is stated in the opinion.

Mr. William A. Barber for plaintiffs in error. *Mr. Samuel W. Melton* and *Mr. Henry N. Obear* were on his brief.

Mr. William H. Lyles for defendant in error. *Mr. Robert W. Shand* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

Wesley, a citizen of New York, brought this action in the Circuit Court of the United States against Tindal and Boyles, citizens of South Carolina, to recover the possession of certain real property in the city of Columbia, South Carolina, with damages for withholding such possession, as well as the value of the use and occupation of the premises.

The complaint alleged that on the 16th day of February, 1892, the plaintiff purchased from the commissioners of the sinking fund of South Carolina two certain parcels of land in the city of Columbia in that State, on one of which is a building known as Agricultural Hall — the lots being the same conveyed to the State by deed of J. B. Johnston, dated April 9, 1883, and duly recorded;

That on the day of the purchase, the premises, by the direction and appointment of the plaintiff, were conveyed by the commissioners to J. W. Alexander, to hold the same "in trust for the use of the plaintiff, his heirs and assigns forever, and to permit the plaintiff to have and possess the same and to enjoy the profits, and in trust to convey the same to the plaintiff, his heirs and assigns, or such person as he might direct and appoint";

That upon the request of the plaintiff, J. W. Alexander by deed dated the 11th day of February, 1893, conveyed the premises in fee simple to the plaintiff;

That the plaintiff "being so possessed thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff, and that the defendants are, and ever since the said 20th day of February, 1892, have been, in possession of said premises and have been and still are withholding the same from the plaintiff, although plaintiff has demanded from the defendants the possession thereof, to the damage of the plaintiff ten thousand dollars"; and

That the value of the use and occupation of the premises was at least twenty-five hundred dollars per annum.

The plaintiff demanded judgment against the defendants for the possession of the premises; for ten thousand dollars, as damages for withholding the same; for the value of the use and occupation of the premises after February 20, 1892, at the rate of twenty-five hundred dollars per annum; and for the costs and disbursements of the action.

The defendant Tindal answered, and for his first defence denied each and every allegation of the complaint. For a second defence he alleged that on the 20th day of February, 1892, he was, and thereafter continued to be, and was at the bringing of this action, the secretary of state of South Carolina; that the premises described in the complaint on the above date were, and thereafter continued to be, and now are, the property of the State, in its possession, and in actual public use; and that he "has no right, title, interest or estate to or in the said premises, of any kind whatever, but that in pursuance of law the same is in the custody of this defendant as said secretary of state."

The defendant Boyles made the same defences as his co-defendant Tindal, and further alleged that he had "no right, title, interest or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal as secretary of state, this defendant has been and now is engaged, on behalf of the said State, in watching, guarding and taking care of the said premises."

The jury found for the plaintiff the possession of the land described in the complaint and judgment for such possession

was entered in his favor. This was followed by an execution commanding the United States marshal or his deputies to deliver possession of the property to the plaintiff.

That judgment was affirmed by the Circuit Court of Appeals. *Tindal* v. *Wesley*, 25 U. S. App. 124. The case is in this court upon writ of certiorari directed to that court.

1. The bill of exceptions shows that W. H. Lyles was a witness on behalf of the plaintiff, and while under cross-examination gave the following testimony:

"Q. You and Mr. Muller went out of the state treasurer's office and almost immediately returned. Now what occurred between the state treasurer on the one hand and Mr. Muller and yourself on the other? A. We returned within five minutes, I think within two minutes. We called the state treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond scrip, known as the Blue Ridge Railroad scrip, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing. Q. And it was refused? A. Yes, the advertisement was not referred to. Q. Was it not the purpose of the transaction to create an issue in the United States court, in order to test the validity of the revenue bond scrip, was not that the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond scrip, but as to the United States Circuit Court we were not —— Q. Then when you bought it you did not intend to pay for it in good money? A. We did, and considered the scrip as good money. Q. When you made the purchase, you made it with a view of compelling the State to take the deferred payment of it in revenue bond scrip? A. Yes.

Q. Did you happen to know whether the revenue bond scrip had any value in the market? A. I don't know. Q. It has not? A. I don't know that it has. Q. Very little if any? A. Yes. Q. You know Alexander? A. Yes, I have never seen him personally. Q. Do you know him as a poor man? A. Yes. Q. He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money. Q. Mr. Wesley holds a large block of revenue bond scrip? A. Yes."

The court excluded this testimony and the defendants duly excepted to its ruling. That ruling is the subject of one of the assignments of error.

It is claimed that the excluded testimony tended to show that Alexander and Wesley intended, from the outset, to make the payment of the deferred instalments of purchase money in "revenue bond scrip, known as Blue Ridge Railroad scrip"; that by the terms of the contract the purchaser was entitled to anticipate the payment of the deferred purchase money; and that as soon as Alexander received the alleged conveyance from the commissioners of the sinking fund he attempted to discharge the bond and mortgage given to secure the unpaid purchase money by tendering in payment "revenue bond scrip." But all this was immaterial under the issue in this case as to the right of possession of the premises. If the legal title passed by a valid deed from the commissioners of the sinking fund then the right of the grantee to possession was not impaired by the circumstance that he intended to insist upon paying the deferred instalments of purchase money in revenue bond scrip. Whether he was entitled to make payment in such scrip was a question to be finally determined when suit was brought to foreclose the mortgage given to secure the payment of the balance of the purchase price. But the possibility or even certainty that such a dispute would arise constituted no reason for refusing possession if the conveyance to Alexander was valid and passed the legal

title, without any reservation by the grantors of the right to retain possession until the whole purchase price was paid.

Throughout the argument of counsel for defendants it is assumed that the purpose on the part of both Alexander and Wesley to tender revenue bond scrip in payment of the deferred instalments was, in itself, a fraud that entitled the commissioners of the sinking fund to withhold possession after conveying the legal title. We cannot concur in this view. If under the law of the State the scrip referred to could be used in meeting any obligations due to it, how could it be regarded as a fraud to do what the law allowed to be done? Nor was it, in any legal sense, a fraud for Alexander or Wesley to form the purpose of tendering such scrip in payment in order that there might be a judicial determination of the question of its validity. If the deed had been obtained under assurances that the deferred instalments of purchase price should be paid in money and not in revenue bond scrip, it may be that the commissioners, in a proper proceeding, could have obtained a rescission of the contract. But upon that point it is unnecessary to express an opinion, as no such case is presented by the record. The case here is one in which the excluded testimony does not tend to show anything more than that Alexander and, perhaps, Wesley, did not during the negotiations for the property or before the deed was obtained, disclose to the commissioners their purpose to use revenue bond scrip, if it could be done, in paying the deferred instalments of purchase money.

The plaintiff insists that the question of fraud or no fraud in the alleged purchase from the commissioners of the sinking fund is not a question in which the defendants have any concern, and could only be raised by the State in a proceeding to which it was a party. We need not stop to consider this question, because we are of opinion that in no view of the case arising upon this record was error committed in excluding so much of the testimony of Lyles as is set forth in the bill of exceptions.

2. At the close of the testimony in the Circuit Court the defendants raised the question whether this suit was not, in

effect, one against the State, of which the court was prohibited from taking cognizance by the clause of the Constitution declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Eleventh Amendment. The Circuit Court held that the suit was not one against the State, and that view was approved by the Circuit Court of Appeals.

It is not claimed, nor could it be claimed, that the commissioners of the sinking fund were without authority to sell the lands in controversy. By an act of the general assembly of the State, approved December 24, 1890, the commissioners were authorized to sell and convey all the right, title and interest of the State (the same being a title in fee simple) in the building in the city of Columbia, with the lot on which it stands, known as Agricultural Hall; and by the General Statutes of South Carolina it was made their duty to sell and convey, for and in behalf of the State, all such real and personal property of the State as was not in actual public use, the sales to be made from time to time, in such manner, and upon such terms, as they may deem most advantageous to the State. Acts of S. C. 1890, 707; Gen. Stat. S. C. 1882, 28, c. 5, § 63; 1 Rev. Stat. S. C. 35, § 85. It is true that by an act approved December 24, 1892, the above act of December 24, 1890, was repealed so far as it authorized and provided for the sale of the lot and building known as Agricultural Hall and the appropriation of the proceeds to Clemson College, and it was provided that if that property had not then been sold and conveyed it should remain unsold, and if sold that the proceeds of sale should be covered into the treasury for the benefit of the State. Acts S. C. 1892, 88. But, as already stated, the sale and conveyance by the commissioners occurred before the passage of the repealing act, and were, therefore, not affected by it.

The parties stipulated that the testimony to be printed in the record should be the evidence given by W. H. Lyles, W. T. C. Bates and J. E. Tindal. But no part of the testi-

mony is made a part of the record by a bill of exceptions, except the above questions and answers in the testimony of Lyles. It must therefore be assumed from the record that the plaintiff prior to the bringing of this action had acquired from the commissioners the legal title to the premises in dispute, and was entitled to possession. The bill of exceptions presents no question as to the genuineness or the execution and delivery of the deed to Alexander conveying the premises in trust for Wesley; and in support of the verdict it must be taken that the conveyance referred to in the complaint as having been made by the commissioners of the sinking fund to Alexander was, in fact, properly executed and delivered to the grantee, and that, as alleged in the complaint, Alexander conveyed to Wesley in 1893.

But it appears from the statutes of South Carolina that the secretary of state has charge of all the property of the State, the care and custody of which is not otherwise provided for by law. Gen. Stat. S. C. 1882, 27, c. 5, § 60; 1 Rev. Stat. S. C. 34, § 82. He admits in his answer that the property in controversy is in his custody. Boyles, under the employment of the secretary of state, watches, guards and takes care of it. They are, therefore, in possession within the meaning of the general rule that ejectment will not lie against a person out of possession. Tyler on Ejectment, 411; *Pope* v. *Pendergrast*, 1 A. K. Marsh. 122. The defendants are the actual occupants of the premises. The contention, therefore, of the plaintiffs in error is that the Circuit Court erred in not holding, as it was asked to do, that, they, having no personal interest in the property and being only custodians of it on behalf of the State, a suit to dispossess them and to give possession to the plaintiff was, in effect, a suit against the State.

Of course, it was competent for the defendants to prove that the lots in question belonged to the State, and in that way defeat the present action. So it would have been competent for the State, if it claimed the property, to have intervened, and, submitting to the jurisdiction of the court, to have obtained a judicial determination of the claim asserted for it by the defendants. But it did not intervene. It refused to

do so. It appears from *South Carolina* v. *Wesley*, 155 U. S. 542, 545, that the State, by its attorney general, suggested to the court that these lands were held, occupied and possessed by the State through and by its officer and agent, and were used for public purposes; and "without submitting the rights of the State to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy," it moved that the proceedings be dismissed. That motion was overruled and a writ of error sued out by the State was dismissed, the Chief Justice observing: "The State does not complain that it was refused leave to intervene, but that the Circuit Court, without the intervention of the State, refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The State was not a party to the record in the Circuit Court and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States* v. *Lee*, 106 U. S. 196, 197; *Georgia* v. *Jesup*, 106 U. S. 458."

So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control, is to be deemed an action against the State within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the State, and assert title and right of possession in the State. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?

We are of opinion that the principles announced by this court in cases heretofore decided furnish an answer to these questions.

Opinion of the Court.

The leading case upon the subject is *United States* v. *Lee*, 106 U. S. 196. It is true that the question there presented was whether the suit was one against the United States within the recognized rule that the Government without its consent cannot be sued directly in any court by original process as a defendant. But it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States.

What was the case of *United States* v. *Lee?* By direction of the Executive Department of the Government proceeding, as was supposed, under legislative authority, Kaufman and Strong, as officers and agents of the United States, held possession of certain real estate in Virginia known as Arlington, and constituting a National Cemetery in which were interred the remains of Union soldiers. An action was brought by Lee in a Circuit Court of the United States against Kaufman and Strong to recover possession. The action proceeded upon the ground that the legal title and right of possession were in the plaintiff. The Attorney General of the United States, without submitting the rights of the Government to the jurisdiction of the court, suggested in writing that the property in dispute was held, occupied and possessed by the United States as a military station, through its officers and agents having actual possession for the Government, but without any personal interest in it; and, therefore, that the court had no jurisdiction of the subject of the controversy. Upon these grounds he moved that all further proceedings be stayed and dismissed. The motion was denied. The same question was raised by the answers of Kaufman and Strong. There was a verdict and judgment against the defendants.

Although the result of the trial of that case was to show that the plaintiff had title to the premises, and that what was set up by the defendants on behalf of the United States was no title at all, it was contended that the court could render no judgment against the defendants. That there may be no doubt as to what was determined, we give the language of

the court stating the question presented for its consideration: "The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that [*United States* v. *Peters*, 5 Cranch, 115], after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

After a full examination of the principles upon which rested the exemption of Government from suit by individuals, and observing that in view of the essential differences between the American and English Governments, in respect of the source and depositaries of power, the decisions of the English courts on this subject were entitled to but little weight, this court, speaking by Mr. Justice Miller, said —

That an "examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, 13 Pet. 498; *Brown* v. *Huger*, 21 How. 305, and *Grisar* v. *McDowell*, 6 Wall. 363, it was not thought necessary to reëxamine a propo-

sition so often and so clearly overruled in previous well-considered decisions"; and

That, "conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the Government. *Ex parte Milligan*, 4 Wall. 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?"

Upon the general proposition that the possession by officers, on behalf of the United States, of property claimed by a citizen, is sufficient of itself to protect those officers against suit by that citizen to recover possession, the court said: "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The

position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court — a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of the plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate and converted one part of it into a military fort and another into a cemetery." Assuming, upon the record before the court, that the President had no lawful authority to place officers of the Government in possession of the property in question, and that Congress could not give him any such authority except upon making just compensation, the court said: "The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the Government, however clear it may be that the executive possessed no such power. Not only no

such power is given, but it is absolutely prohibited, both to the executive and the legislature, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by the Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the Government. See *Ex parte Milligan*, 4 Wall. 2; *Kilbourn* v. *Thompson*, 103 U. S. 168. No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Again: "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed.

That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the Government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

We have made these extracts from the opinion of the court in the *Lee case* because the reasons there assigned for the conclusion reached control the determination of the present case. If a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the Government, we cannot perceive how the present suit can be regarded as one against the State merely because the defendants assert a right of possession in the State through them as its officers and agents.

The essential principles of the *Lee case* have not been departed from by this court, but have been recognized and enforced in recent cases.

In *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452, the court, referring to the cases in which an individual, sued for tort committed upon person or property, defends upon the ground that he acted as an officer of the Government, and in which he must show that his authority was sufficient in law to protect him, said: "To this class of cases belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence. The judgment in that case did not conclude the United States, as the

opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

Stanley v. *Schwalby*, 147 U. S. 508, 518, was an action of trespass to try title brought in a state court against individuals to recover possession of certain lands. The defendants asserted a right of possession in themselves as officers of the United States which, they alleged, had title and right of possession. Referring to the cases in which an individual was sued in tort for some act injurious to another in regard to person or property, in which the defence was that he acted under the orders of the Government, this court, speaking by the Chief Justice, said: "In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence he must show that his authority was sufficient in law to protect him. In this class is included *United States* v. *Lee*, 106 U. S. 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence." See also *Stanley* v. *Schwalby*, 162 U. S. 255, 271; *Belknap* v. *Schild*, 161 U. S. 10.

The cases in this court in which it has been necessary to consider the meaning and scope of the Eleventh Amendment are quite numerous. In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10, the opinion in which case was delivered by Mr. Justice Lamar, the cases previously decided were examined, and were held to belong to two classes. The first class, he said, "is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to *specifically perform its contracts*" — citing *In re Ayres*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*,

107 U. S. 769; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, and *Hagood* v. *Southern*, 117 U. S. 52. The other class, the court said, "is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial — is not, within the meaning of the Eleventh Amendment, an action against the State" — citing *Osborn* v. *United States Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270.

And in *In re Tyler*, 149 U. S. 164, 190, the Chief Justice, referring to the review in *Pennoyer* v. *McConnaughy* of previous cases, said: "The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain, legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State." In the recent case of *Scott* v. *Donald*, 165 U. S. 58, 68, the principle was again announced, Mr. Justice Shiras delivering the opinion, that a suit against individuals, "who claim to act as officers of a State, and, under color of an unconstitutional statute, com-

mit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, is not, within the meaning of the Constitution, an action against the State."

The adjudged cases, in principle, determine the one before us. The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf. We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States* v. *Peters*, 5 Cranch, 115, 139: "It certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the Government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the State, nor one in which the plaintiff seeks to compel the specific performance by the State of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the State. Nor is it one, like *Cunningham* v. *Macon & Brunswick Railroad*, above cited, in which the plaintiff seeks to enforce a lien upon real estate in the actual possession of and claimed by the State, where a decree of sale would be fruitless, as no title could be given to the purchaser without the presence of the State as a party to the proceeding. It is a suit against individuals — a case in which the plaintiff seeks merely the possession of certain real estate once belonging to the State, but which the complaint alleges has become his property, and which, according to the verdict of the jury and the judgment of the court thereon must, on this record,

be taken to belong absolutely to him. The withholding of such possession by defendants is consequently a wrong, but a wrong which, according to the view of counsel, cannot be remedied if the defendants chose to *assert* that the State, by them as its agents, is in rightful possession. The doors of the courts of justice are thus closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State. But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State. Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated. It is true that even in such a case the citizen may, if he choose, rely upon the good faith of the State in the matter of compensation. But he is not compelled to part with his property for public use except upon the terms prescribed

by the supreme law of the land, namely, upon just compensation made or secured.

It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim. It was insisted in *United States* v. *Lee*, in support of the contention there made, that a judgment in favor of Lee against the persons who, as agents of the United States, held possession of Arlington would be in effect a judgment against the United States. But this court said: "Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr* v. *United States*, 98 U. S. 433, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the

United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution." 106 U. S. 222.

We are of opinion that this suit is not one against the State within the meaning of the Eleventh Amendment; and as the record before us shows that the plaintiff owns the premises and is entitled to possession as against the defendants, the judgment must be

Affirmed.

UNITED STATES *v.* AMERICAN BELL TELEPHONE COMPANY.

APPEAL FROM THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 344. Argued November 9, 10, 11, 1896. — Decided May 10, 1897.

If an application has been made for a patent for an invention, and the applicant has once called for action, he cannot be deprived of any benefits which flow from the ultimate action of the tribunal, although that tribunal may unnecessarily, negligently or even wantonly, if that supposition were admissible, delay its judgment.

Maxwell Land Grant case, 121 U. S. 325, affirmed and followed to the point that a suit between individuals to set aside an instrument for fraud can only be sustained when the testimony in respect to the fraud is clear, unequivocal and convincing, and cannot be done upon a bare preponderance of evidence which leaves the issue in doubt; and that if this be the settled rule in respect to suits between individuals it is much more so when the Government attempts to set aside its solemn patent: and if this is true when the suit is to set aside a patent for land, which conveys for all time the title, *a fortiori* it must be true when the suit is one to set aside a patent for an invention which only grants a temporary right.

The case which the counsel for appellant presents may be summed up in these words: The application for this patent was duly filed. The Patent Office after the filing had full jurisdiction over the procedure; the applicant had no control over its action. We have been unable to offer a syllable of testimony tending to show that the applicant ever in any way corrupted or attempted to corrupt any of the officials of the department.

Syllabus.

We have been unable to show that any delay or postponement was made at the instance or on the suggestion of the applicant. Every communication that it made during those years carried with it a request for action, yet because the delay has resulted in enlarged profits to the applicant, and the fact that it would so result ought to have been known to it, it must be assumed that in some way it did cause the delay, and having so caused the delay ought to suffer therefor. There is seldom presented a case in which there is such an absolute and total failure of proof of wrong.

Before the Government is entitled to a decree cancelling a patent for an invention on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing and satisfactory.

Congress has established a department with officials selected by the Government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and entrusted the entire management of affairs of the department to those officials; and when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of the officials, or through his inducement, or at his instance: and proof that they were in fault, that they acted unwisely, unreasonably, and even that they were culpably dilatory, casts no blame on him and abridges none of his rights.

The evidence in this case does not in the least degree tend to show any corruption by the applicant of any of the officials of the department, or any undue or improper influence exerted or attempted to be exerted by it upon them, and on the other hand does affirmatively show that it urged promptness on the part of the officials of the department, and that the delay was the result of the action of those officials.

If the circumstances do not make it clear that this delay on the part of the officials was wholly justified they do show that it was not wholly unwarranted, and that there were reasons for the action of such officials, which at least deserve consideration and cannot be condemned as trivial.

It is unnecessary to determine whether there are two separate inventions in the transmitter and the receiver, or whether the patent of 1891 is for an invention which was covered by the patent of 1880; as the judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit.

Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual; in

Statement of the Case.

the former cases it has all the privileges and rights of a sovereign, the statutes of limitation do not run against it, the laches of its own officials does not debar its right; but when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants.

In establishing the Patent Office, Congress created a tribunal to pass upon all questions of novelty and utility, and it gave to that office exclusive jurisdiction in the first instance, and specifically provided under what circumstances its decisions might be reviewed, either collaterally or by appeal; and when Congress has thus created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals.

On February 1, 1893, the United States filed in the Circuit Court of the United States in and for the District of Massachusetts a bill in equity against the American Bell Telephone Company and Emile Berliner, praying a decree to set aside and cancel patent No. 463,569, issued on November 17, 1891, to the telephone company, as assignee of Berliner. Upon amended pleadings and proofs the Circuit Court on January 3, 1895, 65 Fed. Rep. 86, entered a decree as prayed for. On appeal to the Court of Appeals for the First Circuit this decree was on May 18, 1895, reversed, and a decree entered directing a dismissal of the bill. 33 U. S. App. 236. Thereupon the United States took an appeal to this court. A motion was made to dismiss the appeal for want of jurisdiction, which was denied, 159 U. S. 548, and the case was argued upon the merits.

As stated by counsel for the appellant, four grounds for relief were presented and discussed in the Circuit Court. Those grounds are:

"1. That the delay of the application in the office for thirteen years was, under the circumstances alleged in the bill, unlawful and fraudulent.

"2. That a patent, issued November 2, 1880, upon a division of the original application, covers the same invention as

that covered by the patent in suit, and exhausted the power of the Commissioner as to that invention.

"3. That the patent is not for the same invention which was described in the application as filed.

"4. That, taking the application to date from the time when it was made by amendment to cover the invention described and claimed in the patent as issued, it was barred by public use for more than two years."

By that court only the first two were considered, and the argument in the Court of Appeals was confined to those questions.

Mr. Robert S. Taylor and *Mr. Causten Browne* for appellants. Mr. Attorney General was on their brief. *Mr. Charles H. Aldrich* also filed a brief for appellants.

It was contended in the briefs and in argument; (*a*) that the Berliner patent was void by reason of the delay in the Patent Office, which was in the nature of a fraud on the public; (*b*) that it was void by reason of the Berliner patent of November 2, 1880; (*c*) that it was void because the application of June 4, 1877, did not describe the constant-contact transmitter; (*d*) that it was void because of irregularities in the Patent Office, aside from questions of delay; (*e*) that it was void because the process and apparatus claimed were a part of Bell's invention, disclosed in patent No. 174,465 of March 7, 1876. As to point (*a*) appellants' counsel said, in addition to other things quoted in the opinion, *post:*

The delay in the office is the great fact in the case. It determined the bringing of the suit, stands in the forefront of the bill, was the principal question argued in both courts below, and occupies the chief space in the decisions rendered. It is not set up as laches, nor as a ground of forfeiture under any provision of the law or rule of the Patent Office, but as a course of conduct in the nature of fraud on the public. The effect of this delay as a question of law is the first point to be considered. The facts necessary to present the question may be stated very briefly as follows:

In 1878, the Bell Company, under patents to Bell and others, was just entering upon that splendid exploitation of the art of telephony which has since challenged the admiration of the world. The transmission of speech in that way requires the use of two instruments: the first, — the transmitter, into which the speaker talks, and the second, the receiver, at which the hearer listens. Mr. Bell's patent of 1876 described an instrument which could be used interchangeably for either of these purposes. In 1878 Mr. Edison and Mr. Blake produced transmitters, both unlike Bell's, and differing from each other in detail, but operating on the same general principle. They both belonged to the class of transmitters called microphones, the distinguishing feature of which is that the undulations of the electrical current by means of which the sonorous vibrations of the air in the transmitter are caused to be reproduced in the receiver, are caused by variations of pressure between two electrodes remaining constantly in contact, which variations of pressure are caused by the vibrations of the diaphragm of the transmitter in the manner described in Berliner's specification. The Bell Company acquired the title to both these inventions, the latter immediately upon its production, and the former in 1879; and afterwards used the microphone exclusively, or practically so, in all its great and expanding business. No other transmitter yet produced compares with it in practical utility and value.

In November, 1891, the public were astonished to learn that a patent had just been issued to the Bell Company, covering in the broadest possible terms the identical microphone transmitter for which they had been paying rentals for thirteen years, under which new patent it would be entitled to exact a continuance of the same rentals for the same instrument for seventeen years longer.

An examination of the files in the Patent Office, then for the first time accessible to the public, showed that the application for this patent had been filed by Emile Berliner, June 4, 1877, and had become the property of the Bell Company in 1878, and had been controlled by that company to the time

of its issue. It was the extraordinary delay in the issue of the patent, the application being all the time under the control of the Bell Company, coupled with the manifest interest of that company to prolong its monopoly by means of that delay, and the evidence found in the record that it had yielded to that temptation, and the wrong done to the public by the issue of the patent after such delay, that led to the bringing of the suit. With these facts were also alleged in the bill other facts of which counsel had information at the time it was drawn, which appeared to impugn the validity of the patent.

Was this long delay in the issue of the patent an injury to the public? Was it a violation of any duty imposed by law, either statutory or unwritten? These questions must be answered by reference to the nature of a patent for invention, and the rights, duties and obligations of the parties to it.

A patent is a grant upon a consideration. It is in substance a contract. The essence of the contract is that the inventor shall first have the exclusive enjoyment of the invention for a stated period, and that after that the public shall have it. The contract is executed on the part of the public by the issue of the patent; on the part of the inventor by placing on the records of the Patent Office such full and complete description of the invention as will enable the people to use it when his monopoly expires.

The thing which the public pay for in submitting to the monopoly created by a patent is the free enjoyment of the invention after the patent expires. If this means anything, it is the use of the machine or thing or process in which the invention is embodied, not the possession of a piece of paper, nor to have accessible the scientific or other information contained in the specification. To deny to the public this free use of the invention to which it has become entitled under the contract is to take away from it a thing of value which it has bought and paid for.

A second patent covering the same thing has this effect. It deprives the public of the consideration which it was to receive for being excluded from the free use of the thing during the life of the first patent.

Nevertheless, as our patent laws stand, this may sometimes occur. A single machine or thing may have embodied in it more than one invention. These inventions may be the work of different inventors, or of the same inventor at different times, and each entitled to a patent, — one as justly and clearly as the other. And the patents so issued at different times may each confer a monopoly of the use of the thing. In such a case the people are excluded from the free use of the thing until the expiration of both patents.

In the present case Mr. Bell's patent of 1876 covered broadly the process of transmitting sound by means of an undulatory electric current, as distinguished from an interrupted or broken current, no matter how produced. His patent showed a transmitter capable of producing such a current, but so feebly that its use was limited to short distances. Afterwards Mr. Berliner discovered, we will say, that the undulatory current necessary to transmit speech can be produced by means of another form of transmitter, — one operating by variation of pressure between its electrodes at their point of contact. But as the only function of the instrument was to produce an undulatory current, and as the use of that current, however produced, was covered by Mr. Bell's invention, it follows that the instrument was subject to two independent monopolies.

Later, we will say, Mr. Edison discovered that the use of carbon as the material for the construction of the electrodes of the Berliner transmitter gave to that instrument a greatly increased power and reach of operation. Later still Mr. Blake devised a particular combination of carbon and metallic electrodes, with mechanism for their mounting, which secured an improved ease and permanence of adjustment and superior adaptation to common use. Mr. Bell hit upon the true principle, in relation to the kind of current to be employed, and was justly entitled to a patent for it, although the range of his transmitter may have been but a few hundred feet. Mr. Berliner, we will say, hit upon the true principle underlying the operation of the microphone, and was entitled to his patent, although the mechanism he used in the embodi-

ment of his thought was so unstable in its adjustment as to make it of uncertain value. The inventions of Mr. Edison and Mr. Blake completed the instrument, and made possible the talking telephone in every man's house, the city exchange, and the long-distance line from city to city.

It thus happened that the Blake transmitter introduced into public use by the Bell Company in 1878, and familiar to us all, was the embodiment in one piece of mechanism, and its use of four distinct inventions made by four different men. That company was the owner of all the inventions. For Mr. Bell's invention it held patents issued in 1876 and 1877; for Mr. Blake's, patents were issued in 1881; and for the others, applications were on file subject to its control.

Mr. Bell's invention was one of the first rank, — nothing less than the discovery of a new law of nature. Mr. Berliner's invention was a beautiful intellectual conception of a mode of operation. Mr. Edison's was the discovery of a new property of carbon. Mr. Blake's was an ingenious and a practical utilization of the three. Mr. Bell's invention lies at the foundation of the art of telephony. Mr. Edison's and Mr. Blake's have done more to make the art of practical value than all others following Bell.

We assume that it was not possible to take out patents for all these inventions at the same time. And so far as that was not possible, the overlapping and prolongation of the monopolies created by the patents in the use of the carbon microphone could not be avoided without denying to some one or more of the inventors his right under the law. But does it follow that the Bell Company was entitled of right to hold control of the microphone under the broad claims of the Bell patent and the construction and combination claims of the Blake patents, and nurse the applications for the other inventions in the office, taking out a patent on Berliner's just in time to overlap Bell's, and on Edison's in time to overlap Berliner, and so secure a monopoly on the same transmitter used in the same way to produce the same result for three times the period fixed by the statute for the duration of a patent?

It needs no lawyer's argument to make manifest the inherent moral wrongfulness of such a proceeding toward the public. Every right-minded man will feel it instinctively. Would it be a legal wrong?

It is assumed in this case that such a result would be contrary to the spirit and intent of the patent law. That is one of the postulates of the bill. The statute deals in terms with one invention and one patent at a time. It is its plain purpose that the patentee shall enjoy first his monopoly in the thing in which his invention is embodied, — the machine, instrument, manufacture or process which can be sold, rented or used with pecuniary profit, — and that at the expiration of the term of the patent the public shall enter freely into the same enjoyment of *that same thing.* It does not affect the validity of this assumption that, in the practical administration of the business, the prolongation of monopolies in the way pointed out may occur sometimes and to some extent. They are the unintended results of the operation of the law, contrary to its general spirit and intent.

Whether such results were not foreseen by Congress, or being foreseen were regarded as unavoidable, does not matter. The fact that the machinery of the law is not always adequate to the perfect attainment of its intent is no reason why the intent shall be denied or disregarded.

That is to say, if, under the circumstances of a particular case, the public cannot have the free enjoyment of an invention upon the expiration of a patent which has given the exclusive enjoyment of it to a patentee, because rights have supervened under another patent, the intent of the law still requires that each deprivation shall be for the *shortest time consistent with the rights of the second patentee.*

Hence a man who is enjoying a monopoly under one patent, and is at the same time prosecuting an application for another patent which will give him a monopoly of the same thing for a further period, *is bound to speed his application.*

That obligation is an entirely different thing from the duty of applicants generally to use diligence. It is a special equitable obligation growing out of the special circumstances

under which that application is prosecuted. It has no relation whatever to the regulations and rules provided for the transaction of business between applicants and the office. It arises independently of the statutes and the rules. It would exist exactly as it exists now if there were neither statute nor rules fixing any limitation of time in respect to filing an application, or the steps in its prosecution.

To put the very case assumed in the last sentence, let us suppose that the patent statute consisted of one section authorizing the Commissioner to grant a patent for a term of seventeen years upon a verified application, but containing no other limitation of time as to any part of the business. A citizen holding one patent makes application for another covering the same thing in some other aspect, say as to its construction, material or mode of operation. His application is allowed, and wants only the payment of a final fee to be issued. The clerk in whose custody it is sticks it in a pigeon-hole, and there it remains for ten years, at the end of which time the patent issues. The public, in the meantime, know nothing of the second application, and pay the tribute exacted under the first patent, in the expectation of the free use of the thing therein described at its expiration. The applicant knows all the facts, and, for the express purpose of procuring a prolongation of his monopoly, lets his application sleep in its pigeon-hole year after year, taking out a patent upon it just in time to overlap the first patent.

That is this case stripped bare. The Court of Appeals for the First Circuit held that the eye of a chancellor can see nothing wrong in such a transaction. We say that such a proceeding would be a violation of the spirit and intent of the law, a fraud upon it, a prostitution of it; and all this notwithstanding it would fulfil every vowel and consonant of its letter.

All these propositions seem to us to have a just foundation in the essential nature of the transaction between a patentee and the public. They are the equitable incidents of the contract or grant, or whatever it may be called. They flow naturally and logically from a fair consideration of the purpose, spirit and intent of the patent statutes.

But they may be rested equally well upon a deeper and broader foundation. When a man goes into the Patent Office as an applicant he does not leave behind him the equitable obligations toward his fellows which attach to him in other relations of life. They follow him there, and he is answerable there as elsewhere for the just discharge of them. Among the maxims which define those obligations, none is of higher authority or wider application than that golden rule of the law, *Sic utere tuo ut alienum non lædas.* Let every man use his own so as not to interfere in any way or degree which he can avoid with the enjoyment by his neighbor of that which is his.

In buying and prosecuting Berliner's application the Bell Company was pursuing its lawful right; but it was bound to pursue that right in such a manner as not to trespass upon the rights of others, or subject others to injury in any way or degree which it was possible to avoid. This duty it could only discharge by speeding its application, and so reducing as far as possible that prolongation of its monopoly of the microphone which must result from the grant of its patent.

We shall be told that there is no precedent for this suit. But there is certainly a precedent for the repeal of a patent obtained by fraud upon the Commissioner, and through him upon the public, which is the ultimate subject of and sufferer from the fraud; and the real question is, whether such circumstances as we have alleged to be the circumstances of the obtaining of this Berliner patent constitute a fraud upon the public.

We need not look for any precedent of such a question as that. Fraud is never-ending in the variety of its forms. And the crowning honor of equity is that no form imposes upon it when the substance of the transaction is fraudulent. Some of the greatest judgments in the history of the law have been those in which its capacity for extension by construction to meet new forms of wrong has been asserted, illustrated and applied.

The wrong here alleged is a new one. But it wants for its correction no newly made law; only another, — scarcely a

new, application of old and settled principles. In the nature of things, there must always be around the area of the familiar and specifically settled law a zone of debatable ground. Within this territory the real battles of the law are fought and its great decisions made, the question always being, Do the old principles by fair and logical interpretation and extension cover the new case?

There is a class of decisions outside the field of patent law to which this case has a logical, though in some respects a remote, relationship. We refer to those decisions which deal with the duties of men who have voluntarily placed themselves in situations in which the pursuit of their own interests draws them into antagonism to the interests of others over which they have control. The most familiar illustration of this situation is that of a trustee dealing in his own interest with the business of his *cestui que trust.* Such a relationship not only puts upon the trustee a duty of the highest obligation, but puts upon him a burden of the gravest character when his proceedings become the subject of legal investigation. When a trustee has kept his own affairs free from entanglement with those of his *cestui que trust*, he is entitled to the full benefit of the presumption that his purpose has been to discharge his duty honestly and faithfully. But when it appears that he has dealt with the trust fund or property in his own interest, and with a result of profit to himself and loss to his *cestui*, a very different case is presented, and very different presumptions obtain.

Emphatic objection was taken to this line of argument upon the hearing below. There was even a sort of complaint entered against the law itself in the remark of counsel in argument that "there has been manifest in late years a tendency in the law to transform all obligations into trusts"; in criticism of which was cited a paragraph from an opinion of Lord Westbury, quoting Lord Mansfield's famous epigram that "nothing in law is so apt to mislead as a metaphor."

That the tendency complained of exists is true. But it is not because the courts have been misled by metaphors. It is because they are progressively holding men to higher and

higher ethical standards. There is no noun in the language which broadly and aptly designates one who owes a legal duty to another. The word "trustee" comes nearest to it. And where the duty grows out of the possession or control of property, the analogy is so close that it is not misleading, but helpful. In some cases in which the word is used, we might doubtless have a better one; which illustrates the remark of De Tocqueville that it is easier to invent new things than new names for them.

That the Bell Company occupied the relation of trustee toward the public in any *technical* sense is not claimed. But it had valuable rights of the public within its control. As the owner of the Berliner application, it was intending to, and upon the hypothesis upon which we are now proceeding was entitled to, take out a patent which would exclude the public from the free use of the microphone after the time arrived when it would otherwise be entitled to it. The control of the application was largely in its own hands. It could speed it or delay it. To the extent to which it could thus determine the date of issue of its patent, it had the right — the property right — of the public under its control. Such control was entrusted to it by the law for the benefit of the public as well as itself. Its duty lay in one direction, its interest in the other. It is to this extent that we suggest an analogy between the situation of the Bell Company and that of a trustee who has profited at the expense of his *cestui que trust.* And to this extent the analogy is fair and the precedents are helpful.

In the same category belong many cases falling under the head of public policy, also cases holding men to fair dealing in relations of mutual confidence, employer and employé, principal and agent, fellow-stockholders in a corporation, fellow-property owners in a city, fellow-subscribers to a paper, and the like. We need not cite them. Their general scope and character are familiar.

The great question is, *was there a duty?* The appellees say, in answer to the charge of delay in the bill, that the patent was issued in accordance with the statute and rules. We

reply that that was not enough; that over and above the mint, anise and cumin of the law lay the weightier obligation of justice toward all; that a binding duty *dehors* the letter of the law was violated. The appellees rejoin that no such obligation existed. So the Court of Appeals held.

Ought the fact that the terms of the statute and the rules were complied with to close the inquiry? Does the law know no obligations respecting statutory proceedings except statutory obligations? Is all that a man can make out of the government, or out of the people through the government, lawful game so long as he keeps the letter of the law?

These questions reach far beyond the confines of this case. How to keep the letter of the law is one of the fine arts of our time. The promoters of trusts, combines and all the countless schemes organized for the plunder of society are adepts in that art. Such an issue ought not to be decided against the people until all precedents and analogies have been searched and all fair reasonings tested.

The existence of a duty once established, all else follows easily. The measure of the diligence which it requires grows out of the circumstances. The importance of the interests involved, and the gravity of the consequences likely to occur from a neglect of it, enter into it, as in every case where diligence is an element of duty towards others.

Mr. James McNaught and *Mr. Joseph D. Redding* by leave of court filed a brief on behalf of the Standard Telephone Company in support of the appellants.

Mr. Joseph H. Choate and *Mr. Frederick P. Fish* for appellees. *Mr. James J. Storrow*, *Mr. W. W. Swan* and *Mr. W. K. Richardson* were on their brief.

Mr. Justice Brewer, after making the above statement, delivered the opinion of the court.

This is a suit by the United States to set aside a patent for an invention as wrongfully issued. It is, we believe, the first

case in this court in which upon proofs such an application has been presented. The right of the United States to maintain such a suit was affirmed in *United States* v. *American Bell Telephone Co.*, 128 U. S. 315. The question now is whether upon the facts disclosed in this record the relief prayed for ought to be awarded. It becomes, therefore, a matter of moment to determine under what circumstances and upon what conditions the United States are entitled to have a patent issued in due course of law set aside and cancelled.

Many cases have come to this court, in which patents for lands have been sought to be set aside, and the rules controlling such suits have been frequently considered. Such decisions will naturally throw light upon the question here presented, though before adverting to them it may be well to note the difference between patents for land and patents for inventions. While the same term is used, the same grantor is in each, and although each vests in the patentee certain rights, yet they are not in all things alike. The patent for land is a conveyance to an individual of that which is the absolute property of the Government and to which, but for the conveyance, the individual would have no right or title. It is a transfer of tangible property; of property in existence before the right is conveyed; of property which the Government has the full right to dispose of as it sees fit, and may retain to itself or convey to one individual or another; and it creates a title which lasts for all time. On the other hand, the patent for an invention is not a conveyance of something which the Government owns. It does not convey that which, but for the conveyance, the Government could use and dispose of as it sees fit, and to which no one save the Government has any right or title except for the conveyance. But for the patent the thing patented is open to the use of any one. Were it not for this patent any one would have the right to manufacture and use the Berliner transmitter. It was not something which belonged to the Government before Berliner invented it. It was open to the manufacture and use of any one, and any one who knew how could contrive, manufacture and use the instrument. It conveyed to Berliner, so far as

respects rights in the instrument itself, nothing that he did not have theretofore. The only effect of it was to restrain others from manufacturing and using that which he invented. After his invention he could have kept the discovery secret to himself. He need not have disclosed it to any one. But in order to induce him to make that invention public, to give all a share in the benefits resulting from such an invention, Congress, by its legislation, made in pursuance of the Constitution, has guaranteed to him an exclusive right to it for a limited time; and the purpose of the patent is to protect him in this monopoly, not to give him a use which, save for the patent, he did not have before, but only to separate to him an exclusive use. The Government parted with nothing by the patent. It lost no property. Its possessions were not diminished. The patentee, so far as a personal use is concerned, received nothing which he did not have without the patent, and the monopoly which he did receive is only for a few years. So the Government may well insist that it has higher rights in a suit to set aside a patent for land than it has in a suit to set aside a patent for an invention. There are weightier reasons why the Government should not be permanently deprived of its property through fraudulent representations or other wrongful means, than there are for questioning the validity of a temporary monopoly or depriving an individual of the exclusive use for a limited time of that whose actual use he claims to have made possible, and which, after such time, will be open and free to all. Bearing in mind this distinction, let us inquire upon what conditions the Government may maintain a suit to set aside a patent for land.

These suits may be conveniently grouped in three classes: First, where, the Government being the only party interested, the patent is charged to have been obtained by fraud in representations or conduct. Second, where the land by appropriate reservation is not subject to patent, but is, nevertheless, erroneously patented. Third, where the land, though subject to patent in the ordinary administration of the land office, is patented to the wrong person either through fraud or by reason of mistake or inadvertence. In the first class are the fol-

lowing cases: *United States* v. *Hughes*, 11 How. 552; *United States* v. *Throckmorton*, 98 U. S. 61; *United States* v. *Atherton*, 102 U. S. 372; *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233; *Maxwell Land Grant case*, 121 U. S. 325; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673; *United States* v. *Hancock*, 133 U. S. 193; *United States* v. *Trinidad Coal & Coking Co.*, 137 U. S. 160; *United States* v. *Budd*, 144 U. S. 154; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120; — In the second are these: *United States* v. *Stone*, 2 Wall. 525; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *McLaughlin* v. *United States*, 107 U. S. 526; *Western Pacific Railroad* v. *United States*, 108 U. S. 510; *Mullan* v. *United States*, 118 U. S. 271; — and in the third the following: *Hughes* v. *United States*, 4 Wall. 232; *United States* v. *Beebe*, 127 U. S. 338; *United States* v. *Marshall Mining Co.*, 129 U. S. 579; *United States* v. *Missouri, Kansas &c. Railway*, 141 U. S. 358; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570.

The second and third classes are not paralleled in this case, for it is not claimed that there was no invention, or that the patent issued to the wrong party. The decisions in those classes need not be considered. The first class comprises all cases in which the land, though subject to patent and therefore within the jurisdiction of the land department, was charged to have been patented in consequence of fraudulent representations or conduct on the part of the patentee. The representations may have been as to the matter of right or the matter of quantity. The patentee may have been entitled to no land, or to less, or a different tract than that patented. In any event, fraud was the basis of the relief sought, and as fraud actual or constructive in the issue of the patent is the burden of this suit, we will quote from the opinions in some of these cases. In the *Maxwell Land Grant case*, Mr. Justice Miller, delivering the opinion of the court, said (p. 381):

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a

written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

In *Colorado Coal Co.* v. *United States*, Mr. Justice Matthews, after quoting part of the foregoing, adds (p. 317):

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is,

indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: 'When the negative ceases to be a simple one — when it is qualified by time, place or circumstance — much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.'"

Then, after quotations from many authorities, the learned Justice closes the discussion with these words from 1 Greenleaf on Evidence, sec. 80:

"So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In *United States* v. *Marshall Mining Company*, Mr. Justice Miller again refers to this matter, saying (p. 589):

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

With these declarations of the law controlling such cases we proceed to consider that which, according to the brief of counsel for the Government, is the principal matter in this case. We quote their words:

"The delay in the office is the great fact in the case. It determined the bringing of the suit, stands in the forefront of the bill, was the principal question argued in both courts below, and occupies the chief space in the decisions rendered. It is not set up as laches, nor as a ground of forfeiture under any provision of the law or rule of the Patent Office, but as a course of conduct in the nature of fraud on the public."

What was the delay in this case? The application by Berliner was made on June 4, 1877, he having filed a caveat on April 14, 1877. In 1878, and prior to October 23, the telephone company purchased Berliner's invention, and on November 17, 1891, a patent was issued to the telephone company, as assignee of Berliner. The application was, therefore, pending in the department fourteen years, during thirteen of which the invention was the property of the telephone company. The effect of this, it is said, is to prolong for all practical purposes the telephone monopoly during the lifetime of this patent; and in this way: On March 7, 1876, patent No. 174,465 was issued to Alexander Graham Bell, in which patent, as alleged in the bill and admitted in the answer, were described and claimed "a method of and apparatus for transmitting sound by means of an undulatory current of electricity." This was the original telephone patent. And it signified that Bell invented the telephone. That patent has expired and all the monopoly which attaches to it alone has ceased, and the right to use that invention has become public property. But while he invented the telephone, the apparatus he devised was inefficient for public uses. Berliner invented something by which, taken in connection with Edison's and Blake's inventions, Bell's undulatory current could be made practically available for carrying on conversation at long distances. In other words, the telephone, as we use it — that which has become such an important factor in the commercial and social life of to-day — does not embody simply the invention of Bell, but also those of Edison, Blake and Berliner. So that while the public has to-day, by reason of the expiration of the Bell patent, the right to use as it pleases his invention, such right is a barren one, and the telephone monopoly is practically extended to the termination of the Berliner patent. And this extension of the time of the monopoly has been accomplished by means of the delay in the issue of the Berliner patent, the long pendency of the application in the Patent Office. In order that the contention of the Government may be clearly presented, and in view of the importance of this question, we may properly quote at some length from the brief of counsel:

"In the present case Mr. Bell's patent of 1876 covered broadly the process of transmitting sound by means of an undulatory electric current, as distinguished from an interrupted or broken current, no matter how produced. His patent showed a transmitter capable of producing such a current, but so feebly that its use was limited to short distances. Afterwards Mr. Berliner discovered, we will say, that the undulatory current necessary to transmit speech can be produced by means of another form of transmitter — one operating by variation of pressure between its electrodes at their point of contact. But as the only function of the instrument was to produce an undulatory current, and as the use of that current, however produced, was covered by Mr. Bell's invention, it follows that the instrument was subject to two independent monopolies.

"Later, we will say, Mr. Edison discovered that the use of carbon as the material for the construction of the electrodes of the Berliner transmitter gave to that instrument a greatly increased power and reach of operation. Later still Mr. Blake devised a particular combination of carbon and metallic electrodes, with mechanism for their mounting, which secured an improved ease and permanence of adjustment and superior adaptation to common use. Mr. Bell hit upon the true principle, in relation to the kind of current to be employed, and was justly entitled to a patent for it, although the range of his transmitter may have been but a few hundred feet. Mr. Berliner, we will say, hit upon the true principle underlying the operation of the microphone, and was entitled to his patent, although the mechanism he used in the embodiment of his thought was so unstable in its adjustment as to make it of uncertain value. The inventions of Mr. Edison and Mr. Blake completed the instrument, and made possible the talking telephone in every man's house, the city exchange and the long-distance line from city to city.

"It thus happened that the Blake transmitter introduced into public use by the Bell Company in 1878, and familiar to us all, was the embodiment in one piece of mechanism and its use of four distinct inventions made by four different men.

That company was the owner of all the inventions. For Mr. Bell's invention it held patents issued in 1876 and 1877; for Mr. Blake's, patents were issued in 1881; and for the others, applications were on file subject to its control.

"Mr. Bell's invention was one of the first rank — nothing less than the discovery of a new law of nature. Mr. Berliner's invention was a beautiful intellectual conception of a mode of operation. Mr. Edison's was the discovery of a new property of carbon. Mr. Blake's was an ingenious and a practical utilization of the three. Mr. Bell's invention lies at the foundation of the art of telephony. Mr. Edison's and Mr. Blake's have done more to make the art of practical value than all others following Mr. Bell.

"We assume that it was not possible to take out patents for all these inventions at the same time. And so far as that was not possible, the overlapping and prolongation of the monopolies created by the patents in the use of the carbon microphone could not be avoided without denying to some one or more of the inventors his rights under the law. But does it follow that the Bell Company was entitled of right to hold control of the microphone under the broad claims of the Bell patent and the construction and combination claims of the Blake patents, and nurse the applications for the other inventions in the office, taking out a patent on Berliner's just in time to overlap Bell's, and on Edison's in time to overlap Berliner, and so secure a monopoly on the same transmitter used in the same way to produce the same result for three times the period fixed by the statute for the duration of a patent?

"It needs no lawyer's argument to make manifest the inherent moral wrongfulness of such a proceeding toward the public. Every right-minded man will feel it instinctively. Would it be a legal wrong?"

After discussing the injury to the public which results from the conduct described, they add:

"Hence a man who is enjoying a monopoly of a thing under one patent, and is at the same time prosecuting an application for another patent which will give him a monopoly of

the same thing for a further period, is bound to speed his application."

It will be perceived that it is conceded that some delay is unavoidable. In the very nature of things that is so. It is not possible that an application for a patent can be considered and determined on the instant. So it is not the fact, but the excessiveness of the delay of which complaint is made. The mere fact of delay does not, therefore, operate to deprive the inventor of his legal rights. Before he can be punished it must be shown that he has been guilty of a wrong — that he has caused the delay. It matters not whether the delay be reasonable or unreasonable, for a brief time or for many years, if the applicant is not responsible for it. Whatever may be the injury to the public, if the delay is caused solely through the negligence or inattention of the tribunal before which the application is pending, it is something for which the applicant is not responsible, and which does not affect his legal rights. There is often great delay in suits in the courts. Cases not infrequently are argued before the highest courts and not decided by them for weeks and sometimes for years. Whatever effect such delay may have upon the interests of others or of the public, so long as it results from the mere non-action of the courts, the rights of the suitor are unaffected. He cannot be punished on account of the delay of the tribunal before which he is presenting his suit.

Neither can a party pursuing a strictly legal remedy be adjudged in the wrong if he acts within the time allowed, and pursues the method prescribed by the statute. If the statute gives him five years within which to bring an action on a note he cannot be denied relief simply because he waits four years and eleven months. If he has two years after a judgment against him within which to take an appeal he may wait until the last day of the two years. Under section 4886, Rev. Stat., an inventor has two years from the time his invention is disclosed to the public within which to make his application, and unless an abandonment is shown during that time he is entitled to a patent, and the patent runs as any other patent for seventeen years from its date. He can-

not be deprived of this right by proof that if he had filed his application immediately after the invention the patent would have been issued two years earlier than it was, and the public therefore would have come into possession of the free use of the invention two years sooner. The statute has given this right, and no consideration of public benefit can take it from him. His right exists because Congress has declared that it should. It will not do to say that, because Congress has declared that seventeen years is the life of a patent, seventeen years is the limit of the possible monopoly; for the same legislation that gives seventeen years as the life of a patent gives two years within which an application for a patent may be made, and during that time, as well as while the application is pending in the department, the applicant has practically, if not legally, an exclusive use. A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.

And in this connection it is also well to notice these facts: Sec. 4888, Rev. Stat., requires an inventor to make application in writing to the Commissioner of Patents. That and the two or three succeeding sections prescribe what the application shall state, and by what it shall be accompanied. Section 4893 provides that on the filing of the application and the payment of fees "the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor." Section 4894 reads:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the appli-

cant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Certain rules of procedure have been prescribed by the Commissioner of Patents, and a certain routine of practice has become established in that department. Now, all these matters of statutory enactment, rules of procedure and routine of practice, are things over which an applicant has no control. When he has once filed his application, complying with the statutory requirements, then the Patent Office takes possession of the matter. It determines when and how it will act, and the applicant can only ask and wait.

And why should he be called upon to do more? He comes before the tribunal which the Government has established and presents his application. Why should the validity of the grant which that tribunal finally makes depend in any degree upon the number of times he has repeated his application? The true rule is that if application has been made and the applicant has once called for action, he cannot be deprived of any benefits which flow from the ultimate action of the tribunal, although that tribunal may unnecessarily, negligently or even wantonly, if that supposition were admissible, delay its judgment. If the public is interested in prompt action, if the Government which represents the public thinks that more speed on the part of any of its tribunals is essential, it is the Government which is called upon to act, and the applicant may with propriety wait until either the tribunal has acted or until the Government, having regard for the public interest, has interfered to compel action. Accepting the statement of counsel as to the facts to be correct in all its fulness, consider what would have been the ruling of a court if an application had been made to it based upon those facts. Suppose the applicant had presented its petition for a mandamus to compel prompt action on the part of the patent officials and said, "I have applied for and am entitled to a patent. It will be issued after a while without any judicial

compulsion. I can make large profits if the Patent Office will be dilatory, and yet I ask a mandamus to compel its immediate action," would not the ruling have been, "By your own showing you are entitled to no relief; you have no cause of complaint; it is the Government, representing the public, which alone can complain"? And if it could obtain no assistance by a suit in advance, can it be punished indirectly by being deprived of that which was finally awarded to it?

Much is said in the briefs and in the arguments about the practical continuance of the telephone monopoly. It is well to understand exactly what is meant thereby. No one questions that the Bell patent has expired, and that all of his invention is free to the use of the public. It is not denied that Berliner's invention is something independent and distinct from the Bell invention. It is the combination of these inventions with those of Blake and Edison which makes the instrument in commercial use, and because this is the most serviceable it is the one that the public insists upon having. But each invention has independent rights. It loses nothing because when united with another it results in an instrument more valuable than either alone will give. Suppose that at the expiration of this Berliner patent some new invention shall be made by which in connection with those already free to the public an instrument can be manufactured far surpassing in utility that used to-day, and the Bell Company shall purchase that invention, the public, which always insists on having the best and most serviceable, will undoubtedly take the new instrument, and in that way it may happen that what is called the telephone monopoly is practically still further continued. But surely that does not abridge the legal rights of any one. The inventor of the latest addition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had. All that the patent law requires is that when a patent expires the invention covered by that patent shall be free to every one, and not that the public has the right to the use of any other invention, the patent for which has not expired, and which adds to the utility and advantage

of the instrument made as the result of the combined inventions.

Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor, occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention. He does not make the law. He does not determine the measure of his rights. The legislative body, representing the people, has declared what the public will give for the free use of that invention. He cannot be heard in the courts to say that it is of such value that he is entitled to a larger and longer monopoly; that he is not fully compensated, by the receipts during seventeen years, for the great benefit which his invention has bestowed. No representative of the public is at liberty to negotiate with him for a new and independent contract as to the terms and conditions upon which he will give up his invention. He must come under the dominion of the statute, and take that which the public has proffered its willingness to give. As the lawmaking power has prescribed what the public will give, specified the terms and conditions of purchase, indicated the time and methods of determining the right of compensation, he on his part has an absolute legal right to avail himself of all the provisions thus made. It is not of course doubted that the courts in construing the patent as all other statutes, must have regard to the spirit as well as the letter. That simply requires that courts shall ascertain their true meaning, but when that is ascertained the applicant for a patent is entitled to all the benefits which those statutes thus construed give.

What are the evidences of wrong in this matter of delay? It may have been caused either by the negligent or wrongful

action of the officers of the department, and without any connivance, assistance or concurrence on the part of the applicant, or it may have been brought about by the applicant, either through its corruption of the public officers, or through other misconduct on its part. If the fault is wholly that of the department, the applicant ought not to suffer therefor. While, on the other hand, if its conduct has been wrongful, it may and ought to suffer. There is no presumption against the applicant. If a tribunal charged with official action delays such action, whatever of presumption surrounds the delay attaches to the tribunal, and no evidence of wrong being given, the presumption would be that the delay was at the instance of the tribunal and not caused by the applicant. The Government, therefore, in order to make out its case, must affirmatively show that the delay has been caused in some way by the conduct of the applicant, and before its patent can be set aside the Government must, in accordance with the rules laid down in respect to land patents, establish that fact clearly. It may not rest on mere inferences, mere suggestions, but must prove the wrong in such a manner as to satisfy the judgment, before it can destroy that which its own agents have created. We reiterate what was said by Mr. Justice Miller, for the court, in the *Maxwell Land Grant case*, that a suit between individuals to set aside an instrument for fraud can only be sustained when the testimony in respect to the fraud is clear, unequivocal and convincing, and cannot be done upon a bare preponderance of evidence which leaves the issue in doubt; and that if this be the settled rule in respect to suits between individuals it is much more so when the Government attempts to set aside its solemn patent. And we may here again repeat that if this is true when the suit is to set aside a patent for land, which conveys for all time the title, *a fortiori* it must be true when the suit is one to set aside a patent for an invention which only grants a temporary right.

What evidence has the Government produced? We premise by saying that there is not a scintilla of testimony as to any corruption of the officers of the department by the defendants, or any attempt at such corruption. Counsel do not

put the finger on a single fact tending to show that any money was ever paid to any official of the Patent Office, or that any undue influence was ever attempted to be exerted upon or improper suggestion made to any one. So far as the record discloses, there never was an intimation made to a single official that he could profit in any way by a moment's delay. All thought of wrong in this respect may, therefore, be put aside. If there was no corruption on the part of the defendants, what did they do that calls for condemnation? And we turn to the brief of the learned counsel for the Government to see what evidences of wrong they have found in the record. After noting that their inquiry begins at June 9, 1882, thus impliedly conceding that there is no reason to question the delay up to that time (a period of five years), they call attention to the subsequent correspondence between the solicitor in charge of the application and the officials of the department, which, so far as is material, is as follows:

"On June 9, 1882, the examiner wrote to the solicitor as follows:

> 'As at present advised it is believed that the claims presented may be allowed, but final action in this case must be suspended in view of probable interferences with other pending applications, which will be declared as soon as practicable.'

"On October 8, 1883, sixteen months later, the solicitor wrote as follows:

> 'In June, 1882, I received an official letter dated the 9th of that month, saying that "the claims presented may be allowed, but final action is suspended in view of probable interferences." Since then I have been awaiting the official action. I beg to call attention to the case and ask that it may receive action.'

"October 23, 1883, the examiner wrote as follows:

> 'In response to applicant's letter filed October 9, 1883, it is stated that further action in this case on the part of the office must be still further postponed until the conditions of interfering applications will permit the declaration of interference, which seems unavoidable.'

"On February 19, 1886, two years and four months later, the solicitor wrote as follows:

'The specification is hereby amended as follows: Erase amendment O, filed December 16, 1881. Erase claims 3, 7, 8, 10 and 11, and change number of claims 4, 5, 6, 7 and 9 to 3, 4, 5, 6 and 76.'

"This amendment contained nothing material to the present discussion.

"March 17, 1886, the examiner wrote as follows:

'In response to amendment of February 19, 1886, applicant is advised that the broad claims involving the idea of a variable pressure contact telephone will probably be involved in an interference with a pending application or applications of another applicant, and that said applicant has been advised that he must show that the office action taken in the matter of his application is not a sufficient answer thereto on or before the 1st of April, 1886. In the meanwhile this application will be suspended from further action.'

"August 13, 1886, five months later, the solicitor wrote:

'I desire to be informed of the present status of this case, and to be advised if the office is awaiting any action on the part of the applicant. It is desired that no rights should be lost by inaction.'

"August 19, 1886, the examiner wrote as follows:

'In response to applicant's letter of the 13th inst. he is hereby advised that the delay in this case is a matter over which he has no control, except it be, perhaps, in the matter of urging an early interference. The interference will be declared as soon as the other applicants are in condition, if it be decided that they are entitled to the same. The office is awaiting no action on the part of the applicant, and the delay is through no fault of his.'"

After these quotations, counsel observe as follows:

"These perfunctory exchanges of compliments between the solicitor and the examiner occupied the entire time from June 9, 1882, to March 16, 1888, five years nine months and seven days. In all that time not a demand for action, not a hint

even of dissatisfaction, appears in the record. We have quoted it all. Of course, this appearance of willing acquiescence is not conclusive. The examiner's letters indicate an obstacle in the way; some portending interference or interferences, always coming, yet never arriving. But the supine submission of the company to such extraordinary delay, for such a cause, is the first item of the proof. If it had been possessed of a real purpose to have its patent as soon as possible, if it had been losing millions per annum for want of it, as the people are losing millions because of it, would it not have found some way to force this invisible foe into the field, or at least leave on the record some trace of its mighty effort to burst the bands of official routine which prevented it from finding and fighting him?"

This presents the burden of the case on the part of the Government. It amounts to only this: The defendant company was not active but passive. If millions were to be added to its profit by active effort it would have been importunate and have secured this patent long before it did. As millions came to it by reason of its being passive, it ought to suffer for its omission to be importunate. It must keep coming before the Commissioner, like the widow before the unjust judge in the parable, until it compels the declaration, "though I fear not God nor regard man, yet, because this widow troubleth me, I will avenge her, lest by her continual coming she weary me." But is this the rule to measure the conduct of those who apply for official action? What is the amount of the importunity which will afford protection to the grant finally obtained? How frequent must the demand be? It is easy to say that the applications of this defendant, coming only at the interval of months and years, were, taken with the replies of the Patent Office, mere "perfunctory exchanges of compliments," but this does not change the fact that action was asked and repeatedly asked; that no request was made for delay, no intimation that it was desired or would be acceptable.

In this connection may well be noticed the letter of the solicitor, in March, 1881, to the Commissioner, in which he urged the modification of Rule No. 94 in respect to interfer-

ences, and this in order to hasten the issue of the patent. In this letter, besides pointing out how the rule as it then existed would tend to delay, he adds these statements:

"So far as my client is concerned, I have to submit that it is of the utmost importance that the interference be declared forthwith. . . .

"The indefinite suspension of the interference would only create harassing and oppressive claims after the public had become possessed of the invention without hinderance or objection on the part of the inventor, and it is but just to say that neither of the interfering applicants could with any degree of propriety claim to be the inventor and expect that such notice on his part would be treated by the public with any degree of respect. Patents issued as the result of long pending interferences are always looked upon as odious monopolies because of the manner in which they are enforced at the time when the public were already possessed of the invention. . . .

". . . An early decision upon the question submitted is earnestly requested."

It may be added that the modification was made in October, 1881.

In respect to this letter, and especially the second paragraph, quoted above, counsel for the Government say:

"In the argument below, counsel appeared to think that once was enough, and that they stood as a perpetual exhortation to duty to the examiner and all his successors as though they had been nailed on his office door. But they were not even in the file of the Berliner case. Examiner Freeman, whose report was endorsed on the letter, went out of office in 1883. If any one ever saw it after that until it was exhumed for the purpose of this case, the fact does not appear in the record."

But is the applicant to be condemned because, having once made an urgent request for action and pointed out reasons therefor, it was not continually repeating that request, because it did not see that such request was placed on the files of this particular application, or, as intimated in the words of counsel, nailed on the doors of the Patent Office?

It is, of course, easy to say that these applications, these suggestions and requests meant nothing; that they were a mere blind; but something more than assertion of counsel is necessary to destroy their significance, or to establish collusion between the applicant and the officials of the department. But the case does not stand upon the fact that the formal communications from the solicitor in charge of this application were few in number. While in every one, in which the matter was referred to, there was a request for action, it also appears from the testimony of Messrs. Freeman, Lyons and Kintner, who were the examiners in charge during the major portion of the time in dispute, that the representatives of the Bell Company were urgent in pushing the Berliner application. For instance, Examiner Lyons testified:

"They were urgent and persistent beyond toleration. Hardly a day passed without somebody representing the interests of the Bell Telephone Company coming to our room and urging the allowance of the Berliner case, or the declaration of interferences. I myself was waylaid in the halls of the Patent Office, and on more than one occasion did I sneak into the room to avoid being bored by Mr. Charlie Hedrick, the assistant of Mr. Pollok. Mr. Pollok himself, also, although less frequently, came to the room, and later on, notably toward the end of 1884, and in the spring and summer of 1885, Mr. W. W. Swan was a frequent visitor in the electrical division."

And Examiner Kintner (who was in office from May, 1883, to April, 1887), in reply to a question as to what Mr. Swan, one of the representatives of the telephone company, did in respect to the application, said:

"I had a great many interviews with him in the matter of both the Edison and the Berliner applications under consideration, and he was very persistent in urging the passage of both applications to patent; in fact, to such an extent that his persistency annoyed me not a little."

Another matter referred to by counsel is what they call the "tacit understanding." The facts are these: One Daniel Drawbaugh claimed to have invented the telephone prior to

Bell. He assigned his inventions to the People's Telephone Company, between whom and the defendant company a heated and protracted litigation arose. Now, it is said that there was an agreement, or, at least, a tacit understanding, between the officials of the Patent Office, the People's Company and the defendant company that the proceedings in the Patent Office in respect to the Berliner application should wait the determination of the litigation between the two telephone companies. It is insisted that the officials had no right to enter into such an agreement; that it was unlawful in its character. Assuming that this is so, still the fact appears that the proposition therefor came from the representatives of the Drawbaugh interest, that it was deemed by the officers of the Patent Office to be for the best interests of all, and that it was simply assented to by the defendant. Nowhere does it appear that the defendant urged, or even suggested, the propriety of such a delay. For the present we do not consider the wisdom or the rightfulness of the course pursued. All that we desire to notice is that it was not at the instance of the defendant.

It is further said that, even if there were at first any excuse for such "tacit understanding," and the Patent Office properly delayed action on this application until after the litigation between Drawbaugh and Bell had ended, a judgment therein was rendered in the Circuit Court in 1884; and that then the office should have proceeded promptly, and that there was no excuse for waiting until the decision of the appeal by this court in 1888; and least of all for any delay after that final decision by this court.

Summing up their argument on this branch of the case counsel say:

"The review of the history of the Berliner application which we have now completed shows that in its treatment of it the office proceeded upon two unlawful assumptions.

"The first was that an applicant, whose application is ready for issue except for a possible threatened interference, must wait until the antagonizing application is either found allowable and ready for the interference, or finally ejected from

the office, no matter how long that may be. This assumption governed the action of the examiners from 1882 to the issue of the patent. . . .

"The second assumption was that the judicial determination of the question of Drawbaugh's invention, in the suit between the owners of the applications, was not enough to warrant action by the office. Examiner Kintner took the ground, in conversation with Mr. Swan — never on the record — that the decision of the Circuit Court was not enough for him; that the case might be appealed, and he would act only on the decision of the Supreme Court. But when that came, it received no more consideration than had been given to that of the Circuit Court."

Were it conceded that these two assumptions were "false assumptions," as counsel call them, what are they but errors of judgment on the part of the patent officials as to the course of procedure; and can it be possible that an applicant for a right, who has under the statute no choice of tribunals or course of procedure, but is compelled to apply to one tribunal which has exclusive jurisdiction in the matter, and must abide by its rulings as to procedure, can be held to have forfeited his right simply because of errors of judgment by such tribunal as to the procedure? The statement of the question seems to us to carry its own answer. It is true counsel follow this declaration of the errors on the part of the office in the matter of procedure with the further statement:

"The guilty party is the Bell Company. It had a full and perfect inside view of the whole situation from the beginning. Its attorneys were wiser in these things than the commissioners or the examiners. They shrewdly availed themselves of every unauthorized usage, mistaken assumption, ignorant misconception or supposed obstacle, by means of which the issue of the patent could be delayed without apparent responsibility on their part. In view of the duty which rested upon the company to speed the application, that was fraud, not less but more reprehensible because it was not of the common and gross kind, but so refined and acute that its garb of professed innocence has deceived even the Court of Appeals."

The difficulty with this charge of wrong is that it is not proved. It assumes the existence of a knowledge which no one had; of an intention which is not shown. It treats every written communication from the solicitor in charge of the application, calling for action, as a pretence, and all the oral and urgent appeals for promptness as in fact mere invitations to delay. It not only rejects the testimony which is given, both oral and written, as false, but asks that it be held to prove just the reverse.

Indeed, the case which the counsel present to us may be summed up in these words: The application for this patent was duly filed. The Patent Office after the filing had full jurisdiction over the procedure; the applicant had no control over its action. We have been unable to offer a syllable of testimony tending to show that the applicant ever in any way corrupted or attempted to corrupt any of the officials of the department. We have been unable to show that any delay or postponement was made at the instance or on the suggestion of the applicant. Every communication that it made during those years carried with it a request for action; yet because the delay has resulted in enlarged profits to the applicant, and the fact that it would so result ought to have been known to it, it must be assumed that in some way it did cause the delay, and having so caused the delay ought to suffer therefor. There is seldom presented a case in which there is such an absolute and total failure of proof of wrong.

The defendant company might safely have left the case here, but it has not been content to rest the controversy with the failure on the part of the Government to show any wrong. It has not been content to accept the Scotch verdict of "not proven." It has called as witnesses the examiners who were in charge of this application, and taken their testimony as to what did in fact take place, and as to how and why the long delay occurred. Whatever judgment may be pronounced upon the wisdom of the course pursued by these officials, or the sufficiency of the reasons given by them therefor, there is no ground for controverting that they acted in good faith. The case is not one of arbitrary, peremptory postponements and delay.

They supposed they were acting in compliance with the rules of the Patent Office, and out of proper regard for the rights of conflicting interests. No just estimate can be placed upon the propriety of their conduct without taking into consideration the whole subject of telephonic inventions and litigation. As heretofore stated, and as is well known, Bell claimed to be the pioneer in this matter of telephonic communication. His claim was disputed, and out of that dispute came the most important, the most protracted litigation which has arisen under the patent system in this country. For years this litigation was pending in the trial courts, subsequently brought to this court, and finally decided in 1888. So great was this litigation, so immense the volume of testimony, and so important the rights involved, that it is the only case in the history of this court to which an entire volume of our reports is devoted. (126 U. S.) The argument was protracted through weeks, and the case was held under consideration for a year, and finally decided by a closely divided court. Is it strange that, when the primary right was being so vigorously contested, and was so much a matter of doubt, when (as appears from the testimony in this case) the judgment of the law department of the Government was adverse to the claims of Bell, and to the validity of the patent which he had obtained — is it strange, we ask, in view of these facts, that the disposition of the apparently minor matter should be held in abeyance in the Patent Office until a final decision of the primary right?

Neither can any just estimate be placed upon their conduct without taking into account the volume of business, and the pressure on account thereof, in the Patent Office. Beyond the fact, which is a matter of common knowledge, that thousands of applications are filed and thousands of patents granted each year, the record discloses something as to the multitude of applications for patents for telephones and telephonic devices which were pending during these years. Mr. Townsend, who was an examiner up to November 15, 1880, while unable to state the number of applications, was able to say that he had examined over 120 that went to

patent. This it will be remembered was in the early days of telephonic investigation and invention. It appears also from a communication made by the Commissioner of Patents to the Secretary of the Interior, on December 13, 1892, advising against this suit, that at that time a gentleman, who is called in the letter the "relator," had pending in the Patent Office 152 applications for patents on telephones and telephone systems. These facts may be only side lights, but they show that the examiners and other officials in the Patent Office had something else to do besides considering this application.

Of course, it is easy to say that the Patent Office could have disposed of this application more promptly than it did; that it ought to have done so, and that, in view of the termination of the great litigation favorably to the claims of Bell, its delay has resulted in large pecuniary benefits to the defendant company. But a wisdom born after the event is the cheapest of all wisdom. Anybody could have discovered America after 1492. The question is not whether a better judgment on the part of the patent officials would have disposed of this application long before it was, is not indeed whether there was any error of judgment, but whether they acted wrongfully and their action was induced by or at the instance of the defendant company.

One thing more deserves notice. . The argument of the counsel for the Government proceeds all along on the assumption of the superior knowledge of the representatives of the defendant company; that they saw the end from the beginning; that they knew that their client had an invention which was patentable and that they would ultimately obtain a patent therefor, and also that Bell was and would finally be adjudged the primary inventor of the telephone, and that possessed of all this knowledge they planned the delay in securing the Berliner patent in order that thereby they might extend to the termination of its life the telephone monopoly. But what an assumption this is and how illy justified by the facts! The very process and termination of the Bell-Drawbaugh litigation demonstrates the doubtfulness of the question there in issue, and is absolute evidence that there was up to the close

of that litigation an uncertainty as to the result. Equally uncertain was the outcome of the Berliner application. Indeed, there is an uncertainty as to every application. No one can foretell what will be the judgment of the Patent Office upon the questions of novelty and utility. And in respect to this Berliner application the matters which are subsequently to be considered attest that there was more than ordinary doubt as to the outcome. On account of those matters it is earnestly contended that there was no merit in the application, and that it ought to have been denied. Further than that, they knew that the officials of the Patent Office were subject to change — as in fact they were changed during the pendency of these proceedings — and even if they had any direct intimations from the first examiner or the first commissioner, there was no certainty that a subsequent examiner and subsequent commissioner would entertain the same views. If the Bell-Drawbaugh litigation had terminated the other way and a different opinion on the part of a single member of this court would have changed this result, or if when the time came the Commissioner of the Patent Office had decided against the Berliner application, and his decision been sustained on appeal to the Supreme Court of the District of Columbia, then all this brilliant scheme of realizing millions would have vanished into thin air. If they were possessed of the wisdom which the Government attributes to them, the representatives of the Bell Company must have realized that the certainty which attends a final decision and the issue of a patent was something worth striving for, and not likely to be ignored. And if this underlying assumption has so little foundation, what shall be said of an inference and an imputation unsupported by evidence and based upon that assumption?

Our conclusions on this branch of the case are: First, that before the Government is entitled to a decree cancelling a patent for an invention on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing and satisfactory. Second, that Congress has established a department

with officials selected by the Government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and entrusted the entire management of affairs of the department to those officials; that when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of the officials, or through his inducement, or at his instance. Proof that they were in fault, that they acted unwisely, unreasonably and even that they were culpably dilatory, casts no blame on him and abridges none of his rights. Third, the evidence in this case does not in the least degree tend to show any corruption by the applicant of any of the officials of the department, or any undue or improper influence exerted or attempted to be exerted by it upon them, and on the other hand does affirmatively show that it urged promptness on the part of the officials of the department, and that the delay was the result of the action of those officials. And, fourth, if the circumstances do not make it clear that this delay on the part of the officials was wholly justified they do show that it was not wholly unwarranted, and that there were reasons for the action of such officials, which at least deserve consideration and cannot be condemned as trivial.

The three remaining grounds of relief asserted by the Government may be considered together. Defendants contend that as the last two, although urged in the Circuit Court, were not presented to the Court of Appeals (referring for this fact to the opinion of the latter court and also a notice which was contained in the brief of counsel for the Government), we are precluded from noticing them, citing as authority *Bell* v. *Bruen*, 1 How. 169; *Alviso* v. *United States*, 8 Wall. 337; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Rogers* v. *Ritter*, 12 Wall. 317; *Klein* v. *Russell*, 19 Wall. 433; *Supervisors* v. *Lackawana Iron & Coal Co.*, 93 U. S. 619; *Wilson* v. *McNamee*, 102 U. S. 572; *Wood* v. *Weimar*, 104 U. S. 786; *Top-*

liff v. *Topliff*, 145 U. S. 156; *McGahan* v. *Bank of Rondout*, 156 U. S. 218, and *Carr* v. *Fife*, 156 U. S. 494, in which cases, with more or less particularity, the proposition is announced that this court will not consider questions not presented to and passed upon by the lower court. We deem it unnecessary to determine how far that rule is applicable in this case, for the reasons which compel us to deny relief on the first of these grounds are, when applied to the facts developed by the testimony, equally potent as to the others. That ground, as stated, is "that a patent issued November 2, 1880, upon a division of the original application covers the same invention as that covered by the patent in suit and exhausted the power of the Commissioner as to that invention." The patent of 1880 is for a receiver; that of 1891 for a transmitter. It is claimed that the two instruments are alike in form and alike in function, save as they are operated at different ends of the telephone wire. The transmitter can be placed at the other end of the wire and then becomes a receiver, and so *vice versa*. Popularly speaking, it may be said that the transmitter takes the varying sounds of the human voice and passes them on to the telephone wire, to be borne along thereon by the undulatory electric current until they reach the receiver, which takes and passes them to the human ear. In a sense the receiver is also a transmitter, for it passes the sounds from the wire to the ear. We agree with the Court of Appeals that it is unnecessary to determine whether there are two separate inventions in the transmitter and the receiver, or whether the patent of 1891 is for an invention which was covered by the patent of 1880. The judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the Government, and such judgment cannot be reviewed in this suit.

Suits may be maintained by the Government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and sometimes when the purpose and effect are simply to enforce the rights of an individual. In

the former cases it has all the privileges and rights of a sovereign. The statutes of limitation do not run against it. The laches of its own officials does not debar its right. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120; *United States* v. *Insley*, 130 U. S. 263. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. As said in *United States* v. *Beebe*, 127 U. S. 338, 347:

"We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants." See also *United States* v. *Des Moines Navigation & Railway Co.*, 142 U. S. 510; *Curtner* v. *United States*, 149 U. S. 662.

Now, in the case at bar the United States has no proprietary or pecuniary interest. The result, if favorable to it, would put no money in its treasury or property in its possession. It has a standing in court either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or simply because it owes a duty to other patentees to secure to them the full enjoyment of the rights which it

has conferred by its patents to them. Perhaps both of these objects were in view. In so far as the latter was and is the purpose of this suit it brings it within the rule laid down in *United States* v. *Beebe*, *supra*. Doubtless the removal from the public of the burden of a monopoly charged to have been wrongfully created was also one of the objects, and perhaps, the principal object. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548. To what extent this may relieve the Government as suitor from all the rules governing the suits of private individuals need not be specifically determined here.

One of the familiar rules of equity, reinforced by statute (§ 723, Rev. Stat.), is that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The objection to the validity of this patent on the ground that it was already covered by the patent of 1880 is a defence which, under the statutes (§ 4920, Rev. Stat.), is open to every individual charged by the patentee with infringement, whether the proceeding against him be an action at law or a suit in equity. The Government, therefore, if seeking simply to protect the right of an individual, ought not to be permitted to maintain a suit in equity to cancel that against which the individual has a perfect legal defence available in any action brought by or against him. The query is pressed whether the same rule would not also apply when the Government is only seeking to protect the public at large, for the public is but the aggregation of all the individuals, and if each of them has a perfect defence to the patent, so all, together, have. Again, and as an illustration perhaps of the extent of the rule referred to, it has often been held that while one having the title to and possession of a tract of land can maintain a suit in equity to cancel a deed or other instrument which is a cloud upon the title, such suit cannot be sustained if the deed or instrument is void upon its face, its invalidity resting upon matters of record, and not being affected by any lapse of time or statute of limitations. In other words, the deed or instrument is not considered a

cloud if it can never be used to destroy his title or disturb his possession. The objection to this patent on the ground stated is an objection resting upon matters of record — of record in the Patent Office; not dependent on oral testimony nor subject to change, and in no way affected by lapse of time. Within the scope of this specific application of the general rule it would seem that equity has no jurisdiction either at the suit of the Government or of an individual to formally cancel that which by record and unfailing evidence is, as claimed, absolutely void.

But, further, Congress has established the Patent Office, and thereby created a tribunal to pass upon all questions of novelty and utility. It has given to that office exclusive jurisdiction in the first instance, and has specifically provided under what circumstances its decisions may be reviewed, either collaterally or by appeal. As said in *Butterworth* v. *Hoe*, 112 U. S. 50, 67: "That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed."

Sections 4911 to 4914, Rev. Stat., grant appeals in certain cases to the Supreme Court of the District of Columbia. It is true those sections do not authorize appeals on behalf of the Government, but the failure so to do may be evidence that Congress thought the Government ought not to interfere; and because it believed it had made ample provision for securing the rights of all without the intervention of the Government. Section 4915, Rev. Stat., authorizes a suit in equity on behalf of an applicant for a patent whose application has been refused. *Morgan* v. *Daniels*, 153 U. S. 120, presented a controversy under that section, and in the opinion, on page 124, we said: "It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this

statute, that the decision of the Patent Office was a finality upon every matter of fact."

It is true that all these sections refer to proceedings between individuals, but the Government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the Government, subject to the same limitations as apply in suits between individuals.

There is nothing in *United States* v. *Bell Telephone Company*, 128 U. S. 315, and *United States* v. *American Bell Telephone Company*, 159 U. S. 548, to conflict with the views above expressed. In the former case the question presented was whether the Government could maintain a bill to set aside a patent for an invention on the ground of fraud in its issue, and among the objections urged was the fact that Congress had, in § 4920, Rev. Stat., made specific provision for certain defences in suits by an infringer. It was held that the Government could maintain such a bill, and that these special statutory provisions did not defeat its right, the court summing up the discussion in these words (p. 373):

"The argument need not be further extended. There is nothing in these provisions expressing an intention of limiting the power of the Government of the United States to get rid of a patent obtained from it by fraud and deceit. And although the legislature may have given to private individuals a more limited form of relief, by way of defence to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain a cancellation or vacation of an instrument obtained from it by fraud, an instrument which affects the whole public whose protection from such a fraud is eminently the duty of the United States, is not sound."

In the latter case, which is the one now before us, there

was decided a motion to dismiss for want of jurisdiction in this court of an appeal from the decision of the Court of Appeals, and it was adjudged that this court had jurisdiction. It is true, at the close of the opinion is found this general statement as to the power to maintain such a suit (p. 555):

"In *United States* v. *Telephone Co.*, *supra*, it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative, but where patents for land and inventions are issued by the authority of the Government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee."

But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in

this case. We see no error in the decision of the Court of Appeals, and its decree, dismissing the bill, is

Affirmed.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE GRAY and MR. JUSTICE BROWN were not present at the argument, and took no part in the decision.

INDIANA *v.* KENTUCKY.

ORIGINAL.

No. 2. Original. Final decree announced May 24, 1897.

The report of the commissioners for permanently marking the boundary line established between the States of Indiana and Kentucky by the decree of May 18, 1896, 163 U. S. 520, is approved by this court.

MR. CHIEF JUSTICE FULLER announced the decree of the court.

THIS cause coming on to be heard on the report of Amos Stickney, Gustavus V. Menzies and Gaston M. Alves, commissioners, hereinbefore appointed to ascertain and run the boundary line between the States of Kentucky and Indiana, and continued by the decree of this court herein entered May 18, 1896, for the purpose of permanently marking said line as set forth in their then report which was approved by this court on that date, and to make report thereon to this court; which report now made is as follows:

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

The undersigned Commissioners, appointed by this honorable court, in the above-entitled cause, respectfully report, that, pursuant to the order made in said cause at the October term, 1895, continuing the commission for the purpose therein stated, they gave notice for bids for the stone monuments and iron posts and setting of the same to mark the boundary line as established by the order of this court. The commission met at the custom house in the city of Evansville, Indiana, on the

ninth day of April, 1897, and received and opened the bids for the above-named material and work. The casting of the iron posts was let to the Heilman Machine Works of Evansville, Indiana, for the sum of one hundred and twenty dollars ($120.00), it being the lowest and best bidder; the making and setting in place of the three stone monuments was let to F. J. Scholz & Son of Evansville, Indiana, for the sum of two hundred and forty-five dollars ($245.00), said firm being the lowest and best bidder; the setting of the sixteen iron posts was let to Eb. Cross of Evansville, Indiana, for the sum of one hundred and ninety-seven dollars ($197.00), he being the lowest and best bidder. That contracts were made with each of said parties and bonds taken for the honest and faithful performance of the contracts. That on the 7th day of May, 1897, after the engineer in charge of the work had reported that the monuments had been erected, and posts placed in position, in conformity to the order of the court, and the location on the established line of each monument and post had been verified by accurate observations and measurements, the Commission, accompanied by the engineer, visited the line, and by observations and measurements satisfied themselves of the accuracy of locations, and that the work of making and placing the boundary marks had been well done, and in accordance with the order of the court.

We herewith attach, as a part of this report, the report of the engineer in charge of the works. Also a statement of expenses incurred and compensation of the Commissioners since making the former report, which we recommend be adjudged as cost equally against the parties to the suit. We further recommend that upon the confirmation of this report, a certified copy of the same be sent to the Governor of the State of Indiana, and one to the Governor of the Commonwealth of Kentucky.

Your Commissioners therefore pray that this report be confirmed and they be discharged.

Amos Stickney,
Gustavus V. Menzies,
Gaston M. Alves,
Commissioners.

To the Honorable Commissioners on the Indiana and Kentucky Boundary Line at Green River Island.

GENTLEMEN: In accordance with your instructions, I made plans and detailed drawings for stone and iron monuments, to permanently mark the line between the States of Indiana and Kentucky at Green River Island, to replace the cedar posts as placed on it during the winter of 1896. Upon your approval of the plans and letting the contracts for the monuments, I proceeded to verify the line and angles to satisfy myself that no post had been moved On the completion of the monuments I superintended the work of setting them.

The three monuments of stone are of sawed Green River limestone, 18 inches in cross section and 6 feet in length. At the starting point on the section line between sections 14 and 15, town 7 south, range 10 west, the monument has the word "Initial" on the side next section 14, on the north side the word "Indiana," and on the south side the word "Kentucky" cut horizontally in the stone near the top, in Egyptian letters.

Near the midway distance along the line, and near the line between sections 8 and 9, the second stone monument is set, with the word "Indiana" cut on the northerly side, and the word "Kentucky" cut on the southerly side, similar to the first monument.

At the terminal point going down the Ohio River, the third stone monument is placed. The word "Indiana" is cut on the northeasterly side, the word "Kentucky" on the southwesterly side, and the word "Terminal" on the northwesterly side in the same style as the first monument.

For each of these monuments there was an excavation made six feet square and four feet deep, in the bottom of which one foot in thickness of concrete was placed and well rammed. On this the stone was placed on end and filled around with concrete, well rammed to the surface of the ground, leaving three feet of the stone above the ground.

At each of the 16 intermediate angles, iron monuments were placed. These are of cast iron, round, six inches in cross section, the top closed and a square pedestal cast on the lower end, the casting being three quarters of an inch thick. The

word "Indiana" on the one side and the word "Kentucky" on the other, were cast in raised letters, the words reading downward.

An excavation was made for each of these, three feet square and three and one-half feet deep, and six inches of concrete well rammed in the bottom, on which the post was set and filled around with concrete to the surface of the ground, leaving three feet above ground. In four places where silt had accumulated rapidly on account of a depression in the ground, the excavation was made more shallow, but in each case the concrete bed is three and one-half feet in depth, and the earth banked around it to protect the concrete.

Great care was taken in having centres cut in each monument, and placing them on the exact angle point on the line as originally located.

Every monument was set and completed under my own personal supervision.

Respectfully submitted,

C. C. Genung, *C. E.*

Evansville, Ind., *May 5th*, 1897.

Statement of expenses incurred and compensation of the Commissioners since making former report.

C. C. Genung, Civil Engineer. — Services of himself and assistants, making plans, specifications, writing contracts, verifying lines, angles and points on boundary line; laying out and superintending work, expenses of teams for self and Commissioners at various times for supervising and inspecting work		$195 50
Keller Printing Company, for printing and typewriting		12 50
Heilman Machine Works, 16 iron posts		120 00
F. J. Scholz & Son, 3 stone monuments, placed		245 00
Eb. Cross, placing 16 iron posts in concrete		197 00
Expenses of Lt.-Col. Amos Stickney, Commissioner	$34 50	
Services as member of commission	100 00	134 50
Forward		$904 50

Brought forward		$904 50
Expenses of Gustavus V. Menzies, Commissioner	10 00	
Services as member of commission	100 00	
		110 00
Expenses of Gaston M. Alves, Commissioner	7 50	
Services as member of commission	100 00	
		107 50
Total		$1122 00

It is ordered, adjudged and decreed that their said report this day filed be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the compensation of the commissioners and expenses attendant upon the discharge of their duties in permanently marking said line as directed by the decree of May 18, 1896, *be, and the same are hereby, allowed at the sum of one thousand one hundred and twenty-two dollars* ($1122), *in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.*

And it is further ordered, adjudged and decreed that the clerk of this court do forthwith transmit to the Chief Magistrates of the States of Kentucky and Indiana copies of this decree, duly authenticated, under the seal of this court.

TLA-KOO-YEL-LEE *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

No. 516. Submitted March 1, 1897. – Decided May 24, 1897.

Tak-Ke and the plaintiff were indicted for murder. On the separate trial of the plaintiff in error, Tak-Ke's wife was a witness against him. On cross-examination the following questions were put to her: Who are you

Opinion of the Court.

living with now? Is it not a fact that since your husband was arrested and convicted you have been living with this witness Ke-Tinch? Is it not a fact that shortly after this affair took place you and the witness Ke-Tinch agreed to live together if your husband was convicted and you yourself got clear? Each of these was objected to as immaterial and incompetent and the objection was sustained. *Held*, that the questions should have been allowed.

The same objections made, sustained below, and that court overruled here, as to drinking of the defendant, and as to what took place at the sailing of the sloop.

THE case is stated in the opinion.

Mr. F. D. Kelsey for plaintiff in error.

Mr. Solicitor General for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This case comes here on writ of error to the District Court of the United States for the District of Alaska. The plaintiff in error is an Indian, and was indicted with another Indian, named Tak-Ke, and, upon a separate trial, was convicted of the crime of murder in killing one August Jansen on or about the 5th day of January, 1894, at or near Shekan, within the Territory of Alaska and within the jurisdiction of the District Court thereof. He was thereupon sentenced to be hanged.

Upon the trial in the District Court it appeared that the authorities at Fort Wrangel, some 70 miles from Shekan, were informed by some Indians at that place in May, 1894, of the alleged murder of Jansen in the preceding January at or near Shekan. In July of that year the United States commissioner, a deputy marshal and some others started from Fort Wrangel in a steam launch, chartered for the purpose, and went to Shekan to find the body, if possible, and to take such other proceedings as were proper in the premises. An Indian woman, Tlak-Sha, voluntarily accompanied them for the purpose of showing where the body was to be found. A short distance from Shekan the party landed on the beach,

and under her direction search was made, and the body of Jansen was discovered on the beach covered over with rock and brush. The body was sufficiently preserved to be identified, and it was recognized by some of the party. After the finding and recognition, the defendant, with the other above-named Indian (Tak-Ke), was indicted for murder, and, upon the defendant's separate trial, the Indian woman was sworn as a witness. She testified that in January, 1894, the deceased was killed by the defendant and Tak-Ke, who was her husband; that they were in a small sloop near Shekan at the time of the murder, and there were present the deceased, three male Indians, herself and her child. The third Indian was named Ke-Tinch, and he was also sworn on the trial, and while differing in some of the details from the story of the woman, he corroborated her in the statement that the killing was done by the defendant and by the woman's husband, the defendant shooting the deceased and the woman's husband striking him on the head with an axe.

The two Indians above named are the only witnesses to the killing. The female witness accompanied the searching party from Fort Wrangel, and with her assistance the body was found. As one of the two witnesses on the trial she testified against the defendant and her own husband, who was indicted for the crime, though not then on trial. It is apparent how important it was to show to the jury, if possible, the bias, if any, of the witness against the defendant, or to show that her credibility was not to be depended upon by the jury.

In the course of her cross-examination upon the trial the following questions were put to her:

"Q. Before this affair took place were you Tak-Ke's wife? A. Yes, sir.

"Q. Whose wife are you now? A. I am not married now.

"Q. Who are you living with now?"

Counsel for the prosecution objected to the above question as immaterial and incompetent. Objection sustained by the court, to which ruling counsel for the defendant then and there duly excepted.

"Q. Is it not a fact that since your husband was arrested

and convicted you have been living with this witness Ke-Tinch?"

Counsel for the prosecution objected to the above question as incompetent. The objection was sustained by the court and an exception taken.

"Q. Is it not a fact that shortly after this affair took place that you and the witness Ke-Tinch agreed to live together if your husband was convicted and you yourselves got clear?"

Same objection was taken, which was sustained by the court, and an exception taken.

"Q. I will ask you if it is not a fact that this defendant got so drunk (upon this occasion) that he was laid in the canoe and covered over, and did not recover until after the body had been concealed? A. No, sir; he didn't get drunk; nobody drank.

"Q. I will ask you if it is not a fact that when he awoke and saw the sloop sailing away and asked where the sloop was going, that Tak-Ke told him the white man was sailing away?"

Objection taken to the question as incompetent, irrelevant and immaterial. Objection sustained by the court and an exception taken.

We think answers to all these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end. The two Indian witnesses (of whom the woman was one) did not agree in regard to the details of the alleged murder, and there is enough in the record to show that they were both of a low order of intelligence, and that they testified without any very solemn appreciation of their responsibilities as witnesses upon the trial of one individual for the murder of another. The whole occurrence at the time of the alleged murder is left in a good deal of confusion, and the credence to be given to the testimony of the woman was of the highest importance.

The learned solicitor general in his brief in this case, with most commendable candor and fairness, has said:

"But we feel constrained to say from an analysis of the evidence certified in this record, that while it was left to the jury to ascertain the facts established by the evidence, the mind is oppressed with a painful doubt as to the soundness of the verdict returned by the jury."

And in speaking of the refusal of the court to permit answers to be given to the questions asked, as above recited, counsel for the Government also says in his brief:

"No reason is given for the exclusion of these questions beyond that reiterated in the objection, that they were 'incompetent, irrelevant and immaterial.'"

He frankly says that in his opinion this evidence was admissible, and we have no doubt that it was.

The judgment must, therefore, be

Reversed, and the cause remanded to the District Court of Alaska with instructions to set aside the verdict and grant a new trial.

UNITED STATES *v.* SANDOVAL.

MORTON *v.* UNITED STATES.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

Nos. 205, 599. Argued March 9, 10, 1897. — Decided May 24, 1897.

Under the laws of the Indies lands not actually allotted to settlers remained the property of the king, to be disposed of by him or by those on whom he might confer that power; and as, at the date of the Treaty of Guadalupe Hidalgo, neither the municipalities nor the settlers within them, whose rights are the subject of controversy in these suits, could have demanded the legal title of the former Government, the Court of Private Land Claims was not empowered to pass the title to either, but it is for the political department of the Government to deal with any equitable rights which may be involved.

United States v. *Santa Fé*, 165 U. S. 175, involved the same considerations in its disposition as those presented on this record, and its reasoning and conclusions are to be taken as decisive here.

Statement of the Case.

THIS was a petition filed by Julian Sandoval and others in the Court of Private Land Claims for the confirmation under the act of March 3, 1891, c. 539, 26 Stat. 854, of what was known as the San Miguel del Bado grant in the Territory of New Mexico, containing 315,300 acres. It was alleged that the grant was made November 25, 1794, by Governor Chacon to Lorenzo Marquez for himself and in the name of fifty-one men accompanying him, and copies of the original application; of the decree of the governor thereon; of the report, November 26, 1794, of the alcalde Ortiz; and of the report of the alcalde Pino, in 1803, hereinafter set forth, were attached to the petition as exhibits.

Petitioners averred that Ortiz gave juridical possession of the grant to Marquez and his associates, and that they, soon after, "formed a settlement thereon, as required by the terms and conditions of the said grant, known as the town of San Miguel del Bado, on the present site of the town of that name, within the limits of the said grant, the said settlement being formed, as your petitioners are informed and believe, as a villa, with a corporation council, mayor, aldermen, attorney and secretary, and that the said settlement of San Miguel del Bado continued as a municipal corporation up to the time the Territory of New Mexico was ceded to the United States, the said town of San Miguel del Bado, embracing within its jurisdiction all of the land within the exterior boundaries of the said grant heretofore described, and the said grant, being, as your petitioners are informed and believe, given to the said settlement of San Miguel del Bado upon the condition that the said settlement should be formed and that the said tract should be in common not only to the petitioners, but to all other settlers who might join them in the future."

That the grant has since been occupied by the original settlers, their descendants and assigns, and others who have become part of that settlement, or moved upon the grant and formed other settlements within its exterior boundaries, or built isolated residences and settled thereon, and "has always been recognized as being a concession made to the town or settlement of San Miguel del Bado and all other settlers who

might join them in the future, and from thence hitherto as being the property of all the settlers within the exterior boundaries of the said grant, to be held and used by them in common, except as to such parts and portions as from time to time have been set apart in severalty to individual settlers thereon.

"That there is now no municipal corporation existing within the limits of the said grant of San Miguel del Bado, but all of the settlers upon the said grant, whether residing within the town of San Miguel del Bado or in other towns upon the said grant, or in isolated places thereon, as a community, have succeeded to all of the lands of the said grant, which have not, by prescription and by assignment of alcaldes under the original concession, and subsequent alcaldes, become the property of private individuals and held in severalty, and that the said community, embracing all of said settlers, have managed and controlled the lands of said grant by and through committees, appointed in popular assemblies held for that purpose, since their said municipal corporation, under the laws of Spain and Mexico, was abandoned. That the said individuals herein named as petitioners are the present duly authorized committee of the settlers on the said grant, and make this petition for and in behalf of themselves and all other settlers within the exterior boundaries of the said grant."

Certain proceedings were set forth as having been had on March 18, 1857, before the surveyor general of the Territory of New Mexico on a petition "made for and in the name of the inhabitants of the settlements of La Cuesta, San Miguel, Las Mulas, El Pueblo, Puerticita, San José, El Gusano and Bernal, the said settlements existing at the date thereof within the limits of the said grant and the inhabitants thereof comprising at that time all the settlers upon the said grant, the said petition reciting that the inhabitants of said settlements claimed said grant as being the legal heirs and successors of Lorenzo Marquez and fifty-one other persons, and that they had been up to that date in continual possession of the said grant"; also a report made to Congress on November 13, 1879, and a survey made of the tract, July 26, 1880, it

being stated that "no action has ever been taken by Congress in reference to the said San Miguel del Bado grant, either looking to its confirmation or rejection."

The prayer of the petition was as follows:

"Your petitioners, therefore, claim the said San Miguel del Bado grant as bounded, surveyed and described as hereinbefore set forth, and pray that the validity of their claim may be inquired into and decided by this court and that the said grant may be confirmed to your petitioners and all of the present settlers and residents upon the said grant, as being made to the town of San Miguel del Bado for the use and benefit of all of said settlers, and for the benefit of the owners in severalty of the lots and parcels of land within its limits."

The United States answered that the petition of Lorenzo Marquez of November, 1794, was not for, nor intended to be for, the exclusive use, benefit and behoof of said Lorenzo Marquez or any one else; that if Ortiz put Marquez and his co-petitioners in possession of the property, it was not intended that said "Marquez and his co-petitioners should have the exclusive possession of the whole of the property described in the boundaries set forth in his alleged petition, but that the same was for the use and benefit of said Marquez, his co-petitioners, and any and all citizens without lands who might thereafter settle upon the same; and further, that the entrances and exits, waters and pastures, and the use of the land unappropriated by individuals in severalty, should be common."

The answer further averred that the alcalde Pino was directed by Governor Chacon in March, 1803, to ascertain whether the terms of the grant had been complied with, and that he reported March 12 that he "found fifty-eight heads of families occupying the same; that in obedience to his said instructions he caused an amicable partition among them to be made, and assigned to each one the land he was so occupying and cultivating; that upon the return of said report the same was approved and confirmed by said Governor Chacon on the 30th day of March, 1803, to the resi-

dents of the new town of El Bado, known as San Miguel; that thereafter, up to the occupation of this country by the American troops in 1846, under the terms and conditions of said grant, various parties have moved upon the same, have occupied and cultivated it, and are holding and occupying, were and have been recognized ever since, until now there are a large number of settlements under said grant consisting of several thousand people, and upon which several towns have grown up under the form and construction given to the grant by Governor Chacon in 1803, and under the terms of the conditions of the pretended possession designated by the alcalde Ortiz in 1794, which in point of fact was never executed as alleged and claimed, but was given by Pino in 1803.

"That the names of the settlements are La Cuesta, San Miguel, Las Mulas, El Pueblo, Puerticita, San José, El Gusano and Bernal. The defendant is informed and charges the fact to be that all of these settlements and possessors were recognized by the Spanish Government, and were continued without interruption or challenge by the Mexican Government, and were in existence at the time the sovereignty of the United States was extended over it under the treaty of Guadalupe Hidalgo, and that no title ever passed, or was intended to pass, either legal or equitable, against the Spanish or Mexican Governments, except as to that portion which might be occupied and settled by said Marquez and his fifty-one co-petitioners, and those who might thereafter come in and settle and occupy the same; and that said claim is not entitled to confirmation for any more than was actually appropriated, occupied and cultivated in severalty prior to 1846; and it therefore says that this plaintiff, if entitled to confirmation of anything, is entitled to confirmation only of that portion which he actually occupied and possessed under said grant, and that all the portion of said land which had not been subjected in 1846 to actual occupancy and cultivation is, and of right ought to be, public domain."

After the commencement of Sandoval's suit, two others were instituted, one by Levi P. Morton and the other by Marquez and others, claiming that Lorenzo Marquez took

the title to the entire grant, as the other fifty-one were not named in the grant, petition or act of possession; and asking confirmation in their names alone as successors in interest to Lorenzo. These suits were consolidated with that of Sandoval and the three heard as one case.

The Court of Private Land Claims held that the act of partition of 1803 rendered the grantees certain, and dismissed the petitions of Morton and Marquez; and confirmed the grant in the name of Lorenzo Marquez and his co-grantees and all other persons who might have come in and settled on the grant up to December 30, 1848, Murray, J., dissenting. The United States and Morton appealed.

The papers referred to in Sandoval's petition, and constituting the expediente, were as follows:

"I, Lorenzo Marquez, resident of this town of Santa Fé, for myself and in the name of fifty-one men accompanying me, appear before your excellency, and state that in consideration of having a very large family, as well myself as those accompanying me, though we have some land in this town, it is not sufficient for our support, on account of its smallness and the great scarcity of water, which, owing to the great number of people, we cannot all enjoy, wherefore we have entered a tract of land on the Rio Pecos, vacant and unsettled, at the place commonly called El Vado, and where there is room enough not only for us, the fifty-one who ask it, but also for every one in the province not supplied. And its boundaries are, on the north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente; on the south the Cañon Blanco; on the east the Cuesta, with the little hills of Bernal, and on the west the place commonly called the Guzano, which tract we ask to be granted us in the name of our Sovereign, whom may God preserve; and among these fifty-one men petitioning are thirteen Indians, and among them all are twenty-five firearms, and they are the same persons who appear in the subjoined list which I present in due form; and we unanimously and harmoniously, as one person, do promise to enclose ourselves in a plaza well fortified with

bulwarks and towers, and to exert ourselves to supply all the firearms and ammunition that it may be possible for us to procure. And, as we trust in a compliance with our petition, we request and pray that your excellency be pleased to direct that we be placed in possession in the name of his Royal Majesty our Sovereign, whom may God preserve. And we declare in full legal form that we do not act with dissimulation, etc.

"LORENZO MARQUEZ,
"*For Himself and the Petitioners.*"

[The list referred to does not appear.]

"*Decree.*

"At the town of Santa Fé, capital of this Kingdom of New Mexico, on the twenty-fifth day of the month of November, one thousand seven hundred and ninety-four, I, Lieutenant Colonel Fernando Chacon, knight of the order of Santiago, civil and military governor of said Kingdom, sub-inspector of the regular troops therein, and inspector of the militia thereof, for His Majesty (whom may God preserve), having seen the foregoing document and petition of Lorenzo Marquez for himself and in the name of fifty-one men, should and did direct the principal alcalde of this town, Antonio José Ortiz, to execute said grant as requested by the petitioners, so that they, their children and successors may have, hold and possess the same in the name of His Majesty, observing at the same time the conditions and requisites required in such cases to be observed, and especially that relative to not injuring third parties. Thus I ordered, provided and signed with the witnesses in my attendance, with whom I act for want of a royal or public notary, of which there is none in said kingdom, and upon this common paper, there being none of any seal, to which I certify.

"CHACON.

"Attending: FERNANDO LAMELAS."

"On the twenty-sixth day of the month of November, one thousand seven hundred and ninety-four, I, Antonio José Ortiz, captain of the militia and principal alcalde of the town

of Santa Fé, in pursuance of the order of Lieutenant Colonel Fernando Chacon, knight of the order of Santiago, and civil and military governor of this Kingdom, before proceeding to the site of El Vado, I, said principal alcalde, in company with two witnessess, who were Xavier Ortiz and Domingo Santiestevan, the fifty-two petitioners being present, caused them to comprehend the petition they had made, and informed them that to receive the grant they would have to observe and fulfil in full form of law the following conditions:

"First. That the tract aforesaid has to be in common, not only in regard to themselves, but also to all the settlers who may join them in the future.

"Second. That with respect to the dangers of the place, they shall have to keep themselves equipped with firearms and bows and arrows, in which they shall be inspected as well at the time of settling as at any time the alcalde in office may deem proper, provided that after two years' settlement all the arms they have must be firearms, under the penalty that all who do not comply with this requirement shall be sent out of the settlement.

"Third. That the plaza they may construct shall be according as expressed in their petition; and in the meantime they shall reside in the pueblo of Pecos, where there are sufficient accommodations for the aforesaid fifty-two families.

"Fourth. That to the alcalde in office in said pueblo they shall set apart a small separate piece of these lands for him to cultivate for himself at his will, without their children or the successors making any objection thereto, and the same for his successor in office.

"Fifth. That the construction of their plaza, as well as the opening of acequies and all other work that may be deemed proper for the common welfare, shall be performed by the community with that union which in their government they must preserve.

"And when this was heard and understood by each and all of the aforesaid persons, they accordingly unanimously responded that they understood and heeded what was communicated to them.

"Wherefore I took them by the hand and announced in clear and intelligible words that in the name of His Majesty (God preserve him) and without prejudice to the royal interest or that of any third party, I led them over said lands, and they plucked up grass, cast stones, and shouted 'Long live the King,' taking possession of said land quietly and peaceably, without any objection, pointing out to them the boundaries, which are, on the north, the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente; on the south, the Cañon Blanco; on the east, the Cuesta with the little hills of Bernal, and on the west, the place commonly called the Guzano, notifying them that the pastures and watering places are in common. And that in all time it may so appear, I, acting by appointment, for want of a notary, there being none in this jurisdiction, signed this with my attending witnesses, with whom I act. To which I certify.

"Antonio José Ortiz.

"Attending: José Campo Redondo.

"Ant'o José Ortiz.

"This copy agrees with its original on file among the archives of this town, and is faithfully and legally made, compared and corrected. In testimony whereof I make my customary sign manual, in this town of Santa Fé, on the eighth day of the month of November, one thousand seven hundred and ninety-four.

"(Signed) Antonio José Ortiz."

"[seal.] Fourth rial.

"Fourth seal, fourth rial, years one thousand seven hundred and ninety-eight and ninety-nine.

"[seal.]

"At this place, San Miguel del Bado del Rio de Pecos, jurisdiction of the capital town of Santa Fé, New Mexico, on the twelfth day of March in the present year, one thousand eight hundred and three, I, Pedro Baptista Pino, justice of second vote of the town of Santa Fé and its jurisdiction, by verbal order of Colonel Fernando Chacon, governor of this

province, have proceeded to this said settlement for the purpose of distributing the lands which are under cultivation to all the individuals who occupy said settlement; and having examined the aforesaid cultivated land, I measured the whole of it from north to south and then proceeded to lay off and provide the several portions, with the concurrence of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose, in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible I caused them to draw lots, and each individual drew his portion, and the number of varas contained in each one portion was set down, as will appear from the accompanying list, which contains the number of the individuals who reside in this precinct, amounting to the number of fifty-eight families, between whom all the land was divided, excepting only the portion appertaining to the justice of this precinct, as appears by the possession given by the said governor, and another small surplus portion, which by the consent of all is set aside for the benefit of the blessed souls in purgatory, on condition that the products are to be applied annually to the payment of three masses, the certificates for which are to be delivered to the alcalde in office of said jurisdiction. And after having made the distribution, I proceeded to mark out the boundaries of said tract from north to south, being on the north a hill situated at the edge of the river above the mouth of the ditch which irrigates said lands, and on the south the point of the hill of pueblo and the valley called Temporales, a large portion of land remaining to the south, which is very necessary for the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the care and trust of this matter, giving to each one of those contained in the list the amount he may require and can cultivate; and after having completed all the foregoing, I caused them all to be collected together and notified them that they

must each immediately erect mounds of stone on the boundaries of their lands so as to avoid disputes, and I also notified them that no one was privileged to sell or dispose of their land until the expiration of ten years from this date, as directed by said governor, who, if he be so pleased, will certify his proper approval at the foot of this document, of which a copy shall remain in this town and the original be deposited in the archives where it properly belongs. Done in the aforesaid town, on the day, month and year above mentioned; signed with my hand with two attending witnesses, with whom I act in the absence of a public or royal notary, there being none of any description in this kingdom. I certify.

"(Signed) PEDRO BAPTISTA PINO.

"Attending: JOSÉ MIGUEL TAFOYA."

Here followed the list of fifty-eight individuals, with the number of varas each one received, running from 49 varas in one instance to 230 in another, 65 varas being allotted in thirty-eight instances.

"There are contained in this list fifty-eight families.

"San Miguel del Bado, March twelfth, one thousand eight hundred and three. PEDRO BAPTA. PINO.

"Given gratis, together with twenty-odd leagues travel.

["PINO'S RUBRIC.]

"By virtue of what has been done by Pedro Pino, senior justice of second vote of this capital town of Santa Fé concerning the distribution of lands made in the name of His Majesty to the residents of the new town of El Bado, known as San Miguel, I declare the aforesaid residents of El Bado the lawful owners thereof, approving and confirming the possession given by said Senior Justice Pedro Pino; and in order that it may so appear in all time, I signed this at Santa Fé, New Mexico, on the 30th day of March, 1803.

"FERNANDO CHACON."

It appeared in evidence that the alcalde, Pino, two days after making the distribution at San Miguel, made another

at the place of San José, within the same grant, which was approved by Governor Chacon, March 30, 1803, the same day that he approved the allotment of land at San Miguel; that allotments were made from time to time within this grant at various other places until at least 1846; that a town was formed known as the town of San Miguel del Bado, an ayuntamiento or town council being elected, and also an alcalde; that the town continued until the American occupation; that jurisdiction was exercised by the town council, not only over the municipality and those living therein, but over the adjoining country and settlements which were too small to be entitled to an ayuntamiento; and that at present there are living within the outboundaries of the grant at least four or five thousand people who have collected themselves principally within four or five settlements. Testimony was further introduced, disclosing the manner in which the lands included within the outboundaries had been administered, and also the administration of property rights in adjoining settlements. This tended to show that the people cultivated the portions of land that were partitioned to them according to the number in the family; that they obtained the land from the ayuntamiento, but the alcalde was the person who, under the direction of the board, made the partition to those who came in from time to time to settle, from lands which had not been partitioned before; that the unassigned lands were common pasture grounds for everybody, and the water and watering places were free to all and for the benefit of all families; but none of them were considered the owners of the common pasture grounds, and they had no right to sell anything except the tracts upon which they had houses and farms.

In brief, the evidence is correctly summed up by counsel for the United States as showing that subsequent to the allotment and partition of 1803, and up to the date of the American occupation, the lands within the boundaries of this grant and a large amount of outlying lands were administered by the government of New Mexico through the ayuntamiento of San Miguel del Bado; that persons coming subsequent to

the allotment of 1803 applied to the ayuntamiento for land, and if the petition or application were favorably received and considered, the alcalde was instructed to make them allotments of land for agricultural purposes and to put them into possession of the same, but always subject to the territorial deputation.

Mr. Matthew G. Reynolds for the United States. *Mr. Solicitor General* was on his brief.

Mr. T. B. Catron for Morton. *Mr. Edward L. Bartlett* filed a brief for same.

Mr. John D. W. Veeder for Sandoval *et al.*

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

By Article VIII of the treaty of Guadalupe Hidalgo of February 2, 1848 (and we are not concerned here with the treaty of December 30, 1853), Mexicans established in territories previously belonging to Mexico, and remaining for the future within the limits of the United States as defined by the treaty, were free to continue where they then resided, or to remove at any time to Mexico, "retaining the property which they possessed in said territories or disposing thereof or removing the proceeds wherever they please," and "in the said territories property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, 929.

The mode in which private rights of property may be secured, and the obligations imposed upon the United States, by treaties, fulfilled, belongs to the political department of the government to provide. In respect to California, this was done through the establishment of a judicial tribunal, but in

respect of the adjustment and confirmation of claims under grants from the Mexican government in New Mexico and in Arizona, Congress reserved to itself, prior to the passage of the act of March 3, 1891, creating the Court of Private Land Claims, the determination of such claims. *Astiazaran* v. *Santa Rita Mining Company*, 148 U. S. 80; *Ainsa* v. *United States*, 161 U. S. 208, 222.

By the act of March 3, 1851, c. 41, 9 Stat. 631, Congress created a board of land commissioners to determine claims to land in California asserted "by virtue of any right, or title, derived from the Spanish or Mexican government." § 8.

Section 11 of the act provided that the board of commissioners thereby created, the District Court and this court, "in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of United States, so far as they are applicable"; that is, the decisions theretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities previous to the cession to the United States. *Fremont* v. *United States*, 17 How. 542, 553.

Section 14 permitted the claims of lot holders in a city, town or village to be presented in the name thereof, and authorized the presumption of a grant to such city, town or village when shown to have been in existence on the day named.

The act of March 3, 1891, is couched in different phraseology.

Section 6 authorizes any person or persons, or corporation or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico, "by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed

by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," to file a petition in the Court of Private Land Claims praying that "the validity of such title or claim may be inquired into and decided."

By section 7 it is provided that the proceedings should "be conducted as near as may be according to the practice of the courts of equity of the United States," and the court is empowered "to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord, eighteen hundred and forty-eight, or the treaty concluded between the same powers at the City of Mexico, on the thirtieth day of December, in the year of our Lord, eighteen hundred and fifty-three, and the laws and ordinances of the government from which it is alleged to have been derived."

Section 13 provides that all the proceedings and rights thereinbefore referred to shall be conducted and decided subject to certain enumerated provisions and to the other provisions of the act.

Among the provisions contained in section 13 is the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The seventh subdivision of the same section reads thus:

"No confirmation in respect of any claims or lands mentioned in section six of this act or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty to the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than eleven square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim."

But this limitation does not, in our judgment, affect the construction of the act so far as brought in question in the case in hand.

In *Ainsa* v. *United States*, 161 U. S. 208, 223, attention was called to the act of March 3, 1851, and it was said: "But, under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the Court of Private Land Claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

This was reaffirmed in *United States* v. *Santa Fé*, 165 U. S. 675, 714, and Mr. Justice White, speaking for the court, said: "An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, c. 539, creating the Court of Private Land Claims, 26 Stat. 854, and, therefore, is beyond the reach of judicial cognizance. The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. *Le Bois* v. *Bramell*, 4 How. 449, 461; *Ainsa* v. *United States*, 161 U. S. 208, 222. To the extent only that Congress has vested them with authority to determine and protect such

rights, can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief cannot be given. *United States* v. *Clarke*, 8 Pet. 436, 444."

And after referring to sections 13 and 7, and pointing out that "the meaning of the words 'complete and perfect,'" as used in section 6, "is to be derived by considering the context and not by segregating them from the previous part of the sentence exacting that the claim must be one which the United States was bound to recognize and confirm by virtue of the treaty"; and that "these words are moreover controlled by the mandatory requirements of section 13," the opinion thus continues: "Although the act of 1891, in section 11, authorized a town presenting a claim for a grant to represent the claims of lot holders to lots within the town, this provision does not override the general requirements of the statute as to the nature of the claim to title which the court is authorized to confirm. The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of Congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851. The act of 1851 authorized the adjudication of claims to land by virtue of any 'right' or 'title' derived from the Spanish government, and conferred the power in express language on the board and court to *presume a grant in favor of a town.* The act of 1891 not only entirely omits authority to invoke this presumption, but, as we have seen, excludes by express terms any claim, the completion of which depended upon the mere grace or favor of the government of Spain or Mexico, and of the United States as the successor to the rights of these governments."

The contention on behalf of the United States is that the Court of Private Land Claims had no power to confirm lands situated as these were, within the outboundaries, that had not been allotted prior to the date of the treaty because under the laws of Spain and Mexico the *jus disponendi* of all unassigned

lands remained in the government and passed to the United States.

The papers in the expediente show that it was the intention that a town or pueblo should be, and that it was, established. The application stated that the land asked for was intended not only for the fifty-one petitioners, "but also every one in the province not supplied"; the alcalde Ortiz was directed to execute the grant on "the conditions and requisites required in such cases to be observed"; the conditions are set out by the alcalde in his report as all agreed to by petitioners, among them being the provision that the tract was to "be in common, not only in regard to themselves, but also to all the settlers who may join them in the future."

In 1803, the alcalde Pino under instructions from the governor went upon the grant and divided the lands which had been occupied and cultivated amongst the original petitioners and some others, and put each one in the possession of the lot drawn by him, notifying them that no one should have the right to sell the land allotted to him until the expiration of ten years from that date as directed by the governor. The grant purported to convey only the use of the lands with the right to acquire the legal title to such portion of it as might be allotted to each in severalty on condition that they remained on it and cultivated it for ten years, while the unoccupied or common lands were declared to be for the benefit of the original grantees and all other persons who might desire to settle on the grant and who complied with the terms in regard to settlement and cultivation.

Did the fee to lands embraced within the limits of the pueblo and intended for community use continue to remain in the sovereign or did it pass to the pueblo?

The general subject was much considered in *United States* v. *Santa Fé*, *supra*, and it was said: "It cannot be doubted that under the law of Spain it was necessary that the proper authorities should particularly designate the land to be acquired by towns or pueblos before a vested right or title to the use thereof could arise." Various extracts were made from the laws of the Indies, and the fol-

lowing passages from Elizondo's Practica Universal Forense were quoted:

"The Kings, the fountains of jurisdictions, are the owners of all the *terminos* situated in their kingdoms, and as such can donate them, divide or restrict them, or give any new form to the enjoyment thereof, and hence it is that the pueblos cannot alienate their *terminos* and *pastos* without precedent royal license and authority." Vol. 3, p. 109. "There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a *territorio* and *pertinencias*, which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the *terminos* of the provinces and towns, assigning to these the use and enjoyment, but the domain remaining in the sovereigns themselves." Vol. 5, p. 226.

And it was then observed: "Moreover, the general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the King, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representative, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recopilacion (2 White, New Recop. p. 52), . . . illustrate the absolute control thus exercised by the King of Spain over the subject."

The existence of this power of control and disposition as to municipal lands in the supreme Spanish and then Mexican authority was shown by further references, and various acts of Congress were cited as enacted in view "of this state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant, to all of which rights the United States suc-

ceeded as successor of the King of Spain and the government of Mexico."

"So, also," said the court, "it may well be supposed that it was upon this aspect of the imperfect nature of right in land claimed by towns in territory formerly owned by Spain and Mexico, and the long established construction of such rights evidenced by the foregoing acts of Congress, which caused this court, speaking through Mr. Justice Field, in *Grisar* v. *McDowell*, 6 Wall. 363, 373, to say: 'Even after the assignment the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest . . . amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands or as a source of revenue, or for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country.'"

Although the particular question arising in the foregoing case was whether the Spanish law, *proprio vigore*, conferred upon every Spanish villa or town a grant of four square leagues of land, yet its disposition involved the same considerations as those presented on this record, and we regard its reasoning and conclusions as decisive here.

Under the laws of the Indies, lands not actually allotted to settlers remained the property of the King, to be disposed of by him or by those on whom he might confer that power. As Mr. Hall says (chap. VII, § 122): "The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign, and never in the pueblo as a corporate body." Subsequent decrees, orders and laws did not change the principle.

Towns were established in two ways: By their formation by empresarios or contractors, the title to the lands granted vesting in the contractors and settlers, minute provisions being made in relation thereto: By individuals associating themselves

together for that purpose and applying to the governor of the province, through whose action a city, villa or place was established. These municipalities appear to have been *quasi* corporations, corporations *sub modo*, and their ayuntamientos exercised political control over the pueblos and over surrounding country attached to their jurisdiction. The alcalde made allotments subject to the orders of the ayuntamiento, and they again were apparently subject to the provincial deputation or an equivalent superior body. At all events, unallotted lands were subject to the disposition of the government.

At the date of the treaty of Guadalupe Hidalgo, neither these settlers nor this town could have demanded the legal title to such lands of the former government, and the Court of Private Land Claims was not empowered to pass the title to either. It is for the political department to deal with the equitable rights involved.

The result is that the decree in Morton *v.* United States *is affirmed, and the decree in* United States *v.* Sandoval and others *is reversed, and the cause remanded that a decree may be entered in conformity with this opinion; and it is so ordered accordingly.*

RIO ARRIBA LAND AND CATTLE COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 195. Argued March 9, 10, 1897. — Decided May 24, 1897.

In the grant which forms the subject of controversy in this case, the Spanish governor did not intend to grant nearly 500,000 acres to the applicants, in common, and the alcalde did not so understand it, but delivered juridical possession only of the various allotments made to petitioners in severalty.

United States v. *Sandoval*, 167 U. S. 278 followed, that, as to all such unallotted lands within exterior boundaries, where towns or communities were sought to be formed, the title remained in the Government for such disposition as it might see proper to make.

Statement of the Case.

The fact that Congress may have confirmed similar grants cannot operate to justify the Court of Private Land Claims in adjudication of a case not coming within the terms of the law of its creation.

This was a petition by the Rio Arriba Land and Cattle Company filed in the Court of Private Land Claims for the confirmation of what was commonly called the Cañon de Chama Grant, situated in Rio Arriba County, New Mexico, and alleged to contain 472,763.95 acres.

It appeared that in 1806 a petition was addressed to the governor of the Territory, Alencaster, as follows:

"I, Francisco Salazar, ensign in the militia of Abiquiu, together with my brothers (hermanos) and twenty-eight other poor and needy citizens, appear before your excellency (and state), that I have examined a tract of land, unappropriated and unsettled, called the Chama River Cañon, situated about four leagues distant from this place, and for which we petition to your excellency in the name of the King and without injury to any third party, as we find ourselves without any land wherefrom to support ourselves, owing to the decease of our mother at the rancho off of which she supported us, and as the latter has this day been divided among nine heirs residing in other jurisdictions we find ourselves absolutely deprived of any place to plant and to enable us to pay tithes and first fruits.

"We therefore humbly ask and pray your excellency to heed this our petition, and we trust from the charitable heart of your excellency you will consider the same favorably, and we protest our petition not to be made in dissimulation and whatever be necessary, etc."

This petition was referred, July 6, 1806, by the governor to the alcalde in these words:

"The alcalde will report fully on this petition, giving the extent of the land in question, its boundaries, the proportion of irrigable land, and when he comes to say how many settlers it will accommodate and the application being made public he will report whether any damage may result to any of the surrounding settlers, either in regard to pasturage, water or watering places, and he will make personal examination re-

specting all these matters, to the end that action may be had in accordance with his report and subsequent questions avoided."

On July 14, 1806, the alcalde made the following report:

"I, Manuel Garcia de la Mora, chief alcalde, in obedience to the foregoing decree, proceeded personally to visit and examine the spot (rio) called the Chama River cañon, over all of which I passed with the greatest care and observation, as well the land itself as the places for taking out the heads of irrigating canals and the pastures and watering places, and I report that for pastures without fields and without any resulting damage there is one league from the last grant (that of the Martinezes) to the side on which the sun rises, and that thence to the western boundary, which divides the said Chama River cañon from the Gallina River, there are about two leagues, somewhat more or less, cultivable land, and the town being placed in the centre, the thirty-one families applying for it may be accommodated and land enough remain for the increase they may have in the way of children and sons in law (hijos y llernos), and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the north and on the south one league for pastures, for on these two sides no injury can result, as there is neither a settlement or grant now made or that might be made, and the heads of acequias along the length of the planting land there are five or six of them.

"With all the foregoing I have fulfilled your excellency's order. The same having been read faithfully and quite audibly to all the community, they replied that they had nothing to represent in regard to said petition, and that no one of them was injured, the land being uncultivated and unsettled, and the said cañon is distant from Abiquiu about five leagues."

On August 1, 1806, Governor Alencaster decreed:

"In pursuance of the foregoing report, that the said alcalde may proceed to the assignment of twenty-six lots of land capable of being planted with the equivalent of three cuartillas of wheat, one ditto or three almudes of corn, another three of beans, and of having erected on each of them a small house

with a garden, and of these lots two of them adjoining one another will be assigned to the Ensign Francisco Salazar and the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands, the said assignments to be made in such manner that lands may remain unassigned equally on the four sides, or at least on two of them, so that new assignments may be made in the future, and the lines bounding with the adjoining lands to be described in order that the rights to pastures and watering places may clearly appear; to the said parcel of lots held by the twenty-five settlers will be given the name 'San Joaquin del Rio de Chama"; and the said alcalde, having received the said twenty-four titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of His Majesty, to the twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

On March 1, 1808, the alcalde made this report:

"I, Manuel Garcia de la Mora, chief alcalde of the town of La Canada, proceeded to the rancho of San Joaquin, and in view of and in obedience to the foregoing decree of Lieutenant Colonel Joaquin del Real Alencaster, governor of this royal province, I, said chief alcalde, proceeded to the Chama River cañon, called the San Joaquin cañon, accompanied by the twenty-five settlers; and there appearing also fourteen other citizens without land, and his excellency having given me verbal instructions to the effect that should other persons come forward to increase the settlement land should also be assigned to them with the same rights as the others enjoy, and all the settlers being assembled, I proceeded with the distribution of the land to them, as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own piece

of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land, plucking up weeds and casting stones and shouting aloud 'Long live the King that protects and helps us!' with which they remain in possession, naming the town whose site I pointed out to them, San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all of which authenticated with two instrumental witnesses, designating to the settlers as boundaries — on the north, the Ceballa valley; on the south, the Capulin; on the east, the boundary of the Martinezes; and on the west, the Little White hill, (segita blanca), for their pastures and watering places, and with a view to the coming of other settlers and the increase of families and descendants; all of which I signed with two instrumental witnesses and with the witnesses in my attendance, with whom I act by appointment for lack of a royal or public notary, there being none of any kind in this royal province; to which I certify."

Then followed the specific distribution of so many varas to each duly authenticated.

The record showed that these documents were produced from private hands, and it did not appear that they were ever returned to the governor to be legalized, or authority given for the execution of the various testimonios, and the delivery thereof to the grantees, the original remaining in the office of the public record as directed by the governor in his decree of August 1, 1806; nor did it appear that these various testimonios were issued and the original returned.

In 1832, one Juan de Jesus de Chacon, for himself and Mateo Garcia and Antonio Duran, presented a petition to the governor, asking that all the privileges allowed by law be permitted them, stating that two or three years before the alcalde Ortiz had placed them in possession of lands on the Gallina River; but that the present alcalde, Gallego, was attempting to dispossess them "in a manner most strange," considering that the land had been given to petitioners by a competent judge, and that they had cultivated it for two consecutive years and raised all the crops within their means;

and they applied to the governor that he would direct the alcalde to leave them at liberty to make such use as might appear proper of the lands lawfully belonging to them.

On April 2, 1832, the governor referred this petition to the *asesor general*, the *Licenciado* Barreiro. On the same day Barreiro made his report, stating that he had previously notified the alcalde of Abiquiu that he could not pass upon the rights of the parties on a simple communication, and recommending that the petitioners form an expediente of the whole matter and then refer the case to him; also directing, in regard to the possession given by Alcalde Ortiz, that nothing should be done until final adjudication, whereupon the governor made the following order:

"In order that the responsibility of the constitutional alcalde of Abiquiu may be covered, that the administration of justice may not experience delays prejudicial to the parties, and that the property may not be prejudiced, the said alcalde will proceed in conformity with the decision of the attorney general and will form an expediente of the whole and with new reference will decide as to what he may deem to be just, but in the meantime will respect the land in question, inasmuch as up to the present time the holders of it are not agreed as to the nullity of their possession, and consequently it will form a part of their property, as in such matters the regular formalities are indispensable, and without them the alcaldes cannot decide with the certainty required by the proper administration of justice."

On April 6, the alcalde Gallego reported that having examined the question between the parties he had directed that a suit of conciliation with two arbitrators named by the parties in litigation be brought in accordance with article No. 155; and he found that the alcalde not having carried out the will of Governor Alencaster by properly certifying the grant document and giving certified copies to the parties in interest and returning the original to the capital to be placed in the archives, for which omission and others, he adjudged the original possession not to be legal, and to be without right until confirmed by the governor. He also reported as to the ac-

tion of alcalde Ortiz that it was not legal, possession having been given by him without the production of any document approved by the governor, or any approval or certification of petition, as is usual, nor the proper proceedings taken, which was the province of the most excellent territorial deputation, with report of the proper ayuntamiento on the petition; and that a new possession must be given.

This report was returned by Barreiro, who required the alcalde to make up an expediente as originally directed. The alcalde summoned the parties, and their answers, replies and rejoinders were set forth at length. Salazar and his associates insisted that the possession of the lands at the Cañon de San Joaquin del Rio de Chama and the decree of Governor Alencaster were legal, but that the action of the Alcalde Ortiz was wholly without right. On these papers the asesor general made his report as follows:

"The statements of the parties having been examined, the question is made clear, and it appears that the possession given by the alcalde José Maria Ortiz is of no value because, even if he were an authority, he was not competent to give and partition lands, because this is an exclusive attribute of the territorial deputation.

"Under date of the 6th of February, I decided that with regard to the possession given by Ortiz that nothing should be done until I had resolved upon what I considered proper, but this was not in any way intended to approve the proceedings of the alcalde.

"Finally, I now say that the possession given at the Cañon de San Joaquin del Rio de Chama is legal because, even if there be any requisite lacking, it is not an essential requisite, but one of pure formality. With respect to the possession given, I am of the opinion that the alcalde Ortiz gave it without power and that it should be annulled, the right remaining with the parties aggrieved to petition the most excellent deputation to give them a good title, which will place them legally in possession of the lands which they may desire to possess, with the remark that the annullment must not be understood to extend to the possession which

the children of the old settlers may hold, because these should come in for their part, as is expressed in the grant itself, but not others who are strangers."

On the 10th of May, 1832, Gallego made a partition of lands among eighteen interested parties, assigning to them lots of land of fifty varas each, and of uncultivated land of one hundred varas each.

The record did not show that the proceedings before the asesor general or his action and opinion were returned to or in any way approved by the governor, or the territorial deputation; nor that the partition and assignment by the alcalde were ever reported and approved; nor under what authority he acted.

There was considerable controversy as to the west boundary of the tract, but it was not contended that the proceedings of 1832 extended the area of the lands intended to be granted by Governor Alencaster in 1806.

Certain records of suits in 1880 and 1887 in the District Court of Arriba County, for the purpose of quieting the title and a partition of said lands, as between individual claimants, were set forth in the record.

The Court of Private Land Claims confirmed petitioner's claim to the extent of the lands lying in the Cañon del Rio de Chama, which were first actually apportioned among the settlers, and no more; and the company appealed.

Mr. F. W. Clancy for appellant.

Mr. Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

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

Assuming, but without in any manner deciding, that Governor Alencaster had full power to make the grant in any quantity and in any manner he saw proper, we think it clear that he did not, and did not intend to, make a grant of nearly

half a million of acres to the original applicants, in common, and that the alcalde did not so understand it, and did not attempt to deliver juridical possession of such a tract, but only of the various allotments that were made to petitioners in severalty. The petition simply mentioned a tract called the Chama River Cañon, and the governor directed the alcalde to report on its extent and boundaries, the proportion of irrigable land, and how many settlers it would accommodate. The alcalde reported that he had personally visited the Chama River Cañon and passed over all the land with the greatest care and observation, and he said:

"The town being placed in the centre, the thirty-one families applying for it may be accommodated and land enough remain for the increase they may have in the way of children and sons in law, and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the north and on the south one league for pastures, for on these two sides no injury can result."

There is nothing in the terms of the grant to indicate that the governor intended to place thirty-one persons in possession, with the exclusive right of property, of a grant twenty-five miles north to south, and thirty miles from east to west. He says: "In pursuance of the foregoing report, the said alcalde may proceed to the assignment of twenty-six lots of land capable of being planted with the equivalent of three cuartillas of wheat, one ditto or three almudes of corn, another three of beans, and of having erected on each of them a small house with a garden." He directed that Salaza should have two lots, and "the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands," etc., and that "to the said parcel of lots held by the twenty-five settlers will be given the name 'San Joaquin del Rio de Chama.'" The governor then continued thus:

"And the said alcalde, having received the said twenty-four titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of His Majesty, to

the twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

Eighteen months thereafter the so-called act of possession was executed on a verbal order of the governor. The alcalde recites:

"I proceeded with the distribution of the land to them, as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own piece of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land, plucking up weeds and casting stones and shouting aloud, 'Long live the King that protects and helps us!' with which they remain in possession, naming the town whose site I pointed out to them, San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all of which authenticated with two instrumental witnesses, designating to the settlers as boundaries — on the north, the Ceballa valley; on the south, the Capulin; on the east, the boundaries of the Martinezes; and on the west, the Little White hill (*cejita blanca*), for their pastures and watering places, and with a view to the coming of other settlers and the increase of families and descendants."

The alcalde does not state that he delivered the possession to any one individual or to all these individuals in common, of a large tract of land, but possession to each individual of the land to which he was entitled and no more, and this was accompanied by a description of the outboundaries within which allotments could be made by the proper governmental officials to persons that might come in thereafter.

Reference is indeed made to the use of the lands within the outboundaries for pastures and watering places, but this did not put them out of the class of public lands, and, whatever equities might exist, no title was conveyed.

We have just held in *United States* v. *Sandoval*, *ante*, 278, that as to all unallotted lands within exterior boundaries where towns or communities were sought to be formed, as in this instance, the title remained in the government for such disposition as it might see proper to make.

Moreover, it is clear that the alcalde had no authority to give possession of 475,000 acres of land to these thirty-one petitioners, even if he could have done so if expressly authorized by direct order of the superior authorities, which is not pretended.

We entirely agree with the holding of the Court of Private Land Claims, as indicated by their decree, that the act of possession, the alcalde's report and the governor's decree, taken together, show that the only title which was passed on or intended to be passed on was to the various allotments which were actually made. Nor can we concur in the view that the result is affected by the proceedings had before the asesor general in 1832. Whatever the judicial authority of this officer, his action did not amount to an adjudication that those who were living on the grant, or who went there in 1806 or 1808, were the absolute and unconditional owners of 475,000 acres of land, and, indeed, he seems to have been of opinion, not only that the unallotted lands were subject to disposition by the government, but that the proper authority to make such disposition was the territorial deputation.

It is also said that Congress has repeatedly confirmed similar grants, but the fact that Congress may have thus disposed of the public lands, in its discretion, cannot operate to justify the Court of Private Land Claims in adjudication of a case not coming within the terms of the law of its creation.

The proceedings in the District Court of Rio Arriba County are nothing to the purpose, as the title of this property, under the treaty of Guadalupe Hidalgo and the act of Congress of July 22, 1854, c. 103, 10 Stat. 308, was *sub judice*. The claimants were then proceeding on their claim before the surveyor general, and Congress, under that act, and an attempt to enforce that title and have it adjudicated by the

local courts, comes within the decision in *Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S. 80.

In that case it was said by Mr. Justice Gray, delivering the opinion of the court: "Undoubtedly, private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; and Congress might either itself discharge that duty, or delegate it to the judicial department."

We have frequently reaffirmed the well-settled rule thus announced, and perceive no reason for reviewing it, although counsel suggests that we should do so as bearing on the jurisdiction of the territorial courts and in view of the so-called protocol signed by the commissioners of this country to Mexico, at the time of the exchange of the ratifications of the treaty of Guadalupe Hidalgo. A sufficient account of that diplomatic incident will be found in President Polk's message of February 8, 1849, Ex. Doc. H. Rep., Second Session, 30th Cong., vol. 5; and in Mr. Secretary Bayard's letter of November 24, 1886, 3 Whart. Int. Dig., (2d ed.,) Appx. § 131, p. 885. We did not feel called upon to discuss it in *Astiazaran's case*, nor do we now in disposing of the case in hand, under the act of March 3, 1891, on this record. *Botiller* v. *Dominguez*, 130 U. S. 238.

Furthermore, it is conceded that these records were put in evidence only to show that petitioner had succeeded, in part at least, to the rights of the original grantees.

Decree affirmed.

Syllabus.

MAY *v.* MAY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 269. Argued April 2, 5, 1897. — Decided May 10, 1897.

The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised, whenever such a state of mutual ill-feeling, growing out of his behavior, exists between him and his cotrustee or the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent them from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated.

A testator devised all his estate to his wife and a son, in trust to pay to the wife one third of the income of the real estate for life, and one third of the personal property absolutely; to divide the income of the other two thirds of the estate, after paying his debts and cancelling existing mortgages, among his children and their issue; and in certain circumstances to sell or mortgage the real estate, if necessary; the two trustees to exercise jointly all the powers conferred, except that the son should manage the real estate, collect the rents thereof, pay the taxes and other expenses thereon, and render monthly accounts to the wife; and gave the other children, "for good and sufficient cause," and with the widow's concurrence, power "by their unanimous resolution" to remove him from his office of trustee, and to appoint another person in his stead. *Held*, that the other children, with the concurrence of the widow, had power to remove him, for what they determined to be good and sufficient cause, subject to the jurisdiction of a court of equity to restrain abuse of the power; and that his removal from the office of trustee terminated his authority to manage the real estate.

The filing of a bill by a trustee under a will to obtain the instructions of a court of equity in the execution of his trust does not suspend a power of removing him given to the beneficiaries by the will; but only subjects their action to the supervision and control of the court.

Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of parties not in being, and unnecessary to be decided for the present guidance of the trustee.

Under a will by which the testator devises and bequeathes all his estate in trust to pay to his widow one third of the net annual income of the real estate during her life, and one third of the personal property absolutely, and to divide the income of the estate, with the exception of her thirds,

Statement of the Case.

after paying his debts and cancelling existing mortgages, among his children, the widow is entitled to a third of the income of the real estate, deducting taxes, insurance and repairs, but without any deduction for interest on debts or mortgages.

THIS was an appeal from a decree of the Court of Appeals which affirmed a decree of the Supreme Court of the District of Columbia, removing the appellant from the office of trustee under the will and codicil of his father, Dr. John Frederick May, of Washington, in the District of Columbia, who died there May 1, 1891, leaving a widow, Sarah Maria May, and six children, William and Frederick and four daughters, all of age; a large estate, consisting mostly of real estate in the city of Washington; and a will and codicil, both of which were duly admitted to probate.

By the will, dated February 4, 1890, he devised and bequeathed all his estate, real and personal, to his wife, and her heirs and assigns, upon the following trusts: 1st. That she should receive one third of the net annual income of his real estate during her life, one third of his personal property absolutely, and the use for her life of his dwelling-house in Washington. 2d. That his estate should be kept intact and undivided while any of his children lived; and the rents and profits, with the exception of his wife's thirds, be applied to the payment of his debts, and especially to the cancelling of any incumbrance or mortgage existing at the time of his death; and, after full payment and cancellation of such debts and incumbrances, be equally divided among his children. 3d. That any part of the estate might be sold by the trustee, if manifestly for the benefit of his heirs, and the proceeds reinvested in real estate, or in mortgages of a particular kind; and that such parts of the estate, as should at the time of his death be subject to mortgages, might, upon the expiration of such mortgages, and if the trustee should be unable to pay or cancel them, be remortgaged. 4th. That, upon the death of any child leaving issue, its share of the rents and profits should go to its issue. The testator also gave his wife "the power to appoint a trustee to succeed her should she deem it best at any time to do so"; appointed her executrix of his will; and

directed that she should not be required to give bond as trustee or as executrix.

On December 17, 1890, the testator gave William May a power of attorney to lease or rent his real estate in the city of Washington, to recover possession of the same, and to collect the rents thereof.

The codicil was dated March 27, 1891, and, omitting the formal parts, was as follows:

"I hereby appoint my son, William May, cotrustee with my wife, Sarah Maria May, my said son and my wife to have and exercise the powers and authority in my said will mentioned and created, except as hereinafter otherwise directed. It is my further wish, and I hereby will and direct, that my said son, William May, shall take charge of my real estate (except my present dwelling house, which shall be and remain in the exclusive charge of my wife during her life) and care for and manage the same for the best interests of my said estate, and in accordance with the terms of my said will; and he shall collect the rents and income of my said real estate, and pay the lawful taxes and assessments, and other expenses thereon, and shall keep the same in good repair. It is my will, and I so direct, that the taxes, insurance and repairs of my said dwelling-house shall be paid out of the general income of my other real estate.

"For the said service of my son, William May, in caring for and managing said estate, and for collecting the rents and paying the taxes and assessments, and other services, as hereinbefore directed, he shall and may retain from money so collected, as his compensation, a commission equal to five per centum of the amount of money by him collected from said estate; and the said William May shall render to my said wife full and true accounts of the rents by him collected, and of the disbursements by him made in the execution of this trust, such accounts to be rendered each and every month, and shall be accompanied by the vouchers for such disbursements. After the death of my wife, said accounts shall be rendered to my other heirs. It is my will that no commission shall be paid to my wife, as a trustee.

Statement of the Case.

"I hereby further will and direct that, for good and sufficient cause, my other heirs, with the concurrence of my wife if she be living, shall have and they are hereby given the power, by their unanimous resolution, to remove my said son, William May, from his office as such trustee, and to appoint another person in his stead.

"It is my wish that neither of my said trustees shall be required to give a bond or other security in reference to the execution of the trusts created by my said will or this codicil."

On May 2, 1892, before the estate had been fully administered, William May, as "trustee of John Frederick May, deceased, and in his own right," filed in the Supreme Court of the District of Columbia a bill against his mother, brother and sisters, to obtain the instructions of the court as to the execution of the trust, and especially upon the effect of the omission of the will to dispose of the principal of the estate after the termination of the trust, and upon the question whether the widow was entitled to a full third of the income without allowing for or deducting the interest upon outstanding mortgages.

On July 5, 1892, answers to the bill were filed in behalf of all the defendants; and on September 28, 1892, the plaintiff filed a general replication.

On November 25, 1892, an instrument was drawn up, purporting to be a "deed, declaration and resolution made" by the four daughters and by Frederick May, and by the widow joining therein as evidence of her concurrence, reciting the clause of the codicil authorizing the removal of William May from his office as trustee and the appointment of another person in his stead; and further reciting that "good and sufficient cause exists for the exercise of such power of removal and substitution, for a number of reasons," some of which, without admitting it to be obligatory to state them, were stated to be that he had failed to render full and true accounts, as required by the codicil; that he made excessive and improper charges against the estate; and that "by his intolerably domineering and disagreeable manner in discussing

the affairs of the trust with his cotrustee, displays of anger when questioned, and attempts to browbeat legitimate opposition and criticism, he has compelled said cotrustee to decline any direct communication with him upon business matters, and she is obliged to employ an expert accountant to examine and report upon the monthly accounts of said William May, and act as her representative in relation to the affairs of the trust." The instrument concluded with the statement that therefore the four daughters and Frederick May, with the concurrence of the widow, "have unanimously resolved, and do hereby resolve, that said William May be and he is hereby removed from his office as trustee or cotrustee under the said codicil and the will of said John Frederick May, deceased, and further that they, the declarants aforesaid, by their unanimous resolution, have appointed and do hereby appoint William H. Dennis, of Washington, D. C., trustee in the stead of said William May, removed, to the fullest extent of the powers conferred by said first codicil."

This instrument was signed and sealed by the widow and the four daughters in person, and by the widow as attorney in fact of Frederick May; and was acknowledged before a notary public on November 26, 1892, by the widow and two of the daughters, and on December 3, 1892, by the other two daughters. The widow, at that time, held a power of attorney, executed July 2, 1891, by Frederick May, then residing at Valparaiso in the Republic of Chili, appointing her his attorney "to do and perform any act or acts necessary to be done or performed to protect and care for" his interest in the estate of his father.

William H. Dennis, by writing upon the resolution of removal, accepted the appointment made and the trust conferred thereby; and on December 29, 1892, wrote and sent a letter to the plaintiff, enclosing a copy of the instrument, as well as a letter from the attorney of the defendants, requesting the plaintiff to turn over to Dennis the possession of all property of the testator in his possession or control, and all documents appertaining to the estate.

On January 3, 1893, the plaintiff filed a petition in the

cause, alleging that the widow and daughters, in undertaking to remove him from the office of trustee, and in making the resolution of removal, falsely and deceitfully pretended that the removal was for good and sufficient cause, and did not act with good faith, but from invidious motives; that they had no power to remove him, pending this suit, except upon application to the court; and that the signature of Frederick May by the widow as his attorney was nugatory and of no effect; specifically denying all the allegations of the resolution of removal; and praying for an injunction against the defendants and Dennis from claiming any right or doing any act under that resolution. On January 7, 1893, upon the plaintiff's motion, Dennis was made a party defendant to the suit; and on January 24, 1893, a temporary injunction was granted as prayed for.

On March 7, 1893, the defendants, by leave given January 21, 1893, filed a cross bill, praying that the plaintiff be decreed to surrender possession of the real estate and all moneys and documents in his charge as cotrustee to Dennis as his successor, and to settle his final account.

Frederick May, on May 8, 1893, executed and acknowledged before a notary public in the city of Washington a deed, ratifying, approving and confirming the acts of the widow in voting for and executing in his behalf the resolution of removal, and also the filing of the prior answer and cross bill in his behalf; and on June 6, 1893, personally appeared in the cause, and, by leave of court, filed a supplemental answer to the like effect.

After a filing of an answer to the cross bill, and a general replication to that answer, and other motions and pleadings not material to be stated, much evidence was taken (the substance of which is stated in the opinion of this court) and the case was heard upon pleadings and proofs before the Supreme Court of the District of Columbia; and that court, on July 31, 1894, entered a final decree, by which the injunction granted on the plaintiff's petition was dissolved; "and it appearing to the court that the heirs of John Frederick May, deceased, other than said William May, with the concurrence of Sarah

Statement of the Case.

Maria May, widow of said deceased testator, proceeded rightfully and within the power conferred by the first codicil to the will of said testator in removing, by their unanimous resolution, dated November 25, 1892, for good and sufficient cause, said William May from his office as trustee or cotrustee named in first codicil, and in appointing the defendant William H. Dennis in his stead; and it further appearing to the court from the proofs that there existed good and sufficient cause why the said William May ought to have been removed from said office of cotrustee, more particularly on account of the discordant relations between him on one side and his cotrustee and all the beneficiaries of the trust except himself on the other side," it was decreed that William May within twenty days surrender possession and control of the trust property in his hands, and all leases, papers and books pertaining to the trust, and all moneys of the trust estate, derived from the collection of rents or otherwise, to the widow and Dennis as cotrustees, and that all the powers and duties originally conferred upon him by the will and codicil be vested in them; that he be perpetually enjoined and restrained from acting as cotrustee, and from interfering with their possession and management of the trust property, "without prejudice, however, to the right of said William May to apply to this court as he may be advised, in his quality as a beneficiary interested in said trust"; and that he render a full and final account of all his receipts and disbursements as cotrustee; and it was further adjudged that the widow (in addition to the other provisions for her benefit) was entitled to receive for life to her own use one third of the net income from the rents and profits of the real estate, after deducting taxes, insurance and repairs, and without any deduction for interest paid or to be paid on debts of the testator, or on any mortgages or incumbrances upon his estate.

The plaintiff appealed to the Court of Appeals, which affirmed the decree, with costs, and afterwards denied a motion to amend it so as to allow him his costs and counsel fees in the cause. 5 App. D. C. 552. Thereupon he appealed to this court.

Mr. W. D. Davidge for appellants. *Mr. W. D. Davidge, Jr.*, was on his brief.

Mr. Enoch Totten and *Mr. William Henry Dennis* for appellees.

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

The important question in this case is whether William May has been rightly removed from the office of trustee under the will and codicil of his father.

As to the facts bearing upon this question, we concur, after careful examination of the voluminous record, in the conclusions expressed by the courts below in the following passages of their opinions:

In the Supreme Court of the District of Columbia, Justice Hagner said: "In the present case, the testimony clearly proves that between Mrs. May, the other trustee, and William May there exists so wide a breach that they can have no personal communication. The jealousy and unfriendliness existing before the testator's death on each side has widened into positive, distinct and most unnatural enmity. On William May's part, it has been undoubtedly increased by his mother's positive refusal to confer with him on the business of the estate, because, as she testifies, quarrels would always result from such conferences, which would be perilous to her health, and also by the terms in which she had expressed herself towards him in her pleadings and testimony in this cause and by her execution of the instrument intended to effect his removal; and, on the part of Mrs. May, that dislike has been intensified by the statements in William May's pleadings and his testimony, and perhaps more pointedly because of his introduction of the painful correspondence, many years old, between her husband and herself, and of Dr. May's letters to the plaintiff on the subject of his domestic troubles. She and all the beneficiaries have testified in painful terms that they believe him to be untrustworthy, dishonest, dictatorial and

disagreeable in manner, and incompetent as a business man. Under such circumstances, anything like free conference between the trustees, or concert of action, in the proper sense of the term, is impossible. If either is to act at all as trustee, each must pursue his or her independent way, with a certainty of differing as to the proper performance of many of the duties of the trust, if not as to all." "This unfortunate state of feeling between the trustee and sisters and brother must equally prevent that peaceable intercourse that beneficiaries should enjoy with the party charged with the management of their interests in this considerable estate. They are certainly entitled to confer in peace with the agent appointed to manage their affairs, and receive from him good-tempered explanations, and give their suggestions as to what they consider the proper steps in the management of their business, without risk of unpleasant disputes, naturally liable to increase in violence at each successive difference. Such a state of affairs would ultimately become insufferable, and most hurtful to the interests of all concerned."

The Court of Appeals, speaking by Justice Morris, expressed the same view as follows: "Dissension, however, very soon arose between William May on the one side, and his mother, brother and sisters, on the other; and, as usual in such cases, the dissensions became intense and bitter. There is in the record a painful disclosure of domestic discord which should have been avoided, and into the details of which we do not deem it necessary for the purposes of this case to enter." "As we have stated, we will not enter into any investigation of the causes of dissension between the parties, or of the reasonableness or unreasonableness of their respective positions. That there is dissension, bitter and uncompromising, is beyond question. That such dissension precludes intercourse between the parties, is their mutual declaration. If there can be no intercourse between them, no communication of views, their joint execution of their joint trust is an impossibility. The due execution of the trust requires concurrence of action, and consultation preliminary to action." 5 App. D. C. 555, 561.

We agree with both the lower courts in thinking it to be

unnecessary and undesirable to enter upon a discussion of the conflicting testimony, or to enlarge upon the details of the conduct and expressions of the parties.

It is sufficient to say that, while nothing is shown to justify an imputation of dishonesty against the appellant, it is indisputable that, from the time of his entering upon the execution of the trust, he treated his mother and cotrustee without due respect and consideration, and was somewhat careless and inaccurate in his accounts rendered to her; that his conduct was calculated to excite, and did excite, resentment in her, sympathy with her in his sisters and brother, and suspicion and distrust upon the part of all of them; and that, as is too apt to happen in family quarrels, the breach once made became wider and wider until there was no longer any natural, or even friendly, intercourse between the appellant and the rest of the family.

What, then, are the rules of law applicable to the case, taking into consideration the peculiar provisions of the will and codicil?

The testator by his will, dated February 4, 1890, devised all his estate to his widow in fee, in trust, to receive herself one third of the income of the real estate for life, and one third of the personal property absolutely; to divide the income of the other two thirds of the estate, after paying his debts and cancelling existing mortgages, among his children and the issue of any deceased child; and, in certain circumstances, to sell or mortgage the real estate; and gave her power to appoint a trustee to succeed her, and appointed her sole executrix. Some ten months afterwards, on December 17, 1890, he gave his son William a power of attorney to lease or rent his real estate, to recover possession of the same, and to collect the rents thereof. About three months later, on March 27, 1891, he executed the codicil, by which he appointed William a cotrustee with the widow, the two together to have and exercise all the powers created by the will, except that William alone was to take charge of, care for, manage and keep in repair the real estate, to collect the rents thereof, and to pay the taxes and other expenses thereon,

receiving a commission of five per cent on his collections, and rendering monthly accounts to the widow. The separate authority thus given to William was substantially that of an agent, little more than he had under the power of attorney in his father's lifetime. The powers of paying and cancelling mortgages, and of distributing income among the children, and of making sales or new mortgages of the real estate, belonged to him and the widow jointly as trustees; and were active trusts, requiring mutual consultation and the exercise of discretion in carrying them into execution.

The clause in the codicil, which gave his other heirs, "for good and sufficient cause," and with the concurrence of the widow, power "by their unanimous resolution" to remove William May from his office as trustee, and to appoint another person in his stead, was evidently intended to enable them to remove him by their own act, without being obliged to resort to a court of equity. If no such power had been given them by the testator, any one of them could have applied to a court of equity, and have had the trustee removed, on proving good and sufficient cause therefor, satisfactory to the court. If the words "for good and sufficient cause," in the codicil, mean only such cause as would be deemed by a court of equity to be good and sufficient, the only effect of conferring the express power of removal would be to restrict the power of removal by requiring their action to be unanimous. This cannot have been the testator's intention. The extent of the power conferred appears to us to have been well and accurately stated by the Court of Appeals in these few words: "The power to remove their trustee was vested in the defendants to this cause. The power to determine when there was good and sufficient cause for such removal was necessarily in them also, subject to the restraining power of a court of equity against the abuse of it." 5 App. D. C. 561.

The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual

ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated. *Uvedale* v. *Ettrick*, 2 Ch. Cas. 130; *Letterstedt* v. *Broers*, 9 App. Cas. 371, 386; *McPherson* v. *Cox*, 96 U. S. 404, 419; *Scott* v. *Rand*, 118 Mass. 215, 218; *Wilson* v. *Wilson*, 145 Mass. 490, 493; 2 Story Eq. Jur. § 1288.

A good illustration of this is afforded by the leading case of *Uvedale* v. *Ettrick*, above cited, decided by Lord Chancellor Nottingham in 1682. In that case, the plaintiff's husband, being seized of Horton and other manors, by his will devised them to his wife and Ettrick and three other persons, in trust to be sold, "and, after his debts and legacies paid, the surplus of the land to be conveyed to his heir"; and died, "having, after his marriage with the plaintiff, mortgaged Horton, so as the plaintiff was dowable of all the estate." She brought a bill in equity against Ettrick and the other three trustees and the heir — "which was to have a sale made, but principally that Ettrick might be put out of the trust." The other three trustees declined the trust. The bill alleged that the plaintiff "was drawn into agreement to release her dower" in the other manors, "and to give a bond of £4000 that, if any of the children died, she would not take administration, except they all died; after which, Ettrick turns to be the plaintiff's enemy, and divers matters are charged in the bill upon Ettrick, as if he practised to get Horton, and to be the whole manager himself." At the hearing, the plaintiff declared in court that she was content to accept dower in the manor of Horton, and to join in the sale of the rest of the land, thereby to extinguish her dower therein, "so that Ettrick might be discharged of the trust. On the other side, Ettrick insisted to be continued in the trust, and would attend a master from time to time to get

a purchaser, and to do all reasonable acts," etc. "Lord Chancellor. 'I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it'; and declared that, without any reflection on Ettrick, he should meddle no farther in the trust, etc." 2 Ch. Cas. 131.

The facts of the case at bar, therefore, far from showing any abuse of the power conferred by the testator, present a state of things which would justify a removal of the appellant by a court of equity, had the will been silent upon the subject.

The filing of this bill by one trustee did not suspend the power of removal given by the will to the beneficiaries with the concurrence of the other trustee; but only subjected their action to the supervision and control of the court. *Cafe* v. *Bent*, 3 Hare, 245, 249.

The form in which their power to remove the appellant was undertaken to be executed was by a resolution in writing, declaring that there was good and sufficient cause for his removal; specifying, among other reasons, his failure to render full and true accounts to his cotrustee, and his domineering and disagreeable conduct towards her; and signed by the widow and the four daughters in person, and by the widow as attorney in fact of the other son. Whether the widow was authorized by the power of attorney from him to act in his behalf in the removal need not be considered, since he afterwards formally ratified her action, and the unanimous wish of all concerned that the removal should take place was made manifest to the court before it acted upon the matter.

The necessary conclusion is that the decree appealed from, in so far as it ordered William May to be removed from his office as trustee, was in accordance with law and justice.

The direction, in the decree, that he should surrender possession and control of the trust property, and all the leases and papers in his hands, and all moneys, whether derived from the collection of rents or otherwise, was a necessary incident of his removal and the appointment of a new trustee in his stead. The management of the real estate would have been one of the duties imposed upon the two trustees jointly by the first clause of the codicil, but for the concluding words of

that clause, "except as hereinafter otherwise directed," followed by the direction that he should manage the real estate. This duty of management was not separate from, but annexed to, his office of trustee; and after his removal from that office, he could not perform this or any other duty connected with the administration of the trust.

The question who will take the estate after the deaths of the wife and the children cannot be decided now, before those events happen, and in the absence of parties who may then be interested. Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee. As was said by Mr. Justice Grier, "The court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*." *Cross* v. *De Valle*, 1 Wall. 1, 16.

The decree, in allowing the wife one third of the net income of the real estate, deducting taxes, insurance and repairs, but without any deduction for interest on debts or mortgages, was clearly in accordance with the explicit provisions of the will, that she should receive one third of the net annual income, and that her thirds should be exempted from the payment of debts or mortgages.

That part of the decree which substitutes Dennis as trustee in the place of the appellant was not specifically objected to in argument, and we allude to it only to prevent any inference that, in affirming the decree generally, we express any opinion upon the question whether Dennis, by acting as counsel for the rest of the family throughout this suit, and supporting all the charges, whether grave or frivolous, made by them against the appellant, has so far identified himself with one side of this unhappy controversy as to make it unfit that he should hold the office of trustee under the will. That question is left to be dealt with by the court below, under the right reserved by the decree to the appellant to apply to the court as he may be advised, in his quality as a beneficiary interested in the trust.

Decree affirmed.

PARSONS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 270. Argued April 8, 9, 1897. — Decided May 24, 1897.

The President has power to remove a district attorney of the United States, when such removal occurs within four years from the date of the attorney's appointment, and, with the advice and consent of the Senate, to appoint a successor to him.

Section 769 of the Revised Statutes which enacts that "district attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates" provides that the term shall not last longer than four years, subject to the right of the President to sooner remove.

It was the purpose of Congress, in the repeal of the tenure of office sections of the Revised Statutes, to again concede to the President the power of removal, if taken from him by the original tenure of office act, and, by reason of the repeal, to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office.

The legislative, executive and judicial history of the question reviewed.

THE appellant, on the 4th day of December, 1894, filed in the Court of Claims an amended petition, in which he alleged that on the 4th of February, 1890, after his nomination and confirmation, he was duly appointed, qualified and commissioned for the term of four years as attorney for the United States for the Northern District of Alabama, and also to act as such for the Middle District of Alabama; that thereupon he entered upon the discharge of the duties of his office; that he never resigned the same, and that he then resided, and has continued to reside, since the date of his commission, in the city of Birmingham, Alabama, and within the Northern District of Alabama, and that he had given his personal attention to the duties of his office, and that no cause of removal had existed since his appointment.

Although the appellant was, as he alleged, duly commissioned as such district attorney, the contents of the commission do not appear in the petition nor in the record, but it has

been assumed that it contained the usual language, which, after authorizing and empowering the officer to execute and fulfil the duties of the office, proceeds as follows: "To have and to hold the said office with all the powers, privileges and emoluments to the same of right appertaining unto him, the said Lewis E. Parsons, Jr., for the term of four years from the date hereof, subject to the conditions prescribed by law."

It was further alleged in the petition that on the 29th day of May, 1893, the appellant received a written communication from the President of the United States as follows:

"EXECUTIVE MANSION,
"*Washington, D. C., May* 26, 1893.

"SIR: You are hereby removed from the office of attorney of the United States for the Northern and Middle Districts of Alabama, to take effect upon the appointment and qualification of your successor.

"GROVER CLEVELAND.

"To LEWIS E. PARSONS, JR.,
"*Birmingham, Ala.*"

No charges had been preferred against the appellant.

Under date of Birmingham, Alabama, June 5, 1893, he sent a written communication to the President of the United States, at Washington, D. C., in which he said:

"My commission bears date February 4, 1890, and authorizes me to hold said office for the definite term of four years from the date thereof, fixed by law, and I am advised by counsel, and it is my own opinion, that you have no power to remove me, and I respectfully decline to surrender the office.

"Very respectfully,

"LEWIS E. PARSONS, JR.,
"*United States Attorney for the Northern District of Alabama.*"

This answer was duly mailed to the President of the United States, and on the same day, viz., the 5th day of June, 1893,

the appellant notified both the Attorney General of the United States and Emmet O'Neal that he declined to surrender the office of attorney of the United States for the Northern District of Alabama to said O'Neal, who was named by the President as appellant's successor, his (O'Neal's) appointment bearing date May 26, 1893.

Upon the 20th day of June, 1893, O'Neal moved the Circuit Court for the Southern Division of the Northern District of Alabama to require appellant to turn over to him all the books and papers and other property appertaining to the office, which motion was resisted by appellant, but was granted by the court, although it did not adjudicate or determine the question of the title to the office, or the power of the President to remove the appellant. *In re O'Neal*, 57 Fed. Rep. 293.

The appellant applied to this court for leave to file a petition for a writ of mandamus to compel the judge to vacate his order granting the motion of Mr. O'Neal, which application was denied, but the merits of the case were not passed upon. *In re Parsons, Petitioner*, 150 U. S. 150.

The appellant further alleged in his petition that from the first of January, 1893, to May 26 of that year he had earned certain fees, which had been duly accounted for and approved by the District Judge, and that since the 26th of May, and prior to the 31st day of December, 1893, certain other fees had been earned for services rendered by Mr. O'Neal, who had been performing the duties of United States attorney since the 26th of May, 1893, and that on the whole there was a balance due appellant for salary and fees during the year 1893, appertaining to his office as district attorney, which amount had been demanded by appellant and payment had been refused. Judgment for the amount was demanded.

The usual answer was put in by the United States. It further appears that on the 26th of May, 1893, the Senate of the United States was not in session, but that in August, 1893, that body was in session, and that the nomination of Mr. O'Neal was sent to it, and his appointment was by it consented to and confirmed, and that he was commissioned as United States district attorney for four years from that time. These facts have

not been stated in the formal finding of facts by the court below, but they have been referred to by both the counsel in their briefs in the case as part of the admitted facts, and the fact of the confirmation of Mr. O'Neal on the 26th day of August, 1893, by the Senate, is stated by Judge Weldon in the course of his opinion in this case. 30 C. Cl. 222. The court below determined, as a conclusion of law, that the appellant was not entitled to recover, and his petition was therefore dismissed. From that judgment he has appealed to this court.

Mr. J. A. W. Smith and *Mr. L. T. Michener* for appellant. *Mr. D. D. Shelby*, *Mr. J. H. Parsons, Jr.*, *Mr. W. W. Dudley* and *Mr. R. R. McMahon* were on their brief.

Mr. Assistant Attorney General Dodge for appellees.

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

The question here presented is whether the President of the United States has power to remove a district attorney, who had been duly appointed, when such removal occurs within the period of four years from the date of his appointment, and to appoint a successor to that officer by and with the advice and consent of the Senate. The appellant in this case claims that the President has no such power, and that by virtue of the appointment of appellant to the office of district attorney in February, 1890, he was entitled to hold that office for four years from that date, and to receive the emoluments appertaining thereto during the same period. He bases his claim upon sections 767 and 769 of the Revised Statutes.

Section 767 provides for the appointment in each district of the United States, with the exceptions therein stated, of "a person learned in the law to act as attorney for the United States in such district."

Section 769 reads as follows:

"District attorneys shall be appointed for a term of four

years and their commissions shall cease and expire at the expiration of four years from their respective dates. And every district attorney, before entering upon his office, shall be sworn to the faithful execution thereof."

The appellant claims that this section gives to every district attorney the legal right to hold his office for four years, and that during that time the President has no power to remove him directly, and the President and Senate have no power to remove him indirectly by the appointment of a successor, and that, therefore, he has never been legally removed, and he bases his claim to recover herein upon that fact.

The first question which arises is in regard to the proper construction of the above-quoted section. Does it provide for the continuance in office for four years at all events and for a termination at the expiration of that period, or does it mean to provide that the term shall not last longer than four years, subject to the right of the President to sooner remove? If it were to be construed in accordance with the claim of appellant, the further question would then arise whether a statute which fixed a term of office for a district attorney, during the running of which neither the President, nor the President and Senate by the appointment of a successor, should have power to remove the incumbent from office would be constitutional.

It will greatly aid us in giving the proper construction to this section if we look for a moment at the constitutional history of the subject relating to the President's power of removal and at the debates which have taken place in Congress in regard to it. The question arose in the first session of the first Congress which met after the adoption of the Constitution.

On the 19th of May, 1789, in the House of Representatives, Mr. Madison moved "That it is the opinion of this committee that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer to be called the secretary of the department of foreign affairs, who shall be appointed by the President by and with the advice and consent of the Senate; and to be removable by the President." Subse-

quently a bill was introduced embodying those provisions. Mr. Smith of South Carolina said that "He had doubts whether the officer could be removed by the President; he apprehended that he could only be removed by an impeachment before the Senate, and that being once in office he must remain there until convicted upon impeachment; and he wished gentlemen would consider this point well before deciding it." 1st Lloyd's Cong. Reg. pp. 350, 351. Then ensued what has been many times described as one of the ablest constitutional debates which has taken place in Congress since the adoption of the Constitution. It lasted for many days, and all arguments that could be thought of by men — many of whom had been instrumental in the preparation and adoption of the Constitution — were brought forward in debate in favor of or against that construction of the instrument which reposed in the President alone the power to remove from office.

After a most exhaustive debate the House refused to adopt the motion which had been made to strike out the words "to be removed from office by the President," but subsequently the bill was amended by inserting a provision that there should be a clerk to be appointed by the secretary, etc., and that said clerk, "whenever said principal officer shall be removed from office by the President of the United States, or in any other case of a vacancy," shall be the custodian of the records, etc., and thereupon the first clause, "that the secretary should be removable from office by the President," was stricken out, but it was on the well understood ground that the amendment sufficiently embodied the construction of the Constitution given to it by Mr. Madison and those who agreed with him, and that it was at the same time free from the objection to the clause so stricken out that it was itself susceptible to the objection of undertaking to confer upon the President a power which before he had not. The bill so amended was sent to the Senate, and was finally passed after a long and able debate by that body, without any amendments on this particular subject. The Senate was, however, equally divided upon it, and the question was decided in favor of the bill by

the casting vote of Mr. Adams, as Vice President. Mr. Charles Francis Adams, in the Life of John Adams (vol. 2, p. 143), in speaking of this action of the Vice President, says:

"It was the only time, during his eight years of service in that place that he felt the case to be of such importance as to justify his assigning reasons for his vote. These reasons were not committed to paper, however, and can therefore never be known. But in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of constitutional power in favor of the President, and consequently established the practice under the government which has continued down to this day.

"Although there have been occasional exceptions taken to it in argument, especially in moments when the executive power, wielded by a strong hand, seemed to encroach upon the limits of the coördinate departments, its substantial correctness has been, on the whole, quite generally acquiesced in. And all have agreed that no single act of the first Congress has been attended with more important effect upon the working of every part of the government."

Many distinguished lawyers originally had very different opinions in regard to this power from the one arrived at by this Congress, but when the question was alluded to in after years they recognized that the decision of Congress in 1789, and the universal practice of the Government under it, had settled the question beyond any power of alteration. (To this effect see Kent's Com. vol. 1, Lec. 14, p. 310, subject, U. S. Marshals; Story on the Const. vol. 2, §§ 1542–1544.)

In the subsequent debates in Congress over the removal of the deposits of the Government, by direction of the President, from the Bank of the United States, and the dismissal by the President of the Secretary of the Treasury, Mr. Duane, as a means to accomplish that purpose, the subject of the power of the President to remove from office was alluded to by Mr. Webster, and he admitted the proposition that the President had the power of removal. Although as an original question he would have had a different opinion, yet in view of the action of Congress and the practice of the Government he said:

"I regard it as a settled point, settled by construction, settled by precedent, settled by the practice of the Government, settled by legislation"; and he did not ask to disturb it. In speaking on that subject, and referring to Mr. Webster's admission, Mr. Evarts, upon the trial of President Johnson, said: "He knew the force of those forty-five years, the whole existence of the nation under its Constitution, upon a question of that kind; and he sought only to interpose a moral restraint upon the President, in requiring him, when he removed from office, to assign the reasons of the removal." (Johnson's Impeachment Trial, vol. 2, p. 314, remarks of Mr. William M. Evarts, of counsel for the President.)

In *In re Hennen*, 13 Pet. 230, 259, which was a case involving the validity of an appointment of a clerk of the District Court of Louisiana by the District Judge thereof, it was said, by Mr. Justice Thompson, in speaking of the power of removal:

"In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was, whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

And in speaking of the different language employed in the act establishing the Navy Department from that which was

used in regard to the Department of State, the learned justice further remarked: "The change of phraseology arose, probably, from its having become the settled and well understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and Senate."

The opinions of the law officers of the Government have been in harmony with the foregoing views.

In 1847, Attorney General Clifford, subsequently and for many years one of the justices of this court, in the course of an opinion given in regard to the claim of Surgeon Du Barry for back pay, in speaking of this power of the President and the acquiescence in the result arrived at by the Congress of 1789, said:

"No one ever thought of maintaining that the inferior offices, so called in the Constitution, should be held during life. The doubt which arose was, whether the concurrence of the Senate was not requisite to effect a removal in all cases where it is required to consummate the appointment. The power was finally affirmed to be in the President alone by a majority of both houses of Congress after great deliberation and, perhaps, one of the ablest discussions in the history of the country. 4 Elliott's Debates, 350, 404. That decision was acquiesced in at the time, and has since received the sanction of every department of the Government. It is worthy of special remark that several commentators on the Constitution, who do not entirely admit the correctness of the construction adopted, are, nevertheless, constrained to regard the question as closed. Mr. Justice Story, after reciting the arguments on both sides, remarks: 'If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, perhaps impracticable, after forty years' experience, to recall the practice to the correct theory.' 3 Story, § 1538. The remarks of Chancellor Kent are still more decisive on this point. He says: 'It may now be considered as firmly and definitely settled; and there is good sense and practical utility

in the construction.' 1 Kent, 311." 4 Opinions Attys. Genl. 603, 609.

In 1851, Attorney General Crittenden, in a written opinion delivered to the President of the United States, stated that the President was not only invested with authority to remove the Chief Justice of the Territory of Minnesota from office, but that it was his duty to do so if it appeared that he was incompetent and unfit for the place. Speaking of these territorial judges, Mr. Crittenden said:

"Being civil officers, appointed by the President, by and with the advice and consent of the Senate, and commissioned by the President, they are not exempted from that executive power which, by the Constitution, is vested in the President of the United States over all civil officers appointed by him, and whose tenures of office are not made by the Constitution itself more stable than during the pleasure of the President of the United States."

Concluding he said:

"To answer your inquiry specifically, I have only, in conclusion, to add that, in my opinion, you, as President of the United States, have the power to remove from office the Chief Justice of the Territory of Minnesota, for any cause that may, in your judgment, require it." 5 Opinions Attys. Genl. 288, 291.

In that case the statute under which the Territory of Minnesota was organized, act of March 3, 1849, c. 121, § 9, 9 Stat. 403, 406, provided for the appointment of judges of the Supreme Court, and that they should "hold their offices during the period of four years." In regard to that provision Mr. Crittenden said, in the opinion above referred to: "That these territorial judges were appointed under a law which limited their commissions to the term of four years, does by no means imply that they shall continue in office during that term, howsoever they may misbehave. An express declaration in the statute that they should not, during the term, be removed from office, would have been in conflict with the Constitution, and would have precluded either the House of Representatives or the President from the exercise

of their respective powers of impeachment or removal. The law intended no more than that these officers should certainly, at the end of that term, be either out of office, or subjected again to the scrutiny of the Senate upon a renomination."

Attorney General Evarts, in speaking of the tenure of civil office act, said that it was passed "to change the doctrine and practice of the Government, by which removal from office, at the mere discretion of the President, had been established as a proper, and, as had been thought, a necessary attendant of the executive duty and responsibility under the Constitution to maintain the efficiency and fidelity of the public service in fulfilling the manifold and incessant obligations of administration and in execution of the laws." 12 Opinions Attys. Genl. 439, 446.

This power has been recognized as extending to officers of the army and navy. Attorney General Cushing, in the case of *Lansing*, 6 Opinions Attys. Genl. 4, said:

"I am not aware of any ground of distinction in this respect so far as regards the strict question of law between officers of the army and any other officers of the Government. As a general rule, with the exception of judicial commissions, they all hold their offices by the same tenure in this respect." See, also, case of *Colonel Belger*, 12 Opinions Attys. Genl. 421, 425, and also the opinion of Attorney General Devens as to the power of the President to dismiss an officer from the military service, 15 Opinions Attys. Genl. 421.

The foregoing references to debates and opinions have not been made for the purpose of assisting us in ourselves arriving at a decision of the question of the constitutional power of the President in his discretion to remove officials during the term for which they were appointed and notwithstanding the existence of a statute prohibiting such removal, but simply for the purpose of seeing what the views of the various departments of the Government have been upon the subject of the power of the President to remove and what claims were made and how much of acquiescence had been given to the proposition that to the President belonged the exclusive power of removal in all cases other than by way of impeach-

ment. It is unnecessary for us in this case to determine the important question of constitutional power above stated.

The short review we have taken throws light upon the question of the true construction of the language used by Congress in the section of the Revised Statutes under examination. Other legislation will be adverted to.

Before doing so, however, we think it well to comment upon one or two cases which have been said to indicate a different view on the part of this court as to the power of the President. It is said that in the case of *Marbury* v. *Madison*, 1 Cranch, 137, it was held that a justice of the peace in the District of Columbia was not removable at the will of the President, as his office was one created by Congress, and the term was limited in the act. The case was an original application to this court for a mandamus against the Secretary of State to compel him to deliver a commission to the petitioner which had, as was alleged, been signed by the President and sealed by the Secretary, commissioning the petitioner as one of the justices of the peace for the District of Columbia under an act of Congress. The court unanimously held that it had no jurisdiction to grant an original writ in such case. Chief Justice Marshall, in the course of his opinion, stated that "Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."

Whatever has been said by that great magistrate in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect. In that case, however, the material point decided was that the court had no jurisdiction over the case as presented. The remarks of the Chief Justice in relation to the right of an appointee to retain possession of an office created by Congress in and for the District of Columbia, as against the power of the President to remove him during the term for which he was appointed, are not necessarily applicable to the case of an

officer appointed to an office outside of such District. In the District of Columbia Congress is given by the Constitution power to exercise exclusive legislation in all cases. Art. I, § 8, subdiv. 17, Const. U. S. The view that the President had no power of removal in other cases outside of the District, as has been seen, is one that had never been taken by the Executive Department of the Government, nor even by Congress prior to 1867, when the first tenure of office act was passed. Up to that time the constant practice of the Government was the other way, and in entire accord with the construction of the Constitution arrived at by Congress in 1789.

The case of *United States* v. *Guthrie*, 17 How. 284, has also been cited upon the same point. The question in that case was in regard to the right of the relator Goodrich to a writ of mandamus to compel the Secretary of the Treasury to draw his warrant to pay the amount of salary due to the relator, as he alleged, during the term nominated in his commission appointing him Chief Justice of the Supreme Court of the Territory of Minnesota. The President had removed him within the period of four years, the term named in the statute and in his commission. It was in relation to the power to remove this official appointed under the statute organizing the Territory of Minnesota that Attorney General Crittenden gave his opinion, which is above referred to. This court held that the Circuit Court had no power to issue a writ of mandamus commanding the Secretary of the Treasury to pay a judge of the Territory of Minnesota his salary for the unexpired term of his office from which he had been removed by the President of the United States. The question, whether or not the President had power to remove a territorial judge during his statutory term of office was argued, but was not decided in the case. The prevailing opinion was very brief, and was delivered by Mr. Justice Daniel, and it simply discussed and denied the power of the court to issue the writ. Mr. Justice McLean delivered his own opinion in regard to the power of the President to remove, in which he said that he differed from the opinion of the court in answering the question as it did, and he was of the opinion that the ques-

tion as to the power of the President to remove was before the court, and that such power of removal was not committed solely to the President. The case is not claimed to be authority for the doctrine asserted by Mr. Justice McLean, and it can only be cited for the purpose of showing that there was an exception to the general acquiescence in the power of the President to remove. The case also arose in regard to the dismissal of a judicial officer of a Territory.

The case of *McAllister* v. *United States*, 141 U. S. 174, has also been cited. There is nothing in that case which gives any countenance to the doctrine contended for by the appellant. The court there held that a judge of the District Court of Alaska was not a judge of a court of the United States within the meaning of the exception contained in section 1768, Revised Statutes, relating to the tenure of office of civil officers, and it was held that the judge of the District Court of Alaska, prior to the repeal of that section, was subject to removal, before the expiration of his term of office, by the President in the manner and upon the conditions set forth in that section. Mr. Justice Harlan, in delivering the opinion of the court in that case, and replying to the suggestion that the conclusion reached by the court was not in harmony with some observations of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, stated on page 188, that there was nothing in those observations which militated, in any degree, against the views expressed by him in the case then under consideration, and he said (p. 189): "The decision in the present case is a recognition of the complete authority of Congress over territorial offices, in virtue of 'those general powers which that body possesses over the Territories of the United States,' as *Marbury* v. *Madison* was a recognition of the power of Congress over the term of office of a justice of the peace for the District of Columbia." The case contains nothing in opposition to the contention as to the practical construction that had been given to the Constitution by Congress in 1789 and by the Government generally since that time and up to the act of 1867.

We may now look at the course of legislation in regard to

the appointment of district attorneys from the earliest period in our constitutional history down to the repeal in 1887 of those sections of the Revised Statutes which contained in substance the provisions of the tenure of office acts.

By section 35 of chapter 20, laws 1789, entitled "An act to establish the judicial courts of the United States," it was provided, among other things, as follows: "And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents," etc. 1 Stat. 73, 92. No provision was made in the act for the removal of such officer. In the view held by that Congress as to the power of the President to remove, it was unnecessary. The legislation remained in this condition until the 15th of May, 1820, when the act (chapter 102 of the laws of that year) was passed entitled "An act to limit the term of office of certain officers therein named, and for other purposes." 3 Stat. 582.

The first section of that act provided that from and after its passage "all district attorneys, collectors of the customs, naval officers, and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land office, paymasters in the army, the apothecary general, the assistant apothecaries general and the commissary general of purchases, to be appointed under the laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure."

This was an act designed, as indicated by its title, and by the language used in the body of the act, to bring the terms of those offices named therein to an end after the expiration of four years. Its purpose clearly was not to grant an unconditional term of office for that period. It was an act of limitation and not of grant.

The provision in the second section, that the commissions should cease and expire at the end of four years, shows clearly that the intention of Congress was to restrict what had been a possible life term of office to a period of not more than

four years under any one appointment. The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress of 1789, and having in mind the constant and uniform practice of the Government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.

The legislation in regard to these various officers remained as provided for in this act of 1820 until the passage of the first tenure of office act, March 2, 1867, c. 154, 14 Stat. 430. By that act it was provided that every person holding any civil office to which he had been appointed by and with the advice and consent of the Senate, and all who should be thereafter appointed to any such office, "and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except," etc. The reason for the passage of this well-known act is a matter of history. It was the result of a contest which sprang up between President Johnson and the two houses of Congress within a very short time after he became President, and which grew in force and bitterness as the views of Congress on the one side and the President on the other became more opposed to each other in the matters regarding the States lately in rebellion and the proper measures to be pursued for their government. The act was a portion of the legislation passed by Congress at that time for the purpose of keeping those men in office who were then supposed to be friendly to the views of Congress upon that great subject. On the same day, March 2, 1867, Congress passed the army appropriation act, 14 Stat. 485, 486,

c. 170, by which the headquarters of the general of the army were established at Washington, and all orders and instructions relating to military operations issued by the President to the Secretary of War were directed to be issued through the general of the army. Other provisions were also therein contained for the purpose of restraining the action of the President in the exercise of his power to remove or suspend the general of the army. Reference to the subject is made in *Blake* v. *United States*, 103 U. S. 227, 236.

The President, as is well known, vetoed the tenure of office act, because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United States — a power which had been uniformly exercised by the Executive Department of the Government from its foundation. Upon the return of the bill to Congress it was passed over the President's veto by both houses and became a law. The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act, so that, if constitutional, thereafter all executive officers whose appointments had been made with the advice and consent of the Senate could not be removed by the President without the concurrence of the Senate in such order of removal.

Mr. Blaine, who was in Congress at the time, in afterwards speaking of this bill, said: "It was an extreme proposition — a new departure from the long-established usage of the Federal Government — and for that reason, if for no other, personally degrading to the incumbent of the Presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the Government. . . . The measure was resorted to as one of self-defence against the alleged aggressions and unrestrained power of the executive department." Twenty Years of Congress, vol. 2, 273, 274.

The conduct of President Johnson in regard to the provisions of this act and his contest with Secretary Stanton in relation to the office of Secretary of War led to his impeachment by the House and his trial before the Senate, resulting in his acquittal.

In November, 1868, a new President was elected, who came into office on the 4th of March, 1869. His relations with Congress were friendly, and the motive for the passage of the act of 1867 had ceased to operate. Within five days after the meeting of Congress a bill was introduced in the House to repeal the act of 1867, and was passed by that body. In the Senate, however, the repeal failed, but the act was modified by the act passed on the 5th of April, 1869, 16 Stat. 6, and the first section of the original act was modified so as to provide as follows:

"That every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

Assuming the constitutionality of these acts, it is seen that under the act of 1869, a person who had been appointed to an office by and with the advice and consent of the Senate could yet be removed by and with such advice and consent, or by the appointment, with the like advice and consent, of a successor in his place, except as provided in the second section of the act, which provided for appointments during the recess of the Senate, and for the designation of persons to fill vacancies which might happen during that time. No further legislation upon the subject of removals or appointments was enacted for some years, although repeated but unsuccessful attempts were made to repeal the act of 1869, and to leave the President untrammelled by any statute upon the subject. With the legislation of 1869 in force, this appellant would under the facts of this case have been legally removed by the appointment of his successor in the way it occurred.

A revision of the statutes having been undertaken since 1869, section 769 was placed therein as the substance of the statute of 1820. The section is quoted above. It does not

contain the affirmative recognition of the power of removal which is contained in the act of 1820. The reason for the omission plainly was because the insertion of language in the section which in so many words recognized a right of removal would have conflicted with the succeeding sections, embodying the terms of the tenure of office act, which prohibited removals. Section 769 was so drawn that in effect it permitted removals within the term, and it was left to the succeeding sections to make provisions that should limit the right of removal otherwise existing by virtue of the language of that section. The same construction of the language of that section should be adopted which we would apply to the act of 1820, and which was applied by Attorney General Crittenden and acted upon by the President, in the case of the chief justiceship of the Territory of Minnesota, 5 Opinions of Attorneys General, 288, a construction of limitation and not of grant, a construction by which no more than a period of four years is permissible, subject in the meantime to the power of the President to remove. In thus construing section 769 we think full effect is given to its language and the practical construction of former periods is adhered to, while at the same time the purpose of Congress to retain officials in office is also given full effect by the succeeding provisions upon the subject of the tenure of office. The right to remain in office is made to depend upon those subsequent sections, and when in 1887 they were repealed by Congress, 24 Stat. 500, the full legal force and effect of the language used in section 769 was permitted to come in play, freed from the restraints of the sections thus repealed. Such being the case, the persons appointed under section 769 are not entitled to hold for four years as against any power of the President to remove, and in no event can they remain in office longer than that period without being reappointed. This construction of the act as one of limitation, we think, in the light of the history of the subject, is a most natural and proper one.

The argument of the appellant, however, shows, if adopted, that the result of the passage of the repealing statute of 1887 has been to limit the power of the President more than it was limited before that statute was passed. While the tenure of

office provisions existed, it is conceded that the President might remove an officer like a district attorney within the four years for which he was commissioned, provided his removal was concurred in by the Senate or was effected by the appointment of his successor by and with the advice and consent of the Senate; yet, now since the repeal of those sections which it was supposed limited and restrained the power of the President, he is still further restrained and limited in his power, because under the construction as claimed by the appellant he cannot now remove an officer within the four years even with the advice and consent of the Senate or by the appointment of his successor by the like advice and consent. This extraordinary result is reached by construing, according to appellant's views, section 769 as meaning to give a term of office of four years in any event, and while this term of office was, before the repeal of the sections above named, subject to be shortened in accordance with their provisions, yet as they have been repealed it leaves section 769 in force as granting an unconditional and absolute term of four years which cannot be shortened by the President, or the President and Senate combined, and which leaves the incumbent subject only to removal by the slow and weary process of impeachment by the House and a conviction thereon and a removal by the Senate as a punishment.

This could never have been the intention of Congress. On the contrary, we are satisfied that its intention in the repeal of the tenure of office sections of the Revised Statutes was again to concede to the President the power of removal if taken from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. This purpose is accomplished by the construction we give to section 769, while the other construction turns a statute meant to enlarge the power of the President into one circumscribing and limiting it more than it was under the law which was repealed for the very purpose of enlarging it.

Syllabus.

After a careful review of the case before us we are of the opinion that the Court of Claims committed no error, and its judgment is

Affirmed.

YARDLEY *v.* PHILLER.

APPEAL FROM THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 296. Argued April 28, 1897. — Decided May 24, 1897.

The national banks in Philadelphia organized, for their convenience, a Clearing House Association, with rules for its business set forth in detail in the statement in the opinion below. Among these rules, one provided for the deposit of securities in fixed amounts by each bank as collateral for their daily settlements; and another for the hours in the day in which settlements were to be made, and the mode of making the exchanges. The Keystone Bank made its deposit in conformity with the rule; but, having become indebted to the clearing house by reason of the receipt of clearing house certificates to a large amount, the securities deposited by it were surrendered, and were redeposited by it as security for the payment of the certificates. In the clearing of March 19, 1891, the Keystone Bank presented charges against other banks to the amount of $155,136.41, and the other banks presented charges against it for $240,549, making the Keystone Bank a debtor in the clearing for $75,359.08. In accordance with the rule, the Keystone Bank between the hours of eleven and twelve paid the $75,000 in cash or its equivalent, and gave its due bill to the manager of the clearing house for the fractional sum of $359.08, which was deposited by the manager and checked against by him as cash. In the runners' exchange of that day, the Keystone Bank owed a balance of $23,021.34, which balance it settled by giving its due bill to the manager for deposit in accordance with the system above stated. In operating the clearing on the morning of March 20, the Keystone Bank, through its runner, delivered to the respective clerks of the various banks packages containing claims held by the Keystone Bank amounting to $70,005.46, and the settling clerk of the Keystone Bank received from the runners of the other banks packages containing $117,035.21, leaving the Keystone Bank debtor in the clearing for $47,029.75. The packages containing the demands which the Keystone Bank held against other banks, and which had been delivered to the agent of each of those banks, were by them taken away at the termination of the clearing. The packages containing the charges presented against the Keystone Bank, which in the aggregate amounted to $117,035.21, instead of being taken away by its settling clerk, were, under the arrangement which we have stated, turned over by him to the

manager of the clearing house, to be retained until at the hour named the Keystone Bank paid the balance due by it. Before the hour for making the payment, however, the Keystone Bank, by order of the Comptroller of the Currency, was closed, and subsequently was placed in the hands of a receiver. On the failure of the Keystone to make the payment of $47,029.75, the committee of the association instructed the manager to call on the banks, by whom claims had been presented against the Keystone, "to redeem the packages against the Keystone Bank." The manager thereupon gave the proper notification, and the various banks notified sent their checks and redeemed the packages in question. Among the obligations for $117,035.21, however, were due bills amounting to $41,197.36. These due bills came from the fractional amounts arising by the settlement made on the morning of the 19th, to wit, $359.08; for the due bill given at the runners' settlement on the morning of the 19th, $23,031.44; and for due bills given to various banks during the course of business on the 19th, amounting to $17,806.84. Thereupon, and as part of the same transaction, the manager paid from the $70,005.36, which by his settlement sheet appeared to the credit of the Keystone as owing from other banks to the Keystone Bank for the checks surrendered by that bank, the amount of the due bills referred to, viz., $41,197.36. This left to the credit of the Keystone the sum of $28,808.10, and this amount was by the manager, acting under direction of the committee of the association, credited on the loan certificate account of the Keystone Bank with the association. In a suit by the receiver of the bank to determine the rights of the parties, *Held*, (1) That the claim of the receiver that the Keystone Bank was entitled to be paid $70,005.36 of credit, irrespective of the outstanding due bills which it had been expressly agreed between the parties were to be paid by way of set-off in the clearing, was without foundation; (2) That the Clearing House Association, having been in possession of the $28,808.10 as the fiduciary agent of the Keystone Bank without a lien or right upon it, its appropriation of the same after the insolvency of the Keystone Bank to the debt owing for loan certificates was obviously a preference within the inhibition of the statute against preferences in the cases of insolvent banks, Rev. Stat. § 5242.

The case is stated in the opinion.

Mr. H. B. Gill and *Mr. Silas W. Pettit* for appellant.

Mr. A. T. Freedley and *Mr. John G. Johnson* for appellees.

Mr. Justice White delivered the opinion of the court.

The Clearing House Association of Philadelphia is a voluntary organization, created by the coöperation of national banks

doing business in that city. Its affairs are governed by rules and regulations adopted by agreement between the banks forming the association, and the general direction of its operation is under the control of a president, secretary and manager, and of a committee selected by the members of the association. As the name of the association implies, it is intended to afford a uniform and convenient method by which daily settlements of balances can be had between the banks entering into the association. In addition to the function of affording a means for the daily clearing of balances, the Clearing House Association, by agreement among its members, issued, at periods when it was deemed best to do so, clearing house certificates. These certificates were delivered, under the discretion of the managers, when applied for by a member of the association, and were secured by the pledge of bills receivable or assets taken from the portfolio of the bank obtaining the certificates. These certificates were available as cash in settlements between the banks and for other purposes, and the object of issuing them was, in times of panic or stringency, to create, to the extent of the certificates, solidarity of responsibility between the banks, as each bank was liable for a proportionate share of the certificates in case of default in their payment, thus fortifying the credit of one by the credit of all. Moreover, the certificates afforded a means by which a bank with good assets could use them in order to obtain certificates which were, for banking purposes, the equivalent of cash, when, from any stringency or panic, the assets themselves, although entirely sound, could not be readily convertible into current money.

Article 2 of the constitution of the Clearing Association provided as follows:

"ART. 2. Its object shall be to effect at one place the daily exchanges between the several associated banks, consisting of a morning exchange and a runner's exchange, and the payment, at the same place, of the balances resulting from such exchanges. The responsibility of the association for such exchanges is strictly limited to the faithful distribution by the manager, among the creditor banks for the time being, of

the sums actually received by him; and should any losses occur while the said balances are in the custody of the manager, they shall be borne and paid by the associated banks, in the same proportion as the expenses of the clearing house, as hereinafter provided for."

Article 11 said:

"ART. 11. Should any of the associated banks fail to appear at the clearing house at the proper hour, prepared to pay the balance against it, the amount of that balance shall be immediately furnished to the clearing house by the several banks exchanging at that establishment with the defaulting bank, in proportion to their respective balances against that bank, resulting from the exchanges of the day, and the manager shall make requisitions accordingly, so that the general settlement may be accomplished with as little delay as possible. The respective amounts so furnished the clearing house on account of the defaulting bank will, of course, constitute claims on the part of the several responding banks against that bank: *Provided*, That the amount of the due bill given by the defaulting bank, in settlement of its debit balance in the runner's exchange of the previous day, and deposited by the clearing house in its depository bank, shall be deducted from the total charge of such bank, and shall be the first claim against the securities deposited by the defaulting bank, under article 17."

Article 17 was as follows:

"ART. 17. Each bank, member of the Clearing House Association, shall deposit securities with the clearing house committee as collateral for their daily settlements, in the following percentage or assessment on capital:

"1st. Banks with capitals of $800,000 and over, ten per cent.

"2d. Banks with capitals of $500,000 and under $800,000, fourteen per cent; but not to be required to deposit over $80,000.

"3d. Banks with capitals over $250,000 and under $500,000, twenty per cent; but not to be required to deposit over $70,000.

"4th. Banks with capitals of and under $250,000 shall deposit not less than $50,000.

"The committee shall apply the deposit of any defaulting bank to the payment of the balance due by such bank at the clearing house, or to the reimbursement, *pro rata*, of the several banks furnishing said balance, under article 11; and the surplus, if any, shall be held as collateral security for other indebtedness to members of this association."

By article 9 of the constitution the hour for making the morning exchange at the clearing house was fixed at eight and a half o'clock, and the hour for making the runners' exchange at half-past eleven. By the same article it was provided that a bank becoming a debtor by the morning clearing must pay the sum debited to it to the clearing house between the hours of eleven and twelve o'clock that day, and at twelve and a half o'clock of the same day the bank being a creditor in the daily clearing should receive from the manager of the clearing house the sum of the credit to which it was entitled. The settlement at the runners' exchange was made by due bills, and these due bills were deposited by the manager of the clearing house in his bank account, kept with one of the banks belonging to the association, and were checked against by him as if the due bill were cash. Such due bill, when so received on deposit by the bank and treated by it as cash, became a credit item, presented by it, in the clearing of the following morning. In addition, where claims were presented by the runner of one bank for payment to another bank during the course of a business day, the bank by whom the money was to be paid, to obviate the risk of carrying it, instead of handing over money, gave to the runner a due bill for the amount, which, on its face, was stipulated to be payable in the clearing of the next day.

The Keystone National Bank was a member of the Clearing House Association. It deposited with the association, in accordance with the rules, securities to guarantee its obligation to meet its daily clearing. It had obtained, moreover, from the Clearing House Association clearing house certificates to a large amount, and in December, 1890, by an agreement

between the association and the Keystone Bank, the securities deposited by the Keystone Bank to guarantee its liability to pay any balance arising from the daily clearing, were returned to that bank, and were by it deposited anew with the Clearing House Association as security for clearing house certificates. It resulted from this transaction that the Keystone Bank did not have in the hands of the Clearing House Association any security to guarantee its obligation to meet its daily clearing. At the time, however, when the securities were withdrawn and used by the Keystone for the purpose of securing clearing house certificates, an agreement was made that in order to secure the performance of any obligation which might arise from the daily clearing the Keystone Bank would leave in the hands of the manager of the clearing house the vouchers presented by other banks against it at the time the clearing was made, to be held by the manager until the balance shown to be due by it in the clearing was paid in accordance with the agreement. From December, 1890, until the 20th of March, 1891, in execution of this agreement, whenever in the daily clearing the Keystone Bank owed a balance, it did not take away the vouchers delivered to its settling clerk, but they were turned over to the manager of the clearing house to be held until the obligation of the Keystone Bank resulting from the clearing was made good.

The operation of making the clearing was accomplished by the following method: At the hour named a runner and a settling clerk representing each bank met at the clearing house. These representatives of the respective banks brought with them, in separate sealed packages, the checks which the banks they represented held against other banks. The runner of each bank thereupon delivered to the settling clerk of the others these packages, taking receipts therefor, so that at the common place of meeting the clerk of each bank received from every other bank the checks drawn against the bank he represented. The making up of these packages for exchange is thus provided for in the rules:

"Rule III. Sealed packages, well gummed and sealed with wax and endorsed with ink or indelible pencil, shall be used

exclusively in the morning exchange and in the runners' exchange, and the amounts stated thereon shall be the basis of settlement. These packages, with the seals unbroken, shall be delivered by the messengers of the several banks to their respective institutions; otherwise, no responsibility shall attach to the sender."

After these packages had been received the settling clerk of each bank made up from the indorsements on the packages delivered to him the debits, and stated the credits arising from the sum of the packages delivered by the runner of his bank to the settling clerks of the other banks. The sheets thus made up were then turned over to the manager of the clearing house, by whom they were verified and consolidated. The manager's balance sheet hence, necessarily, contained a statement itemizing the aggregated debits and credits of all the banks concerned in the clearing. Where any fractional sum was due by a bank in consequence of the clearing, this fractional sum was paid to the manager by a due bill, the manager treating this due bill as cash, deposited it in the bank where his account was kept and the sum of this due bill became a credit item in favor of the bank holding it in the clearing of the next morning.

In the clearing of the 19th of March, 1891, the Keystone Bank presented charges against other banks to the amount of $155,136.41, and the other banks presented charges against it for $240,549, making the Keystone Bank a debtor in the clearing for $75,359.08. In accordance with the rule, the Keystone Bank between the hours of eleven and twelve paid the $75,000 in cash or its equivalent, and gave its due bill to the manager of the clearing house for the fractional sum of $359.08, which was deposited by the manager and checked against by him as cash. In the runners' exchange of that day, that is, the 19th of March, the Keystone Bank owed a balance of $23,021.34, which balance it settled by giving its due bill to the manager for deposit in accordance with the system above stated. In operating the clearing on the morning of March 20, the Keystone Bank, through its runner, delivered to the respective clerks of the various banks packages

containing claims held by the Keystone Bank amounting to $70,005.46, and the settling clerk of the Keystone Bank received from the runners of the other banks packages containing $117,035.21, leaving the Keystone Bank debtor in the clearing for $47,029.75. The packages containing the demands which the Keystone Bank held against other banks, and which had been delivered to the agent of each of those banks, were by them taken away at the termination of the clearing. The packages containing the charges presented against the Keystone Bank, which in the aggregate amounted to $117,035.21, instead of being taken away by its settling clerk, were, under the arrangement which we have stated, turned over by him to the manager of the clearing house, to be retained until at the hour named the Keystone Bank paid the balance due by it.

Before the hour for making the payment, however, the Keystone Bank, by order of the Comptroller of the Currency, was closed, and subsequently was placed in the hands of a receiver. On the failure of the Keystone to make the payment of $47,029.75, the committee of the association instructed the manager to call on the banks, by whom claims had been presented against the Keystone, "to redeem the packages against the Keystone Bank"; in other words, "to redeem the amounts which they had been credited with on the manager's balance sheet, in settlement of the account of checks drawn on the Keystone Bank." Not being able from his records to ascertain what banks to call upon to make the payment of $117,035.21, the manager sent to the Keystone Bank, and received from that institution their settlement and package sheets for that day. On receipt thereof, the manager thereupon gave the proper notification, and the various banks notified sent their checks and redeemed the packages in question. Among the obligations for $117,035.21, however, were due bills amounting to $41,197.36. These due bills came from the fractional amounts arising by the settlement made on the morning of the 19th, to wit, $359.08; for the due bill given at the runners' settlement on the morning of the 19th, $23,031.44; and for due bills given to various banks during the course of

business on the 19th, amounting to $17,806.84. Thereupon, and as part of the same transaction, the manager paid from the $70,005.36, which by his settlement sheet appeared to the credit of the Keystone as owing from other banks to the Keystone Bank for the checks surrendered by that bank, the amount of the due bills referred to, viz., $41,197.36. This left to the credit of the Keystone the sum of $28,808.10, and this amount was by the manager, acting under direction of the committee of the association, credited on the loan certificate account of the Keystone Bank with the association. The result of the transaction was a reduction of the claims which had been originally made against the Keystone Bank in the exchanges of the 20th of March, 1891, from $117,035.21 to $41,197.36, and a return to the various banks of $75,837.85 of checks and drafts received from their customers. Whilst the record does not affirmatively show the fact, it is fairly inferable from it that these checks, etc., aggregating $75,837.85, were immediately charged back by the banks by whom they had been received and were returned to the depositors from whom they had received them, and therefore reached ultimately the drawers, who were depositors in the Keystone Bank, thus leaving the Keystone Bank liable for their amount in its deposit account with its depositors.

On February 19, 1894, the receiver of the Keystone Bank filed his bill in this cause in the Circuit Court of the United States for the Eastern District of Pennsylvania, setting forth the relations between the Keystone Bank and the clearing house, and detailing the transactions of the 20th of March, 1891, substantially as we have stated them; alleged an appropriation by the association to its own use, after the insolvency of the Keystone Bank, and in violation of the statutes of the United States, of the checks and drafts which had been surrendered at the clearing house by the Keystone Bank on the morning of the 20th of March, as hereinbefore stated, and also alleging an appropriation and application to the use of the association of bonds of the Baltimore Traction Railway Company of the par value of $100,000, which it was claimed had been specifically deposited by the Keystone Bank as security

for the payment of any balance which might be owing by it in the daily clearing. It was averred that demand had been made on the association, and that it had refused to account to the receiver for the said checks, drafts and bonds. A discovery was asked and relief prayed that the association surrender the checks, drafts and bonds, or, in the alternative, that the association be decreed to pay the amount collected thereon with interest. The answer of the association detailed most of the facts heretofore recited and averred the lawfulness of the appropriation made of the $70,005.36. As to the traction bonds, it was averred that they were deposited as security for loan certificates, and that they had been sold and the proceeds duly accounted for in the account as to such certificates. The claim of the receiver as to these bonds was subsequently abandoned.

A decree was entered in the Circuit Court adjudging that the receiver recover from the defendants $70,005.36 with interest from March 20, 1891. 58 Fed. Rep. 746. On appeal, the Circuit Court of Appeals reversed that decree, and remanded the cause to the trial court with directions to dismiss the bill of complaint. 17 U. S. App. 647. From this latter decree an appeal was taken to this court. The opposing judgments rendered by the Circuit Court and by the Circuit Court of Appeals well define the conflicting contentions of the parties, since the conclusion of the Circuit Court entirely sustained the position taken by the complainant while the Court of Appeals justified the rights asserted by the defendants.

The receiver of the Keystone Bank argues that the result of the transactions at the clearing house on March 20, 1891, after the failure of the bank, was to wholly dismiss the Keystone Bank from the clearing and leave it with a claim of $70,000 against the clearing house, which it is entitled to have paid in full without reference to all or any of the debts due by it, which otherwise would have been properly chargeable in the clearing. In other words, the Keystone Bank, although it put into the clearing only claims against other banks sufficient to partially discharge its obligations, and failed subsequently to perform the duty, owing by it, to pay

in cash a sum adequate to make up the difference, that is, to discharge all its debts resulting from the clearing, asserts that as a consequence of its failure to pay all it has been absolved from thereafter paying anything whatever in the clearing. Or, stated in another form, the argument is this: As the banks which held checks on the Keystone Bank, when they received these checks from the clearing house, charged them back to their depositors, and therefore made them obligations due by the Keystone Bank on its deposit account with its depositors, these banks elected to consider the Keystone Bank as no longer connected with the clearing house, and hence also lost their right to compensate the credit of the Keystone Bank by such other obligations, outside of the checks, which were properly entitled to and had actually figured in the clearing, such as due bills, etc., which these banks had not charged back, because they were not of the nature to be so charged, as they were when presented in the morning clearing held by the banks for their own account. It is clear then that the claim of the receiver of the Keystone Bank is that, by the default of that bank, its liability to have its claim in the clearing compensated by its due bills held by other banks was cancelled, and hence that it was in a much better position by its failure than it would have been if it had not suspended and had furnished the funds to pay all the claims presented against it in the clearing.

On the other hand, the claim of the Clearing House Association is that it owes nothing, and that by the default of the Keystone Bank the clearing house became entitled to appropriate the balance of the credit due the Keystone Bank in the clearing, to debts due to the clearing house, although such debts were not of a nature to have authorized them to be charged against the clearing if the failure had not taken place. That is, the clearing house also contends that the effect of the failure was to give it rights against the Keystone Bank which it would not have had if the failure had not taken place.

The claims of both parties, therefore, when analyzed, amount to the assertion, as a proposition of law, that they both have greater rights in consequence of the insolvency than they

would have had if the insolvency had not taken place. The self-evident error of this proposition points to the unsoundness of the claims of both parties to the controversy.

We will demonstrate that this is the case by considering the situation of the parties in order thereby to determine their respective rights against and obligations towards each other. A clear ascertainment of the legal status of the parties will be at the outset greatly facilitated by first considering a matter much discussed in argument, viz.: what, if any, bearing the payment of $117,035.21 to the manager of the clearing house by sundry members of the association has upon this controversy.

In the manager's settlement sheet of the daily clearings between the banks, made up from the data contained in the settlement sheets prepared by the settling clerk of each bank at the close of the clearing, there was set out in the centre of the sheet, running from top to bottom, a list of banks, each bank being given a number ranging from 1 to 43. In a column to the left of the number and name of each bank there was a list of debit items, each item indicating that the sum stated was owing from the bank opposite to which it was placed, for checks and drafts and due bills which had been presented against that bank by other banks in the association. The banks which had presented these checks, drafts and due bills were given credit therefor on the credit side of the sheet, in a column to the right of the name of each bank, as being claims in their favor against the debit items due from other banks. The aggregate of the debit items was therefore the fund from which the aggregate of the credit item was to be paid. The two necessarily balanced each other.

If, as the result of the failure of the Keystone Bank and the return to the banks, which had presented them, of the packages in question, the sum of $117,035.21 had been stricken from the debit side of the manager's sheet, the effect necessarily would have been that the totals on the credit side would have been just that much greater than the total of the debit side, and, therefore, there would have been a shortage of that amount in the execution of the clearing. It follows that in paying the aggregate credits the manager of the clearing house would

have been short that much money. In other words, to have paid the banks who had presented the checks against the Keystone Bank the sum of their claims against all the banks in the association, as shown by the credit side of the manager's sheet, the manager necessarily would have had to make good the shortage by paying less to that amount to the banks who had received an increased credit because of the expected payment of the debit item charged against the Keystone. That is to say, the deficiency on the credit side which would have resulted from taking out the $117,035.21 debit due by the Keystone would have caused the loss to fall on the banks which had presented the claims against the Keystone, because they would have received that much less on the aggregate amount due to them from the entire clearing, that is, from all the other banks. Instead of doing this, however, and in order to render his settlement regular in form, the manager called upon the banks who had presented the claims against the Keystone Bank to substitute money for these claims, so that this money, paid in by them in response to the call, might take the place of the amount of $117,035.21, and thus cause the debit and credit side to agree, and enable him to carry out the clearing just as it had been made in the early morning. The effect of this was not to change the situation at all, since if the $117,035.21 had not been paid in, the loss would have fallen on the banks who had received credit, because they had presented claims against the Keystone amounting to $117,035.21. It results that by paying in the amount called for and having it put fictitiously on the sheet, in lieu of the $117,035.21 due from the Keystone Bank the banks paying in the amount neither gained nor lost, since they immediately received back the amount when the clearing was carried out. Whilst the transaction then assumed the form of a payment of $117,035.21 by the banks called upon, it was in reality no payment at all, for it simply enabled the money paid in to be considered as on one side of the account in order to be handed back to them on the other. This is the inevitable result of the transaction, which, besides, is clearly shown by the testimony of Mr. Boyd, the manager of the clearing house, who

says that the payment of the $117,035.21 *was a mere matter of bookkeeping.*

When it is understood that the payment in of the money in consequence of the call made upon the banks was in reality no payment at all, since it was but the giving on the one hand to the manager of a sum of money to be handed back by him on the other in order that his settlement sheet might balance, it becomes perfectly clear that the result was in no way to change or destroy the credit of $70,005.36 standing on the clearing sheet in favor of the Keystone Bank. This latter amount was the sum of checks which the Keystone Bank had surrendered at the morning exchange to the settling clerks of the banks upon which such checks were drawn. As a result of such surrender, the Keystone Bank was entitled to receive out of the debits paid by other banks the sum named. The banks which owed that sum were charged in the debits as owing that amount to the clearing house, and when, as they did, they settled their indebtedness to the clearing house the manager thereof necessarily received that sum for account of the Keystone Bank. The banks which for mere bookkeeping purposes had paid in a sum of money and at once received it back certainly cannot be permitted to claim that the effect of this transaction was to destroy the rights of the Keystone Bank on the credit side of the clearing, which rights of necessity resulted from the paying into the clearing house of the aggregate debits.

But these banks who paid in their money, under the call, and received it back, whilst they were not in a position, in consequence of having done so, to enable them to assert that the credit of the Keystone had disappeared, were certainly not thus put in a position by which they could not exercise their lawful claims upon the credit of the Keystone. The claims which, as we have seen by the rules of the clearing house and the contracts between the parties, were to be mutually compensated, in the clearing, one with the other, were the due bills and the items of bankers' exchange checks, drafts, etc. The $117,035.21 against the Keystone Bank contained $75,837.99 of checks and drafts, and the remainder

consisted of due bills. These checks and drafts, on the failure of the Keystone Bank, were charged back by the banks who held them to those who had deposited them, and in consequence, presumably, ultimately reached the hands of the depositors of the Keystone, by whom the checks were drawn. The right of the bank holding a check against the Keystone Bank, on the failure of that bank, to charge back the checks was unquestionable. Indeed, it was not only to the interest, but it was the duty, of the banks towards their stockholders to do this, for if they had held the checks, without charging them back, they would have become responsible for them, and therefore would have assumed a debt which they were under no obligation to assume. Having exercised the right to return the checks, there arose a resulting obligation on the banks not to continue to present against the Keystone Bank, for payment out of its credit in the clearing, obligations for which there was no longer a right to make a claim. Deducting, therefore, the $75,837.99 of checks, it left only the due bills, $41,197.26, which were paid by the manager of the clearing house out of the $70,005.36 to the credit of the Keystone Bank. This payment of course extinguished the due bills and reduced the credit of the Keystone Bank ($70,005.36) to the extent of the payment of $41,197.26, leaving, therefore, a balance to the credit of the Keystone Bank of $28,808.10 unappropriated by anything resulting from or entering into the clearing. This sum the Clearing House Association at once appropriated in reduction of an indebtedness due it by the Keystone Bank upon the loan certificate account, an account which had arisen from loan certificates which the Keystone Bank had previously obtained from the clearing house, secured by collaterals, as already stated.

From the foregoing it obviously results that the claim of the receiver that the Keystone Bank was entitled to be paid $70,005.36 of credit, irrespective of the outstanding due bills which it had been expressly agreed between the parties were to be paid by way of set-off in the clearing, is without foundation. This conclusion leaves only for consideration the question whether the Clearing House Association possessed the

right to appropriate and impute the $28,808.10 of balance in its hands and due to the Keystone Bank towards the payment of the indebtedness of the Keystone Bank for loan certificates.

It is undisputed that there was no agreement between the clearing house and the Keystone Bank by which the sums due to the latter, in the clearing, could be applied to the loan certificate account. It is obvious that the Clearing House Association was an agent and fiduciary representative of all the banks forming the association. When the nature of the loan certificates and the relation of the Clearing House Association to its members is thus understood, the question whether the Clearing House Association had a right to take as it did the clearing credit of the Keystone and apply it to the debt in question, in reason, answers itself. As said in *Reynes* v. *Dumont*, 130 U. S. 354, 391, "A general lien does not arise upon securities accidentally in the possession of a bank, or not in its possession in the course of its business as such, or where there is a particular mode of dealing, inconsistent with such general lien."

The Clearing House Association having been therefore in the possession of the $28,808.10 as the fiduciary agent of the Keystone Bank without a lien or right upon it, its appropriation of the same after the insolvency of the Keystone Bank to the debt owing for loan certificates was obviously a preference within the inhibition of the statute against preferences in the cases of insolvent banks. Rev. Stat. § 5242.

But want of power in the clearing house to absorb the $28,808.10 belonging to the Keystone necessarily follows, even if we eliminate from view all claim of lien or all question of fiduciary relation, and consider the matter solely under the principles of the general law of set-off. It is certain that all or any portion of the $70,005.36 entered on the clearing sheet and resulting from the claims presented against other banks by the Keystone Bank, in the clearing of that morning, was a debt due by the clearing house, not to the Keystone Bank, but to the other banks who had presented claims against the Keystone in excess of the $70,005.36. This is shown by the

fact that up to the time of the insolvency not only did the Keystone Bank have no claim against the clearing house, but it was under obligation to pay $47,029.75, the difference between the sum which it had presented and the sum of the claims presented against it. Not only, therefore, all of the $70,005.36 presented by the Keystone Bank in the clearing, but the $47,029.75, which it had to pay, belonged to other banks, and hence up to the time of the insolvency the Keystone was a debtor and not a creditor. The credit of $28,808.10 which the clearing house impounded arose as a result of the transactions between the parties, after the announcement of the insolvency of the Keystone was made, that is, the credit of $28,808.10 was solely caused by the withdrawal, after the insolvency, by certain banks of checks and drafts which they held against the Keystone Bank. It was only when, in consequence of the failure of the Keystone to pay the sum due by it to the other banks, and thereupon these banks exercised their undoubted right to make this withdrawal, and charge back to the persons from whom they had received them the checks and drafts against the Keystone, that that credit in the favor of the Keystone arose. But this withdrawal was confessedly made after the declared insolvency, and hence the credit which the withdrawal caused could only have arisen after that time. The claim of the clearing house, therefore, is that a fund put in its hands for account of certain banks having become the property of the Keystone after the insolvency of the latter, by a partial release granted by the banks in whose favor the fund existed, therefore there instantly arose on the part of the clearing house a right to set off its certificate account held against the Keystone by the sum of the fund so created after insolvency. But, obviously, the right to set off, as recognized in *Scott* v. *Armstrong*, 146 U. S. 499, is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created. The case under this aspect is directly controlled by *Nashville Security Bank* v. *Butler*, 129 U. S. 223, and, indeed, is governed by the general principle announced in *Davis* v. *Elmira Savings Bank*, 161 U. S. 275.

Whilst, however, we find the appropriation of the $28,808.10 to have been unlawful, the record is not in such a shape as to enable us to dispose finally of the controversy. As we have said, the bill of the complainant sought not only the recovery of the entire $70,005.36 credit shown on the manager's clearing sheet, but also an accounting for certain bonds which it was claimed had been held by the clearing house as collateral for the payment of the daily balances in the clearing. The proof having shown that these collaterals were not held as security for the clearing but for the loan certificates, this claim was abandoned. But from the evidence offered in relation to this item and found in the record, there is a statement of the condition of the loan certificate account between the clearing house and the Keystone Bank or its receiver. This statement shows that after reducing the loan certificate account by the $28,808.10 credit, resulting from having appropriated the balance in the clearing, as above stated, and after having realized on certain assets held as collateral for that account, there was a balance of $9695.62 in cash to the credit of the Keystone Bank or its receiver. That is to say, after putting the clearing house in funds to discharge all the loan certificates, it had in cash nearly ten thousand dollars to the credit of the receiver. The statement moreover shows that in addition to this cash there were in the hands of the clearing house collaterals held for the loan certificates and which had not been realized, amounting to $331,941.47, and besides that there was a balance due on collateral notes, in process of collection, amounting to $16,397.72. Necessarily, if the appropriation made by the clearing house of the $28,808.10 be stricken from the loan certificate account, the amount due to the Clearing House Association by the Keystone or its receiver will be increased by that amount, and this would absorb the sum of $9695.62 credited thereon as shown by the account in the record, and leave a balance besides against the Keystone. The uncollected collaterals would, of course, be a guarantee for the payment of the balance, and the ultimate sum due, after exhausting all the collaterals, would be a claim against the receiver, entitled to its distributive share from the

assets of the Keystone Bank. The record fails to disclose whether the receiver of the Keystone Bank has taken the collaterals and the balance of cash stated in the account. If he has, the issues are settled, for plainly he cannot be permitted, after having taken the collaterals or the cash balance, upon the theory that the loan certificate account has been extinguished by imputing thereto the $28,808.10, and then in this suit seek to recover by repudiating the credit.

We conclude, therefore, that the ends of justice require that the result of the dealings between the parties should be ascertained and settled before a final decree passes, and that to accomplish this purpose

It will be necessary to reverse both the decrees of the Circuit Court of Appeals and of the Circuit Court, and to remand the cause with directions to allow the parties if necessary to reform their pleadings so that their rights may be determined in conformity with the foregoing opinion, the costs of the Circuit Court of Appeals to be borne by the receiver, those of this court by the appellees, those in the Circuit Court to abide the final result.

CALIFORNIA BANK *v.* KENNEDY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 206. Argued and submitted March 10, 1897. — Decided May 24, 1897.

This court has jurisdiction to review a judgment of the highest court of a State, holding a national bank liable, under a statute of the State, as a shareholder in a state savings bank, when the answer sets up that the stock of the savings bank was issued to it without authority of law, and the motion for a new trial and the specifications of error which were the basis of appeal from the trial court to the Supreme Court of the State assert such want of power under the laws of the United States.

The statutes of the United States relating to the organization and powers of national banks prohibit such banks from purchasing or subscribing to the stock of another corporation, although they may, as incidental

Statement of the Case.

to the power to loan money on personal security, accept stock of another corporation as collateral, and thus become subject to liability as other stockholders.

The want of such authority may be set up by a bank to defeat an attempt to enforce against it the liability of a stockholder.

THIS action was commenced in the Superior Court of the county of San Diego, State of California, against the California Savings Bank, and other defendants, including the plaintiff in error. In each of five counts of an amended petition a separate cause of action was stated, seeking a judgment against the savings bank for the amount of a particular deposit of money alleged to have been made with it on a specified date, and a recovery was asked against the other defendants upon the ground that they were stockholders in the savings bank on the dates of the various deposits, and in consequence liable under the laws of California to pay the debts of the savings bank in proportion to the amount of stock held and owned by each stockholder. A demurrer to the amended complaint was overruled, and the California National Bank answered, denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it, it was issued without due authority from the bank in its corporate capacity and without authority of law. The answer also averred that the bank never acquired "in the usual course of business or now has as owner any stock of the said defendant, the California Savings Bank."

No issue was taken upon the truth of the averments in the amended complaint as to the amount and date of the respective deposits which plaintiff alleged he had made in the savings bank.

From the evidence it appeared that the savings bank began business in January, 1890. Its stock consisted of twenty-five hundred shares, and was originally distributed in five certificates, each for 500 shares, one certificate being made in the name of each of the following persons: J. W. Collins, S. G. Havermale, D. D. Dare, William Collier and H. F. Norcross. Norcross had no official connection with the national bank,

but Collier, Dare and Collins were, respectively, president, vice president and cashier of the national bank, and were also, with Havermale, directors of the bank during the period when the alleged transfers of stock were made to the bank.

The certificates in the names of Collier and Norcross were never delivered, and when subsequently cancelled contained no indorsement. In the stead of those certificates, however, on September 10, 1890, three certificates, aggregating 990 shares, were issued in the name of J. W. Collins, cashier, and two certificates, each for five shares, were issued to Collier and Norcross, respectively. On January 2, 1891, the three certificates for 990 shares in the name of Collins, cashier, were surrendered, and a single certificate for that number of shares was issued in the name of the California National Bank.

In December, 1890, and January, 1891, five per cent dividends were declared and paid on the stock of the savings bank. The amount of each dividend received by the California National Bank was $750. No direct evidence was introduced accounting for these payments having been made on the basis of an ownership of 1500 shares, when the bank was sought to be held liable for and appeared to be the holder of but 990 shares, put in its name as above stated. Both the savings bank and the national bank became insolvent; the former suspending November 12, 1891, while the receiver of the national bank qualified December 29, 1891.

The cause was tried by the court without a jury, and by findings of fact and conclusions of law rested thereon the court sustained the averments of the complaint, adjudged the national bank to be the holder of 990 shares of the stock of the savings bank, and responsible to the creditors of the savings bank in that proportion. Judgment was entered against the savings bank for $47,497.75, and against the national bank for $18,507.52, a payment to the savings bank, however, to be a satisfaction of the judgment against the national bank. Both at the hearing, by objection to the introduction in evidence of the certificate of stock, and in a statement filed with the motion for a new trial, the point was made that the issue

of the stock to the bank was void because not shown to have been acquired pursuant to authority of its board of directors, and because the stock was not taken in the ordinary course of the business of the bank as security for the payment of a debt or otherwise. In addition, by the first, second and third specifications of errors of law occurring at the trial it was specially stated that error had been committed in admitting the certificate in evidence and holding the national bank liable — substantially the same language being employed in each specification — because the national bank, a corporation under the banking laws of the United States, could "not in law become a stockholder or incorporator in any other corporation." The motion for a new trial was overruled, and an appeal was taken to the Supreme Court of the State, by which court the judgment was affirmed. 101 California, 495. A writ of error was allowed, and the cause has been brought here for review.

Mr. Edward Winslow Paige for plaintiff in error.

Mr. George Fuller, *Mr. H. E. Doolittle* and *Mr. T. L. Lewis*, for defendant in error, submitted on their brief.

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

Before discussing the merits, we will briefly consider and dispose of a suggestion that no Federal question appears by the record to have been properly raised below, and, therefore, there is a want of jurisdiction in this court to review the judgment. The answer averred that if any stock of the savings bank appeared to have been issued to the national bank, it was "issued without authority of this corporation defendant, and without authority of law." In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct

of the corporation, that is, the law of the United States. But if there were ambiguity on this subject, it is entirely removed by the grounds which were presented on the motion for a new trial and the specifications of error which formed the basis of the appeal which was taken to the Supreme Court of the State of California, for in both the motion and specifications the want of power under the laws of the United States was clearly asserted. The Supreme Court of the State interpreted the case brought to it from the court below as presenting the question of the power of the corporation under the law of the United States to become a stockholder in a savings bank, for in the opening sentence of its opinion it said:

"The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation."

The suggestion as to the want of jurisdiction is, therefore, without merit.

The Federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States, Rev. Stat. § 5136 *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? and, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

As to the first question. — It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank* v. *Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing

such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank* v. *Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 128.

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which this stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. *The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?*

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas* v. *Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Oregon Railway & Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S. 1; *Pittsburgh, Cincinnati &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24; *St. Louis &c. Railroad* v. *Terre Haute & Indianapolis Railroad*, 145 U. S. 393; *Union Pacific Railway* v. *Chicago &c. Railway*, 163 U. S. 564, and *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the

opinion of the court in *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

This language was also cited and expressly approved in *Jacksonville &c. Railway* v. *Hooper*, 160 U. S. 514, 524, 530.

As said in *McCormick* v. *Market National Bank*, 165 U. S. 538, 549:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh, Chicago &c. Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 48."

The doctrine thus enunciated is likewise that which obtains in England. *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Attorney General* v. *Great Eastern Railway Company*, 5 App. Cas. 473; *Baroness Wenlock* v. *The River Dee Company*, 10 App. Cas. 354; *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Ooregum Gold Mining Co. of India* v. *Roper*, (1892) App. Cas. 125; *Mann* v. *Edinburgh Northern Tramways*, (1893) App. Cas. 69.

Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearce* v. *Railroad Company*, 22 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. (Cook on Stock and Stockholders, vol. 1, p. 435, note 1 to sec. 316, and authorities there cited.)

In the *Royal Bank of India's case*, L. R. 4 Ch. 252 (1869), while it was held by the Court of Appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Sir C. J. Selwyn, L. J., said (p. 261):

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Sir G. M. Giffard, L. J., said (p. 262):

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

In *Ex parte Liquidators of the British Nation Life Assurance Association*, L. R. 8 Ch. Div. 679, (1879) the Court of Appeals (Lords Justices James, Baggally and Thesiger) dis-

charged an order of an arbitrator which had put the British Nation Association on the list of contributories of the British Commercial Insurance Company, a corporation in the process of being wound up. Pursuant to authority conferred by its deed of settlement, the British Nation Association had, through its directors, purchased the business of the British Commercial Insurance Company. Under the agreement entered into between the companies, certain stock of the British Commercial Company was transferred to the trustees appointed by the British Nation Company. Subsequently this stock was transferred into the name of the association, and it was sought to hold it liable as a stockholder, because of its alleged ownership of such stock. Lord Justice James delivered the opinion of the court, holding that while the British Nation Association was empowered to purchase for investment shares of a certain character, it was not empowered to purchase stock which would practically constitute it a partnership in business speculations or adventures, and that the transfer of the stock in question into the name of the bank was *ultra vires* and void. It was further held that the shareholders who had transferred the stock to the British Nation Association had no power, as between themselves and the association, to transfer their liability to the latter, and that —

"No other person or body of persons could be prejudiced or benefited or affected by an instrument to which they were absolutely strangers, such instrument being void as between the parties to it."

The case before the court was declared to be not one of a person induced to become a shareholder, and who had become a shareholder by fraud, but that of a person who had never in fact become a shareholder.

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant

in error. *National Bank* v. *Whitney*, 103 U. S. 99; *National Bank* v. *Matthews*, 98 U. S. 621. The difference between those cases and one like this was referred to in *McCormick* v. *Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified. As was said by this court in *Union Pacific Railway* v. *Chicago &c. Railway*, 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581):

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

It follows from the foregoing that the judgment of the Supreme Court of California against the bank was erroneous, and it must, therefore, be

Reversed.

Mr. Justice Harlan dissented.

NEW ORLEANS *v.* CITIZENS' BANK.

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

No. 108. Argued January 15, 18, 1897. — Decided May 24, 1897.

By the act of January 30, 1836, the legislature of Louisiana exempted the capital of the Citizens' Bank in New Orleans from taxation.

The two judgments of the District Court of New Orleans between the bank and the city, which are set forth in the opinion of this court, hold that

this exemption continued after the expiration of the original charter and during its extension, and as they were made upon identically the same facts and circumstances as those here presented, they are *res judicata*, conclusive upon the parties, and estop the city from attempting to enforce such taxes.

The exemption of the capital of a corporation from taxation does not necessarily exempt its shareholders from taxation on their shares of stock.

The claim of the bank to non-liability to taxation on property acquired by it under foreclosure of a mortgage is rejected, without prejudice to the right of the State and the municipal authorities to claim a license tax, if imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defences to the payment of such tax.

THE case is stated in the opinion.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, for appellants. *Mr. F. C. Zacharie* and *Mr. Alexander Porter Morse* were on his brief.

Mr. William A. Maury for appellee. *Mr. Henry Denis* and *Mr. Branch K. Miller* were on his brief.

Mr. Samuel L. Gilmore for appellants.

MR. JUSTICE WHITE delivered the opinion of the court.

Under the taxing laws of the State of Louisiana, real estate held or owned by banking corporations is assessed like the same class of property owned by other citizens, but special provision is made for the assessment in other respects of the capital of the banks as follows:

"That no assessment shall hereafter be made under that name, on the capital stock of any national bank, state bank, banking company, banking firms or banking association, whose capital stock is represented by shares, but the shares shall be assessed at their actual value as shown by the books of the bank, or banks, to the shareholders, who appear as such upon the books, regardless of any transfer not registered or entered upon the books, and it shall be the duty of the president or other officer to furnish to the assessor a

complete list of those who are borne upon the books as shareholders; and all taxes so assessed shall be paid by the bank, company, firm, association or corporation, which shall be entitled to collect the amounts from the shareholders or their transferees; all real estate owned by the bank, company, firm, association or corporation shall be assessed directly to the bank, company, firm, association or corporation, and the *pro rata* of such direct property taxed, proportioned to each share of capital stock, shall be deducted from the amount of taxes assessed to that share under this section.

"Such assessment shall be made where the bank, etc., is located, and not elsewhere, whether the shareholders reside there or not. The said book value shall be ascertained upon a statement duly sworn to by the president, cashier or secretary, and chairman of finance committee, or in the absence of such latter officer then by one of the directors, showing the assets in detail, and the valuation placed upon each, and said valuation shall be at a fair market value. The sworn statement of the bank's condition made next preceding the date of listing shall be the basis of assessment. Any president or other officer who shall refuse or fail to deliver the said list of shareholders, and said statement of book value and of bank's condition, within the first twenty days of January of each year to the assessor, shall be guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both, at the discretion of the court. The district attorney will at once act upon any complaint of such neglect or refusal made to him by the assessor, or by the board of assessors in the parish of Orleans." (La. Acts of 1890, p. 133; La. Acts of 1888, p. 123.)

The revenue laws of the State in addition provide that whenever the assessors find that property has been omitted from the assessment rolls, such property shall be assessed for the current year and for three back years.

The Citizens' Bank of Louisiana, a corporation created under the laws of that State, filed in 1892 its bill in the Circuit Court of the United States against the city of New Orleans, the board of state assessors for the parish of Orleans

and the state tax collectors for the various collection districts in the parish of Orleans. The bill in substance alleged that although the bank was contractually exempt from state and municipal taxation under its charter and the acts supplementary thereto, the board of assessors were about to assess the bank under the assessing law above referred to, not only for the tax of the year 1892, but also for the three preceding years, viz., 1889, 1890 and 1891; that the assessing board had called upon the bank for a list of its shareholders in order to make the assessment, and that unless restrained the assessment would be made and the tax collected thereon. Besides alleging the contractual exemption resulting from the charter, the bill averred that the fact of such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The bill also averred that an attempt to enforce the assessment and tax would impair the obligations of a contract protected by the Constitution of the United States, the rights asserted by the bank under the Federal Constitution being specially set up and claimed in the complaint. The prayer was for a restraining order and for an injunction enjoining the board of assessors from taking the steps necessary to make the assessment, from completing the assessment, and the collectors from collecting any tax thereunder. The restraining order which was issued allowed the board of assessors to obtain the necessary information from the bank to make the assessment, and also the formal making of the assessment by the board subject to the final decision as to its legal right to assess the bank, but restrained any attempt to collect any tax or to enforce any assessment after it was made under the conditions above stated until the final decision in the cause. Under the terms of the restraining order the board of assessors assessed the bank in accordance with the law above referred to for the year 1892 and for the years 1889, 1890 and 1891.

The complainant was refused leave to file an amended bill attacking these assessments for invalidity in form. Thereupon the complainant filed a supplemental bill against the

sheriffs of thirteen parishes in the State of Louisiana, outside of the parish of Orleans. This bill alleged that the sheriffs named as defendants were *ex officio* tax collectors for the respective parishes in which they held the office of sheriff, and that as such they proposed to collect, and were about to collect, certain taxes for various years on real property belonging to the bank situated in said parishes, and which had been illegally assessed for taxation therein. That the assessment of the taxes complained of had impaired, and the collection thereof would further impair, the obligations of the contract resulting from the charter of the bank protected from impairment under the Constitution of the United States. The prayer was that the named defendants be made parties to the bill and that the collection of the taxes be perpetually enjoined. Demurrers to the jurisdiction to entertain either the original or supplemental bill having been overruled, answers were filed specially denying the right of the bank to the exemptions claimed. A hearing was had, and from a decree entered against them, 54 Fed. Rep. 73, the defendants appealed to this court.

The court found in favor of the complainant and adjudged that "the exemption of said Citizens' Bank, its capital, property and shares of stock of its shareholders, is hereby recognized and decreed to exist as conferred by its charter and the laws amendatory thereof and relating to the Citizens' Bank, and especially by the act No. 40 of 1874, extending the charter of the Citizens' Bank, which extension and the said exemption for the further period thereof is hereby recognized and decreed to exist, and the injunction herein issued is hereby made peremptory." The injunction which the final decree allowed forbade the collection of taxes for designated years by the State of Louisiana and the city of New Orleans, "upon the capital, property or shares of stock of the shareholders of said bank, whether assessed against the bank or its shareholders," and in addition the writ also enjoined the demanding or collecting from the bank of any state or city license tax.

The exemptions to which the decree below held the bank to be entitled related therefore to distinct objects of taxation,

one not necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital, shares of stock or real estate and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure proceedings, because property so acquired became by virtue of the purchase a part of its capital stock. Fourth. That the non-liability of the bank to taxation embraced also immunity from the payment of a license tax to either the State of Louisiana or the city of New Orleans.

The contentions which arise between the parties on this appeal from the decree below rendered are as follows: First, the bank asserts that by the effect of its charter it was contractually exempt from taxation on all the foregoing objects of taxation; that this exemption existed not only during the terms of the original charter, but during the term for which the charter was extended. The contract being asserted to result, not only from the express terms of exemption in the original act, but from the fact that the very nature of the contract between the bank and the State carried this exemption into the period of the extended charter, as the bank and its capital were dedicated to the payment of the bonds, outstanding obligations of the State, and the bank was, therefore, in a measure, a *quasi* state institution. Second, that the contractual right to the exemption as above stated is conclusively determined by the presumption of the thing adjudged, resulting from certain judgments relied upon.

On the other hand, the contention of the defendants is that the exemption did not originally obtain, or if it did, was not carried into the extended period of the charter, because it could not be so carried under the constitutions of the State

of Louisiana of 1868 and 1879, by which the bank was bound, and that the judgments relied on and which were offered in evidence do not constitute "the thing adjudged."

A brief statement of the history and purposes of the organization of the Citizens' Bank and of the past action of the taxing authorities in the State of Louisiana as to that bank is necessary in order to make clear the conclusions which we have formed on the foregoing contentions.

The Citizens' Bank was organized by a legislative charter granted in 1833, and amended in 1836. As the effect of the charter on the taxing power will be hereafter fully stated in the language of the Supreme Court of the State of Louisiana, it suffices now to say that in its ultimate form the scheme proposed by the charter was as follows: The subscribers to the stock of the bank did not pay for their subscriptions in cash, but evidenced the amount thereof by interest-bearing notes, payable in instalments maturing many years ahead, the last instalment becoming due only in 1886. The payment of these notes, thus furnished for the amount of the subscription, was secured by a mortgage on real estate and slaves. The working capital of the bank was procured by a loan from the State to the bank of its bonds to the amount of seven millions of dollars, and these bonds of the State were endorsed by the bank, and were by it sold in open market. To secure the payment of these state bonds the bank pledged all the notes furnished by its stockholders for the amount of their stock subscriptions, as well as the mortgages by which the payment of these notes was secured. As an additional security for the payment of the bonds of the State, the right of the stockholders to receive a dividend was limited, the charter providing that a given portion of the earnings should be added to the capital. The State, moreover, was to have an interest in the profits of the bank to a stated amount, and its affairs were to be conducted by a board partly elected by the stockholders and partly appointed by the State.

By the original act, the term of the charter would have expired in 1884, and section 4 of the act of 1836 provided that "the capital of said bank shall be exempt from any tax laid

by the State, or by any parish or body politic under the authority of the State, during the continuance of its charter." The constitution of the State of Louisiana, adopted in 1868 (article 118), after directing that all property shall be taxed in proportion to its value, provided that "the general assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes." In interpreting this provision of the constitution, the Supreme Court of the State of Louisiana has held in many cases that it deprived the general assembly of all power to exempt property not actually used for church, school or charitable purposes. In 1874, ten years prior to the period when the charter of the Citizens' Bank would have expired, the general assembly of the State of Louisiana passed an act extending the charter to the year 1911. The preamble of this act recited the loss and damage which must ensue from an attempt to promptly realize on the obligations resulting from the stock mortgages and the interest of the State in the collection of the sums due, as they were the means relied upon to pay the bonds by it issued. Besides extending the charter to the period stated, it authorized the board of directors of the bank to negotiate for an extension of the state bonds. (La. Acts of 1874, No. 40, p. 77.)

In the year 1880 (La. Acts of 1880, p. 104), the general assembly of Louisiana passed an act conferring on the Citizens' Bank the power to compromise and settle the obligations of its mortgage stockholders, provided the assent of the bondholders was obtained, and the compromise was made also with the approval of the directors of the bank appointed on behalf of the State. The act contained a provision for its acceptance by the bank, and stipulated that the bank should be made subject to articles 234 and 237 of the constitution of 1879.

When this act was adopted the constitution of 1879 had superseded that of 1868. The new constitution contained a provision as to taxation differing in some respects from that of 1868, but which as to the power of the general assembly to exempt from taxation may be said to be equally as stringent

as were the provisions found in the constitution of 1868. The Citizens' Bank accepted the terms of the act.

From the date of the original charter in 1833 to the year 1877, that is, for a period of forty-four years, no attempt was made by the State, or any of its political subdivisions, to tax the bank on the subjects of taxation referred to above under the first heading. The State, therefore, in all its taxing departments of every nature for this long period, recognized the bank as in part not subject to taxation. In 1878, for the taxes of 1877, assessable in 1878, the board of state assessors, whose assessment rolls were also the basis for the taxation of the city of New Orleans, assessed the bank on taxable assets over and above the capital stock, not including real estate, at a value of $159,828.62, and on the cash value of the capital stock assessed to the shareholders $636,450, and the bank under the law of Louisiana was notified not only to pay the tax thus placed upon its assets, but also the sum of the tax resulting from the assessment made on the shares of stock against the shareholders. In June, 1878, the bank filed its petition in the third District Court for the parish of Orleans, seeking to enjoin the collection of the tax so assessed. The petition for an injunction set out the charter and the amendments thereto, the fact that the bank was not liable to taxation, and that if enforced it would impair the obligations of the contract entered into between the State, the bank, the stockholders and bondholders, and upon the petition of the bank a preliminary injunction was allowed. To this suit the state tax collector and the state auditor and the board of assessors were made parties defendant. The board of assessors answered, admitting the assessment and averring its validity. The answer besides averred that the clause of the charter exempting the bank from taxation was in violation of the constitution of the State of Louisiana of 1812, in force at the time the charter was granted, and that it also violated subsequent constitutions, and particularly the clause in the constitution of 1868, to which reference has already been made. The answer, moreover, averred that the tax on the shares of stock in the hands of the shareholders was not a

tax on the bank, and that the provisions of the state law by which the bank was obliged to pay the sum of the tax assessed on the shares of stock of its shareholders was lawful. The state tax collector and the state auditor, through the assistant attorney general of the State, also answered, setting up defences similar in character to those made by the board of assessors. By way of reconvention under the Louisiana law (Code of Practice, articles 374, 375), these officials, averring the liability of the bank for the taxes assessed as above stated, prayed judgment against the bank for the entire sum of the taxes, with costs, penalties and attorney's fees.

Upon these issues there was judgment in favor of the bank, declaring the assessment null and void, and perpetuating the injunction. From the judgment so rendered an appeal was prosecuted to the Supreme Court of the State of Louisiana. The case was heard in that court. *Citizens' Bank* v. *Bouny, Tax Collector*, 32 La. Ann. 239. Two opinions were announced by the court, one on the first hearing and the other on a rehearing. In the first, the court unanimously held that the exemption of the bank under its charter was valid, and, therefore, that the taxes assessed against it *eo nomine* were void, because impairing the obligations of its contract, but that the tax assessed against the shareholders was irregular in form and not in accordance with the provisions of the Louisiana statute, and was therefore invalid. In the opinion on application for rehearing, the previous opinion as to the non-liability of the bank *eo nomine* to taxation of its capital or assets was reiterated, but the previous conclusion as to the irregularity of the assessment on the shareholders was withdrawn, the court unanimously holding that under the peculiar provisions of the charter of the Citizens' Bank any attempt by the State to take from the funds of the bank any of its money for the purpose of paying the sum of the tax assessed against the shareholders impaired the obligation of the contract entered into between the State and the bondholders and stockholders, and was therefore void. The opinion of the court on the rehearing so clearly and concisely states the attitude of the bank to the State, and the obligations resulting from those relations, that we reproduce in full the text of the opinion:

Opinion of the Court.

"SPENCER, J. It will be seen by our former opinion in this case, that there is demanded of the bank taxes —

"First, on $159,828.62 assessed as 'taxable assets over and above the capital stock,' and

"Second, on $636,450 assessed to the shareholders of said bank, as 'value of capital stock,' etc.

"The taxes so assessed to the stockholders are demanded of the bank, under the revenue act of 1878, which requires the banks to pay such assessments.

"The bank resists both demands on the ground that by its charter it is exempt therefrom.

"1. We see no reason to doubt the conclusion that by section 4 of the act of January 30, 1836, the capital of the Citizens' Bank is exempt from taxation. 'The capital of said bank shall be exempt, etc., . . . during the continuance of its charter,' is the language used. That language is broad enough to cover everything which, during its existence, should enter into and make part of the capital of said bank.

"By the twenty-ninth section of the original charter 'all the profits made by said corporation shall be added to and made a part of its capital,' except a certain fraction of any excess of profits over what was necessary to pay the bonds issued by the bank. It is not pretended that any such excess of profits exists or ever has. As a matter of fact, the bank has never declared a dividend to its shareholders. This sum of $159,828.62 is accumulated profits, which, by the charter, enter into and become part of the bank's capital, and is, therefore, exempt.

"2. The shareholders of the bank have been assessed for the value of their shares of stock and the tax thereon is demanded of the bank. Under the view we have taken of this case, it will be unnecessary to discuss the question so much argued by counsel as to the right of the State to tax the shares of the shareholders. The bank has no mission to raise such a question, except so far as it may be necessary to protect itself. Even if the shareholders be liable to taxation on their shares (upon which we express no opinion), under the peculiar and exceptional nature of the charter of the Citizens' Bank we

think it cannot be forced to pay the taxes assessed to its shareholders.

"To enable this bank to obtain its capital, the State loaned it bonds to the amount of several millions; which bonds were put upon the market and sold by the bank; the bank binding itself to take them up at their maturities, and to pay the interest thereon as it accrued. In order to secure the State against loss, and guarantee the payment of the bonds, the mortgages and pledges given by the stockholders to secure their subscriptions and loans were transferred to the State and the bondholders. All profits were to be capitalized, except as above mentioned. No dividends were to be distributed, except out of a small fraction of any surplus of profits, after meeting and paying the maturing bonds and interest.

"It is, we think, manifest that the bondholders are to be paid out of the profits of this bank by preference, and before any dividend can be declared or distributed to shareholders. It is not shown or pretended that the bank has in its possession any funds which it could legally distribute to its shareholders, or which it could pay to them without a manifest violation of its charter. If voluntary payments to or for account of its shareholders would violate its charter, and be a breach of its contract with the State and its bondholders, forced payments would be equally so. The authorities cited by the defendants are inapplicable to the present case. Where the capital, assets and profits of a bank are at the disposal of its shareholders, the State may perhaps compel the bank to pay their taxes on stock. But such legislation with reference to the Citizens' Bank would be violative of the vested rights of others, and, as we think, unconstitutional."

Under this judgment of the Supreme Court of the State, the taxes against the bank were cancelled.

In the meanwhile, pending the appeal to the Supreme Court of the State in the case just mentioned, a like assessment on the Citizens' Bank and its shareholders was made for the taxes of 1879, and in 1882 the city of New Orleans brought suit in division A of the civil district court, a court of general and unlimited original jurisdiction created under the constitu-

tion of 1879, to enforce the payment of this assessment. To this suit the bank answered, setting up by way of defence its non-liability to taxation under its charter, and there was judgment in favor of the bank rejecting the claim of the city, and in consequence of this fact the assessment was cancelled.

From 1879 to 1884, presumably in consequence of the foregoing judicial proceedings, no assessment was made against the bank. In 1884, however, the board of assessors again assessed the bank on its furniture and banking house, and upon its shares of stock. Thereupon, in October, 1884, the bank filed its petition in division B of the civil district court, against the board of assessors, the city of New Orleans and the state tax collector of the city of New Orleans, praying for judgment decreeing "that said assessments are illegal, null and void, that they be erased and cancelled and be prohibited from being collected, and that any record of the mortgage therefrom resulting, be decreed to be erased." The petition set out the charter of the bank, the decision of the Supreme Court of the State in the case of *Citizens' Bank* v. *Bouny*, and averred the non-liability of the bank for taxation, and averred no other legal defence. After issue joined, there was judgment in favor of the bank "against the defendants, the board of assessors for this parish, the city of New Orleans, and the state tax collector above Canal street, ordering said board of assessors in and for the parish of Orleans, the city of New Orleans, and the state tax collector of the city of New Orleans above Canal street to be directed and commanded to erase as illegal, null and void the assessments described in plaintiff's petition and recited below, and that they be prohibited from collecting any taxes based on said assessment." From this judgment no appeal was prosecuted, and on its finality an entry cancelling the assessment was made. From the date of this assessment in 1884 until the year 1886 no other assessment on the subjects of taxation referred to was made against the bank. In 1886, however, — the term of the original charter of the bank having expired in 1884, and the extended term provided for by the act of 1874 having therefore come into existence, — the board of

assessors again assessed the bank for the state and city taxes for the year 1886, on its banking house and on its shares in the name of the shareholders. In October, 1886, the bank filed its petition in division D of the civil district court for the parish of Orleans, praying the annulment of this assessment, and making the board of assessors, the state auditor, the city of New Orleans and the state tax collector parties defendant. The petition set out the charter of the bank, its non-liability to taxation thereunder, and the judgment of the Supreme Court of the State in the case of *Citizens' Bank* v. *Bouny* was pleaded as *res judicata*. Although there was a general averment in the petition that the tax was excessive besides being illegal, there was no allegation contained therein adequate to justify or support the prayer that the assessment be annulled, except the assertion that the property of the bank was exempt from taxation.

After answer by the parties defendant, there was judgment on March 10, 1887, decreeing "the assessment for the year 1886, standing against the banking house or real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at seventy-five thousand dollars, on 10,500 shares of the capital stock, at $42.75 per share, aggregating an assessment of $448,875, null and void and of no effect, and that the same be cancelled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be cancelled and erased, and costs of suit." This judgment was not appealed from, and on its becoming final an entry on the assessment roll was made cancelling the assessment.

On the 21st of March, 1887, a few days after the decision in the cause just stated, the Citizens' Bank filed its petition in division A of the civil district court of the parish of Orleans against the board of assessors. In this petition, after averring that under its charter the bank was not liable to assessment and that it could not be taxed without impairing the obligations of the contract created by the charter and in violation of the constitution of the State and of the United States, the petitioner proceeded to aver the previous judicial recognition

of the effect of the charter, and alleged that, notwithstanding these facts, the board of assessors were about to assess the bank for the taxes of 1887 upon its shares of stock, upon its banking building and upon the furniture therein used by petitioner for conducting its said banking business and upon other property possessed by petitioner, that said proposed assessments were without warrant of law, and the bank was entitled to enjoin the making of the same. A preliminary injunction having been issued as prayed for, the case was put at issue, and resulted in a judgment, on the third of May, 1887, perpetuating the preliminary injunction, and enjoining the board from "assessing the Citizens' Bank for taxes, state or city, for the year 1887, upon its capital stock, on the shares thereof, or its property, and that said assessment if made be cancelled from the books of the assessor for the year 1887, and that the recorder of mortgages for the parish of Orleans be and is hereby enjoined from recording said assessments upon the books of his office." This judgment was also not appealed from, and upon its becoming final was executed by proper entry on the books of the recorder of mortgages. From the date of this judgment in 1887 to the year 1892, to quote the language of the deputy recorder of mortgages, "there are no assessments on the roll against the bank on capital or on the bank building or on the shares. In the place of the assessments there is the word 'exempt' and the name of the bank, but no assessments, and all the assessments of which I have spoken [referring to those above alluded to] have been marked cancelled by order of court."

In 1892 the right to assess was again asserted by the board of assessors under the circumstances which we have previously stated, and the controversy now before us therefore arose.

Since this case was decided below, the Supreme Court of the State of Louisiana has had before it a suit brought by the bank against the board of assessors, asserting its non-liability to assessment and taxation under its charter, for taxes against real estate acquired by it under foreclosure of its stock mortgages. Certain judgments rendered in favor of the bank (presumably those relied upon in this record) were set up as

constituting *res judicata.* The court of last resort of the State said in its opinion on the first hearing that it was unnecessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included within its exemption. The court held, considering the terms of the charter, that such property was not included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874 were set up as conclusively establishing that the bank was not exempt from taxation at all. In an opinion on a rehearing the court somewhat modified the grounds for its conclusions, and in the course of the opinion said:

"We refrained from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880. We now do the same, because we think it unnecessary to do so. We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered."

In concluding the opinion the court said:

"We think the Citizens' Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for carrying on its legitimate business or purposes." *State ex rel. Citizens' Bank* v. *Board of Assessors*, 48 La. Ann. 35.

From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the State of Louisiana, sanctioned by nearly sixty years of practical execution, and supported by decrees of the courts of that State which are final and which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank. It is true that during the greater portion of the time when the charter was construed by the officers of the State of Louisiana, and interpreted by the courts as rendering taxation of the bank illegal, the original charter was in force, and the question whether the bank was subject to taxation during the term of its extended charter could not therefore technically arise. But the old charter period expired in 1884,

and it is clear that from 1884 until 1892, not only was the bank generally treated as not liable to taxation under its charter, but whenever an attempt was made to tax it the courts of the State held the assessment unlawful.

Indeed, the language of the Supreme Court in the case to which we have referred, decided since the decree under review was rendered, sustains the construction which the charter of the bank had previously received under so many years of practice approved by the repeated adjudications of the Louisiana courts. It is argued that in giving expression to these views the Supreme Court of the State of Louisiana indulged in mere *dicta*, but although this be conceded, the *dicta* necessarily afford some light as to the proper meaning of the charter.

Passing the consideration of the question of the correctness of the decisions of the courts of Louisiana, and the influence which they should have upon this court in interpreting a purely Louisiana contract, the question arises, Are not the judgments rendered between the bank, the board of assessors, the city of New Orleans and the state taxing officers, absolutely conclusive, under the principle of the thing adjudged, of the issue here presented? Of course, if the judgments are the thing adjudged, and conclusively determine as between the parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question.

In considering this question, we at once eliminate all the judgments rendered prior to the period when the amended charter took effect, and therefore confine our examination to the two judgments rendered by the civil district court, the one as to the taxes of 1886 and the other as to those of 1887. The reasons relied on to establish that these judgments do not constitute the thing adjudged are embodied in three propositions. First, because although it is true the officials who are made defendants are the successors in office of the officers who were impleaded in the judgments relied upon, as they are not the same natural persons, therefore there is a want of

identity of parties; second, because the records do not show with sufficient certainty that these judgments were based on the identical claim of exemption from taxation which is now asserted, and therefore that the judgments do not establish that the matter here in issue was necessarily therein concluded; third, because, whatever as a general principle may be the efficacy of the thing adjudged, that rule has no application to taxes of different years, since a judgment decreeing a tax of one year illegal can never be *res judicata* as to a tax of a future year, although the right to tax for a future year is resisted upon the same facts and between the same parties, and upon the identical legal grounds held to be conclusive in a judgment previously rendered between them.

In passing we notice briefly an argument advanced in the discussion at bar, that as the civil district court of the parish of Orleans is a court composed of several judges, each of which judges presides over a separate division, therefore the judgments of one of the divisions can never become the subject-matter of *res judicata*. But this argument denies that the civil district court of the parish of Orleans is a court at all. The civil district court is a court of general and unlimited original jurisdiction, possessing full common law, equity and probate powers, besides having an appellate jurisdiction over the city courts. Constitution, 1879, art. 130. It is true that the court is divided into divisions, but each division has plenary jurisdiction over the causes allotted to it for decision, and the mere creation of separate divisions does not deprive the courts of their judicial character, or prevent their judgments when final from creating the presumption of the thing adjudged between the parties thereto. Constitution of the State of Louisiana, 1879, art. 130.

The first contention based upon the mere change in the person holding the particular office is without merit. It is not denied that the tax collectors and board of assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is also not gainsaid that the successors in office of those officers who are defendants here are also duly em-

powered. The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged. *Scotland County* v. *Hill*, 112 U. S. 183; *Harshman* v. *Knox County*, 122 U. S. 306; *State* v. *Rainey*, 74 Missouri, 229; *Harmon* v. *Auditor*, 123 Illinois, 122.

The second question then is this: *Were the final judgments which held that there was no power to levy the taxes on the Citizens' Bank for the years* 1886 *and* 1887 *based upon the identical claim of exemption now asserted by the bank in order to defeat the taxes here in question?*

The petition filed by the bank in the suit, by it commenced, to have the taxes of 1886 on stock cancelled and annulled, is set out in full in the margin.[1] It will be seen that it specifically averred the charter of the bank, and that under its provisions the bank could not be taxed, and that to so do would impair the contract obligations created by the charter, and would be violative of the constitution of the State of Louisiana and of the United States. It, moreover, referred to the previous adjudication by the Supreme Court, and contained an allegation that the assessments, besides "being illegal and without warrant of law, were excessive." But the relief prayed was not the correction or reduction of an excessive assessment, but solely that the assessment be decreed "void and null," and be "cancelled and annulled." The answers of the defendants asserted the legality of the assessment and denied the right of the bank to question the amount, because it had not availed itself of the antecedent statutory remedies necessary to entitle it to assert such right. The judgment ren-

---

[1] PETITION. Filed October 29, 1886.

The Citizens' Bank of Louisiana *vs.* The Board of Assessors, et als. } No. 19144. Civil District Court. Division "D."

To the honorable the civil district court for the parish of Orleans:

The petition of the Citizens' Bank of Louisiana, a corporation established by law, domiciled in New Orleans, respectfully shows —

That the board of assessors for the parish of Orleans have assessed petitioner upon the assessment rolls for 1886 for taxes to the city of New Orleans and State of Louisiana, on which the assessments are as follows, to wit:

dered upon these issues decreed, not that the tax was excessive, not that it should be reduced, *but that it was null and void, and must be cancelled.* The judgment is inserted in the

---

On the banking house of petitioner, erected on petitioner's real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, and on said real estate, assessed at seventy-five thousand dollars, and on 10,500 shares of the capital stock of the bank, assessed at $42.75 per share, aggregating an assessment of $448,875, on which the taxes assessed will amount to upwards of fifteen thousand dollars, as appears by said assessment, specially referred to for fuller explanation and greater certainty.

That under the charter of the bank granted by the State the bank is exempted from all taxation, state, parish and municipal, in any form; that on the faith of said charter and of said exemptions the capital of the bank was furnished, the bank organized, and its banking has been for years and is now conducted, all of which more fully appears by the legislative acts on it, the act to incorporate the Citizens' Bank, approved 1st April, 1833; the act amendatory of the first act, approved 30th January, 1836; the act No. 246 of 1853, the act 141, p. 852, and other acts on the subject, under which acts of 1833 and 1836 the original capital of the bank of ten millions, and under which acts of 1852 and 1853 the additional capital of the bank of one million dollars were furnished, all of which more fully appears by the said acts, specially referred to for fuller explanation and greater certainty, said exemptions being contained in the thirtieth section of the act of 1833.

That the aforesaid assessment on shares of $448,875 purports to represent the capital of the bank and is specially in excess of the value of the shares and of the capital, besides being illegal and without warrant of law; that the aforesaid real estate assessed as aforesaid is in excess of the value of said real estate, besides being illegal; that said real estate was purchased and the building thereon erected with the funds of and belonging to the capital of the bank and said real estate and building represent and form part of said capital; that said assessments are in violation of the exemption granted to the bank and are illegal, null and void, and any liens, if any there be, binding to direct said assessments is void for repugnancy to article 1, section 10 of the Constitution of the United States, and article 155 of the constitution of the State.

That in the suit of The State Tax Collector *v.* The Citizens' Bank, decided by the civil district court on the ——, 1880, and affirmed by the Supreme Court of the State, 32 Ann. p. 239, said exemption was maintained and adjudged valid, and said adjudication is *res judicata* against said present assessment and all demands thereon.

That within the delays and according to the forms prescribed by law petitioner protested against said assessment and applied to the board of assessors to have the assessment cancelled, but said protest and application were disregarded; that within the delays and according to the forms prescribed by law petitioner made the same protest and application to the

margin.[1] Now, to say that this judgment may have proceeded upon other issues or may have been rendered because of some presumed irregularity, without considering the asserted exemption, is to substitute conjecture for the facts unequivocally and conclusively established by the record itself. Under the pleadings only two issues were presented, that the tax was void because under the charter the bank could not be taxed, and that it was excessive; but the judgment did not reduce the amount of the tax — it decreed it to be void. In the pleadings there is nothing which justified the decree or to which it was responsive except the exemption of the bank. And this conclusion results by an overwhelming implication when the state of the statute law of Louisiana is considered. By that law, as is shown by the assessment here assailed, wherever a tax is excessive in amount it is not to be avoided

---

common council and to its standing committee on assessments of the city council, but said protest and application were also disregarded.

Wherefore petitioner prays that the board of assessors for the parish of Orleans and the city of New Orleans be duly cited to answer this demand; that the state tax collector for the first district be also cited; that after due proceedings according to law there be judgment in petitioner's favor, decreeing said assessment of said shares and on said real estate to be void and null and decreeing it to be cancelled and annulled, and that any inscription of the same in the mortgage office be erased and cancelled, and for general relief.

[1] JUDGMENT.

In this cause, submitted to the court for adjudication, for the reasons orally assigned by the court, the law and evidence being in favor of plaintiffs —

It is ordered, adjudged and decreed, that there be judgment in favor of plaintiffs, The Citizens' Bank of Louisiana, and against the board of assessors of the parish of Orleans and James D. Houston, tax collector for the upper district for the parish of Orleans, decreeing the assessment for the year 1886 standing against the banking house or real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at seventy-five thousand dollars, or on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448,875, null and void and of no effect, and same be cancelled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be cancelled and erased, and costs of suit.

Judgment rendered March 3, 1887.

Judgment signed March 10, 1887.

but is reduced, and the board of assessors are entitled when property is omitted for any reason to immediately make up a supplemental roll correcting the error. Acts of 1884, sec. 2, p. 136.

If, therefore, the court had concluded that there was an excessive or irregular assessment it could not have rested its decree upon that ground, because, as the tax could have been reduced, or, in case of irregularity, have been assessed, the issues necessarily required a decision of the question of exemption *vel non*. In other words, if the court had found that the tax was excessive or irregular, to have so decreed would not have passed upon the issue before it or terminated the controversy. In this connection it is worthy of remark that the record discloses that from the date of this judgment no supplemental roll of any kind assessing the bank for the tax of 1886 was made. But under the statutes of Louisiana, if the judgment had proceeded upon an irregularity in the assessment, the plain duty of the board was to comply with the statute and make the supplemental roll. The fact that no such roll was prepared is a conclusive demonstration that the judgment was based on the claim of exemption, which rendered it impossible that the new roll should be made out.

The judgment rendered for the tax of 1887 is, if it were possible, even more conclusive of the identity of the issue than the one rendered for the taxes of 1886. In that case the suit was brought by the bank, not to assail an assessment which had been actually made, but to enjoin the making of any assessment against it whatever. The petition which is set out in the margin[1] stated no ground for relief other than the claim

[1] No. 20541. — Petition Filed March 21, 1887.

To the honorable the civil district court in and for the parish of Orleans:

The petition of the Citizens' Bank of Louisiana, a corporation established by law, domiciled in the city of New Orleans, respectfully shows —

That petitioner is exempted by law — all taxation, state or municipal, upon its capital, shares and property of every description, as appears by the act of the legislature of Louisiana, approved April 1, 1833, entitled "An act to incorporate the Citizens' Bank of Louisiana," and especially the thirtieth section of said act, and by the act amendatory of the preceding act, approved January 30, 1836, and especially by the fourth section thereof,

of exemption. Indeed, the very nature of the remedy invoked precluded the possibility of any other ground, since the relief sought related, not to an assessment already made, but to prevent any assessment whatever under the existing law of objects named from being made. How can it be contended that the assertion in the pleadings that there was no power to make any assessment at all of the specified property, was simply a claim that an assessment was irregular? The judg-

---

which acts are specially referred to for fuller explanation and greater certainty.

Petitioner shows that under said charter, as contained in said legislative acts, and in accordance with the conditions thereof, the Citizens' Bank of Louisiana was organized in 1836, with a capital of upwards of ten millions of dollars, then obtained from the subscribers to the capital stock, in accordance with the charter of the bank; that in 1853 additional capital for the Citizens' Bank of one million dollars was obtained from the subscribers thereto under the authority of the act of the legislature of Louisiana for the relief of the Citizens' Bank, being the act No. 141 of 1852 and the act of the legislature of Louisiana No. 246 of 1853, approved April 28, 1853; that the aforesaid original capital obtained in 1836, as well as the said increased and additional capital obtained in 1853, was all furnished and paid to the bank on the faith of its charter, and especially on the faith of the aforesaid exemption in the charter of all the property, stock and capital of the Citizens' Bank, and that, relying on the aforesaid exemptions, the said bank has conducted and is now conducting its banking business.

Petitioner further shows that said acts containing the charter of the said bank, and especially the provisions thereof containing said exemptions from taxation, are contracts under the protection of the articles of the Federal and state constitutions protecting contracts, said articles being article 1, section 10, of the Constitution of the United States and similar articles in the state constitutions, and petitioner further shows that said exemptions have been decreed valid by the courts.

Petitioner further shows that, notwithstanding said exemptions from said taxation and said judgments decreeing the same to be valid, the board of assessors for the parish of Orleans are about to assess the Citizens' Bank upon the assessment rolls for the year 1887 for taxation upon its shares of stock, and upon its banking building and upon the furniture therein used by petitioner for conducting its said banking business, and upon other property possessed by petitioner; that said proposed assessments are without warrant of law, are prejudicial and injurious to petitioner and will cause irreparable injury to petitioner, and it is entitled to an injunction to prohibit and enjoin said assessments.

Wherefore petitioner prays that said board of assessors for the parish of Orleans and the city of New Orleans be duly cited to answer this petition;

ment, a copy of which is reproduced in the margin,[1] was responsive to the issue presented, and enjoined the making of any assessment for taxes for the year 1887. Now, as there was in the case of excess or irregularity lawful power, provided by statute, to make an assessment by supplemental roll, the decree prohibiting any assessment could have rested alone upon a want of power to tax, that is, of exemption, for that cause alone was adequate to justify the relief afforded. It is shown in the proof that, both as to the taxes of 1886 and 1887, after the two judgments were rendered, there was entered on the official rolls, "cancelled, exempt." The effect of this contemporaneous execution of the judgment cannot in reason be argued away. The additional fact is shown that for five years after these judgments were rendered the board of assessors, in annually making up their rolls, placed the name of the bank on the roll but made no assessment, marking in the place where the assessment should have been the word "exempt." In other words, all the departments of the state

---

that, considering the bond and affidavit herewith filed, a writ of injunction issue, directed to said board, enjoining them and prohibiting them and each member thereof from assessing the Citizens' Bank for taxes, city or state, for 1887, or for any subsequent year upon the capital stock of the Citizens' Bank or the shares thereof, or upon the banking building of petitioner or upon the furniture used therein, or upon any other property of petitioner; that said injunction be made perpetual, and that said board and the recorder of mortgages be prohibited and enjoined from recording any such assessments in the office of the recorder of mortgages and for general relief.

[1] JUDGMENT.

In this case, submitted to the court upon the evidence and pleadings filed, the law and evidence being in favor of plaintiff, it is ordered, adjudged and decreed that the injunction herein issued on the 21st day of March, 1887, be now made perpetual, and that the board of assessors for the parish of Orleans and the members thereof be enjoined and prohibited from assessing the Citizens' Bank for taxes, city or state, for the year 1887 upon its capital stock on the shares thereof or its property, and that said assessment, if made, be cancelled from the books of assessments for the year 1887, and that the recorder of mortgages for the parish of Orleans be, and he is hereby, enjoined from receiving said assessment upon the books of his office.

Costs herein be paid by defendants.

Judgment rendered April 27, 1887.

Judgment signed May 3, 1887.

and municipal government having tested the question of exemption before the courts and having been defeated recognized the fact, and for a series of years treated the judgments as concluding the question of exemption. The effect, therefore, of the claim now made is, in substance, to disregard the pleadings, to disregard the necessary effect of the decrees and to repudiate their execution contemporaneously made and followed by years of official conduct. The fact that the petition of the bank, filed in 1887, after alleging the exemption, contained the general averment that "said proposed assessments are without warrant of law and prejudicial and injurious to petitioner," does not furnish reason for saying that other reasons than the exemption may have been (in consequence of the use of these words) presented for adjudication. The quoted sentence was not traversable and was a mere legal conclusion from the facts previously alleged, that is, the exemption of the bank under its contract.

It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year cannot be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defence and of the facts upon which the defence is founded.

There is difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one, two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may

depend upon a question which has previously been determined under the same facts and circumstances. On the other hand, the reasoning that this must be the rule, because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine first the proposition that because a tax of one year is a different demand from the tax of a subsequent year, therefore *res judicata* as to one can never apply as to the other, and the second question of whether as a matter of public policy the thing adjudged applies to taxes at all.

The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear.

In *Bank* v. *Beverley*, 1 How. 134, 139, it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137, and *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes.

In *Cromwell* v. *Sac County*, 94 U. S. 351, 353, after a full

statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the court then considered the extent of the estoppel, where the causes of action were distinct, and said (p. 353):

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It is unnecessary to multiply citations of authority, as the subject has been quite recently fully considered and passed upon by this court. In *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, where an estoppel resulting from the thing adjudged was enforced, this court said (p. 687):

"The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided. *Hopkins* v. *Lee*, 6 Wheat. 109; *Smith* v. *Kernochen*, 7 How. 198; *Pennington* v. *Gibson*, 16 How. 65; *Stockton* v. *Ford*, 18 How. 418; *Washington &c. Steam Packet Co.* v. *Sickles*, 24 How. 333; *S. C.* 5 Wall. 580; *Lessee of Parrish* v. *Ferris*, 2 Black, 606; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Davis* v. *Brown*, 94 U. S. 423; *Russell* v. *Place*, 94 U. S. 606; *Campbell* v. *Rankin*, 99 U. S. 261; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Johnson Company* v. *Wharton*, 152 U. S. 252."

And the law of Louisiana is exactly in accord with the rulings of this court, for, as said by the Supreme Court of Louisiana in *Heroman et al.* v. *Louisiana Institute of Deaf & Dumb et al.*, 34 La. Ann. 805, 814:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. Cooley on Const. Lim. p. 47 *et seq.*, and authorities there cited.

"'Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court.' Bigelow Estoppel, 3d ed., Outline, pp. lxi, 29, 57, 103.

"'The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein.' *Aurora* v. *West*, 7 Wall. 102; 4 N. Y. 113; 2 An. 462; 14 An. 576; 19 La. 318; 5 N. S. 664; 11 M. 607; 14 La. 233; 5 N. S. 170."

It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the lawmaking and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial inves-

tigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation.

It is contended, however, that the asserted theory finds support in two authorities, one a decision of this court, *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, and the other, *Davenport* v. *Chicago, Rock Island &c. Railway*, 38 Iowa, 633, 640. But that these authorities do not sustain the contention is demonstrable. In the *Keokuk case* the court held that the controversy which it decided was not between the same parties as was the controversy in the case wherein the judgment was rendered which was relied upon as *res judicata*. The two judgments not being between the same parties, there could have been and was no necessity for deciding whether, if the judgment had been between the same parties or their privies, it would have been *res judicata*. True it is, that in the *Keokuk case* the opinion *arguendo* discusses the question of whether a judgment against the validity of a tax for one

year would be a bar to a suit for taxes for a subsequent year. But that this reasoning was not considered as relating to a case where the validity of the tax was resisted on a particular ground, which particular and special defence had been previously held between the same parties to be valid under identically the same conditions and circumstances, becomes clear when the context of the opinion is examined, and it is discovered that it approves and quotes the case of *Cromwell* v. *Sac County*, the opinion in the *Keokuk case* saying: "If there were any distinct question litigated and settled in the prior suit, the decision of the court upon this question might raise an estoppel in another suit upon the principle stated in *Cromwell* v. *Sac County*, 94 U. S. 351." To seek, then, to avail of the general language used in the opinion in the *Keokuk case* without taking note of the circumstance that it was there said that the estoppel would exist even as to a tax in a case like this is, in reason, to misinterpret the opinion and make it cover the very case which it in express language declared it was not intended to govern. It may also be conceded that language was used in the course of the opinion in *Davenport* v. *Chicago, Rock Island &c. Railway*, *supra*, which is susceptible of the interpretation that under no circumstances, even between the same parties, would a judgment as to the tax of one year operate as the thing adjudged as to the tax of a future year. But that case stands alone, and the language therein used has been since, if not repudiated, at least qualified by the Supreme Court of Iowa to the extent necessary to bring that case in harmony with the true and universal doctrine so often laid down by this court. In *Goodenow* v. *Litchfield*, 59 Iowa, 226, where the *Davenport case* was pressed as an authority upon the Supreme Court of Iowa, that court in an opinion on a rehearing said:

"It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But where an action is brought to recover taxes paid in one year, and an action is afterwards brought to recover for the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second

action, the question whether the estoppel is effectual will depend upon the issues in the two actions.

"If the right to recover and the defence thereto are based upon precisely the same ground, why litigate again the question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction. It is not essential that the causes of action should be the same, but it is essential the right or title should be; that is, the issues in both actions and the matter on which the estoppel depends must be the same, or substantially so. The very matter or thing which it is sought to litigate must have been adjudicated in the prior action. In such case the bar or estoppel is complete. This rule will not, we think, be disputed. Therefore authorities are not required in its support, but see *Merriam* v. *Whittemore*, 5 Gray, 316."

It follows, then, that the theory by which it is sought to take questions of taxation entirely out of the reach of the rule of the thing adjudged is not only without foundation in reason, but is also without support of authority, since the case from this court, which is cited to sustain it, cannot properly be said to maintain the contention, and the other from the Supreme Court of Iowa has been either overruled or qualified.

The only question then remaining to be determined is, to what subjects of taxation does the estoppel of the thing adjudged apply, for it extends only to the matters which are necessarily concluded by the judgment. It is clear upon the face of the records and judgments which are relied upon to constitute *res judicata* that the only questions therein presented and decided were the non-liability of the bank for taxation on its capital, its banking house, and furniture acquired for the purposes of its banking business, and to a tax levied *eo nomine* on its shareholders, with obligation imposed by the taxing law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the first of the enumerations which we at the outset made, and do not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and

judgments does not conclude three of the general subjects of taxation as to which the court below decreed the bank not liable for taxation. The argument, however, is that although the objects embraced in the last three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said as the thing adjudged determined that the bank under its contract cannot be taxed, the principle thus established carried the other items with it. The contention is unsound, and to demonstrate that it is we will examine briefly the three items referred to, which are embraced in the second, third and fourth headings. They are as follows:

Second. That the stockholders of the bank are not liable for assessment on their shares of stock. The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; 163 U. S. 416.

Indeed, the judgment of the Supreme Court of the State of Louisiana in *Citizens' Bank* v. *Bouny*, *supra*, expressly noted this distinction, and the opinion on the rehearing expressly held, not that the shareholders could not be taxed, but that even although they could be, the law could not lawfully impose, under the exceptional nature of the charter of the Citizens' Bank, the duty on the bank to pay the tax. Moreover, in the *Bouny case* the Supreme Court of Louisiana held that the bank was without authority to champion the rights of its stockholders, and the bill in this case is filed in behalf of the bank alone, and is predicated solely upon the theory that the bank was entitled to attack the tax because of the absolute duty imposed upon it to pay. The decree below, therefore, which held that the stockholder could not be taxed because of the contract right of the bank, conflicted with the settled rules of law, and accorded the complainant a right to which it was not entitled, although under the authority of the thing adjudged the non-liability of the bank to taxation as to certain objects of taxation be fully established.

Third. That the bank was also not subject to taxation on any

real estate held by it, which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings, because property so acquired became by virtue of the purchase by the bank a part of its capital stock. The argument by which it is asserted that this right is embraced within the contract, and therefore is covered by the thing adjudged, may be thus briefly stated. The thing adjudged, it is said, establishes that the capital of the bank is non-taxable, and where the capital cannot be taxed, that in which the capital is invested becomes a part of the capital, and therefore cannot be taxed, and authorities are cited which, it is claimed, support this proposition.

But conceding *arguendo* the correctness of the premise it begs the question for consideration, since it assumes that the capital of the bank was invested in the debt which the stock mortgages secured. The stock mortgages guaranteed the payment of the subscriptions to the stock, and these mortgages with the obligations arising from the subscriptions were pledged to secure the loan from which the capital resulted. In other words, the stock subscriptions and mortgages, instead of drawing away the capital and therefore being an investment into which the capital entered, were a mere security on the faith of which the capital was obtained. The review which we have made of the legislation as to the Citizens' Bank makes this clear, and it is additionally fortified by these considerations: The act of 1833 provided for the subscriptions to the stock and for the securing of these subscriptions by mortgage, but the subscriptions were not to produce the capital. On the contrary, the capital was to be obtained by the issue by the bank of bonds, secured by the subscriptions and the mortgages; the money coming from the sale of the bonds to constitute the capital of the bank. Thus the very first section of the act of 1833 says: "That the capital of said bank shall be $12,000,000, to be formed and procured by means of a loan or loans to be made by the directors of said bank." Section 4 of the act, which in detail provides for the making of the loan, says: "That in order to facilitate the directors of said bank in negotiating or obtaining the loan aforesaid, *which is to form*

the capital thereof." La. Acts of 1833, pp. 172 and 175. By the act of 1836 the State provided for the loan of its own bonds to the bank from the sale of which the capital of the bank was to be derived as a substitute for the provision of the act of 1833. But the substitution of state bonds for bonds of the bank, instead of weakening the proposition that the capital was to be derived from the bonds of the bank, strengthens it, for it makes obvious the fact that the State on her credit furnished the capital, taking as security the stock subscriptions and the mortgages. To accept the theory that the subscriptions to the stock and the stock mortgages securing the same were the capital of the bank would necessarily presuppose that the bank was to be carried on without capital, for the subscriptions were not to be paid for a long period of time. Indeed, the whole theory of the act was that the capital being obtained by the bonds the subscriptions would only produce capital when by operation of the provisions of the act they were paid, thereby discharging the obligations of the State. But this operation could not be effectual until either the subscription had been paid or the property mortgaged to secure the same had been actually sold and converted into money, and this was manifestly the view taken by the Supreme Court of Louisiana in the case upon which the defendant in error relies, *Citizens' Bank* v. *Bouny, Tax Collector, supra*, where the court said:

"To enable the bank to obtain its capital, the State loaned its bonds to the amount of several millions, which bonds were put upon the market and sold by the bank, the bank binding itself to take them up at their maturities and to pay the interest thereon as it accrued. In order to secure the State against loss and guarantee the payment of the bonds, the mortgages and pledges given by the stockholders to secure their subscriptions and loans were transferred to the State and the bondholders."

Evidently it was a confusion of thought on this question which led the court below to hold that the property bought in in enforcement of the stock mortgages and held by the bank was the capital of the bank, and therefore not liable to taxa-

tion. In considering the question of whether the capital of the bank was taxable, in one part of its opinion the court said:

"The original charter was granted in 1833. La. Acts of 1833, p. 172. That act contemplated that the capital of the bank, which was fixed at $14,000,000, would be obtained by the issuance by the bank of its own bonds. The subscribers for the stock were to pay nothing upon their subscriptions, but were to furnish mortgages upon cultivated lands and slaves to secure the payment of their subscriptions."

And after speaking of the failure of this plan and the provision of the act of 1836 loaning the bonds of the State to the bank for the purpose of obtaining its capital, the court said: "And the bonds of the State were loaned to the bank as its capital." Whilst taking this correct view of the act in considering the question of whether the capital could be taxed, a directly opposite opinion was held to be the sound one in determining whether the property bought in by the bank in foreclosure of its stock mortgages was a part of its capital, for on that branch of the case the court said: "*The bank had no other capital except the subscriptions by the stockholders secured by stock mortgages.*" We cannot approve a conclusion which rests, on one branch of the case, upon the proposition that the bank had no other capital but the proceeds of the sale of the state bonds, and on another issue in the cause holds that the bank had no other capital but the subscriptions to the stock and the mortgages securing the same. If the asserted rights of the bank as to non-taxation on the one hand arise from the premise that the proceeds of the state bonds were its capital, it cannot derive the advantage resulting from this interpretation of the charter and then immediately reject this construction for the purpose of obtaining an additional advantage by saying that the proceeds of the bonds were not the capital, but that the stock subscriptions and mortgages securing the same alone constituted the capital. That the capital of the bank consisted of the money derived from the sale of the state bonds and not from subscriptions and stock mortgages by which they were secured,

was unquestionably the contemporaneous and continued construction of the statute, results from the fact that the record affirmatively shows that for many years after the charter was adopted the property acquired by the bank under foreclosure of its mortgages was taxed like property of other citizens, and the tax was voluntarily paid. Indeed, it was stated in the discussion at bar, and not denied, that the supposed right of the bank to exemption on property acquired by it under foreclosure of mortgage was for the first time asserted in this suit, and that for the long series of years which had elapsed since the organization of the bank that character of property was regularly taxed and the tax paid.

The claim that because the charter provided that the subscribers should have a right to borrow from the bank on their stock a certain amount of the capital afforded by the sale of the bonds, therefore the stock mortgages constitute an investment of the capital, is likewise without merit. Whatever may have been the obligations of the stockholder to reimburse the money so loaned, and conceding that these obligations were secured on the property mortgaged for the stock subscription, primarily the property upon which the stock mortgage rested was and continued to be, until it was converted into cash and applied to the *pro tanto* extinction of the loan which had furnished the capital, a security for the capital and not the capital itself. The rights of the holders of the bonds and of the State which had furnished the capital necessarily exact this view of the relations between the parties.

Fourth. That the non-liability of the bank to taxation embraced also immunity from the payment of a license tax to either the State of Louisiana or the city of New Orleans. We are at a loss to understand by what process of reasoning the decree was made to cover the question of the non-liability of the bank for license. It was not presented by the pleadings, and was entirely *dehors* the issues in the case.

As we conclude that the decree below was in part erroneous we must reverse it. The decree below is, therefore,

Reversed, and the case remanded with the following directions: First, *to enter a decree in favor of the Citi-*

Counsel for Appellants.

zens' Bank, recognizing and enforcing its non-liability to taxation, state, parochial and municipal, on its capital stock, its banking house and furniture acquired and used for the purposes of its banking business, and on a tax on its shareholders eo nomine, *accompanied with a legal obligation on the bank to pay the tax.* Second, *rejecting the claim of the bank to non-liability of its shareholders for taxation, without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana.* Third, *rejecting the claim of the bank to non-liability to taxation on the property acquired by it under foreclosure of mortgage — the whole without prejudice to the right of the state and municipal authorities to claim a license tax, should such be imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defences which it may have to the payment of such license tax.*

Mr. Chief Justice Fuller, Mr. Justice Brown and Mr. Justice Peckham dissented on the ground that the judgments relied on by the appellee are not *res judicata*, although in all other respects they concurred.

LOUISIANA *v.* NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 483. Argued January 15, 18, 1897. — Decided May 24, 1897.

New Orleans v. *Citizens' Bank*, 167 U. S. 371, affirmed and followed.

The case is stated in the opinion. The case was argued with *New Orleans* v. *Citizens' Bank*, *ante*, 371, as one case.

Mr. M. J. Cunningham, Attorney General of the State of

Louisiana for appellants. *Mr. F. C. Zacharie* and *Mr. Alexander Porter Morse* were on his brief.

Mr. William A. Maury for appellee. *Mr. Henry Denis* and *Mr. Branch K. Miller* were on his brief.

Mr. Samuel L. Gilmore for appellant.

Mr. Justice White delivered the opinion of the court.

The reasons given for our decree in the case of *New Orleans* v. *Citizens' Bank*, just decided, are decisive of this cause, which comes on error to the Supreme Court of the State of Louisiana. The controversy presented to that court was whether property bought in by the Citizens' Bank under foreclosure of its stock and stock loan mortgages became a part of its capital, and as such was not liable to taxation. The Supreme Court of Louisiana held, conceding, *arguendo*, the nontaxability of the capital that the real estate so purchased was taxable. *State ex rel. Citizens' Bank* v. *Board of Assessors*, 48 La. Ann. 35.

The theory on which the writ of error was prosecuted is that this decision of the Supreme Court of the State of Louisiana constitutes an impairment of the obligations of the contract arising from the charter of the bank.

As, in the case just decided, we have held that the property bought in by the bank under foreclosure of its stock mortgages was not the capital of the bank, and therefore was not covered by the estoppel of the thing adjudged, the conclusions there expressed are in all respects applicable and decisive of the controversy here presented, and the judgment of the Supreme Court of Louisiana is, therefore,

Affirmed.

HOVEY *v.* ELLIOTT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 255. Argued March 30, 31, 1897. — Decided May 24, 1897.

It is not within the power of the Supreme Court of the District of Columbia to order the answer of the defendant in a chancery suit pending in that court to be stricken from the files, and a decree to be entered that the bill be taken *pro confesso* against him, simply because he was held to be guilty of contempt in neglecting to pay into court money held by him which was the subject of controversy in the suit, and declined to appear when summoned to do so.

A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court.

The judicial history of the law concerning contempt of court in England and in this country reviewed and considered.

THE case is stated in the opinion.

Mr. Everett P. Wheeler and *Mr. A. S. Worthington* for plaintiff in error.

Mr. John Selden for defendant in error. *Mr. H. B. Titus* filed a brief for same.

MR. JUSTICE WHITE delivered the opinion of the court.

The facts out of which this controversy grows are fully stated in *Hovey* v. *McDonald*, 109 U. S. 150, but we briefly reiterate those which are material to an understanding of the issues now presented.

A. R. McDonald, a British subject, obtained an award from the Mixed Commission appointed under the treaty of 1871 for the settlement of the "Alabama claims." 17 Stat. 863. Before the payment of the award, two suits in equity were commenced in the Supreme Court of the District of Columbia

against McDonald and one William White, to whom it was asserted McDonald had made a fraudulent assignment of his claim. One of the suits was by Thomas R. Phelps, who alleged that he was the owner of the claim as the assignee in bankruptcy of McDonald; the other was brought by Hovey and Dole, who claimed to be entitled to a one-fourth interest in the award in consequence of an alleged contract which they asserted they had made with McDonald entitling them to an interest, to that extent, for professional services rendered or to be rendered in the prosecution of the claim. Injunctions were issued against the collection by McDonald and White of the fund. In the Phelps suit a consent decree was entered, which was also assented to by the parties in the Hovey and Dole case, releasing one-half of the award, and authorizing G. W. Riggs, who was appointed receiver, to collect the other half and retain it to abide the result of both suits. The receiver, moreover, was directed to invest the money by him collected either in registered bonds of the United States or of the District of Columbia guaranteed by the United States.

The bills and amended bills were demurred to in each suit, and the demurrer in both cases being sustained the bills were dismissed. The decree of dismissal in the Hovey and Dole case, entered on the 24th of June, 1875, simply stated that the demurrer was sustained and the bill dismissed with costs. On the same day an appeal, without supersedeas, to the general term was noted on the minutes of the court. This decree was a few days thereafter, on the 28th of June, amended by ordering the receiver to pay over the funds in his hands and providing for his discharge. This decree was presented to the receiver, and in accordance with personal and verbal instructions given him by a judge of the court by which the decree of dismissal was rendered, the receiver delivered the bonds in his custody to McDonald. On the same day the firm of Riggs & Company, supposing that they had a perfect right so to do, purchased the bonds from McDonald at their full market value, and caused them to be transferred into their name. The decree of dismissal in the *Phelps case*, which was also appealed from, was affirmed by the general term of the

Supreme Court of the District, but that in the case of Hovey and Dole was reversed. The latter case was put at issue by filing an answer, averring fraud and wrongdoing on the part of Hovey and Dole, the answer alleging facts which, if found to be true, would have defeated a recovery by the complainants. After replication, testimony was taken at various times during the years 1875 and 1876.

In June, 1877, the complainants obtained an order from the Supreme Court of the District of Columbia at general term, requiring the defendants McDonald and White to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver. This order was disobeyed, and thereupon the complainants, in September, 1877, moved the defendants McDonald and White to show cause "why they and each of them should not be punished for disobedience of the order as for a contempt." On December 8, 1877, the Supreme Court of the District of Columbia made a decree at general term that "the rule upon the defendants to show cause why they should not be decreed to be in, and punished as for a contempt of court, etc., be made absolute, and that the said McDonald and White be taken and deemed to be in contempt of the aforesaid order," etc. Such decree further provided that "unless McDonald and White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay into the said registry of this court the sum of $49,297.50, the answer filed by them in the cause be stricken out, and that this cause proceed as if no answer therein had been interposed; and that, until the said defendants shall comply with the said order of June 19, 1877, all proceedings on the part of said defendants in this cause be and the same are hereby perpetually stayed."

On December 29, 1877, the Supreme Court of the District of Columbia at general term, on motion of the complainants, and proof of non-compliance on the part of the defendants McDonald and White with the requirements of the decree of December 8, 1877, "ordered, adjudged and decreed that the answer filed in this cause by the defendants McDonald and

White be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed."

On February 12, 1878, the Supreme Court of the District of Columbia at general term made decree as follows:

"The answer of defendants having been removed from the files for their contempt in refusing to obey the order of court and deposit in the registry the sum of $49,297.50, it is now ordered, adjudged and decreed that the bill be taken *pro confesso* against them."

On April 17, 1878, that order was made absolute by another order or decree, which, after reciting material allegations in the complainants' bill as "standing without denial on the part of the defendants," ordered and adjudged "that the complainants have a lien upon the claim of Augustine R. McDonald against the United States . . . of $197,190, and upon any draft, money, evidence of indebtedness or proceeds thereof."

Thereafter proceedings were taken in the court by which the judgment had been awarded, to compel Riggs as receiver to account for the money which had come into his hands and which he had paid over to McDonald under the circumstances already stated. This suit culminated in a judgment in favor of Riggs, affirmed by this court in *Hovey* v. *McDonald*, *supra*.

The suit now before us was subsequently commenced in the State of New York against the surviving partners of Riggs & Company, but service was had only on one of the partners, John Elliott, and he having died, his executors were substituted as parties defendant. The object of the suit was to compel the defendants to account for the bonds or their value, upon the theory that Riggs & Company had acquired them with actual notice of the pending litigation concerning the bonds, and were bound by the result of the judgment rendered as above stated in the suit of *Hovey and Dole* v. *McDonald*. The Court of Appeals of New York held that the judgment was not binding upon Riggs & Company or the surviving members thereof, because, as it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause, the judgment was

beyond the jurisdiction of the court, as the power of courts of the District of Columbia, to punish for contempt, was restricted by the provisions of section 725 of the Revised Statutes. 145 N. Y. 126. The New York court, moreover, held that, even assuming that the Supreme Court of the District had jurisdiction, and that the doctrine of the liability of purchasers *pendente lite* applied to a purchase made under the circumstances shown, the firm of Riggs & Company were not such purchasers with reference to the judgment in question, as the *lis* in which the judgment was rendered was not the one pending at the time of the sale to the firm. From this judgment error was prosecuted to this court upon the theory that the decision of the Court of Appeals of the State of New York denied proper faith and credit to the judgment rendered by the Supreme Court of the District of Columbia.

Whether, as held by the court below, the courts of the District of Columbia are confined in all characters of contempt only to an infliction of the penalties authorized in section 725 of the Revised Statutes, and, therefore, have not power in any other form or manner to punish for a contempt, is a question which we do not deem it necessary to decide, and as to which, therefore, we express no opinion whatever. In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The funda-

mental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

In *McVeigh* v. *United States*, 11 Wall. 259, the court, through Mr. Justice Swayne, said (p. 267):

"In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. . . . The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And quoting with approval this language, in *Windsor* v. *McVeigh*, 93 U. S. 274, the court, speaking through Mr. Justice Field, again said (pp. 277, 278):

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction

in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus Coke (2 Inst. p. 46), in commenting on the 29th chapter of Magna Charta, says: "No man shall be disseised, etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all), by the due course and process of law."

Blackstone, in Book 4 of his Commentaries, at page 282, after referring to the subject of summary convictions, says:

"The process of these summary convictions, it must be owned, is extremely speedy, though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite, though the justices long struggled against the point, forgetting that rule of natural reason expressed by Seneca:

> '*Qui statuit aliquid, parte inaudita altera,*
> *Æquum licet statuerit, haud æquus fuit*':

a rule to which all municipal laws that are founded on the principles of justice have strictly conformed; the Roman law requiring a citation at the least, and our common law never suffering any fact (either civil or criminal) to be tried till it has previously compelled an appearance by the party concerned."

In *Capel* v. *Childs*, 2 Cromp. & Jer. 558, (1832) the validity of a proceeding by a bishop under an act of Parliament against a church vicar was in question. A requisition upon the vicar to do a certain act was held to be in the nature of a judgment and void, as the party had no opportunity of being heard. Lord Lyndhurst, C. B., at p. 574, said:

"A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defence. On consideration, then, it appears to me, that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment."

In *Bonaker* v. *Evans*, 16 Q. B. 162, the main question for consideration was whether a sequestration ordered by a bishop was a proceeding simply in the nature of a distress to compel residence or altogether, or even in part *in pœnam* for previous non-residence. The court said (p. 171):

"If it be the latter, then the bishop ought to have given the incumbent an opportunity of being heard before it was issued; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary. This is laid down in *Bagg's case*, 11 Rep. 93*b*, 99*a*; *Rex* v. *The Chancellor &c. of the University of Cambridge* (*Dr. Bentley's case*), 1 Strange, 557; *Rex* v. *Benn*, 6 T. R. 198; *Harper* v. *Carr*,

7 T. R. 270; and *Rex* v. *Gaskin*, 8 T. R. 209; and many other cases, concluding with that of *Capel* v. *Childs*, 2 Cromp. & Jer. 558, in which Bayley, B., says he knows of no case in which you are to have a judicial proceedings, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard. That case was a very strong one, and shows how firmly the court adhere to that great principle of justice, that, in every judicial proceeding, '*Qui aliquid statuerit parte inauditâ alterâ, Æquum licet statuerit non æquus fuerit.*' "

Story, in his treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the Fifth Amendment, where it is declared that no person "shall be deprived of life, liberty or property, without due process of law," says:

"The other part of the clause is but an enlargement of the language of Magna Charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per legem terræ*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legem terræ* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brought into answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power

to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent.

In *Galpin* v. *Page*, 18 Wall. 350, the court said (p. 368):

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

Again, in *Ex parte Wall*, 107 U. S. 265, 289, the court quoted with approval the observations as to "due process of law" made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College case:* 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.'"

The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to

the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.

But the argument is that however plain may be the want of power in all other branches of the government to condemn a citizen without a hearing, both upon the elementary principles of justice and under the express language of the Constitution, these principles do not limit the power of courts to punish for contempt or as for contempt, because it is asserted that from the earliest times the Chancery Court in England has possessed and exercised the power to refuse the right to be heard to one in contempt, and that a power so well established in England, before the adoption of the Constitution and which has been so often exercised since, is not controlled by the principles of reason and justice just stated. But this contention is without solid foundation to rest upon, and is based upon a too strict and literal rendering of general language to be found in isolated passages contained in the works of writers on ancient law and practice and on loose statements as to the practice of the Court of Chancery to be found in a few decisions of English courts. Certain it is that

in all the reported decisions of the Chancery Courts in England no single case can be found where a Court of Chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And in the American adjudications, whilst there are two cases, one in New York and the other in Arkansas, asserting the existence of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous character of the conclusions reached.

The foundation for the assertion that the power existed in and was exercised by the English Court of Chancery to strike from the files the answer of a defendant in contempt for disobedience to an order made in the cause, and to decree *pro confesso* against him, primarily rests upon what is supposed to be the true construction of one of the ordinances of Lord Bacon (promulgated in 1618), which reads as follows:

"78. They that are in rebellion, especially as far as proclamation of rebellion, are not to be here (heard?), neither in that suit, nor in any other, except the court of special grace suspend the contempt."

What construction was given to this ordinance or the extent to which it was enforced by the Court of Chancery in the years immediately succeeding its adoption cannot be positively affirmed, as we have not found nor have we been referred to any decisions made in the seventeenth or eighteenth centuries purporting to be based upon that ordinance.

On the mere text of the ordinance, it is manifest that it does not necessarily embrace the power to enter a decree *pro confesso*, after answer filed, upon the theory that the defendant was guilty of contempt. On the contrary, the proclamation of rebellion, referred to in the ordinance, was one of the then recognized processes for the purpose of compelling an answer in the suit. Indeed, the powers of the chancery courts to punish for contempt were normally brought into play, beginning with an attachment of the person and culminating in the sequestration of the property of the one in contempt in order to compel an appearance and answer. Gilbert, For. Rom. p. 33; 3 Bl. Com. 443. Nowhere in these works is

there an intimation that, as a penalty for contempt, a refractory defendant, not in default for answer, might be punished by being disallowed the right to defend against the bill filed in the cause. So far from such being the case, as already stated, a party who failed to appear or answer was treated as in contempt, and the various processes for contempt were resorted to in order to compel his appearance and answer; this being done in order that the conscience of the court might be satisfied when it entered a decree in the cause.

Thus in the Forum Romanum, Lord Chief Baron Gilbert says (p. 35):

"The canonists do take the proclamation or *primum decretum* to be *quasi litis contestatio;* and, therefore, the plaintiff may proceed to his proofs, and then the *secundum decretum* for the thing in demand may be pronounced. We have no *quasi litis contestatio* with us, because, unless the defendant comes in and contests there is no jurisdiction to a court of conscience; for unless the party confesses the fraud or corruption of which the court inquires, or it be proved upon him, there is no sufficient ground for a decree, which cannot be without *contestatio litis.*

"But there are two cases in which an implied confession is a sufficient ground for a decree.

"The first is, when a man appears by his clerk in court, and afterwards lies in prison, and is brought up three times to court by *ha. cor.*, and has the bill read to him, and he refuses to answer. Such public refusal in court does amount to the confession of the whole bill.

"The second case is, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration. There also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared, and departs in spite of the court, and withstands all its process without answering; and this seems to have been the ancient practice of the civil law, for Justinian, by the Novel, brought in the *secundum decretum* in the absence of the party; and the canonists, by a fiction of law, made the proclamation *quasi*

litis contestatio; but by the ancient civil law no decree could be had against an absent person against whom process had been issued, but could never be brought in to appear. And it is so with us, that if the whole process of the court be spent, and the defendant never appears, you can never have a decree, for you can never make any proofs against an absent person who is never brought into contest, and there is no foundation for a decree without confession or proofs. However, the plaintiff has the benefit of the sequestration, which answers to the *primum decretum.*"

While by act 5 Geo. II, c. 25, for want of appearance, when a defendant avoided service of process, the court was authorized, after the giving of prescribed public notice, to order the plaintiff's bill to be taken *pro confesso*, *Davis* v. *Davis*, 2 Atk. 21, 23, the text quoted is convincing evidence that a decree was only permissible in the "court of conscience" under a state of facts which justified the implication of an admission by the defendant that the allegations of the bill were true, and that the practice was not pursued as a punishment for any other contempt than of contumaciously refusing to inform the chancellor of the defence, if any, possessed by the defendant in a cause.

In stating the practice with reference to injunction suits, several of the ancient writers use general language as to the practice pursued when a party disobeyed an injunction, which, perhaps, affords room for speculation as to the extent to which the court *might* have proceeded in refusing to hear a party who had violated its order and had not purged his contempt. Thus, in the Practical Register in Chancery, p. 217, it is said:

"Where an Injunction is disobeyed, on Oath thereof, Process of Contempt is to issue against the Contemnor, as in other Cases, till he yield Obedience; nor is he to be heard in the principal Case, till he yield Obedience."

Comyn, in his Digest (Chancery, D. 8), thus puts it:

"And if, after service (of an injunction), it shall be disobeyed, all process for contempt issues, till the offender be taken and committed upon an *affidavit* of his disobedience. Vide Pract. Reg. in Chan. 217.

"And when he is taken he shall be committed, until he obeys, or gives security for his obedience, and shall not be heard in the principal case, until he obey." Ib.

Whether in early chancery times the practice was to stay all proceedings on the part of a disobedient party defendant until his contempt of an injunction was purged, can only be surmised. In 1788 it seems that a defendant, though in contempt for violating an injunction, might file his answer in the cause. *Robinson* v. *Lord Byron*, 2 Dick. 703. It is not at all unlikely that the restriction was upon the party coming before the court by way of motion seeking affirmative action by the court in his favor. It is certain that neither in the Register nor in Comyns is there a suggestion that a party, while in contempt for disobedience of an injunction, might, *for such cause*, be defaulted upon the merits.

The Forum Romanum makes no reference to the rule or method of practice stated in the Register, otherwise than as may be inferred from the statements in paragraph 11, p. 194, where the author mentions that by the proceeding then in vogue for punishing for breach of an injunction "a man is at once deprived of his liberty, and cannot move or petition but *in vinculis*, unless the court otherwise give leave on a petition to hear him."

The review and analysis of the English cases which we now propose to make will demonstrate that the passages to which we have just referred could not have imported the power of a court to strike an answer from the files and take a bill for confessed because of a contempt, since that analysis will conclusively establish that there is no basis for the assertion that the Courts of Chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the Chancery Courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to

accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases.

The cases of *Phillips* v. *Bucks*, (*Duke*) 1 Vern. 227, (1683); *Roper* v. *Roper*, 2 Vern. 91, (1688); and *Maynard* v. *Pomfret*, 3 Atk. 468, (1746) do not discuss the ordinance of Lord Bacon, but touch upon the question of the right of a defendant in contempt to be heard. In the first case cited, the reporter, in a marginal note, alluding to a defendant who was in contempt *for failure to appear or answer*, says: "One of the defendants is in contempt and stands out to a sequestration and the cause is heard against the other defendants; yet he may come in and answer, and the cause may be heard again as to him." In *Roper* v. *Roper*, upon a decree for payment of money, after a writ of execution and an attachment returned, the court declined to give leave to defendant to be examined, unless he gave security to abide the decree. This was clearly an application addressed to the discretion of the court, and therefore a matter of favor.

In *Maynard* v. *Pomfret*, a bill was brought against the defendant for a discovery. As the material part of the case depended upon the discovery, the defendant would not answer, but stood out the whole process of contempt to a sequestration, and the bill was taken *pro confesso*, and there was a decree against the defendant *ad computandum*. It was moved, on behalf of the defendant, that the sequestration may be discharged on paying the costs of the contempt. The chancellor regarded action upon the application as discretionary, and held that the sequestration should be kept on foot to stand as security for the appearance of the defendant before the master.

That in the time of Lord Clarendon the practice of the Court of Chancery was only to deny to a party in contempt the privilege of having favorable action taken by the court upon applications addressed to its discretion finds support, not only in the case of *Phillips* v. *Bucks*, *supra*, but also in a decision of Sir H. Grimston, Master of the Rolls, who, in refusing an application for relief against a sequestration of lands of the defendant following a decree, assigned, among other reasons,

the following: "2dly the defendant not having performed the decree by the payment of the money, he shall not receive any favour from the court whilst he stands in contempt." Bacon's Abridgment, Sequestration, C., the marginal reference being to a case entitled *Sands* v. *Darrell.*

Vowles v. *Young*, 9 Ves. 172, (1803) was likewise an application to the favor of the court. A decree absolute had been entered after a decree *nisi*, against a defendant who was in default, and consequently in contempt. He applied for a rehearing, and in the course of an opinion granting the application upon terms, Lord Eldon said, not citing authority: "As to the contempt, the general rule is, that the parties must clear their contempt before they can be heard." The language of the chancellor necessarily related to the question before it, that is, an application for a rehearing addressed to the exercise of discretion. Stating the *general* and not the *invariable* rule, implied the possible existence of exceptions to such rule.

Anonymous, 15 Ves. 174, (1808) was a case where the defendant, being in default for not answering, filed an answer without making any stipulation for the payment of costs, and also moved to dismiss the bill for want of prosecution. Upon the authority of the passage in *Vowles* v. *Young*, just quoted, counsel for the complainant objected that the defendant could not make the motion or take any step to the prejudice of the plaintiff, until the contempt was discharged. The Lord Chancellor said: "The general rule, that has been referred to, is perfectly true; that a party, who has not cleared his contempt, cannot be heard." The plaintiff, however, was held to have waived the right to treat the defendant as being in contempt, because he had excepted and replied to the answer without insisting upon the costs and enforcing his process of contempt. Presumably, the general rule here referred to was that to which we have already adverted, viz., the power of a chancellor to refuse to grant a favor to one in contempt. The facts brought the case under this rule, since the defendant who was in contempt for not paying the costs, on filing his answer, sought to invoke the aid of the court to dismiss the plaintiff's bill for failure to prosecute the suit.

Heyn v. *Heyn*, Jacob, 49, decided in 1821, was a case where, after a decree *pro confesso* upon default for answer, the defendant moved that a sequestration which had been issued against his property for not putting in his answer might be discharged upon payment of costs, and that he might be allowed to attend the master upon the taking of the accounts directed by the decree. The Lord Chancellor observed that an answer which had been put in after an order for taking the bill *pro confesso* ought not to be noticed, and that it could not vary the decree which had been rendered. He, however, granted the application upon conditions, being of opinion that the defendant was not at liberty to go before the master without an order. The mere statement of this case demonstrates that it involved purely a question of whether the chancellor would accord to the defendant a favor or privilege.

In *Clark* v. *Dew*, 1 Russ. & M. 103, (1829) the plaintiff applied for the appointment of a receiver, and it was objected by the defendants that, as the plaintiff was in contempt of court for disobeying certain orders in another cause pending between the same parties, he ought not to be heard in this. All that was said by the Lord Chancellor on the subject under review was as follows:

"That the practice was the same, he apprehended, in equity as at law, that a party could not move, till he cleared his contempt; but that the rule must be confined to proceedings in the same cause; otherwise, the consequence would be that a party, who was utterly unable to comply with an order of the court, might be prevented from afterwards prosecuting any claims, however just, against the person who had succeeded in obtaining that order. Here the suit was between the same parties, but it had reference to distinct properties."

It will be seen that this conflicts with the literal language of Lord Bacon's ordinance, which was that a party should not be heard "neither in that suit, *nor any other*," etc.

Several decisions of the Rolls Court in Ireland bearing upon the question are contained in the first volume of Hogan's Reports.

Thus, in *Anon.* v. *Lord Gort*, p. 77, (1823) a receiver was

moved for on process against the defendant, who opposed the application. Counsel for plaintiff insisted that, as the defendant was in contempt, he should not be heard unless he purged his contempt, citing *Vowles* v. *Young*, *supra*. The Master of the Rolls said:

"The general rule is, that when a party is in contempt, he will not be allowed to oppose the relief sought by the plaintiff, by contradicting the allegations in his bill, or bringing forward any defence, or alleging new facts, neither will he be heard by affidavit, except it be made with a view of purging his contempt, but he may be heard to direct the attention of the court to any error or insufficiency in the plaintiff's own case, as made by the bill, as for example, if it should appear by the bill that plaintiff's charge only extends over Whiteacre, and the plaintiff, by motion, sought a receiver over Blackacre."

The application for a receiver would seem to have been one of the steps in the process of punishment for contempt for not answering. Thus, in the case of *Fitzpatrick* v. *Hawkshaw*, Ib. p. 82, a motion was made for the appointment of a receiver on process against the defendant, and in the marginal note it is said: "A defendant who has appeared, but is in contempt for not answering, is entitled to notice of a motion for a receiver on process."

A further indication that the rule was not understood to operate to deny to a defendant a hearing upon matters of strict right is shown by the case of *Cooke* v. *De Montmorency*, 1 Hogan, 181, where it was held that though a party was in contempt, he might notwithstanding apply for and obtain time to answer the bill, and an order on the plaintiff to stay the entry of process in the meantime.

In the case of *Valle* v. *O'Reilly*, 1 Hogan, 199, complainant moved for the appointment of a receiver on process against the defendant, on an affidavit stating that the bill was filed to raise the arrears of an annuity which was still due. The contempt would seem to have consisted in failure to answer. After observing that the estate was in the possession of a receiver in another cause, the Master of the Rolls said:

"As this defendant is in contempt, he cannot be heard to

dispute or deny the plaintiff's case, as disclosed by his bill; but he may be heard to point out the irregularity or impropriety of any application made by his antagonist. I must refuse this motion and give the defendants the cost of appearing here this day."

The cases of *Howard* v. *Newman*, 1 Moll. 221, and *Odell* v. *Hart*, 1 Moll. 492, were decided by the Lord Chancellor in 1828. In *Howard* v. *Newman* a rule to refer the bill for impertinence was obtained by the defendant, against whom there was process *for want of an answer*. The rule was discharged, the Lord Chancellor saying: "A party in contempt is not to be heard until his contempt is cleared, except only to complain that he is irregularly put in contempt, and ought not to be so. He is precluded from applying for any order of any kind." Of course refusal to allow a party to move until he has answered, and when he was in default for not answering, cannot possibly be construed as supporting the contention that when a defendant had regularly answered his answer might be stricken from the files, and the case be decided as though no answer had ever been filed.

In *Odell* v. *Hart* a motion was made on behalf of the defendant to set aside as irregular an order which awarded an attachment absolute (instead of conditional) in the first instance against him for not bringing in title deeds according to a previous order. It was objected that the defendant, being *de facto* in contempt, ought to appear *in vinculis*, citing *Vowles* v. *Young*, 9 Ves. 172.

The Lord Chancellor said:

"A party in contempt may move by counsel to set aside the order against him, by which he is declared to be in contempt, for irregularity in that order, without coming *in vinculis*, but for no other purpose, without submitting himself to custody."

In other words, the party in contempt, when not in custody cannot *apply to the court for an order* except to set aside for irregularity the order adjudging him guilty of contempt.

In *Ricketts* v. *Mornington*, 7 Sim. 200, decided in 1834, we find the first adjudicated case directly referring to the seventy-eighth ordinance of Lord Bacon. On the authority of the

ordinance and the case of *Vowles* v. *Young*, *supra*, defendant objected to the cause being heard, on the ground that the plaintiff was in contempt for disobedience of an order in the case. The opinion rendered by the vice chancellor is as follows:

"Suppose the Defendant had moved to dismiss the Bill, the Plaintiff, notwithstanding he was in Contempt, might have come forward and assigned reasons why his Bill should not be dismissed.

"Lord Bacon's Order, as administered in Practice, is confined to Cases where Parties who are in Contempt come forward, voluntarily, and ask for Indulgences. But the Rules of the Court make it imperative on the Plaintiff to bring his Cause to a Hearing at a certain time; and, therefore, the Cause must proceed."

Barker v. *Dawson* and *Parry* v. *Perryman* were decided, respectively, in 1836 and 1838, and are reported in 1 Coop. Ch. C. 207. The general rule was stated to be that a party in contempt could not be heard on other matters, but it was held that there were exceptions to it, as where an order which was alleged to be irregular was obtained subsequent to a contempt, and it was sought to set it aside for irregularity, and "where the party in contempt was merely protecting himself," in both of which cases the rule was held not to apply. The Lord Chancellor said that to extend the rule to the case of an order made subsequent to the contempt "would place the party in contempt too much at the mercy of his adversary."

King v. *Bryant*, 3 M. & C. 191, (1838) was a foreclosure suit, in which the defendant, after appearance, was in contempt for want of an answer and was imprisoned under attachment. A decree was subsequently taken *pro confesso* ordering an account, and the proceedings before the master were had *ex parte* without notice to the defendant. An application was made by the defendant praying that the order confirming the report of the master might be discharged, and that it might be referred back to the master to review his report. An objection made before the vice chancellor was renewed on appeal, viz.,

that the defendant was not entitled to be heard, because in contempt. The Lord Chancellor, however, decided that the defendant was entitled to be heard to show that the plaintiff had been irregular in his mode of prosecuting the decree, and also said (p. 195):

"If the plaintiff ought to have served warrants on the defendant (to attend before the master) and if he ought to have served him with the order *nisi*, it would be a most unjust extension of the rule against parties in contempt, to take away a man's estate without giving him any opportunity of coming in and protecting himself.

"The court will not hear a party in contempt coming himself into court to take any advantage of proceedings in the cause; but such a party is entitled to appear, notwithstanding, and resist any proceedings taken against him, and it would be a very easy way of evading that rule if his adversary, instead of giving him notice, were to avoid serving him, and then to say that he could not take advantage of the rule in order to impeach the previous proceedings. However there is no such practice.

* * * * *

"The court punishes the defendant's default in refusing to answer, by giving to the plaintiff the benefit of a decree upon the bill as confessed; but there the advantage stops, and when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way. Accordingly, no authority is to be found in support of the proposition that, upon a decree taking the bill *pro confesso*, and directing an account, the account may be prosecuted *ex parte*. The case of *Dominicetti* v. *Latti* shows that, in the year 1781, the practice was considered to be directly otherwise. . . .

"The plaintiff here has miscarried. He has proceeded *ex parte*, when he ought to have proceeded by warrants, and the present application is to protect the defendant against an order for a foreclosure, obtained upon an irregular report, which can only be considered as a nullity." . . .

In *Wilson* v. *Bates*, 3 M. & C. 197, the plaintiff, while in

contempt and in the custody of the sheriff for failure to pay the costs of a motion, sued out an attachment against the defendants for want of an answer, under which the defendants were arrested and thereupon entered into bail bonds. The vice chancellor having refused a motion, on behalf of the defendants, that the attachments against them might be set aside, and that the bail bonds might be ordered to be cancelled, the motion was renewed before the Lord Chancellor, by way of appeal. Counsel for defendants contended that the proceedings of the plaintiff were irregular because a party in contempt could not take any proceedings in the cause, and cited the seventy-eighth ordinance of Lord Bacon and *Vowles* v. *Young*, *supra*. Counsel for plaintiff characterized the proposition that a plaintiff could not take any step in a cause for the reason that an attachment had issued for non-payment of costs, "as new, and if established, would be a *dangerous extension* of the ordinary rule with respect to parties in contempt." The Lord Chancellor, after alluding to the fact that *no case upon the point had been produced*, and that the argument was mainly grounded upon the seventy-eighth ordinance of Lord Bacon, said (p. 200):

"That ordinance, although the foundation of the practice, can only be construed now by the practice which has since prevailed with reference to it. It is quite obvious that its terms, if strictly acted upon, would produce a very different state of practice from that which is recognized in modern times. If I had to decide upon that in the first instance, and were called upon to settle a rule for future guidance, I certainly never should lay down any such rule. It would seem extraordinary that a party, who may not be able to pay the costs of a refused motion, should be therefore absolutely stopped from asserting his rights. At the same time, if the practice be established, it would not be for me to alter it. Now, although it may be generally true that a party in contempt cannot be heard to make a motion, he is nevertheless permitted to be heard upon a motion to get rid of that contempt, a case for which, so far as I can see, Lord Bacon's ordinance makes no provision. It is also well settled, that if a party in con-

tempt is brought into court by any proceedings taken against him, he has a right to be heard in his defence, and in opposition to those proceedings; another case which is inconsistent with Lord Bacon's ordinance, if construed strictly."

The conclusion was reached that there was an absence of all authority to sustain the proposition contended for, and that the vice chancellor was right in permitting the plaintiff to proceed in the cause.

In *Bickford* v. *Skewes*, 10 Sim. 193, (1839) plaintiff moved to defer the trial of a cause until the defendant had cleared himself of a contempt. The vice chancellor said (p. 196):

"The motion now before me is one of the first impression. A party who is in contempt may, at any time, clear his contempt. At the time the Lord Chancellor's order was made, the defendant was not in contempt. That order is still in full force, and I cannot understand how the circumstance that the defendant had subsequently come in contempt can give to the plaintiff the right to postpone the trial of this action, which, to a certain extent, he is under an obligation to try. The defendant may, perhaps, clear his contempt before the trial, but whatever may be the circumstances of the defendant, the order of the court may remain as it is. Although the cases cited afford some countenance for this application, I cannot think that they warrant it, and therefore I shall refuse the motion without costs."

Here it appears that the defendant, though in contempt, was conceded to be entitled to participate in the trial of the cause.

In *Everett* v. *Prythergch*, 12 Sim. 363, (1841) it was held that a defendant, though himself in contempt for want of answer, might except to the bill for scandal, but not for impertinence.

In *Cattell* v. *Simons*, 5 Beav. 396, it was held that it was competent for a plaintiff, though in contempt, to refer for scandal and impertinence an affidavit filed on the part of the defendant in opposition to a motion filed by the plaintiff, while he was in contempt for non-payment of costs, asking that costs be set off between the parties. The Master of the

Rolls said that the motion was one which the plaintiff was clearly entitled to make, being an application for relief against the process of attachment.

In *Morrison* v. *Morrison*, 4 Hare, 590, (1844) it was held that a party in contempt for non-payment of costs, and who had been served with an order *nisi* to confirm a report, might, notwithstanding his contempt, take exceptions to the report, and draw up, pass, and enter an order to set down the exceptions; and might also present and be heard upon his petition to discharge the report as irregular, and for leave to open the accounts allowed in former reports, on the ground that items therein were allowed in the absence of the petitioner and while the suit was abated. A motion to discharge the order setting down the exceptions, and that the exceptions might be taken off the files, was made upon the ground that a party in contempt cannot take any active step in the cause until he had cleared his contempt. Counsel in opposition to the motion contended that the steps taken by the defendant were purely defensive, and characterized as "most extravagant" the proposition "that a party who was unable to pay a sum for costs should be precluded from taking any step in a cause, while his adversary might proceed, and his entire rights on the subject of the suit be concluded without allowing him to be heard." The vice chancellor held (p. 594) that —

"What the petitioner is in truth doing, is seeking to protect himself against the proceedings which have been taken in the cause; and the cases of *Wilson* v. *Bates* and *King* v. *Bryant* show that, in such a case, the being in contempt will not now prevent, *if it ever would have prevented*, the party from applying to the court."

In *Oldfield* v. *Cobbett*, 1 Phillips Ch. 613, (1845) it was held, among other things, that a party who is in contempt for non-payment of costs in the suit, is not thereby prevented from moving for leave to defend it *in forma pauperis*.

Chuck v. *Cremer*, 1 Coop. Ch. C. 205, was decided in 1846. A defendant having unsuccessfully sought to dissolve an injunction obtained *ex parte*, gave notice of motion by way of appeal. It was objected that the defendant could not be

heard, because previously to the giving of notice an attachment had issued against him, when abroad, for not having put in an answer. The decision upon this objection is thus reported:

"The Lord Chancellor said he was of opinion that the appeal motion could not proceed. That a party was entitled to be heard, if his object was to get rid of the order or other proceeding, which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt; but he was not generally entitled to take a proceeding in the cause for his own benefit. That there were exceptions to the last rule, but they were few in number."

In *Futvoye* v. *Kennard*, 2 Giff. 110, (1860) the plaintiff moved to discharge an order in the cause, and the defendants took the preliminary objection that the plaintiff being in contempt for the non-payment of the costs of a motion, which had been refused with costs, could only be heard to purge his contempt. On the intimation of the vice chancellor that he thought the objection could not be maintained, the objection was not pressed, and the motion was heard and refused.

In *Fry* v. *Ernest*, 12 Weekly Reporter, 97, (1863) a bill was filed by mortgagees for the purpose of enforcing their security. The defendant put in his answer and also filed a bill in the cause of *Ernest* v. *Partridge* (to which Fry and several others were made defendants) for the purpose, among other things, of setting aside the mortgage security. A demurrer being allowed to this bill, Ernest afterwards filed in *Fry* v. *Ernest* a concise statement, containing in substance the same averments as those in *Ernest* v. *Partridge*, and exhibited interrogations for the examination of the plaintiff Fry. Upon a summons taken out by the plaintiff the chief clerk made an order enlarging the plaintiff's time to answer the interrogatories for one month, after payment by the defendant of the costs of the demurrer in *Ernest* v. *Partridge*. Counsel for the plaintiff contended that the concise statement must be treated merely as a cross bill, and that the defendant could not be allowed to harass the plaintiff with a second cross bill until he had paid the costs of the first.

"Wood, V. C., said that, according to the general rule, a defendant, though in contempt, was at liberty to take every step necessary for his defence. He looked upon this mode of proceeding as of a nature purely defensive, and the defendant was therefore entitled to file a concise statement and interrogatories, which were material for his defence, and the plaintiff must answer within the usual time. The order of the chief clerk would be discharged with costs; such costs, however, as the defendant was in default for his former costs, were not to be paid to him."

In *Haldane* v. *Eckford*, L. R. 7 Eq. 425, (1869) it was held that although a defendant is in contempt, not for non-payment of costs, but for non-compliance with orders of the court, he is entitled to take any step required for the purposes of his defence. The report of the case (p. 426) reads as follows:

"The vice chancellor said that although the contempts committed have been of the most flagrant kind, as these documents were required by the defendants for the purposes of defending themselves, *he had no jurisdiction to refuse the order.*"

In *Chatterton* v. *Thomas*, 36 L. J. Ch. 592, (1886) a plaintiff in contempt was held to be at liberty to proceed with the cause in the ordinary way; and a special order for leave to amend was granted to him.

Other decisions illustrating the general rule that a party in contempt cannot be heard to ask a favor are digested by Chitty in his Equity Index, vol. 5, p. 4366, but it is unnecessary to particularly refer to them, as none of them are relied on in argument or change the result of the foregoing cases.

It is manifest from this review of the English cases that they lend no support whatever to the claim that the English Court of Chancery claimed to exercise the power to strike out an answer and render a decree *pro confesso*, as a punishment for contempt. It also clearly establishes that the seventy-eighth ordinance of Lord Bacon was never construed or enforced according to its strict import, if under that import it authorized the conclusion that a power existed in a Court of Chancery to condemn without a hearing.

The conclusion which we have reached accords with that of Daniell, who in his Chancery Pleadings and Practice (vol. 1, pp. *504, *505) says:

"Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the court, he places himself in this further predicament, viz.: That of not being in a situation to be heard, in any application which he may be desirous of making to the court. Lord Chief Baron Gilbert lays it down, that 'upon this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs; as, for example, if he comes to move for anything, or desires any favor of the court. . . .'

"The rule, that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and, therefore, a defendant cannot object to a cause being heard because the plaintiff is in contempt. So a defendant in contempt is entitled to production of documents."

The learned author nowhere suggests in his treatise that under any conceivable circumstance has a Court of Chancery in England ever allowed a decree *pro confesso* to be taken, otherwise than upon default for appearance for answer. See chap. 11, p. *517, "On Taking Bills *Pro Confesso*."

The decisions in this country, with two exceptions, which we have, in the outset, referred to, substantially maintain the view we have reached of the question under consideration. An early case holding the correct rule, viz., that a party in contempt was not entitled to be heard upon an application not of strict right, but a matter of mere favor, is *Johnson* v. *Pinney*, 1 Paige, 646, decided in 1829. In that case, after an order had been entered closing the proofs, the defendant applied for a commission to take the testimony of a witness. Objection was made that the defendant was in contempt for not paying a bill of costs on a motion previously made by him to dissolve an injunction in the suit. In granting the application, upon terms, the chancellor said: "It is a general

rule that a party cannot apply to the court for a favor while he is in contempt. *Vowles* v. *Young*, 9 Ves. 172; Prac. Reg. 138; *Green* v. *Thompson*, 1 Sim. & Stu. 121." The doctrine of this decision was adopted by the Supreme Court of New Hampshire in 46 N. H. 38 (1865).

In 1846, in *Ellingwood* v. *Stevenson*, 4 Sandf. Ch. 366, the bill having been taken *pro confesso* when the defendant was in default for not answering, a motion was made to open the default and for other relief. The vice chancellor said (p. 368):

"3. The motion to open the default for not answering would be granted upon terms, but for the contempt for which the attachment is ordered. His application is made to the favor of the court, and he cannot be heard until his contempt be purged. Gilbert For. Rom. 102; 1 Daniell, 655; *Johnson* v. *Pinney*, 1 Paige, 646."

In *Brinkley* v. *Brinkley*, 47 N. Y. 40, 49, after reviewing the authorities, it was held that a court which has control of its own proceedings, can refuse the benefit of them to the party in contempt, *when asked as a favor*, and can prevent him from taking any progressive proceedings against his adversary, but it has no power to stay him in his proceedings by motion or appeal, where the object is to rid himself of the alleged contempt, or show that the order which he did not obey was erroneous. While the order reviewed provided that unless the defendant complied with a certain order his answer should be stricken out and the cause should proceed as though there was no answer, the reviewing court held that the order in this particular was conditional and not final and absolute, and was, therefore, not appealable.

However, in the case of *Walker* v. *Walker*, 82 N. Y. 260, the Court of Appeals of New York declared that the rule was broader than that laid down in *Brinkley* v. *Brinkley*, and maintained also *that it had been enforced with much rigor by the English courts*, and concluded its consideration of the subject by saying: "That there has long been exerted by the Court of Chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of

chancery of this country." The expression "the power to refuse to hear the defendant" was manifestly intended to be understood as meaning that a court of equity might disregard any answer lawfully filed by the defendant and proceed to adjudicate upon the claim of the adversary party as though in contempt for want of answer. In the case before the court the answer of a defendant in a divorce suit had been stricken from the files for failure to obey an order to pay alimony and counsel fees, though a decree was not granted as a matter of course, but a reference had been directed to take proof of the facts stated in the complaint. Immediately after stating that the rule was broader than that laid down in the *Brinkley case*, the learned judge who delivered the opinion of the court said (p. 262):

"Chief Baron Gilbert lays it down in his Forum Romanum (p. 33) that 'if the defendant appeared before the *secundum decretum*, he was liable to a mulct, for he could not be heard in the cause till he had cleared his contempt.' . . . It is suggested in Cooper's Cases (temp. Cott. 209) that this is merely a statement of the practice according to the canon law. But the Chief Baron says at another place (p. 71) that 'the answer will not be received without clearing his contempt'; and at another (p. 211): 'So it is where a man hath a bill depending in court and falls under the displeasure of the court and is ordered to stand committed. Here, when his cause is called, if the other side insist that he hath not cleared his contempt, nor actually surrendered his body to the warden of the Fleet, he must do both these things before his cause can be proceeded in. . . .'"

The statement in the opinion as to the practice of the Court of Chancery in England does not, as we have shown, accord with the authorities, and it is equally clear that the citation from the work of Baron Gilbert does not justify the conclusion for which it was cited. This is abundantly shown by the citations we have made from the work of Baron Gilbert, confirmed by an analysis of the passages quoted. Thus the extract from page 33 is from a chapter which is devoted to a comparison of the practice under the civil and canon law

with that of the English Court of Chancery in the particular of compelling an appearance and answer by a defendant to a bill, and the particular extract cited was a statement of the canon law. The *secundum decretum* or second decree was the last step in the process employed to compel an appearance in the cause, and only issued at a time when the defendant was in default and could not file his answer except by leave of the court.

So, the statement that "the answer will not be received without clearing his contempt" was made in the course of a consideration of the various processes that follow the filing of the bill, designed to secure an appearance and answer of the defendant. The author had previously observed that where an attachment by proclamation (one of the steps in the process to compel an appearance and answer) had issued the defendant could not, as of course, purge his contempt by a mere tender, and had also remarked that by the very fact of an attachment he was required to answer, and also clear his contempt at the same time, adding:

"But the usual way is not to take the penalty, which is no more than for the clearing his contempt, till he hath answered. For when the penal sum is received, the defendant may reasonably say that the fault is purged, and so there would be no sufficient foundation to retain the party or carry on the process, in case he will not answer; and, therefore, the usual way is for the plaintiff to insist that the defendant should answer; but the answer will not be received without clearing his contempts."

The case spoken of was one where the defendant was in actual custody, liable to be coerced into paying the costs of the contempt.

The extract from page 211 had reference to the case of a *plaintiff*, and was in effect merely a declaration that the court might stay the proceedings in the cause until the contempt was purged.

Indeed, there is nowhere in the Forum Romanum anything suggestive of the existence of a practice in the English Court of Chancery in accord with the power which the New York

court mistakenly considered as always exercised by that tribunal.

It needs, however, no critical review of the passage from Baron Gilbert cited by the New York court to establish that the construction put upon it was a mistaken one, for Baron Gilbert leaves no doubt in another passage not cited by the New York court that the opinion attributed to him by the New York court was unfounded. At page 102 of the Forum Romanum, speaking of the steps usually taken to compel a further answer where the answer of a defendant had been held insufficient, he said:

"And upon this head it is to be observed, as a general rule, that the contemner who is in contempt is never to be heard, by motion or otherwise, till he hath cleared his contempt and paid the costs. As, for example, *if he comes to move for anything, or desires any favor of the court*, if the other side says or insists he is in contempt, though it is but an attachment for want of an answer, which, if not executed, is only ten shillings, and if executed, is twelve shillings and six pence, yet even in this case he is not entitled to be heard till he hath paid these costs (however small they are). He must first pay them to the party or his clerk in court, and produce a receipt for them in open court, before he can be heard; and this is always allowed as a good cause against hearing of the contemner in any case whatsoever."

The English authorities cited by the New York court to support its conclusion are: *Maynard* v. *Pomfret*, *Vowles* v. *Young*, *Heyn* v. *Heyn*, *Clark* v. *Dew*, *Anon.* v. *Lord Gort*, and *Valle* v. *O'Reilly*, *supra*. The review we have made of these cases does not, as we have already stated, induce us to regard them as sustaining the doctrine of the New York decision.

Nor is the opinion expressed in the *Walker case* supported by the American cases to which reference is made therein, viz.: *Mussina* v. *Bartlett*, 17 Alabama (8 Porter), 277; *Rutherford* v. *Metcalf*, 5 Hayw. (Tenn.) 58, 61; and *Saylor* v. *Mockbie*, 9 Iowa, 209, 212.

Mussina v. *Bartlett*, decided in 1839, was a case where the defendant was in default for answer, and he was held inca-

pacitated thereby from appearing to contest the complainant's demand before the clerk and master to whom after decree *pro confesso* the bill had been referred to take an account.

Rutherford v. *Metcalf*, 5 Hayw. (Tenn.) 58, 61, was a case where, on a hearing upon a proceeding to punish for breach of an injunction, an answer of one of the defendants in the cause, not a party to the contempt proceeding, was offered, but the court refused to receive it, on the ground that whether the injunction was rightfully issued or not, the defendant should submit to it until he had procured a dissolution of the injunction. In the course of the opinion, in stating the practice upon proceedings for contempt, the court said — though the question was not before it for decision — that after a party had been found guilty of contempt, "He must stand committed and pay the costs; and then he cannot be heard in the principal cause until he has yielded obedience to the injunction." The authority for the latter statement were the passages in Practical Register and Comyn's Digest, already alluded to.

Saylor v. *Mockbie* was decided in 1859, and was a case where the application was to the favor of the court. The defendant, *being in default for answer*, also violated an injunction which had been granted in the cause, and, on an attachment being issued, he was brought into court, filed his answer to the bill and to the rule granted against him, and moved to dissolve the injunction. The court, after observing that throughout the whole of the proceedings complained of the defendant was in default, held that until he had purged himself of the contempt in disobeying the rule of the court, the court might well refuse to receive his answer to the bill (which was only entitled to be filed as a matter of favor) or consider the matters therein set up by way of excuse for his refusal to obey the order.

It is then manifest that the decision in *Walker* v. *Walker* finds no support in the authorities upon which it is based. It was accepted, however, without any review of the authorities in *Pickett* v. *Ferguson*, 45 Arkansas, 177, 191, (1885) as correctly stating the law on the subject, though both the

trial court and the reviewing court shrank from enforcing the doctrine to its logical consequences, as though the complaint of a plaintiff in contempt was removed from the files, and he was denied the right to answer a cross bill, in determining the questions presented by the cross bill, the trial court considered the evidence which had been taken in the case before it and in another cause, supposed to embody all the material facts upon which the rights of the parties depended. The reviewing court also held that if the complainant below had been prejudiced by the action of the trial court, the record furnished the means of correcting the error, and after a consideration of the whole record, ordered a personal judgment in favor of the complainant for a large amount.

Hazard v. *Durant*, 11 R. I. 195, has in one instance been referred to as a case where the court was much perplexed over the proper decision of a like question, and had declined to definitely decide it. That case was one where a party in contempt for violating an injunction was also in default for answer, and a decree *pro confesso* had been taken. He was, however, held entitled to take such steps in the cause as were matters of strict right; and while refusing an application of the petitioner to be let in to defend, the reviewing court held that it did not follow that the suit was to be abandoned to the plaintiffs, and, as the defendant denied the truth of the averments in the bill, the question was reserved as to whether a decree ought to be entered against the defendant, without first referring the case to a master "to ascertain the truth of the allegations, *so that our minds and consciences may be satisfied upon the point.*" This branch of the case having been subsequently argued, the court rendered an opinion, from which we extract, as follows (12 R. I. 99):

"The defendant entreats for leave to answer, denying them [the averments of the bill]. . . . Shall we then proceed as if they were true, because the defendant, being in contempt, and unable to relieve himself, cannot make his denial effectual by answer or defence? The question is novel; but we think it admits of but one solution. The court must be careful not to become an instrument of injustice, even against a person

who has forfeited all claims upon its favor. We decide, therefore, that the cause must go to a master to inquire into the truth of the inculpating allegations of the bill, and if he finds them true to any extent, to take the account accordingly, making, for the sake of dispatch, one report of the entire matter. We also decide that in making the inquiry, the master shall not be confined to testimony furnished by the complainants, but shall notify Durant, so that he may be present, if he sees fit, to aid the inquiry, and to testify himself, and furnish the testimony of others."

Nor is there force in the contention that *Allen* v. *Georgia*, 166 U. S. 138, impliedly sustains the validity of the authority exercised by the court of the District of Columbia in the matter now under consideration. In the *Allen case* the accused had been regularly tried and convicted, and the error complained of was that the Georgia Supreme Court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the Supreme Court of Georgia, the court called attention to the distinction between the inherent right of defence secured by the due process of law clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal. It said (p. 140):

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

The same view had been previously announced in *McKane* v. *Durston*, 153 U. S. 684, 687, where the court said:

"An appeal from a judgment of conviction is not a matter

of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary."

Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defence, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us.

The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso*, which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common law doctrine of "outlawry," and that of the continental systems as to "civil death," would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

It being therefore clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did

not enter an appearance, the court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald*, upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defence? As said by this court in *Adams* v. *Postal Telegraph Cable Co.* 155 U. S. 689, 698: "The substance and not the shadow determines the validity of the exercise of the power."

The case at bar is within the principle of the decision in *Windsor* v. *McVeigh*, *supra*. It is also controlled by the decision in *Reynolds* v. *Stockton*, 140 U. S. 254. In that case, the scope and object of a suit in a court of the State of New York — a judgment recovered in which was sought to be enforced in a court of the State of New Jersey — was the subjection of a fund in the hands of the superintendent of the insurance department of the State of New York to the satisfaction of claims against a New York insurance company which had become amalgamated with a New Jersey corporation which had passed into the hands of a receiver. The New York company and the New Jersey company and its ancillary receiver in the State of New York, one Parker, were made parties defendant. There was no actual appearance by Parker or the New Jersey company subsequent to the filing of their answer. Parker took issue merely upon the allegations of the petition, and the cause proceeded to trial upon such issue before a referee. Upon the report of the latter, a decree was entered which finally disposed of the fund. Paragraph 8 of that decree contained the following reservation:

"And it is further ordered that either party to this action or any person interested in the subject-matter thereof have liberty to apply for further directions on the foot of this

decree, and the question of the indebtedness of Joel Parker, as receiver of the New Jersey Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott and Messrs. Harris and Rudd, reported by the referee Samuel Prentiss, be reserved."

Subsequently to the entry of the decree just referred to, on notice to the attorney who had represented Parker, a judgment was entered in favor of plaintiffs against the receiver Parker and the New Jersey company for more than a million of dollars. This was the judgment which was sought to be enforced in New Jersey against the assets in the hands of the receiver in that State. The courts of New Jersey decided that the judgment was void, and this court affirmed such decision on the ground that the decree passed upon questions not at issue in the cause, and was rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer. There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files.

As a consequence of the foregoing views, we conclude that the Court of Appeals of New York did not err in refusing to give effect to the judgment in question as against a member of the firm of Riggs & Company, as in the courts of the District of Columbia the decree in question was not entitled to be regarded as valid as to them. Whether since the rendition of the judgment for any cause, such as by reason of active steps taken by McDonald and White, in the courts of New York, assailing the validity of the judgment in question, those parties are now estopped from asserting the invalidity of the decree (*Lawrence* v. *Nelson*, 143 U. S. 215, 223, and cases there cited), we need not determine. It is sufficient for the purposes of the case now before us to say that, as the record contains no proof of facts constituting an estoppel as to Riggs & Company, the judgment is not binding upon them.

From the fact, however, that we rest our decision on the

want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree *pro confesso* as in case of default for want of an answer, we must not be considered as implying that we think the purchasers of the bonds under the circumstances disclosed by the record took them subject in any way to the *lis pendens* created between the actual parties to the controversy arising from the suit, or that such purchasers were or could be in any way bound by the result of that litigation.

Judgment affirmed.

PARSONS v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

ERROR TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 198. Argued March 8, 9, 1897. — Decided May 24, 1897.

The right of a shipper of goods over a railway, who pays to the railroad company reasonable rates for the transportation of the goods to the place of destination, to recover from such company the excess of such payment over the rates charged to shippers of similar goods to the same destination from another place of shipment of the same or greater distance from it, is a right growing out of the interstate commerce act; and, being in the nature of a penalty, can be enforced only by strict proof, showing clearly and directly the violations complained of.

The portion of a through rate received by one of several railway companies transporting the goods as interstate commerce, may be less than its local rate.

The only right of recovery given by the interstate commerce act to the individual, is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act"; and before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has operated to his injury.

THIS was an action commenced by the plaintiff in error, plaintiff below, in the Circuit Court of the United States for the Southern District of Iowa to recover of the defendant fifteen hundred and fifty dollars on account of alleged vio-

lations of the interstate commerce act. An amended and substituted petition was filed which, in five counts, stated plaintiff's causes of action. To this the defendant demurred, and the demurrer having been sustained judgment was entered in its favor. The plaintiff took the case to the Court of Appeals of the Eighth Circuit, by which court the judgment was affirmed. 27 U. S. App. 394. Thereupon the case was brought here on writ of error.

The first count alleged facts which, as claimed, show that the defendant had such relations to the Fremont, Elkhorn and Missouri Valley Railroad Company and the Sioux City and Pacific Railroad Company that the lines of those railroads, together with that of the defendant, were under a common control and management, and therefore that the defendant was to be treated for all practical purposes as the owner of a single line from the points in Nebraska, hereinafter mentioned, to Chicago. It stated the distances from those points to Chicago, and also from the places in Iowa along the line of defendant's road from which the plaintiff made his shipments, these latter distances being substantially less than the former. Then after a general averment that the Nebraska rates to Chicago had always theretofore been greater than the Iowa rates, it alleged that on December 30, 1887, the defendant, for the purpose of giving unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against the plaintiff and other shippers of corn and oats in Iowa, put in force from Nebraska points a certain freight tariff upon corn and oats, in words and figures following:

"C. & N. W., G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949 and G. F. D. No. 859 of 1887.

"Chicago and North Western Railway, Fremont, Elkhorn and Missouri Valley and Sioux City and Pacific Railway.

"Joint tariff on corn and oats in carloads, taking effect December 30, 1887, to Rochelle, Ill., when destined to New York, Boston, Philadelphia, Baltimore.

Statement of the Case.

From	Per 100 lbs.
Blair, Neb.....	11
Kennard, Neb.....	11

* * * * *

[Here follow rates from many other Nebraska points, which are omitted as immaterial in the case.]

"Prepaid. Way bill through to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York and Boston see C. & N. W. G. F. D. No. 2604, November 25, 1878, amendments or subsequent issues.

"H. R. McCULLOUGH,
"*G. F. A., C. & N. W. R.*

"K. C. MOREHOUSE,
"*G. F. A., S. C. & P. and F. E. & M. V. R.'s.*"

After this it continued:

"Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission, as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Iowa.

"Plaintiff avers that said special tariff remained in force at the several stations named therein upon the line of the Fremont, Elkhorn and Missouri Valley Railroad in the State of Nebraska from December 30, 1887, up to the 1st of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Ill., at the rates therein specified, to wit, the sum of 11 cents per 100 pounds from the stations of Blair and Kennard, Neb.

"Plaintiff avers that between the 30th day of December,

A.D. 1887, and the 1st day of February, A.D. 1888, and at the several dates named in the Schedule No. 2 attached to original petition and made a part of this petition, plaintiff had for shipment at Correctionville, Iowa, aforesaid, the number of pounds of corn and oats in said schedule specified, and plaintiff was prevented and deprived by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rate given, as aforesaid, to the shippers in the State of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Correctionville to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 21 cents per 100 pounds for the transportation of said corn and oats a distance of only 475 miles, the same being a less distance, and for a like and contemporaneous service over the same line in the same direction, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Ill.

"Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to Chicago, Ill., and was then sold on the market or delivered to connecting roads for eastern seaboard points.

"Plaintiff avers that the charges so made, demanded, received and collected from plaintiff as aforesaid were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress entitled 'An act to regulate commerce,' approved February 4, 1887, in that an unlawful preference and discrimination was practised by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and received a greater compensation for a short than for a longer haul in the same direction, over the

same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

"Plaintiff avers that the price and value of corn and oats at the dates of said shipment was at Chicago the price at New York and other seaboard points, less the freight, and the price at — in Iowa, was the Chicago price, less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Kennard and Blair, Neb., to wit, the sum of 10 cents per hundred pounds upon 241,710 pounds of corn and oats, to wit, the sum of 241.71 dollars, for which sum he asks judgment on this count of his petition, with 6 per cent interest per annum from February 1, 1888."

The next three counts were, so far as any question is involved in this case, substantially like the first.

The fifth count alleged that the defendant was a common carrier, engaged in the business of transporting freight over its line of road in Iowa, Illinois and Nebraska, "and in connection with other railroads in Chicago, east to New York, Philadelphia, Boston, Baltimore and other seaboard points." Then, after stating facts showing plaintiff's interest in the matter, it averred that the defendant "on the 17th day of February, 1888, at all the stations on the said Fremont, Elkhorn and Missouri Valley Railroad in Nebraska between Blair and Skull Creek and each of said points, put in force a certain tariff on corn and oats destined for New York and other seaboard points, whereby it proposed to transport, and did, on and between said 17th day of February and the first day of March, A.D. 1888, transport corn and oats from Blair and other points in Nebraska, on the line of said road, to New York for 36½ cents per 100 pounds, and to Boston for — cents per 100 pounds, and to Philadelphia for 34½ cents per 100 pounds, and to Baltimore for 33½ cents per 100 pounds. Plaintiff avers that all of said points on the Fremont, Elkhorn and Missouri Valley road were a greater distance from

Chicago and from New York and other seaboard points aforesaid than the stations on the defendant's road in the State of Iowa." It alleged a failure to publish such rates, substantially as in the first count, and "that the only rate on corn and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ from Chicago to New York, and a correspondingly high rate from Chicago to other seaboard points. That said local rate from Carroll to Chicago was 19 cents per 100 pounds." And concluded as follows:

"Plaintiff avers that between the 17th day of February and the 1st day of March, A.D. 1888, and at the several dates named in Schedules No. 4 attached to original petition and made a part of this petition, plaintiff had for shipment at Carroll, Iowa, aforesaid, the number of pounds of corn and oats in the said schedule described, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rates given to shippers in the State of Nebraska, and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Carroll to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 19 cents per hundred pounds for the transportation of said corn and oats to Chicago, and subjected said plaintiff to a further charge of 27½ cents per 100 pounds to transport the same to New York and a like local charge to other seaboard points, or dispose of the same at Chicago at 27½ less per hundred than the price at New York.

"Plaintiff avers that the charges so made, demanded and received and collected as aforesaid were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress entitled 'An act to regulate commerce,' approved February 4, 1887, in that an unlawful preference and discrimination was practised by defendant in favor of shippers of grain in the State of Nebraska, and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged and demanded a greater compensation for short

than for a longer haul in the same direction over the same line, the shorter being included in the longer haul and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

"Plaintiff avers that the price and value of corn and oats at the dates of said shipments was, at Chicago, the New York or other seaboard price less the freight, and the price at Carroll, Iowa, was the Chicago price less the freight, and that plaintiff was damaged by reason of the premises in a sum equal to the difference between the aggregate of the two local rates from Carroll to Chicago and from Chicago to New York, to wit, 46½ cents, and the said sum of 36½ cents, the rate given from said Nebraska points to New York, which difference was the sum of 10 per 100 pounds on 107,750 pounds of corn and oats named in Schedule No. 4 aforesaid, for which the plaintiff asks judgment on this second count of his petition."

Mr. C. C. Nourse for plaintiff in error.

Mr. Lloyd W. Bowers for defendant in error.

Mr. Assistant Attorney General Whitney filed a brief on behalf of the Interstate Commerce Commission.

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

Some preliminary matters deserve notice. The wrongs charged against the defendant took place in the winter of 1887–1888, and affected other Iowa shippers than the plaintiff. Several actions were brought by such shippers on account thereof, and brought by the counsel for this plaintiff. Two of such actions were tried before juries, and resulted in judgments for the plaintiffs. *Osborne* v. *Chicago & Northwestern Railway*, 48 Fed. Rep. 49. These judgments were taken to the Court of Appeals, and in October, 1892, were reversed and the cases remanded for new trials. 10 U. S. App. 430. The plaintiffs then applied to this court for a

certiorari, 146 U. S. 354, which, on December 5, 1892, was denied on the ground that there had been no final judgment. See *Forsyth* v. *Hammond*, 166 U. S. 506, 514. Thereafter, and on December 28, 1892, this amended and substituted petition was filed. Now it is contended that the Court of Appeals read into this petition the facts disclosed by the records in the former cases, and so decided some other case than the one presented. This is a mistake, though it may be that the court construed the allegations of this petition in the light of those facts. And it is not strange that it did so. For, while this being an action in behalf of a different plaintiff, he is not concluded by the evidence introduced on those trials, can state other and different facts, and recover on other and distinct grounds, yet the same acts on the part of the defendant are made in all the cases the basis of relief. Hence, allegations in this petition, which are doubtful in their meaning and susceptible of two constructions, may not unfairly be taken as intended to mean that which the testimony in the former cases showed were the facts. The course of the litigation makes it apparent that the purpose was not simply to present a new case to the same court, but to obtain from a higher court a construction of the law applicable to the facts. The brief of counsel, while it points out what is alleged are differences between the case made in this petition and that established in the prior cases, also discloses that in his judgment the views expressed by the Court of Appeals in those cases were wrong, and that he is seeking the judgment of this court thereon. It was easy, if counsel intended to present an entirely different case, to make the averments so positive and distinct as to clearly distinguish it.

We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably

and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality — an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders — such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the interstate commerce act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the interstate commerce act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the interstate commerce act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed. Now, the tariff set out in the first four counts appears on its face to have been a joint tariff, and stated the rates to be charged from points of shipment to Rochelle or Turner on corn shipped to the four cities of New York, Boston, Philadelphia and Baltimore. It does not pur-

port to be the local rate on grain shipped to Rochelle or Turner, or even to Chicago — the eastern limit of the defendant's road. Nowhere in these counts is there an allegation as to the through rates from Nebraska or Iowa points to the four above-named eastern cities, or to any other place beyond the eastern terminus of defendant's road. There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places. No figures as to the through rate are given; no averments as to its relation to the local rates on the defendant's road, whether from Nebraska or Iowa to Chicago. So that if we regard this tariff as being (what on its face it purports to be) a joint tariff, there is no violation of the fourth section of the interstate commerce act, the one containing the long and short haul clause.

But it is said that there is an averment that the fixing or naming of Turner and Rochelle as the pretended termini of the shipments of corn and oats under the special tariff was a mere device to evade the law; that they were not grain markets, and had no elevators or facilities for handling grain, and that the grain was intended to be, and was in fact, transported by the defendant to Chicago, and there sold on the market or delivered to connecting roads for eastern points. It is this averment which introduces some uncertainty into the case. For if there had been no agreement between the defendant and eastern companies, and no through rates established thereby from Nebraska to the four places named, and this putting forth of the so-called joint tariff was a mere device, under color of which the defendant was shipping grain over its own lines from Nebraska to Chicago only, at less rates than were charged to the nearer points in Iowa, there would have been a violation of the long and short haul clause. But the trouble is the pleader does not distinctly make such a case. He does not allege that there was not such an agreement between the defendant and eastern roads, that there was

not such a joint tariff established, that the grain shipped from Nebraska was not shipped on such tariff, or that the tariff was itself a pretence. He does say that the naming of the points Turner and Rochelle, as termini of the shipment, was a mere device to evade the law, but what evasion, or how it operated to make the evasion, is not indicated. It is true he says that the grain was intended to be, and was in fact, transported by the defendant to Chicago. But it must have been so transported if it was shipped to the termini named in the joint tariff. It is true also that he alleges that when transported to Chicago the grain was sold on the market or delivered to connecting roads for eastern seaboard points. But which, he does not advise us. If the former, that might happen by the shipper's intercepting at Chicago a shipment made under the joint tariff through to one of the four eastern points; if the latter, it would necessarily occur if the shipment was under such tariff. So the former is consistent with and the latter implies the joint tariff. Neither makes certain any violation of the long and short haul clause. On the contrary, the plain implication of the averments of these counts is that there was such a joint tariff (indeed, it is alleged that it was never printed in type, was not circulated or published at any of the stations on defendant's road in Iowa, and no copy thereof filed with the Interstate Commerce Commission, as required by law; and also that it remained in force up to February 1, 1888, and that the corn shipped from Nebraska was shipped on that tariff); and further, that the ground of complaint is not that it did not exist, but that it was not published in Iowa; that plaintiff was not informed and did not know of its existence, and therefore did not get the benefit of it, but shipped his corn at local rates to Chicago instead of at through rates to the eastern points. That the portion of a through rate received by one of the companies party thereto may be less than its local rate, is not questioned. The Interstate Commerce Commission, which has filed a brief in this case, and which has criticised some of the views expressed in the opinion of the Court of Appeals in the *Osborne case*, concedes this, and also that the judgment in that case was

right. All that it contends for is that the total through rate shall be greater than the local rate, so as not to violate in this respect the long and short haul clause.

We pass, therefore, to consider the allegations as to the non-publication of this tariff. It is alleged that it was never printed in type, was never circulated or published at any of these stations on defendant's road in Iowa, that no copy thereof was ever filed with the Interstate Commerce Commission, and that the existence of the same was concealed from the knowledge of the plaintiff and other shippers in Iowa, and the benefits and advantages of the rates therein specified were denied to plaintiff and such other shippers. The burden of this is the ignorance of the plaintiff, through failure to publish this tariff at Iowa stations. The interstate commerce act, in section 6, requires the railroad company to post in every station along the line of its road its local tariffs. It also requires such carrier to file with the commission copies of all contracts, agreements or arrangements with other common carriers, and also copies of any joint tariffs made with such common carriers, and adds that "such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

In the former cases it was shown that the commission had made a general order requiring the publication of joint tariffs "at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid," and it was there held that the places of shipment in Iowa were not competing points within the scope of this order, and that, therefore, no publication of this tariff at the points named was necessary. Counsel contends that this fact only appeared in

the evidence on the part of the defendant and is not disclosed or suggested in the petition in this case, and that the Court of Appeals improperly based its decision upon the supposed existence of this order. We do not so understand the scope of its opinion. No reference is made to any such order, and the case is discussed upon simply the averments in the petition. The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff. But these "might be's" interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made any arrangement with any consignee in any of those points for the receipt and sale of his corn, or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege, either directly or indirectly, that if he had known of these rates he would have shipped his corn, under this tariff, to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or the other of them, and thus to take advantage of the joint tariff. Every fact which he alleges might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago. Surely it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong; for, if he would not under any circumstances have shipped to New York, was

compelled by his contracts or any other consideration to ship to Chicago, he cannot say that he was injured by his ignorance of the rate to New York. The only right of recovery given by the interstate commerce act to the individual is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act." So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities. We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the interstate commerce act.

With reference to the fifth count, little need be said. In that it is disclosed that the through rates to the four eastern points were largely in excess of the local rate charged by the defendant for shipment to Chicago. Of course, therefore, within any view of the scope of the fourth section — the one containing the long and short haul clause — there was no violation of its provisions.

With reference to the matter of publication, nothing more need be said than has been in reference to such allegations in the prior counts, and as to the complaint of an unlawful preference and discrimination forbidden by the third section of the act, it is sufficient to refer to the fact heretofore noticed of the failure of the plaintiff to show a certain injury to him.

These are all the matters that call for consideration. We see no error in the judgment of the Court of Appeals, and it is

Affirmed.

Mr. Justice Brown took no part in the decision of this case.

MERCHANTS' AND MANUFACTURERS' BANK *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 301. Argued April 28, 29, 1897. — Decided May 24, 1897.

The decision of the Supreme Court of Pennsylvania that the act of June 8, 1891, in respect of the taxation of national banks does not conflict with the constitution of that State is conclusive in this court.

There is no lack of uniformity of taxation under that act which renders it obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," as the right of election which, if not availed of by all, may produce an inequality, is offered to all.

That act treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such.

The making the national bank the agent of the State to collect such taxes is a mere matter of procedure, and there is no discrimination against the national banks in the fact that the state banks are not so compelled, but the auditor general looks to the stockholders directly.

The statute, by fixing the time when the bank shall make its report, and directing the auditor general to hear any stockholder who may desire to be heard, provides "due process of law" in these respects.

This case comes on a writ of error to the Supreme Court of the State of Pennsylvania, and involves the validity of the statute of that State of date June 8, 1891, Laws Penn. 1891, p. 240, in respect to the taxation of national banks. The decision of that court was in favor of its validity, 168 Penn. St. 309. Sections 6 and 7 of the statute contain these provisions:

"Sec. 6. In case any bank or savings institution incorporated by the state or the United States shall elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of all shares of said bank or savings institution that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be ex-

empt from local taxation under the laws of this Commonwealth.

"SEC. 7. That from and after the passage of this act, every national bank located within this Commonwealth, which shall fail to elect to collect annually from the shareholders thereof a tax of eight mills on the dollar upon the par value of all the shares of said bank that have been subscribed or issued, shall, on or before the twentieth day of June in each and every year, make to the auditor general a report in writing, verified by the oath or affirmation of the president or cashier, setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of this State, that is to say, at the rate of four mills upon each dollar of the actual value thereof."

Mr. Jeremiah M. Wilson for plaintiff in error. *Mr. William A. Hale, Jr.*, and *Mr. John Wilson* were on his brief.

Mr. John P. Elkin for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The validity of this statute is challenged by plaintiff in error on three grounds: The first is, that its operation results in a lack of uniformity of taxation upon the same class of subjects, to wit, shares of national banks within the State; and the argument of counsel is that it conflicts with article 9, section 1 of the constitution of the State of Pennsylvania, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania sustaining the statute is conclusive in this court, as to any question of conflict between it and the state constitution. *West River Bridge Co.* v. *Dix*, 6 How. 507; *Bucher* v. *Cheshire*

Railroad, 125 U. S. 555; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Lewis* v. *Monson*, 151 U. S. 545; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685.

If it be said that a lack of uniformity renders the statute obnoxious to that part of the Fourteenth Amendment to the Federal Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws," it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of four mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying eight mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the State should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.

Again, it will be perceived that this inequality in the burden

results from a privilege offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation. It is common practice in the States to offer a discount for payment before the specified time, and impose penalties for non-payment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all. It was well said by Mr. Justice Williams, speaking for the Supreme Court of Pennsylvania, in the opinion in the present case: "The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand." Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237, in which case Mr. Justice Bradley, speaking for the court, said:

"The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. . . . We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of

the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt." See also *Jennings* v. *Coal Ridge Improvement Co.*, 147 U. S. 147.

The second ground upon which the statute is challenged is that, as claimed, it conflicts with the legislation of Congress, regulating the taxation of shares of stock in national banks. This legislation is found in § 5219, Rev. Stat., which provides: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere." The purpose of this, as often announced in this court, is to prevent any discrimination between national bank capital and other moneyed capital. *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, and cases cited in opinion. But this section does not forbid discrimination between national banks, but only as between such banks and state banks, or other moneyed capital in the hands of private individuals. The legislation before us treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such.

It is further insisted that the act is really one taxing the bank and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of section 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the eight mills shall make a report to the auditor general "setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof,

whereupon it shall be the duty of the auditor general to assess the same for taxation," and also that after such report is made to the auditor general "it shall be his further duty to hear any stockholder who may desire to be heard on the question of the valuation of the shares as aforesaid; and he shall have the right, by other evidence, to satisfy himself as to the correctness of the valuation of said shares of stock in said report contained, and to correct said valuation. The auditor general shall thereupon transmit to the said national banks a statement of the valuation and assessment so made by him, and the amount of tax due the Commonwealth on all of said shares, which tax the said banks shall, within thirty days after receiving said statement, collect from their shareholders and pay over into the state treasury."

That the State has the right to make the bank its agent to collect the tax from the individual stockholders was settled in *National Bank* v. *Commonwealth*, 9 Wall. 353.

It is further urged that there is discrimination because as to those state banks that do not elect to pay the eight mills the auditor general is required to look to the stockholders directly for the regular four mills tax, whereas as to national banks he reaches the stockholders through the bank itself, and hence it is said that some shareholders in state banks may escape taxation. But this is a mere matter of procedure. It is no objection to the law that it makes the national bank the agent to collect and does not compel the state bank to do the same.

A final objection is that there is a lack of due process of law, in that the property of the shareholders is subjected to an *ad valorem* tax without an opportunity being given to them to be heard as to the value. It is true the statute contemplates no personal notice to the shareholder, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provision to the contrary,

to be had at the office of the officer charged with the duties; *Andes* v. *Ely*, 158 U. S. 312, 323; and a notice to all property holders of the time and place at which the assessment is to be made is all that "due process" requires in respect to the matter of notice in tax proceedings. As said in *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, 710:

"The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." See also *Bell's Gap Railroad* v. *Pennsylvania*, *supra*; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660, 669; *Lent* v. *Tillson*, 140 U. S. 316; *Paulsen* v. *Portland*, 149 U. S. 30.

These are the only matters requiring notice. We see no error in the judgment of the Supreme Court of Pennsylvania, and it is

Affirmed.

Mr. Justice Shiras did not hear the argument or take part in the decision of this case.

WARNER *v.* NEW ORLEANS.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 282. Argued April 22, 1897. — Decided May 24, 1897.

Cross v. *Evans*, 167 U. S. 60, as to the certification of questions to this court by the court of appeal, approved and applied.

The city of New Orleans, under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which it acquired the property and franchise of the Canal Company from Van Norden, and under the averments in the bill, which are set forth in the statement of the case, is estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of its obligation to account for drainage funds, collected on private property, and as a discharge from its own liability to that fund as assessee of the streets and squares: and, accord-

Statement of the Case.

ingly the first question asked by the Court of Appeals must be answered in the affirmative.

The second question, inquiring whether the decision in *Peake* v. *New Orleans*, 139 U. S. 342, should be held to apply to the facts in this case, and operate to defeat the complainant's action, puts the facts of the one case over against the facts of the other, and asks this court to search the record in each case to see if one operates to bar the other, and practically submits the whole case, instead of certifying a distinct question of law, and therefore does not come within the rule in respect to certifying distinct questions of law.

This case comes on questions certified by the Court of Appeals of the Fifth Circuit. The statement of facts, the questions and the order of the court, as found in the record, are as follows:

"The complainant, a citizen of the State of New York, filed his bill in said Circuit Court against the city of New Orleans, alleging substantially as follows:

"By act approved March 18, 1858, the legislature of the State of Louisiana undertook to provide for draining and reclaiming portions of the parishes of Orleans and Jefferson. The work was to be accomplished through boards of drainage commissioners appointed for each of the three districts into which the territory was divided.

"The funds to pay for work were to be raised as follows: Whenever the several boards were prepared to drain their districts they were required to cause a plan to be made of the proposed work, designating its subdivisions and the names of the proprietors of the land, etc. This plan was to be filed in the mortgage office, of which notice was required to be published once a week for four consecutive weeks. At the expiration of the notice the boards were to apply to a court specified in the act, which was required to decree that the district was subject to a first mortgage lien and privilege for such an amount as might be assessed upon the property. After the tax had been levied the court was authorized to render judgment against the several property owners for the amount due by them.

"By another act, approved March 17, 1859, the boards were authorized to issue bonds to the extent of $300,000 for each

district for the purpose of carrying on the work, redeemable out of drainage taxes.

"By an act approved March 1, 1861, the boards were authorized to apportion the amount which each taxpayer should be required to pay yearly to meet the annual interest and instalments due on the bonds. Other and more stringent provisions for the collection of these taxes were also made in the act, such as authorizing judgments to be rendered against the taxpayer and his property and the issuance of execution as in ordinary cases. The boards of commissioners for the first and second districts filed plans of the work they proposed to do, and obtained judgments decreeing the lands in those districts to be subject to liens and privileges for the proposed work; they levied assessments payable in instalments and obtained judgments for the amount of the rolls, and some money was collected thereon.

"By act 30 of 1871 the several boards of drainage commissioners were abolished and the work of drainage was transferred to the Mississippi and Mexican Gulf Ship Canal Company, but the board of administrators of the city of New Orleans for all other purposes was made their successor, and was subrogated to all moneys, assessments and other assets then belonging to them, and was required to collect such tax and assessments and to make and collect an additional tax of two mills per superficial foot on all lands where no tax had been levied for drainage purposes, and that all collections from these sources be placed to the credit of said Mississippi and Mexican Gulf Ship and Canal Company and held as a fund to be applied only to the drainage of the city of New Orleans and Carrollton.

"By the eighth section of the act it was made the duty of the administrator of accounts to draw a warrant on the administrator of finance against this fund for the payment of amounts due for all work done by that company.

"The board of administrators entered on the duties imposed on them under this act, procured the mortgages and liens to be decreed, assessments to be levied, and judgments to be rendered for the taxes assessed in the third and fourth drainage districts.

"The whole amount of assessments that came under their administration was $1,699,637.37, and of this $1,003,342.28 was assessed against individuals and $696,394.30 against the city of New Orleans on the area of her streets and squares.

"The work was continued under this act until 1876 by Warner Van Norden, who had become transferee of the said Mississippi and Mexican Gulf Ship Canal Company. He excavated some 5,000,000 cubic yards of earth and completed two thirds of the plan of drainage, when act No. 16, of February 24, 1876, was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and, if she desired it or deemed it advisable, to purchase from said canal company and its transferee, Van Norden, all the tools, boats and apparatus appertaining to drainage work and the franchise of the company, upon an appraisement to be made by appraisers to be appointed by the city council. The act further provided that the price should be paid by the city of New Orleans in drainage warrants in the same form and manner as those theretofore issued under act 30 of 1871.

"Pursuant to this act the city council caused the property to be appraised. The valuation was fixed at $300,000, and on the 7th of June, 1876, a formal act of sale and transfer was executed between Warner Van Norden and said canal company and said city of New Orleans, by which the former made a transfer of the drainage plant and franchise for said amount, payable in drainage warrants, and the city covenanted 'not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same.'

"Up to the date of this sale the city had collected on the assessments against private property $229,922.89, leaving $1,469,714.47 outstanding and uncollected, of which amount

the city owed $696,394.30 as assessed against the streets and squares. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the 'drainage series' to the amount of $1,672,105.21 under authority of act 73, approved April 26, 1872. The thirteenth section of this act, after providing for the issue of said bonds, further provided that 'all taxes collected for drainage and not required for payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage.'

"Complainant sues on three of the drainage warrants, of $2000 each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans as above set forth. The bill, after setting out the foregoing state of facts in more amplified form, avers: (1.) That the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery and suffered the rest to become rotten and valueless and abandoned all work of drainage; that by reason of the non-completion of the drainage system the Supreme Court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefit had been conferred on the property. (2.) That the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances and proclamations encouraged and induced people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become valueless. (3.) That the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected, or which she ought to have collected but has wasted, as well as her own indebtedness, by the issuance and delivery, between May 10, 1872, and December 31, 1874, of drainage bonds under authority of the act 73 of 1872. (4.) That the city had never claimed, prior to the purchase of said property and franchise, that the issuance of said bonds operated as such discharge, and made no such plea, save in the case of *Peake* v. *New Orleans*, filed March 19, 1888. (5.) That the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had

not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment. (6.) That the contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876 and its effects on his rights and remedies; that neither at the time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid; that Van Norden has expressly and by a writing annexed to and made part of the bill subrogated complainant to all his rights and remedies growing out of said sale (R., p. 145); the complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defence.

"The bill closes with a prayer for an accounting of said drainage fund, and especially that the amount due by the city as assessee of the streets and squares be decreed to be a trust fund in the hands of the city applicable to the payment of said drainage warrants.

"Defendant demurred to the bill, especially asserting that the decision in the case of *Peake* v. *New Orleans*, 139 U. S. 342, is decisive of the issues in this case. The demurrer having been sustained by the Circuit Court, the complainant has removed the case to this court for review, assigning, among others, error in this respect.

"And it appearing that the suit of said Peake was based on drainage warrants given for work, all dated July 9, 1875, complainant insists that they were issued while the city was an involuntary and non-contractual trustee, and in this respect differ from those involved in this case, which were issued by the city as a voluntary and contractual trustee under the permissive authority of the legislature, and that both on principle

and owing to the estoppel pleaded in the bill his rights are not affected by said decision.

"The case having been argued in this court on the errors assigned, and this court desiring the instruction of the honorable the Supreme Court for the proper decision of the questions arising herein touching the matter of estoppel aforesaid and the application of the decision of the Supreme Court to the issues involved in this suit, it is ordered that the following questions and propositions of law be certified to the Supreme Court in accordance with the provisions of section 6 of the act entitled 'An act to establish Circuit Courts of Appeal and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, to wit:

"First. Is the city of New Orleans under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

"Second. Should the decision in the case of *Peake* v. *New Orleans*, 139 U. S. 342, be held to apply to the facts of this case and operate to defeat the complainant's action?

"It is further ordered that a copy of the printed record and the several acts of the legislature, together with copies of the briefs on file in this court, be sent to the honorable the Supreme Court with the transcript certifying the aforesaid questions."

Mr. Wheeler H. Peckham and *Mr. William Grant* for Warner. *Mr. Richard DeGray* and *Mr. J. D. Rouse* were on *Mr. Grant's* brief.

Mr. Branch K. Miller for New Orleans.

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

We had occasion in the recent case of *Cross* v. *Evans*, *ante*, 60, to comment on the practice of certifying questions in such manner as to practically submit the entire case to this court for consideration. In addition to what was said in the opinion then filed, it may be proper to observe that the purpose of the act of 1891, creating the Courts of Appeal, was to vest final jurisdiction as to certain classes of cases in the courts then created, and this in order that the docket of this court might be relieved, and it be enabled with more promptness to dispose of the cases directly coming to it. In order to guard against any injurious results which might flow from having nine appellate courts, acting independently of each other, power was given to this court to bring before it for decision by certiorari any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable, but the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the Courts of Appeal the right to avoid the responsibility cast upon it by statute by transmitting any case it saw fit to this court for decision. If such practice were tolerated it is easy to perceive that the purpose of the act might be defeated, and the Courts of Appeal, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of Congress they should finally determine. It is true power was given to the Courts of Appeal to certify questions, but it is only "questions or propositions of law" which they are authorized to certify. And such questions must be, as held in the case just cited, "distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact." It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon

which that question is based. But care must always be taken that under the guise of certifying questions the Courts of Appeal do not transmit the whole case to us for consideration. Here, in addition to the long preliminary statement of facts, the court ordered up the entire record, and counsel in their briefs, assuming that the whole case is before us, have entered into a discussion of many questions, such as the effect of certain limitations in the constitution of Louisiana, which may have been in the case as it was presented to the Court of Appeals, but cannot be found in any distinct question of law certified to us.

With these preliminary observations, we pass to the consideration of the questions certified, or so much thereof as are distinct questions of law. The first question is one of estoppel. In order to a full understanding of it a brief review of the facts is essential; and for these facts we look simply to the statement prepared by the Court of Appeals, and not to the bill and exhibits, copies of which it ordered to be sent to this court. From that statement it appears that in 1858 the State of Louisiana undertook the work of draining and reclaiming portions of the parishes of Orleans and Jefferson; that this work was to be done under the direction and control of boards of drainage commissioners appointed for the several districts into which the territory was divided. Provision was made for assessing the cost and expenses of the work upon the property benefited. The work continued under these auspices until 1871, when, by an act of the legislature, the boards of drainage commissioners were abolished and the work of drainage transferred to a canal company. But the duty of collecting the assessments was imposed upon the board of administrators of the city of New Orleans, and the administrator of accounts was directed to draw warrants on the administrator of finance against the drainage fund for the payments of amounts due for the work. Warner Van Norden became the transferee of the canal company, and completed about two thirds of the work prior to February 24, 1876, when an act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if it desired, to

purchase from the canal company and its transferee all the boats, tools and apparatus pertaining to the work, and also the franchise of the company. This act further provided that the price should be paid by the city in drainage warrants in the same form and manner as those theretofore issued.

The whole amount of assessments was $1,699,637.37. Of this, $1,003,342.28 was assessed against individuals, and the balance against the city of New Orleans on the area of its streets and squares. Of the assessment against private property the city had up to this time collected $229,922.89. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before this act of 1876 by the issue of city bonds, to the amount of $1,672,105.21, under authority of an act approved April 26, 1872. The city elected to make the purchase of the property of the canal company and its transferee. It was appraised at $300,000, and on June 7, 1876, a formal sale and transfer was executed by the company and its transferee to the city for the amount named, payable in drainage warrants, and the city covenanted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

It will be seen that the bonds issued by the city more than covered in amount the assessments against its streets and public grounds and the amount it had collected from private property, and all this had taken place prior to the purchase of the property from the canal company and its transferee. Now, after the city had assumed exclusive control of the work, after it had voluntarily purchased from the canal company and its transferee their property and had given these warrants, payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and abandoned the work of drainage, so that by reason of the non-completion of the drainage system, as held by the Supreme

Court of the State, drainage taxes could not be collected, inasmuch as no benefit had been conferred upon the property. Not only that; it by various means impeded the collection of the taxes, and by conduct, ordinances and proclamations encouraged and induced the people to refuse to pay the assessments, whereby those due by private persons became valueless.

And now the question is whether the city is not estopped to plead in defence of liability on these drainage warrants the fact of the prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily. It was not, in reference to these matters, as it was to those considered in *Peake* v. *New Orleans*, 139 U. S. 342, a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is, that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund — a fund yet partially to be created and created by the performance by him of a statutory duty — cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defence to a liability on the warrants drawn on that fund that it had prior to the purchase paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city (and in respect to that matter we can only refer to *Peake* v. *New Orleans*, *supra*), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary to facilitate by all lawful

means, the collection of the assessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, you must look to the fund and not to me. We are clear in the opinion, therefore, that the first question must be answered in the affirmative.

With reference to the second, we are of the opinion that it does not come within the rule in respect to certifying distinct questions of law. It invites an inquiry into all the matters considered in the case of *Peake* v. *New Orleans* (and there were many), and asks whether the matters there decided apply to the facts of this case and operate to defeat the plaintiff's action. In other words, the question puts the facts of the one case over against the facts of the other, and asks us to search the record in each to see whether the one case operates to bar the other. Surely that is practically submitting the whole case instead of certifying a distinct question of law. Our decision, therefore, is that

The first question must be answered in the affirmative, and the second we decline to answer, and it is ordered accordingly.

Mr. Justice White and Mr. Justice Peckham took no part in the decision of this case.

INTERSTATE COMMERCE COMMISSION *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 733. Argued March 22, 23, 1897. — Decided May 24, 1897.

Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates either maximum or minimum or absolute; and, as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

New Orleans & Texas Pacific Railway v. *Interstate Commerce Commission*, 162 U. S. 184, affirmed and followed.

This case is before us on a question certified by the Court of Appeals for the Sixth Circuit. On May 29, 1894, the Interstate Commerce Commission entered an order, of which the following is a copy:

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of May, A.D. 1894.

"Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements and Hon. James D. Yeomans, commissioners.

"The Freight Bureau of the Cincinnati Chamber of Commerce

v.

The Cincinnati, New Orleans and Texas Pacific Railway Company, Lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western and Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Rail-

road and Banking Company of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington, Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

"THE CHICAGO FREIGHT BUREAU

v.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY; The Chicago and Alton Railroad Company; The Chicago and Eastern Illinois Railroad Company; The Cincinnati, Hamilton and Dayton Railroad Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Evansville and Terre Haute Railroad Company; The Illinois Central Railroad Company; The Louisville, Evansville and St. Louis Consolidated Railroad Company; The Peoria, Decatur and Evansville Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Terre Haute and Indianapolis Railroad Company; The Wabash Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company, Lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western and Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Railroad and Banking Company

of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington, Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved herein having been had, and the commission having on the date hereof made and filed a report and opinion containing its finding of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the commission having, as appears by said report and opinion, found and decided, among other things, that the rates complained of and set forth in said report and opinion as in force over roads operated by carriers defendant herein and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Meridian, Miss.; Birmingham, Ala.; Anniston, Ala., and Selma, Ala., are unreasonable and unjust and in violation of the provisions of the act to regulate commerce:

"It is ordered and adjudged that the above-named defendants and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth or sixth class, do from and after the tenth day of July, 1894, wholly cease and desist and

thenceforth abstain from charging, demanding, collecting or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to Knoxville, Tenn.; Chattanooga, Tenn.; Rome, Ga.; Atlanta, Ga.; Meridian, Miss.; Birmingham, Ala.; Anniston, Ala., or Selma, Ala., than is below specified in cents per hundred pounds under said numbered classes respectively and set opposite to said points of destination — that is to say:

On shipments of freight from Cincinnati —

To —	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville	53	45	37	27	22	20
Chattanooga...	60	54	40	30	24	22
Rome	75	64	54	44	34	24
Atlanta.....	86	73	60	45	35	27
Meridian	114	98	80	62	49	38
Birmingham...	87	74	60	46	36	28
Anniston	86	73	60	45	35	27
Selma	108	92	78	60	48	36

On shipments of freight from Chicago —

To —	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville	93	79	62	44	37	32
Chattanooga...	100	88	65	47	39	34
Rome	114	97	79	61	49	38
Atlanta.....	126	107	85	62	50	39
Meridian	114	98	82	60	47	38
Birmingham...	111	95	72	52	44	34
Anniston	126	107	85	62	50	39
Selma.....	128	112	89	66	53	38

Argument for Appellant.

"And said defendants and each of them are also hereby notified and required to further readjust their tariffs of rates and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

"And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce."

The railroad companies having failed to comply with the order, the Interstate Commerce Commission instituted this suit in the Circuit Court of the United States for the Southern District of Ohio to compel obedience thereto. The court upon a hearing entered a decree dismissing the bill (76 Fed. Rep. 183), from which decree an appeal was taken to the Court of Appeals, and that court, reciting the order, submits to us the following question: "Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth — all proceedings preceding said order being due and regular, so far as procedure is concerned?"

Mr. Harlan Cleveland for appellant. *Mr. Assistant Attorney General Whitney* filed a brief for same.

Mr. Edward Baxter for appellees.

Mr. George F. Edmunds closed for appellant.

I. The testimony before the commission completely proved the complainants' case. There was the evidence of several witnesses extensively engaged in various kinds of business, as well as railway gentlemen, showing beyond all fair dispute the unreasonableness in themselves of the rates from Cincinnati and Chicago to southern points, and also the undue pref-

erence given by the established rates to eastern cities and localities. The defendants evidently intended to lie by, as their custom had been, but they did introduce one or two witnesses whose testimony rather tended to support than to rebut the complainants' evidence; and the written documents of their agreements and proceedings furnish the key to the whole of the concerted tyranny that was established by the Southern Railway and Steamship Association and its allies.

There is submitted herewith a memorandum of the points of the testimony adduced before the commission and of that adduced in court, including that in the private suit of *Shinkle et al.*, which is in by stipulation, which may be useful as a reference index. A few tables and documents are also collated. The proceedings of the commission are a part of the bill of complaint.

II. As to the powers of the commission:

The United States may institute *direct* proceedings for the enforcement of its provisions *and* for punishment. These are two distinct powers. The first is to be exercised on notice and investigation and decision, as in any judicial tribunal; the second, in causing criminal procedure against offenders.

Suppose in this matter the commission had found on its own inquiry that section 1 had been violated by the failure of the railway to maintain "reasonable" rates, and had instituted direct proceedings in the Circuit Court to compel obedience to the requirements of that section, could not the court have power to decree the observance of the prices it should find to be reasonable? Or could it only say that the prices exacted must not be continued, and stop there? Is this at all consistent with the requirements of another section of the act, that the court shall proceed in the enforcement of it as a court of equity, and in such a manner as to do justice? Such a question furnishes, we submit, its own answer.

III. If the foregoing be true, can it be doubted that the commission, in exercising its duty in the enforcement of section 1, could require the railroad to do the same thing, and if it fail to do it, apply to this court to compel obedience?

Argument for Appellant.

IV. As to the action of the commission in trying the matter, the thirteenth section declares that any person, etc., "complaining of anything done or *omitted* to be done" may apply; whereupon the commission shall notify the carrier and call on him to satisfy the complaint, or answer. It then provides that if the carrier shall make "*reparation*," etc., no further proceedings shall be had. Does not this mean that if the carrier shall have reduced his rates to a reasonable point no further proceeding shall be had? Could it be said that the carrier had made reparation if the extortion were twenty cents a hundred and he only reduced five? Obviously not! It is clear, then, that the reparation required is the whole of that conduct which the word "reparation" principally means, and that short of doing that the proceeding shall go on, and that the commission shall have power to require *all* that the carrier is bound by law and justice to do.

The fourteenth section provides that if such reparation shall not be voluntarily made by the carrier, the commission shall decide and make "recommendation as to *what* reparation, if any, should be made." This is as clear as language can make it, that the commission is to have power to determine *what* the carrier ought affirmatively *to do*, and not merely the power to say what the carrier ought *not* to do.

The fifteenth section provides that in such a case the commission, if anything is found "to have been done or *omitted* to be done to the injury *or* damage of any person," etc., shall notify the carrier to "desist from such violation or to make *reparation* for the injury so found to have been done, or both." Here are two things that the commission is to require the carrier to do: First, to desist from violation; and, second (if he has not already desisted), to make reparation. Here again, in clear language, is authority to require not only the stopping of the existing exaction, but the affirmative action on the part of the carrier to make his conduct conform to the law. The first section says that the charge must be reasonable. The commission is to require that to be done, and of course it is impossible to decide that the carrier shall be reasonable without saying, as an inseparable part of such

a decision, what is reasonable. To stop by saying that the carrier shall be reasonable would amount in substance only to a moral lecture.

Then section 16 provides for an application to the court in cases where the carrier refuses to obey the order of the commission.

The words "lawful order" mean an order which the commission has *jurisdiction* to make. An order may be lawful and at the same time erroneous, so that if the commission made an order in a matter over which they had jurisdiction, which was merely an error in judgment, as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to "hear and determine the *matter*" — that is, the whole *subject*, "as a court of equity . . . in such manner as to do *justice* in the *premises*" — that is, complete justice in the whole premises. Premises is not merely the particular order that the commission have made, but it is the whole subject that had been duly brought before the commission and on due notice and hearing had been acted upon. It is that duty which rested with the Circuit Court which is now imposed upon this court.

V. All the preceding action described is not "fixing rates" in the sense that state commissioners of railways are authorized by their legislatures to establish general rates for all classes and for all railways, as is contended for by the defendants. We make no such claim. The action of the commission and the action of this court on what is really an appeal from and a review of the judgment is the trial and determination of a particular case and determining for that particular case what the conduct of the carrier shall be in respect of the particular dispute involved in it. It is the exertion of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general. If this distinction be observed, there is no difficulty whatever. This is precisely in accord with what Justice Shiras said. After stating what had happened before the commission, and stating that in the Circuit Court evidence was introduced which had not been laid before the commission, showing that the rate to Birmingham had been forced

down by the coming in of a new competitive road, and that the Circuit Court had thereupon found that the evidence was sufficient to overcome the findings of the commission, and that the rate complained of was not unreasonable; and after stating that the Circuit Court of Appeals had adopted the views of the Circuit Court in respect of the reasonableness of the rate from Cincinnati to Atlanta, and "as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact," he then condemned the conduct of the carriers in lying by. He then says, "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel." He says, "We do not find any provision of the act which expressly or by necessary implication confers such power," and so forth. He then says, "The reasonableness of the rate in a given case depends on facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fix a rate, that rate is prejudged by the commission to be reasonable." In this proposition we entirely concur, but in this case the identical question was raised by the petitions, an issue was made, evidence was taken on both sides, and the facts found, so that the sum fixed as reasonable by the commission was not prejudged. And he adds that, "subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law." Here, again, it will be seen that reasonableness and unreasonableness, justice and injustice, preference, advantage, prejudice, disadvantage, are the very subjects that he says are within the competence of the commission to determine. If the Supreme Court had been of opinion that the action of the commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power,

they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirm the judgment of the Circuit Court and the Court of Appeals upon the express ground that the commission was in error in its finding of fact.

VI. Section 3 provides against "any undue or unreasonable preference or advantage to any . . . locality, or any particular description of traffic," etc.

Section 3 is to be *enforced by the commission.* How is this *possibly* to be done otherwise than by commanding *action* by their carriers suited to the nature of the case, so as to obliterate the whole "undue preference," etc.? And how possibly otherwise can "*reparation*" be made to a "locality"? Reparation means "restoration" of the right.

VII. The Circuit Court had full power to decree what the commission ought to have required in any case within its jurisdiction, and this is precisely what the Court of Appeals did, and what the Supreme Court affirmed in the *Social Circle case.* In the present case the commission ordered two things: First, that the defendants desist from charging their then existing prices, and, second, that the defendants do not charge more than a named price, which the commission found to be reasonable and non-preferential. If what the commission thus decided was right upon the whole facts of the case as they now appear, where is the want of power in this court to affirm their judgment; or, if the commission was wrong in degree, why has not this court, under the positive command of the statute to do justice in the premises, the power to say what ought to be done? It is the duty of the courts to endeavor, so far as the language of the act will allow, to execute its spirit and purpose. The act is in all civil respects a remedial act, and is therefore entitled to be liberally construed, if a liberal construction to effect its purpose be necessary. But in this case we need invoke no such principles, for, we submit, the language of the act is clear.

VIII. Every essential and nearly every primary fact found by the commission is really unchallenged, and, if challenged, is clearly supported by the whole tenor of the oral and documentary evidence. Only the conclusion of unrea-

sonableness in price and the conclusion of undue preference are disputed.

The fundamental and detailed circumstances of the whole case were developed before the commission. Witnesses were examined and documents produced on both sides. The additional evidence does not change any of the facts and circumstances appearing before the commission. There are discussions and speculations and opinions in abundance from the defendants' witnesses, speaking under the strongest bias.

By their own account of the conduct of their own lines toward each other they are in the frequent habit of exercising bad faith and doing secretly what they had solemnly engaged they would not do. Testimony from such sources (particularly mere opinions) is not entitled to much consideration against the great leading facts of the railway and steamship association contract and the contrivances attending them and their conduct appearing in the case.

The evidence of the complainants' witnesses before the commission shows distinctly the unreasonableness of the prices, and *very* distinctly the undue preference for eastern territory accomplished by the association contract and by the territorial lines which the carriers will not allow to be crossed.

The unreasonableness of the prices was attempted to be defended by the defendants' witnesses on the ground that the lines north of the Ohio fix their own rates and the lines south of the Ohio fix theirs, and that the shippers had no right to look at the distances, etc., traversed by the lines on both sides of the Ohio as one system. This contention is exploded by the decision in the *Social Circle case*, where it was held that if the carriers went into the business of through traffic at all, the reasonableness and so forth of the whole rate from the point of shipment to the point of destination was to be considered together.

In spite of the assertions of some of the defendants' witnesses that distance has nothing to do with the fixing of prices for carriage, it appears from their own testimony, as well as all the other evidence, that in every transaction

between themselves and in every aspect of carriage their results, divisions of receipts, and their management are based almost, if not quite, entirely upon that very thing. And in the internal considerations of every company we find that they make up their conclusions of gain or loss from statistics and accounts kept in respect of distance and mileage, and so forth. And it is obvious enough that the truth of the cost and profit of their operations can be ascertained only in that way, and out of that what the carrier may consider to be a reasonable price (from his point of view) for carriage is determined. We refer, as a matter of public knowledge, for illustration of this, to the printed annual reports of the Lake Shore system; and the same thing will be found in all, or nearly all, of the full and detailed printed reports of great numbers of railways of the country.

Applying these principles and practices to the case in hand, we will take from the undisputed record a single illustration to show the enormous disparity between the eastern and western traffic, based on the railway's own established constructive mileage:

New York to Knoxville: Constructive miles, seven hundred and sixty-three; rate, one hundred cents per one hundred pounds; equals thirteen one-hundredths of a cent per mile.

Chicago to Knoxville: Five hundred and sixty miles; rate, one hundred and sixteen cents per one hundred pounds; equals twenty one-hundredths of a cent per mile.

Cincinnati to Knoxville: Two hundred and ninety miles; rate, seventy-six cents per one hundred pounds; equals twenty one-hundredths of a cent per mile.

On the New York rate the rate from Chicago to Knoxville would be seventy-three and eight-tenths cents per one hundred pounds instead of one hundred and sixteen cents per one hundred pounds.

All the details of rates prove in general the same great disparity.

Again, the eastern distance is only computed from New York, so that the whole great territory to the north and east of New York gets the same rate that New York itself does.

This operates in respect of a great many articles to give the territory one hundred or more miles further from the points of delivery that much greater advantage over the territory of which Chicago and Cincinnati are the typical points.

No witness for the defendants even has said that they cannot carry at a great profit at the prices fixed by the commission.

IX. As to the undue preference, the principal and apparently only answer that the defendants' witnesses make is that if the western rates were reduced, the eastern rates would be reduced also. If this should be so, it furnishes no reason for this court hesitating to do justice. The consequences must take care of themselves. It is monstrous to maintain that, if the carriers are compelled to do right, they will, as between themselves, proceed (in the elegant language of the defendants' counsel) "to cut each others' throats." If they do, the eastern and western territory will stand on an equality, and the rates, it may be presumed, will not then be grossly unreasonable as against the shipper.

It is earnestly contended by the defendants that such a reduction as is required by the commission will make a great diminution of revenue. This may or may not be so, but the stopping of every extortion necessarily diminishes the profits of the extortioner. It is submitted that this is no reason for the commission or this court failing to require conduct on the part of the carriers that is right in itself.

X. The real key and fortress of this whole injustice on the part of the carriers is found in the treaty between the defendant lines known as the "Southern Railway and Steamship Traffic Association Contract." An agreement to maintain certain rates, so long as they shall be reasonable and so long as they shall not make undue discrimination between persons and localities, is perfectly lawful for carriers to make; but an agreement that carriers shall divide the country or any part of it into sections and make prohibitory rates, as they themselves say they have done, on business crossing the line, establishes an absolute monopoly, and, it is submitted, is as clearly a violation of the interstate commerce law and of the

trust law as it is of the common law. This was the very purpose as well as the effect of the contract. The resolutions adopted at the meetings and by the various committees all absolutely demonstrate this purpose.

It is said by the defendants that everything must be right because manufacturers in the west have increased. This does not follow at all. Manufacturers in the west have increased in spite of the injustice of these transactions between the carriers, and these manufacturers have been compelled to find their chief market in the great and growing northwest, and have been kept out of the south in a very large degree in consequence of this monopolistic tyranny.

We refer on these subjects in general to the testimony of the complainants' witnesses, taken before the commission, and to the testimony of the defendants' witnesses: Eger, pages 197–199; Peck, page 405; Davant, page 208; Culp, page 267; Smith, page 784; and see especially complainants' witnesses before the commission: Mann, pages 16, 17; Reed, pages 16–18.

XI. The alleged water competition set up to explain the obvious inequality of eastern and western rates is completely disposed of by the value and effect of the water competition having been by the railway and water carriers themselves ascertained and defined by treating three miles of water as equal to one mile of rail transportation, and the contention that outside of that there are tramp and sailing vessels is also disposed of, though these can have no real influence upon the subject, by the testimony of one or more of the defendants' witnesses stating that they do not allow these vessels to compete for the kind of traffic that can have any play in the consideration of the present questions; and it is obvious enough that the difficulties attending shipments and unlading by tramp steamers to connect with the lines of these railways would make it impossible to accomplish anything; and as to sailing vessels, nothing but the coarsest and least valuable commodities, in respect of which time and safety play a very small part, can be carried at all.

Opinion of the Court.

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

A similar question was before us at the last term in *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, and in the opinion, on pages 196 and 197, we said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates, was mooted in the courts below, and is discussed in the briefs of counsel.

"We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

"It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

"We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of the *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 43 Fed. Rep. 37, and whose judgment was affirmed by this court, 145 U. S. 263:

"'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

The views thus expressed have been vigorously and earnestly challenged in this and in other cases argued at the present term. In view of its importance, and the full arguments that have been presented, we have deemed it our duty to reëxamine the question in its entirety, and to determine what powers Congress has given to this commission in respect to the matter of rates. The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions.

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial trans-

actions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the States of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice had been varying. It will be interesting to notice the provisions in the legislation of different States. We quote the exact language, following some of the quotations with citations of cases in which the statute has been construed:

Alabama, Code 1886, Title 12, c. 2, § 1130: "Exercise a watchful and careful supervision over all tariffs and their operations, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just."

California. In the constitution, going into effect January 1, 1880, article 12, sec. 22: "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make."

Florida, Session Laws 1887, c. 3746, § 5: "Make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this State, on the railroads thereof." *Railroad Commissioners* v. *Pensacola & Atlantic Railroad*, 24 Florida, 417.

Georgia, Code 1882, c. 7, § 719: "Make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof." *Georgia Railroad* v. *Smith*, 70 Georgia, 694.

Illinois, Statutes 1878 (Underwood's Edition), c. 114, § 93: "To make, for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable

maximum rates of charges for the transportation of passengers and freights on cars on each of said railroads."

Iowa, Laws 1888, p. 42: "Make for each of the railroad corporations, doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads." *Burlington &c. Railway* v. *Dey*, 82 Iowa, 312.

Minnesota, Laws 1887, c. 10, § 8: "In case the commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power, and is hereby authorized and directed to compel any common carrier to change the same and adopt such rate, fare, charge or classification as said commission shall declare to be equal and reasonable." *State* v. *Chicago, Milwaukee &c. Railway*, 40 Minnesota, 267.

Mississippi, Laws 1884, c. 23, § 6: "Shall so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances and equipments, . . . and to increase or reduce any of said rates according as experience and business operations may show to be just."

New Hampshire, Laws 1883, c. 101, § 4: "Fix tables of maximum charges for the transportation of passengers and freight upon the several railroads operating within this State, and shall change the same from time to time, as in the judgment of said board the public good may require; and said rates shall be binding upon the respective railroads." *Merrill* v. *Boston & Lowell Railroad*, 63 N. H. 259.

North Dakota, Laws 1890, p. 354: "In case the commissioners shall at any time find that any part of the tariffs of rates, fares, charges or classifications, so filed and published, as herein provided, are in any respect unequal or unreasonable, they shall have the power and are hereby authorized and directed to compel any common carrier to change the same and adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable."

South Carolina, Laws 1888, p. 65: "Authorized and required to make for each of the railroad corporations doing

business in this State, as soon as practicable, a schedule of reasonable and just rates of charges for the transportation of freights and cars on each of said railroads."

On the other hand in —

Kansas, Laws 1883, c. 124, section 11, reads:

"No railroad company shall charge, demand or receive from any person, company or corporation, an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad company. And upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and if sustained shall make a certificate under their seal, setting forth what is a reasonable charge for the service rendered, which shall be *prima facie* evidence of the matters therein stated."

Section 18 authorized an inquiry upon the application of parties named in reference to freight tariffs and an adjudication upon such inquiry as to the reasonable charge for such freights. Section 14 required a notice of the determination to be given to the railroad company, and a communication of a failure to comply with such determination in a report to the governor; and section 19 reads:

"Any railroad company which shall violate any of the provisions of this act shall forfeit for every such offence, to the person, company or corporation aggrieved thereby, three times the actual damages sustained by the said party aggrieved, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court; and if an appeal be taken from the judgment, or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in appellate court or courts."

The effect of these provisions was to make the determination of the commission *prima facie* evidence of what were reasonable rates, and to subject the railroad company failing to respect such determination or to prove error therein to the large penalties prescribed in section 19.

KENTUCKY. The act of April 6, 1882, c. 90, § 1 (General Stat. p. 1021), provided that "if any railroad corporation shall wilfully charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State . . . it shall be guilty of extortion," etc. Further sections created a commission, and by section 19 the commissioners were authorized to hear and determine complaints under the first and second sections of this act, and upon such complaint and hearing file their award with the clerk of the Circuit Court, which might be traversed by any party dissatisfied, and the controversy thereafter submitted to the court for consideration and judgment.

MASSACHUSETTS. Pub. Stat. 1882, c. 112, § 14: "The board shall have the general supervision of all the railroads and railways, and shall examine the same." Section 15: If it finds that any corporation has violated the provisions of the act, or any law of the Commonwealth, it shall give notice thereof in writing, and if the violation shall continue after such notice shall present the facts to the attorney general, who shall take such proceedings thereon as he may deem expedient. By section 193 special authority is given to the board to revise the tariffs and fix rates for the transportation of milk. See *Littlefield* v. *Fitchburg Railroad*, 158 Mass. 1.

NEW YORK. Vol. 6, Rev. Stat. c. 39, contains the railroad law of the State. By section 157, the board of railroad commissioners "shall have general supervision of all railroads." By section 161, if in the judgment of the board it appears necessary that "additional terminal facilities shall be afforded, or that any change of rates of fare for transporting freights or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem proper"; and by section 162 "the Supreme Court at special term shall have power in its discretion in all cases of

decision and recommendations by the board which are just and reasonable to compel compliance therewith by mandamus, subject to appeal," etc.

This last section was enacted in 1892 (Laws 1892, c. 676), and prior thereto, in *People* v. *Lake Erie & Western Railroad*, 104 N. Y. 58, it was held that the judgment of the commissioners was not binding on the railroad company in respect to certain terminal facilities ordered, and could not be enforced by mandamus.

VERMONT. Laws 1886, No. 23, § 7, provided that if any railroad company "unjustly discriminates in its charges for transporting passengers or freight, or usurps any authority not granted by its charter, or wilfully refuses to comply with any reasonable recommendations of said board of commissioners, or enters into any combination or conspiracy with any other person, persons or corporation, whereby the rates of charge for transportation of freight or passengers, or the cost of commodities is unduly increased, said commissioners shall give notice thereof in writing to such corporation, or person, and if the act complained of is continued after such notice the board shall report the same to the then next session of the general assembly, and if in their judgment such action is irregular, may at any time make application to the Supreme or county court for any remedy warranted by law."

The legislation of other States is referred to in the Fourth Annual Report of the Interstate Commerce Commission, Appendix E, pages 243 and following. It is true that some of these statutes were passed after the interstate commerce act, but most were before, and they all show what phraseology has been deemed necessary whenever the intent has been to give to the commissioners the legislative power of fixing rates.

It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act. *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S.

362, 397; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649, 663; *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, 196; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 216; *Munn* v. *Illinois*, 94 U. S. 113, 144; *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, 178; *Express cases*, 117 U. S. 1, 29.

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the interstate commerce act do we find words similar to those in the statutes referred to, giving to the commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the first section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889, (25 Stat. 858,) gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that in enforcing and executing the provisions of the act it

is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges; and as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not in terms given the commission the power to determine what are just and reasonable rates for the future, yet as no other tribunal has been provided, it must have intended that the commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section commanding reasonable rates, and the twelfth empowering the commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the commission the power to prescribe any tariff and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees:

"Article II, sec. 3, of the Constitution of the United States, ordains that the President 'shall take care that the laws be faithfully executed.' The act to regulate commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce." . . .

"The first section simply enacted the common law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts 'to execute and enforce' the common law requirement that 'all charges shall be reasonable and just'; and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers."

But the power of fixing rates under the interstate commerce act is not to be determined by any mere considerations of omission or implication. The act contemplates the fixing of rates and recognizes the authority in which the power exists. Section 6 provides, among other things, "that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. . . . Such schedule shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected." . . .

"No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

"And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force.

"Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for, copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

"No advance shall be made in joint rates, fares and charges, shown upon joint tariffs, except after ten days' notice to the commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect. No reduction shall be made in joint rates, fares and charges, except after three days' notice, to be given to the commission as is above provided in the case of an advance of joint rates. The commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any

joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time.

"The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

Finally, the section provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the commission. Now, but for this act it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This section 6 recognizes that right, and provides for its continuance. It speaks of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the commission, are subject, in any way, to the latter's approval. Filing with the commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line; but further when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the commission,

and nothing but the kind and extent of publication thereof is left to the discretion of the commission.

It will be perceived that the section contemplates a change in rates either by increase or reduction, and provides the conditions therefor; but of what significance is the grant of this privilege to the carrier if the future rate has been prescribed by an order of the commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the commission.

We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by

implication carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates, is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second, the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission.

These considerations convince us that under the interstate commerce act the commission has no power to prescribe the tariff of rates which shall control in the future, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate com-

merce act, shall be secured to all shippers. It must also see that that publicity, which is required by section 6, is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. Rep. 231, 261, to both reasonableness and equality of rate as contemplated by the interstate commerce act.

We have not overlooked the statute of Nebraska, nor the decision of the Supreme Court of that State in respect thereto. This statute was approved March 31, 1887, a few weeks after the passage of the interstate commerce act (Laws Nebraska, 1887, p. 540), and was obviously largely patterned upon that act. The general obligations incorporated into that act in respect to reasonableness of rates, prohibitions of discrimination, undue preferences, etc., are all in the Nebraska statute. A commission, called "a board of transportation," is also provided for (section 11), and is charged with the general duty of enforcing the act and supervising the railroad companies in the State. Section 17, which is more full and specific than any to be found in the interstate commerce act, provides that "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. . . . It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities, . . . or against 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 change in the mode of conducting its business or operating its road is reasonable and expedient 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," etc.

In *State* v. *Fremont, Elkhorn &c. Railroad*, 22 Nebraska, 313, it appeared that the board of transportation had found that certain rates enforced upon the road of the defendant company were excessive, and that certain other rates less than those in force were reasonable and just. On application to the Supreme Court it was held that the State was entitled to a mandamus compelling obedience to such determination, the court observing, p. 329: "In the case under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the State, and, having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, therefore, to establish and regulate rates and charges upon railways within the State of Nebraska is full, ample and complete."

Without criticising in the least the logic of this decision, it is enough to say that it is based upon a section which gives wider and more comprehensive power to the supervising board than is given in the interstate commerce act to the commission, and does not justify the inference that the latter has the same power in respect to prescribing rates that by such decision was declared to belong to the Nebraska board of transportation.

Some reliance was placed in the argument on this sentence, found in the opinion of this court in *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, 196, "if the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable." And it is thought that this court meant thereby that while the commission was not in the first instance authorized to fix a rate, yet that it could, whenever complaint of an existing rate was made, give notice and direct a hearing, and upon such hearing determine whether the rate established was reasonable or unreasonable, and also what would be a reasonable rate if the one prescribed was found not to be, and that such order could be made the basis of a judg-

ment in mandamus requiring the carrier thereafter to conform to such new rate. And the argument is now made, and made with force, that while the commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and of enforcing its judgment in this respect by proceedings in mandamus.

The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted. It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms. In this connection it must be borne in mind that the commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but, under section 13, "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 14 whenever an investigation is made by the commission, it becomes its duty to make a report in writing, which shall include a finding of the facts upon which its conclusions are based, together with a recommendation as to what reparation, if any, ought to be made to any party or parties who may be found to have been injured. And by sections 15 and 16, if it appears to the satisfaction of the commission that anything has been done or omitted to be done, in violation of the provisions of the act, or of any law cognizable by the commission, it is made its duty to cause a copy of its report to be delivered to the carrier, with notice to desist, and failing that to apply to the courts for an order compelling obedience. There is nothing in the act requiring the commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case the order of the commission was directed against a score or more of companies and determined

the maximum rates on half a dozen classes of freight from Cincinnati and Chicago respectively to several named southern points and the territory contiguous thereto, so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the commission of its own motion to suggest that the interstate rates on all the roads in the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make one general order, reaching to every road and covering every rate. It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred.

Again, it is said that this court, in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, 276, declared that "the principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit," etc.; but this by no means carries with it any suggestion that the way by which unjust and unreasonable rates were to be prevented was by intrusting to the commission the power to prescribe what should be charged.

Still again, it is urged that the commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of cotemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it. And, indeed, an examination of the decisions of the commission discloses this curious fact. In the early case of *Thatcher* v. *Delaware & Hudson Canal Company*, 1 Int. Com. Com. Rep. 152, 156, a case heard and decided in July of the year in which the commission was created, the commission declined, for lack of evidence, to fix certain rates, saying: "It is therefore impossible to fix them in this case, even if the commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute."

Again, it will be perceived that nowhere in the act is there

any suggestion of a maximum or minimum rate. The first section declares that the rates shall be reasonable and just, and prohibits every unreasonable and unjust charge. Now the rate may be unreasonable because it is too low as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper. It was declared by this court in *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 597, that in determining the question of reasonableness "its duty is to take into consideration the interests both of the public and of the owner of the property"; but in the matter of the *Chicago, St. Paul & Kansas City Railway*, *supra*, the commission held that it had no power to order rates to be increased upon the ground that they were so low that persistence in them would be ruinous. The opinion in that case, prepared by Commissioner Cooley, and with his usual ability, while seeking to prove that under the provisions of the statute the commission has no power to prescribe a minimum or to establish an absolute rate but only to fix a maximum rate, goes on further to show how the operation of other provisions of the act tend to secure just and reasonable rates. Were it not for its length, we should be glad to quote all that he says on the subject. We think that nearly all of the argument which he makes to show that the commission has no power to fix a minimum or establish an absolute rate, goes also to show that it has no power to prescribe any tariff, or fix any rate to control in the future.

Our conclusion then is that Congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

Syllabus.

The question certified must be answered in the negative, and it is so ordered.

MR. JUSTICE HARLAN dissented.

SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY *v.* FLORIDA FRUIT EXCHANGE. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. No. 141. Argued November 5, 1896. Decided May 24, 1897. MR. JUSTICE BREWER delivered the opinion of the court. The conclusions announced in the case just decided dispose of this; and for the reasons stated in that opinion, the judgment of the Court of Appeals is reversed, and the case remanded to the Circuit Court, with instructions to enter a decree for the defendant, dismissing the bill without prejudice.

MR. JUSTICE HARLAN dissented.

Mr. John E. Hartridge for appellant. *Mr. R. G. Erwin* was on the brief.

Mr. Charles M. Cooper for appellee.

WIGHT *v.* UNITED STATES.

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

No. 494. Argued November 5, 6, 1896. — Decided May 24, 1897.

Hauling goods on the Pittsburgh, Cincinnati and St. Louis Railroad from Cincinnati to Pittsburgh and delivering them to a consignee in his warehouse from a siding connection, and hauling similar goods for him from and to the same cities on the Baltimore and Ohio Railroad, and delivering them to him from the station of that road in Pittsburgh, there being no siding connection, is transportation "under substantially similar circumstances and conditions," within the meaning of section 2 of the interstate commerce act of February 4, 1887, c. 104; and a rebate allowed him by the Baltimore and Ohio road to compensate for cartage to his warehouse is a discrimination against other shippers over that road to whom no rebate is allowed.

Whether the same words as used in section 4 of that act have a broader meaning or a wider reach than they do as used in section 2, is not determined.

Statement of the Case.

SECTION 2 of the interstate commerce act reads:

"That 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 or less 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 conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Act of February 4, 1887, c. 104, 24 Stat. 379.

Section 10 of the act as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, makes the violation of any of the provisions of the act a misdemeanor and subject to punishment. On October 8, 1894, an indictment was found in the District Court of the United States for the Western District of Pennsylvania, charging the defendant with a violation of said section 2. The trial resulted in a verdict and judgment against him, to reverse which this writ of error was sued out.

In their brief his counsel make this statement of facts:

"The undisputed facts proved in evidence are as follows: F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburgh; he purchased his beer in Cincinnati in carload lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburgh, Cincinnati and St. Louis Railroad Company, known as the 'Pan-handle,' and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-handle Railroad for this service from Cincinnati to the warehouse was fifteen cents per hundred pounds. The station of the Baltimore and Ohio Railroad Company in Pittsburgh was

at some distance from Bruening's warehouse, and there was no track connection between the Baltimore and Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore and Ohio route it was necessary to haul it in wagons from the Baltimore and Ohio station to the warehouse. The rate charged by the Baltimore and Ohio route between Cincinnati and Pittsburgh, on beer in carloads, was likewise fifteen cents per hundred pounds.

"In the month of June, 1892, agents of the Baltimore and Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with Mr. Bruening, by which it was agreed that, if Bruening would ship his beer via the Baltimore and Ohio route from Cincinnati to Pittsburgh, the railroad company would make the same delivery at the door of his warehouse that was made by the Pan-handle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterward, it was found that the cost to the railroad company for this hauling would be three and one half cents per hundred pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August and September, 1892. During these months Bruening made large shipments of beer in carloads via the Baltimore and Ohio route, paid the charge of fifteen cents per hundred pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for three and one half cents per hundred pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening; it was not questioned that the three and one half cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Pan-handle Railroad, and at the same charge of fifteen cents per hundred pounds.

"During the continuance of this arrangement with Bruening,

as shown in the evidence, the Kaufman Brewing Company of Cincinnati made several shipments of beer in carloads by the Baltimore and Ohio route, on bills of lading in the form shown at pages 73, 74 and 75 of the record. Each of these shipments was consigned to the 'Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburgh, Pa., to order of shipper,' and was taken at the fifth class rate of fifteen cents per hundred pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburgh, whose warehouse was near the station of the Baltimore and Ohio Railroad Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and, on presenting it and paying fifteen cents per hundred pounds, received the beer, which he hauled to his warehouse at his own expense."

Mr. Hugh L. Bond for plaintiff in error. *Mr. John K. Cowen* was on his brief.

Mr. Assistant Attorney General Whitney for defendants in error.

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

Accepting the statement of facts made by the defendant as correct (and there is nothing in the statement which makes to his prejudice, or omitted from that statement which would be to his advantage), we are of opinion that the verdict and judgment were right, and must be sustained. It is unnecessary to consider all the instructions given and those refused, or determine whether in those given there may or may not be some language open to criticism. In its general charge the court narrowed the case to the facts which, as stated by

counsel, are undisputed, and correctly stated the law applicable to those facts. Indeed, while the question of guilt or innocence was submitted to the jury and passed upon by them, it is one rather of law than of fact, and if the court properly stated the law applicable to the facts, then the verdict was right and ought to be sustained. With reference to all other matters it is enough to say that our attention is called to no errors in the admission of testimony, and we see nothing in the instructions asked and given or asked and refused which could injuriously affect the rights of the defendant or limit the specific interpretation by the court of the rules of law applicable to those facts.

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore and Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which for fifteen cents per hundredweight it would bring the beer from Cincinnati and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him three and one half cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for fifteen cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburgh, and charging him fifteen cents therefor. Mr. Wolf had no siding connection with the rival road, and, therefore, had to pay for his cartage by whichever road it was carried. His warehouse was in a direct line 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore and Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to

Mr. Wolf, because he would have to go to the expense of carting by whichever road he transported; that, therefore, the traffic was not "under substantially similar circumstances and conditions" within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore and Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the fifteen cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether if one shipper has a siding connection with the road of a carrier it cannot run the cars containing such shipper's freight on to that siding and thus to his warehouse at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid fifteen cents a hundred; the other, in fact, but eleven and a half cents. It is true he formally paid fifteen cents, but he received a rebate of three and a half cents, and regard must always be had to the substance and not to the form. Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback or other device" to charge, demand, collect or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the

statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is

Affirmed.

Mr. Justice White concurs in the judgment.

CAMFIELD *v.* UNITED STATES.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 278. Submitted April 20, 1897. — Decided May 24, 1897.

The act of February 25, 1885, c. 149, 23 Stat. 321, is within the constitutional power of Congress to enact, and is valid.

The Government of the United States has, with respect to its own lands within the limits of a State, the rights of an ordinary proprietor to maintain its possession, and to prosecute trespassers; and may legislate for their protection, though such legislation may involve the exercise of the police power; and may complain of and take steps to prevent acts of individuals, in fencing in its lands, even though done for the purpose of irrigation and pasturing.

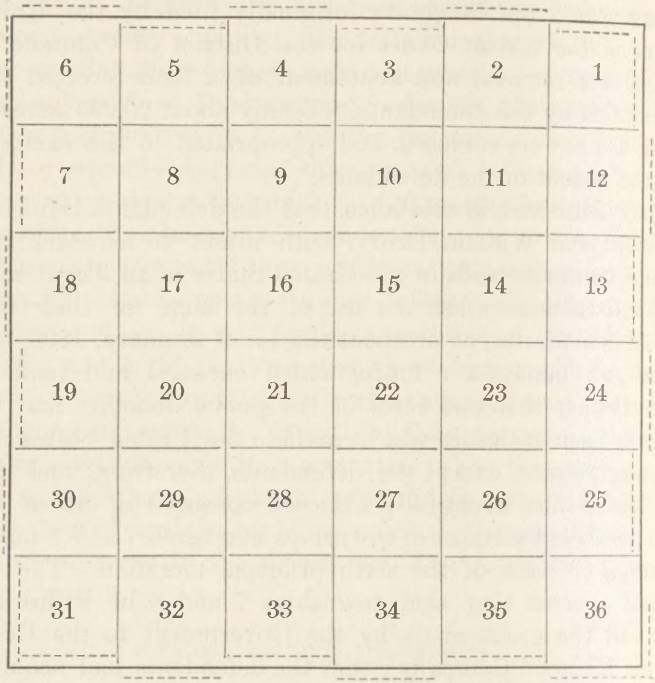
Statement of the Case.

THIS was a bill in equity, originally filed by the United States in the Circuit Court for the District of Colorado, to compel the removal and abatement of a fence erected and maintained by the defendants, whereby about 20,000 acres of public lands were enclosed, and appropriated to the exclusive use and benefit of the defendants.

The bill averred, in substance, that the defendants Daniel A. Camfield and William Drury, with intent to encroach and intrude upon the lands of the United States in an illegal manner, and to monopolize the use of the same for their own special benefit, did, on or about the 1st of January, 1893, construct and maintain a fence, which enclosed and included about twenty thousand acres of the public domain; that the effect of such enclosure was to exclude the United States and all other persons, except the defendants, therefrom; and that the lands thus wrongfully enclosed consisted of all of the even-numbered sections in townships numbered 7 and 8 north, of range 63 west, of the sixth principal meridian. The bill further averred that said townships 7 and 8 lie within the limits of the grant made by the Government to the Union Pacific Railroad Company; that the defendants had acquired from said railroad company the right to use all the odd-numbered sections of land which lie within said townships 7 and 8 and outside thereof, immediately adjacent to the even-numbered sections lying within and on the margin of said townships, and that, in building the fence complained of, the defendants had constructed it entirely on odd-numbered sections, either within or without townships 7 and 8, so as to completely enclose all of the government lands aforesaid, but without locating the fence on any part of the public domain so included.

The subjoined diagram of one township will serve to illustrate the manner in which the fence was constructed so as to enclose the even-numbered sections. The fence is indicated by the dotted lines.

Statement of the Case.



The defendants admitted by their answer that they had constructed a fence so as to enclose all of the even-numbered sections in townships 7 and 8 substantially as set out above in the plaintiff's complaint, save and except that at each section line a swinging gate had been placed to afford access to so much of the public domain as was enclosed by the aforesaid fence. By their answer the defendants sought to justify the erection of the fence in question, upon the ground that they owned all the odd-numbered sections in townships 7 and 8, and that they were engaged in building large reservoirs for the purpose of irrigating the land by them owned, and much other land in that vicinity. They averred that, in carrying out such irrigation scheme, they found it necessary to fence their lands in townships 7 and 8, in the manner above described. They also denied that they had any intention of monopolizing the even-numbered sections enclosed by said

fence or to exclude the public therefrom; and further averred, in substance, that the work in which they were engaged was of great importance and utility, and would redound to the great advantage of the United States and its citizens.

An exception was filed to the answer upon the ground that it was insufficient to constitute a defence to the bill. This exception was sustained, 59 Fed. Rep. 562, and, as the defendants declined to plead further, a decree was entered in favor of the Government, from which decree the defendants appealed to the Court of Appeals, which affirmed the judgment of the Circuit Court. 32 U. S. App. 42, 123. Whereupon defendants appealed to this court.

Mr. James W. McCreery, *Mr. Charles W. Bates* and *Mr. C. W. Bunn* for appellants.

Mr. Solicitor General for appellees.

Mr. Justice Brown delivered the opinion of the court.

This case involves the construction and application of the act of Congress of February 25, 1885, c. 149, entitled "An act to prevent unlawful occupancy of the public lands." 23 Stat. 321. The first section of the act reads as follows:

"That all enclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the enclosure the person, party, association or corporation making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden and prohibited; and the assertion of a

right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title or asserted right, as above specified as to enclosure, is likewise declared unlawful and hereby prohibited."

By section 2 of said act, it is made the duty of the district attorney of the United States for the proper district, when complaint is made to him by affidavit by any citizen of the United States, that section 1 of the act is being violated, to institute a civil suit in the name of the United States in the proper United States District or Circuit Court against the person or persons in charge of or controlling the unlawful enclosure complained of. By this section jurisdiction is also conferred upon any United States District or Circuit Court, or territorial District Court having jurisdiction over the locality where the land enclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of the act. It is also made the duty of said courts in case any enclosure shall be found to be unlawful, to make the proper order, judgment or decree for the destruction of the same, in a summary way, unless the enclosure shall be removed by the parties complained of within five days after they are ordered to do so.

Defendants are certainly within the letter of this statute. They did enclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith under the general laws of the United States. The defence is in substance that, if the act be construed so as to apply to fences upon private property, it is unconstitutional.

There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: *Sic utere tuo ut alienum non lædas.* His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since *Aldred's case*, 9 Coke, 57, it has been

the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.

It is true that a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor; and, that in this particular, the law takes no account of the selfishness or malevolence of individual proprietors; *Mahan* v. *Brown*, 13 Wend. 261; *Chatfield* v. *Wilson*, 28 Vt. 49; *Frazier* v. *Brown*, 12 Ohio St. 294; *Pickard* v. *Collins*, 23 Barb. 444; *Clinton* v. *Myers*, 46 N. Y. 511; *Phelps* v. *Nowlen*, 72 N. Y. 39; *Walker* v. *Cronin*, 107 Mass. 555, 564, although there are many strong intimations to the contrary.

But the injustice of the prevailing doctrine upon this subject, in its practical operation, became so manifest that, in 1887, the legislature of Massachusetts passed a statute declaring that any fence "unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," should be deemed a private nuisance, and that any such owner or occupant who was thereby injured in his comfort, or in the quiet enjoyment of his estate, might have an action of tort for the damage. The constitutionality of this statute was attacked in the case of *Rideout* v. *Knox*, 148 Mass. 368, but upon full consideration, the Supreme Judicial Court was of opinion that the statute was within the limits of the police power, and was constitutional; and, although the fence was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit, beyond which it was not lawful to go. The court also held the statute to be constitutional with refer-

ence to fences already in existence when the act was passed; that although it involved, to a certain extent, the taking of property without compensation, yet "having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value," the court was of opinion that the act was constitutional to the full extent of its provisions. The case is authority for the proposition that the police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests. Apparently the principal doubt entertained by the court was whether the maintenance of a private fence could be said to be "injurious to the public at large," but it seems to have been of opinion that such a nuisance might give rise to disputes and bickerings prejudicial to the peace and good order of the community.

While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preëmption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

But the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to

exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all enclosures of public lands, and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all "enclosures" of public lands, by whatever means, that the act becomes of any avail. The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, they are manifestly intended to enclose the Government's lands, though, in fact, erected a few inches inside the defendants' line. Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives

it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to enclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands; and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands, that the portion sold and granted by the Government cannot be enclosed by the purchasers without embracing also in such enclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the odd-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the Government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.

The Government has the same right to insist upon its proprietorship of the even-numbered sections that an individual has to claim the odd sections, and if such proprietor would have the right to complain of the Government fencing in his lands in the manner indicated and leasing them for pasturage, the Government has the same right to complain of a similar action upon his part. If there be any general impression that in dealing with public lands the rights are altogether those of the individual proprietors, and that such rights as the Government has exist only by their sufferance, the act in question will do much to rectify this misapprehension.

Opinion of the Court.

These grants were made in pursuance of the settled policy of the Government to reserve to itself the even-numbered sections for sale at an increased price; and if the defendants in this case chose to assume the risk of purchasing the odd-numbered sections of the railroad company for pasturage purposes, without also purchasing or obtaining the consent of the Government to use the even-numbered sections, and thereby failed to derive a benefit from the odd-numbered ones, they must call upon their own indiscretion to answer for their mistake. The law and the practice of the Government were perfectly well settled, and if it had chosen in the past to permit by tacit acquiescence the pasturage of its public lands, it was a policy which it might change at any moment, and which became the subject of such abuses that Congress finally felt itself compelled to pass the act of February 25, 1885, and thereby put an end to them. It was not intended, however, to prohibit altogether the pasturage of public lands, or to reverse the former practice of the Government in that particular. Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured may not be still pursued, provided herdsmen be employed, or other means adopted by which the fencing in and the exclusive appropriation of such land shall be avoided. The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the Government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and were bound to avoid obstructing or embarrassing it in such disposition. If practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the Government in their appropriation of public lands, had acquired a title to them as against every one except the Government, and perhaps even against the Government itself.

It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the Government from the even-

numbered sections, since this was a contingency which the Government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large. It may be added, however, that this is scarcely a practical question, since a separate enclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section.

It is equally immaterial that the defendants have undertaken to build large reservoirs for water to be supplied for the irrigation of its lands, or that they have proceeded in accordance with the act of Congress in acquiring the necessary sites to be used in the construction of such reservoirs, or that they have expended large sums of money in providing for this improvement. If they have enclosed the public lands in violation of the statute it is no answer to say that they have enclosed them for irrigating as well as for pasturage purposes. The violation of the statute is none the less manifest from the fact that the defendants had an ulterior purpose, or a purpose other than that of pasturage.

We are of opinion that, in passing the act in question, Congress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property; that the act is valid, and that the judgment of the Circuit Court of Appeals must be

Affirmed.

WHITNEY *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 271. Argued April 9, 1897. — Decided May 24, 1897.

The claimants have not made out their case by a fair preponderance of evidence, or such weight of testimony as is necessary to establish their title to this large tract of land.

This was a petition by Joel Parker Whitney and others filed in the Court of Private Land Claims for the confirmation of what is commonly known and called the "Cañada de Cochiti grant," containing over 100,000 acres, and situated on the Rio Grande River, in the county of Bernalillo, Territory of New Mexico. On the day following, Manuel Hurtado and José Antonio Gallegos filed a suit against the United States for the confirmation of the same land, claiming under the same title. It appearing to the court that these two suits were for the same property and under the same original title, the court ordered them to be consolidated, and to proceed as one cause.

The petition set forth that, on the 2d of August, 1728, the King of Spain, by Juan Domingo de Bustamente, governor of the Royal Province of New Mexico, upon the petition of one Antonio Lucero, made a grant of a certain tract of land, bounded and described as follows: On the north by the old pueblo of Cochiti; on the east by the Rio del Norte (otherwise called the Rio Grande); on the south by the lands of the Cochiti Indians, and on the west by the Jemez Mountain, with its entrances and exits, watering places, uses and customs. That the granting decree for said land was signed by the governor on said date, and countersigned by Antonio de Cruciaga, his secretary of state and war, and it directed that the grantee should be placed in royal and personal possession under the boundaries described in said petition, and under the conditions prescribed by the royal ordinances in that behalf as to the settlement of the same. It also directed that, after the possession of the land had been given to the grantee, the original

expediente should be returned to the governor, to the end that duplicates thereof might be given to the grantee; that in execution of said decree, Captain Andres Montoya, chief alcalde of the pueblos of Cochiti, Santo Domingo and San Felipe, gave to the said Lucero juridical possession of the land on August 6, 1728, executing and delivering the act of juridical possession on the premises in due form of law in the presence of his attending witnesses.

The petition also alleged that the granting decree and act of juridical possession were returned to the governor and placed in the royal archives of Santa Fé, New Mexico, and that a *testimonio*, or duplicate thereof, was delivered to the grantee; and that the said *testimonio* was not in the possession, custody or control of the petitioners, but that the same was deposited in the governmental archives at Santa Fé upon the cession of New Mexico to the United States, and has ever since been in its custody.

It was also alleged that Antonio Lucero settled upon, occupied, improved, enlarged and claimed the land in fee simple openly, continuously and uninterruptedly from the date of the act of possession, August 6, 1728, for a period much longer than four years, and up to the time of his death, and that he died fully seized and possessed of the same; that his heirs-at-law and legal representatives have ever since continued under the same claim of title, peaceably occupying and possessing the same, save only in the year 1785, when it was intruded upon by one Antonio Gallego, a lieutenant in the military service at the place called Cañada del Medio, under pretence of authority from Governor de Anza to occupy and use the cañada for the pasturage of the royal cavalry; whereupon, in the month of November, 1785, Antonio Lucero de Godoi and numerous others, descendants and heirs-at-law of said original grantee, presented their petition to Antonio de Armenta, chief alcalde and war captain, having, as alleged, judicial and administrative jurisdiction in the premises, complaining of the said intrusion by the lieutenant, Gallego, and asking for relief in the premises. It was alleged that, in view of said petition, Armenta, the said chief alcalde, reported said petition and the

subject-matter thereof to the governor; and, upon due consideration of the petition, the governor found and determined, and so declared in substance to the chief alcalde and war captain, that, inasmuch as the petitioners were in all respects the legal heirs of the said tract of land, they were entitled to occupy the same in preference to any other individuals, and the said intrusion by the said Lieutenant Gallego was unjust and unfounded.

That thereupon the chief alcalde and war captain, under full authority in that behalf conferred upon him by the said governor, duly made his order and judgment, reciting the petition, report to the governor, and the determination of the superior authority thereon, adjudging and declaring that the said order and judgment, being an instrument in writing signed by the said chief alcalde and his witnesses, should remain as conclusive evidence of the rightful title of the said heirs to the said land granted and its rightful acquisition by them and their descendants from the King of Spain; and by the said instrument the said alcalde, in the exercise of the judicial jurisdiction legally vested in him, declared that the same should remain before any tribunal as evidence for all time of the title of the heirs to the tract of land granted.

That the originals of said petition and adjudicatory instrument were in the possession of the respondent and kept in the archives at Santa Fé;

That the petitioners are interested in said tract under the original grantee by divers mesne conveyances from his heirs and legal representatives; and

That all conditions, precedent and subsequent, of the grant at any time incumbent upon the said grantee, his heirs or assigns, have been fully performed and discharged.

The answer of the United States put in issue the allegations of the petition generally, and specifically denied that the alleged granting decree and act of possession were returned to the governor and placed in the royal archives at the city of Santa Fé, New Mexico; denied that a *testimonio* or duplicate thereof was delivered to the said original grantee under and by virtue of the direction of the governor; denied that

the alleged *testimonio* or duplicate was ever placed in the governmental archives at Santa Fé upon the cession of New Mexico to the United States, for the reason that there was no necessity for nor any law authorizing the same, but that the owners or alleged owners of the grant were the only proper custodians of said alleged *testimonio*. It denied specifically that Lucero ever entered upon the tract of land sued for, and occupied or appropriated the same, as alleged in said petition, for the reason that it was impossible and impracticable for him so to do, because, under the conditions of the country at the time and for more than a century thereafter, it was impossible for Lucero or any one else to occupy, appropriate, or use, directly or indirectly, the grant described in the petition; all of which Lucero knew at the time he applied for said grant.

As to the allegation that, in 1785, Antonio Gallego intruded upon the Cañada del Medio, an alleged portion of said tract, upon the pretence that he had authority from the governor to use the same for the pasturage of the royal stock, the Government alleged that it had no knowledge or information; nor as to whether in said year Antonio Lucero de Godoi and others, claiming as descendants of Lucero, presented a petition to Armenta, chief alcalde, complaining of said intrusion, and asking for an investigation of the same or for relief. Nor had it any knowledge or information as to whether Antonio Armenta, alcalde, reported said petition or the subject-matter thereof to the governor of New Mexico; nor as to whether, in passing on said matters, the said alcalde had any authority to act in that behalf under the authority of said governor; nor as to whether said alcalde undertook to make a finding in said matter; nor as to whether he undertook to or did attempt to make the allegation set forth in the petition; but it was alleged that if he did do so, the same was without warrant or authority of law, and without any direct order from the governor, and that the said alcalde had no power or authority in that behalf except such as might be conferred upon him for that purpose by direct order of the governor of the province, and the Government therefore denied that said

alcalde had jurisdiction in the premises, and denied that any jurisdiction was shown in that behalf.

It denied that the originals of said petition and adjudicatory instrument, dated in the year 1785, before referred to, were or ever had been in the said archives; and alleged that if the same were in the possession of the surveyor general they were filed with him under the law of July 22, 1854, which provided for the adjustment of private land claims in the Territory of New Mexico, and that they never constituted part of the archives of the Spanish or Mexican Governments; that no action was ever taken upon said alleged acts of said justice by the governor of the province; and, therefore, it constituted neither adjudication nor admission on the part of the Spanish Government, but was simply an unauthorized and unapproved act of an alcalde.

Further answering, the Government alleged that the petition by Antonio Lucero was one for a small piece of land on which to cultivate ten fanegas of wheat and two of corn, and to pasture small stock and horses; that the boundaries designated in said petition were only to indicate the district of country within which said small piece of land was located; that in acting upon said petition, if he ever did, the said governor did not make a grant, but specially reserved that act until after the alcalde should have placed the petitioner in possession of the property and returned the *expediente* to him for final action, which was never done, and, therefore, no grant, either legal or equitable, was ever made.

Upon a hearing upon pleadings and proofs the Court of Private Land Claims was of opinion that the petitioners were not entitled to the grant to the full extent demanded of 104,554.24 acres, but that they were entitled to a grant of land "bounded on the north by the old pueblo of Cochiti, which is situated on the mesa of Cochiti on the south side of the cañada of Cochiti, which point is about eight thousand one hundred and ninety feet in a northerly direction from the northwest corner of the lands of the Indians of the pueblo of Cochiti, as the same has been fixed and determined by the survey and patent of the same by the United States of Amer-

ica; on the east by the Rio del Norte (otherwise called the Rio Grande); on the south by the lands of the Cochiti Indians, as the same has been fixed and located by the survey and patent thereof to the Indians of the pueblo of Cochiti by and under the authority of the United States of America, and on the west by the same old pueblo first above referred to as the northern boundary of the grant hereby confirmed, which said grant of lands contains in area about five thousand acres of land"; and that such claim was entitled to confirmation in the name of the original grantee, Antonio Lucero, for the use and benefit of all parties in interest, claiming by, through or under him, by the same title. Whereupon petitioners prayed and were allowed an appeal to this court.

Mr. John H. Knaebel for appellants.

Mr. Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

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

Some difficulty in this case arises from the mutilated and fragmentary condition of the original petition in Spanish, and the grant of the land prayed for, purporting to be of the same date, and supposed to have been made by Bustamente, Governor and Captain General of New Mexico. The original petition as it now appears, reads as follows, the stars indicating the illegible portions:

"Antto. Lusero * * querque ante * * resco por aqu * * que el derech * * por quanto * * familia y no * * ante V. SSa. * * so de tierra * * en la Mesa de Cochiti donde estubieron retirados los indios que se sublebaron para en el sembrar i cabra [labrar] en dicho pedaso de tierra, dies anegas de trigo y dos de mais, y para apastar mi ganado menor y Cavallada, y luida dicha tierra por la parte del norte con el Pueblo Viejo de Cochiti, y por el oriente con el Rio del Norte,

y por el Sur con tierras de las naturales dicho pue * * el poniente con * * de Xemes con sus * * salidas abreva * * y Servidumbres * * lo en perjuisio de * * de serbir V. SSa. de * * ersed en nombre * * gestad por todo * * lico provea y mau * * do que resivire * * rsed y juro por Dios Nuestro Señor no ser de malicia en lo necesario &a.

"Annto. Lucero."

The description of the land prayed for, which is the only part of the petition material to this case, may be represented in translation as follows:

"* * cel of land * * on (or at) the mesa of Cochiti where the Indians who rebelled retreated, to sow thereon, and to cultivate on said piece of land about ten fanegas of wheat and two of corn, and to pasture my sheep and horse herd; and the said land is bounded on the north by the old pueblo of Cochiti, and on the east by the Del Norte River, and on the south by the lands of the natives of said pue * * the west with * * of Jemez."

The grant, which appears immediately at the foot of the petition, is also partly mutilated, but so far as it is legible and can be translated reads as follows:

"Village of Santa Fé, *August* 2, 1728.

"This petition was presented by the party therein before his excellency the governor and captain general of this kingdom of New Mexico.

"And the same being examined by his excellency he treated the same as presented and regis * * the land which the party asks, and for which purpose he ordered * * ed that the chief alcalde of San Felipe Santo Dom * * and Cochiti to proceed and examine said piece of land by * * tation of the natives of said pueblos and others who may live near, and there being any opposition to suspend, and there being no impediment and it being without prejudice to a third party having a better right the grant is made to him in the name of His Majesty, and he will be placed in royal and personal posses-

sion under the boundaries he refers to and of which having acquired it * * *"

This grant was probably signed by Bustamente, and countersigned by Antonio de Cruciaga, his secretary of state and war, although these signatures do not now appear upon the original documents.

These documents are produced by the petitioners themselves, and not, as usual, by a *testimonio* or copy certified by the proper officer.

As this grant refers to the land demanded in the petition for a description, it throws no light upon the controversy in this case, which turns, not upon the validity of the grant, which is admitted, but upon the identification of the calls or objects described as boundaries, and therefore of the extent of the grant. As the grant is bounded upon the east by the Rio del Norte or Rio Grande, of course there can be no uncertainty so far as to what is meant. As the boundary upon the south is "by the lands of the natives of said Pue * *" meaning, evidently, thereby the Pueblo of Cochiti, and as this boundary appears to have been fixed and located by the survey and patent to the Indians of this pueblo, by and under the authority of the United States, no question is made with regard to its correctness. The difficulties arise from the uncertainty as to what is meant by the "Old Pueblo of Cochiti," described as the northern boundary, and by the western boundary, described as "the west with * * of Xemes (Jemes)."

The chief contention is over the northern boundary, owing to the fact that there are two Pueblos of Cochiti, one of which is seven miles to the northeast of the other. The court below adopted the southernmost one, known as the Pueblo Viejo de Cochiti, as answering the call in the grant of the Old Pueblo of Cochiti, while the petitioners insist upon locating the north boundary by what was, and still is, known as the Pueblo Viejo, which is supposed to have long antedated the other.

There are other calls, however, which tend to identify the description with greater certainty:

1. The land is described as "*en la mesa de Cochiti donde estubieron retirados los indios que se sublebaron*," in or upon (or perhaps *at*, the difference being immaterial) the *mesa* (tableland) of Cochiti, where the Indians who rebelled retreated.

The location of this *mesa* is perfectly well settled. It lies upon the southerly side of the *cañon* or *cañada* (water course) of Cochiti, its northerly side forming the wall of the cañon. It is evident, however, that the grant was not intended to be limited to the *mesa* itself (notwithstanding the use of the word "en"), which appears to have been comparatively small, as the grant extended easterly across the Cochiti *cañon*, the Cañada José Sanchez, and the lower waters of the Cañada de en Medio, some five miles to the Rio Grande, and included about 5000 acres of land, a considerable part of which seems to have been arable.

Upon this *mesa* is a ruined pueblo commonly known as the Pueblo de Cochiti. Whether it was also known as the "Old Pueblo of Cochiti" is one of the points in dispute here. It seems that the Spanish, who settled this territory as far to the north as Santa Fé, during the middle and latter half of the sixteenth century, were, about 1680, driven out by the Indians, whom they had reduced to a virtual condition of slavery; and that, for about thirteen years, the latter continued to control the country, defeating successive Spanish expeditions, until, in 1693, they were reconquered by Diego de Vargas; and the Cochiti Indians, or a portion of them, took refuge in the pueblo upon the *mesa* of Cochiti. We do not understand this fact to be questioned; and it goes a long way toward identifying this pueblo as the "Old Pueblo of Cochiti," mentioned in the same description as the northern boundary of the grant. It does not seem very probable that, after having mentioned the *mesa* of Cochiti, upon which it is admitted there was a pueblo, and then proceeding to bound the land on the north by the "Old Pueblo of Cochiti," Lucero intended a wholly different pueblo, situated seven miles to the northeast of the other.

The very fact that such prominence was given to the *mesa*

of Cochiti indicates that it was mentioned for some purpose, the subsequent description of the grant by boundaries being complete in itself. Upon the theory of the claimants it is difficult to see why this *mesa* was mentioned at all. Upon that theory it was not named as a boundary, since both the north and west boundaries are claimed to be miles from this pueblo, and as a local object it seemed to have been no more prominent or worthy of mention than several other pueblos within the alleged limits of the grant. Assuming that Lucero stood there, and from that spot made a mental image of what the extent of his claim should be, does not aid the matter, since it is quite as likely that he intended to claim the comparatively fertile land between himself and the Rio Grande, as the vast territory now claimed by his heirs and assigns. In view of the fact that there was a pueblo upon this *mesa* — a pueblo still known as the pueblo of Cochiti — the natural inference is that he desired to connect this *mesa* with the "Old Pueblo of Cochiti," named as one of the boundaries.

2. That Lucero did not intend to claim an extensive grant is also evident from his express purpose, "*para en el sembrar i cabra* (*labrar*) *en dicho pedaso de tierra dies anegas* (*fanegas*) *de trigo y dos de mais, y para apastar mi ganado menor y Cavallada*," "to sow thereon, and to cultivate on said piece of land ten *fanegas* of wheat and two of corn, and to pasture my stock of small cattle and horses." The words "*ganado menor*" are used to indicate, not a small herd of cattle, but a herd of small cattle (sheep), as distinguished from a "*ganado mayor*," or herd of large cattle. The word "*fanega*" is used both as a dry measure and as a measure of land, and in its former sense it appears to have been somewhat uncertain in quantity, varying from one and one half to two and one half bushels; or, to speak more accurately, about one hundredweight of grain. As a measure of land it appears to have been even more uncertain, indicating, not the quantity of land necessary to raise a *fanega* of wheat, but that quantity which requires a *fanega* of wheat to sow it. The *fanega* of wheat differs again from the *fanega* of corn. It is agreed, however, in this case that the twelve *fanegas* called for would

be about thirty-three acres. Under any method of determining what a *fanega* was intended to represent, it would seem that 5000 acres of land, if any of it were cultivable, would be amply sufficient, while the 104,000 acres claimed would be out of all proportion to the calls of the grant. How much land would be necessary to pasture his stock of sheep and horses would depend so much upon the character of the land and of the size of his herd that it throws no light whatever upon the intended limits of the grant.

3. All these conjectures, however, are preliminary to and useful as throwing light upon the more important question as to what is meant by the "Pueblo Viejo de Cochiti," mentioned in the petition as the northern boundary. Lucero apparently had been a soldier in the Spanish army; had taken part in putting down the rebellion of the Indians, and had a somewhat numerous family. Claimants' argument in this connection is that, by these words "Pueblo Viejo de Cochiti," must be understood a pueblo about seven miles to the northeast of the *mesa* of Cochiti, and commonly known as the Pueblo Viejo, on the Potrero de las Vacas — the farm or *mesa* of the cows. It appears that when the Cochiti Indians, after being defeated by the Spaniards, retreated to the historical *mesa* of Cochiti, in the latter part of the seventeenth century, they built there the pueblo which has now, after the lapse of upwards of two centuries, become known as the Old Pueblo of Cochiti, although at the time of the grant it was not in reality an old pueblo, having been burned by the Spaniards not much more than thirty years prior thereto. It is possible, however, that Lucero did not refer to this particular pueblo as the Old Pueblo of Cochiti, since it appears from Professor Bandelier's work upon Archæological Investigations in the Southwest, part 2, page 178, that the oldest ruins on the *mesa* of Cochiti are those of a prehistoric Queres pueblo, although the best preserved are those of the pueblo built after the year 1683, when the Indians retreated there, and abandoned, April, 1694. In virtue of these older ruins the pueblo may well have acquired the name of the Old Pueblo of Cochiti without reference to the later ruin. We do not regard this as of any

decisive weight, however, as it does not take long for a deserted village or house to become known as "the old house," etc. It also appears that the Pueblo Viejo is of much greater antiquity than that of Cochiti, and at the time of the grant was a conspicuous object in Cochiti traditions, and so much venerated by the Indians in that vicinity as to be resorted to for religious or semi-religious purposes. This fact is the basis of the main argument for the claimant.

We have, however, carefully considered the testimony upon this point, and have come to the conclusion that while Pueblo Viejo may have been much the older of the two, it was never commonly known as the Pueblo Viejo de Cochiti, and that while the southerly of the two pueblos was generally known as the Pueblo de Cochiti, it was also known as the Pueblo Viejo de Cochiti.

4. The uncertainty regarding the western boundary arises from the blank in the description "*et poniente con* * * * *de Xemes*" — "the west with * * * of Jemez." That a word is torn off is perfectly obvious from an inspection of the original document. That this word related to something connected with Jemez is equally evident. The claimants insist that these words must be explained by the context, the topography of the country, the customary adoption in royal grants of prominent natural objects, or conspicuous artificial objects, as landmarks, the significance of names used as descriptive of well-known places, and by the reasonable probabilities of the case. As the boundaries of this grant, like those of Spanish land grants generally, were fixed by such landmarks — upon the east by a river; upon the north by a pueblo; upon the south by the lands of another pueblo — it is natural to suppose that the western boundary was fixed, either by reference to a river, a cañada, a pueblo, or a range of mountains (sierra), also a most common boundary. As the Jemez River is far to the westward of the *sierra* of that name, it is very improbable that this was intended. There was also an ancient Indian village or pueblo of that name, whose inhabitants did not belong to the Queres stock from which the Cochiti Indians sprang, and were in no respect affiliated with them. The

languages of the two communities were different; they could not even converse together, except in Spanish; the two villages of the two nations were quite distinct; each inhabited, cultivated, pastured and hunted over a district into which the other tribe did not intrude unless by favor, and the Jemez country, with its fields and mesas, streams and mountains, lay far to the west of the Cochiti country. The village occupied by the Indians of the Jemez was called the Pueblo de Jemez. The river that flowed about its land was called the Rio de Jemez, and its cañon the Cañon of Jemez, while the mountains adjacent were called the Sierra de Jemez. As this sierra was the first natural object to which the name of Jemez was affixed, lying to the westward of the mesa of Cochiti, we think the grant must have referred to that *sierra;* or if there were more than one range of mountains known as the Sierra de Jemez, then to the one most easterly. Perhaps this will not extend the grant beyond the mountains immediately west of the *mesa.*

There was also some evidence tending to show that the west boundary was reputed to be the *sierra*, and some to the effect that the stock of Lucero and his descendants grazed as far west as the Jemez Mountains. It must be confessed that this evidence is not entitled to great weight, but, such as it is, it supports the inference that one would naturally derive from an inspection of this mutilated grant.

So, also, in the admitted reproduction or restoration of these documents, made by the alcalde de Baca in 1817, to which reference will hereafter be made more in detail, the words "la Sierra" are imported before "de Jemez." If this restoration of the mutilated documents be of no other value, it tends, at least, to show the opinion of an intelligent native of that region, familiar with the topography of the country and the customary boundaries of Spanish and Mexican grants, as to what this grant probably intended to refer to as the westward boundary. If Lucero had intended to fix the western limit at the pueblo or *mesa* of Cochiti, it is probable that he would have used the word "Cochiti," instead of the word "Jemez" which, as above stated, indicated clearly that

some natural object, to which the word "Jemez" was fixed, must have been within his contemplation. The very fact that he made the pueblo the northern boundary, without also making it the western boundary, indicates that another boundary to the westward was intended. We are, therefore, of opinion that the court below erred in locating the western boundary by the pueblo of Cochiti, and that it should be extended westward to the nearest sierra or other natural object that bears the name of Jemez.

Certain proceedings, subsequent to the grant, are also called to our attention as tending to throw light upon the identification of the old pueblo de Cochiti.

5. The first of these, in the order of time, is an appeal made by the alcalde mayor, Don Bartolomé Fernandez, "in favor of the republic of the Indians of the pueblo of Cochiti against some residents called Romero, who claimed to settle the place called El Capulin," which was probably in the Cañon Capulin, in the northeasterly portion of the tract claimed in this proceeding.

In this appeal, Fernandez brought to the notice of the governor that at the place commonly called El Capulin, contiguous to the pueblo of Cochiti, the Romeros were settled, and, in view of the fact that during all the time he had lived in this country, he had never seen said tract settled, which was the pasture land of the horses and stock of the said pueblo, and other residents of the kingdom, and not knowing of any grant having been made to authorize such settlement, he informed the governor and captain general of the fact.

In answer to this, an order, in the nature of an order *nisi*, seems to have been made, directing the alcalde to eject the settlers, unless they showed cause to the contrary. The document is a very peculiar one, but this seems to have been its purport.

Romero thereupon appeared before the governor by petition, stating that he had been notified by Fernandez to vacate the Capulin, and that he had obeyed immediately; but that he had not removed his property, as he had held it for five years and six months without objection until this year (1765), when

it was made known that he had purchased parts which did not belong to him by law, from parties claiming under a grant to one Andres Montoya, which instrument he presented with due formality, stating that he saw no reason for his being interfered with or deprived of his purchase. Thereupon the governor and captain general of the kingdom, under date of April 18, 1765, ordered that the previous order be carried into effect, and that the parties be again notified not to settle by building or cultivation at the said place of Capulin, "they being permitted only to have their stock on the said place of the Capulin as crown land, as the other residents do, but without prejudice to the pueblos and republics of the Indians of Cochiti and San Ildefonso," which the alcalde mayor of the city of Santa Fé was directed to notify to them, and which he accordingly did, and made return thereof.

Attached to these papers is the grant to Andres Montoya, which covers a tract between the orchards or gardens of Cochiti on the south, and on the north by the orchards of San Ildefonso. This grant, which was made in 1739, seems to have been subsequently cancelled as fraudulent, because there did not appear to be any citation of the adjoining land holders.

The litigation seems to have been terminated by an order of April 25, 1767, made by Don Fermin de Mendinueta, governor and captain general, reciting the nullity of the grant to Montoya, and that the attempted settlement by Romero was in 1765, twenty-six years after the grant was made (1739); declaring the grant to Montoya to be of no value; that the only rights which Romero had were those enjoyed and used by the natives of Cochiti and the adjoining residents, as *crown lands*, and ordering that neither Romero nor anybody else should settle or have ownership in the said tract of the Capulin, and "that it shall be held and esteemed as crown land for the common benefit of all those who may desire to pasture their stock on the same, without excluding the said Romero."

Of course, these proceedings cannot be considered in the light of *res adjudicata*, since neither the Spanish crown, the predecessor in title of the United States, nor Lucero were

parties thereto. The only weight that can be given to them is that of a general reputation that the lands upon the Cañada de Capulin were considered and treated as crown lands, over which the Cochiti Indians and other residents of the neighborhood had some indefinite rights of pasturage. As these lands were within the asserted grant to Lucero, it is somewhat singular that he made no resistance to the claim of Romero; put forward no title in himself; and left the litigation to be carried on by the natives and other residents of that neighborhood, who were allowed to pasture upon these lands as crown lands.

6. Similar considerations apply to the adjudication of 1785, which arose from an alleged intrusion by one Antonio Gallego upon lands in the Cañada de en Medio. The proceedings opened by a petition by the heirs of Lucero to the chief alcalde and war captain, Antonio de Armenta, claiming to be residents of the jurisdiction of the Cañada de Cochiti, and heirs of the place, and complaining that their lieutenant was seeking to possess for himself for the purpose of pasturing "the few cavalry we have for the royal service of His Majesty, whom may God preserve, and for better protection concerning which we declare, sir, that that favor of our lieutenant is very grievous," the petition terminating with a prayer that the matter be examined into, and their rights protected.

Upon this petition, the alcalde made an order reciting the injury done to the heirs of Lucero in desiring that the Cañada de en Medio remain reserved for cavalry upon the petition of Gallego, and finding that the petitioners were, in all respects, the legal heirs to the tract.

The proceedings in this litigation undoubtedly form a strong item of testimony in favor of the claimants' theory of this case, and we are by no means disposed to deny their weight. At the same time they are by no means conclusive. The crown was not a party to nor represented in the litigation. There was no attempt to adjudicate that the northern boundary was the Pueblo Viejo, or that the Luceros had a good title to the cañada against any one but Gallego, who seems to have been little better than a trespasser, and put forward no title to

the land himself. Indeed, it would appear from the order of the alcalde that such right as he had was "by favor only" to "raise a few sheep * * * without having any title or document which might accredit its being his."

7. The next item of testimony upon which the claimant relies is that of the so-called *testimonio por concuerda*, which purports to have been made in 1817 by Juan Antonio Cabesa de Baca, chief alcalde of the jurisdiction of Cochiti, and is certified to be "a true, faithful and legal copy of the documents of grant to which they refer, of which, as they are incomplete and very badly treated [*truncos y muy mal tratados*], this copy has been made with great labor before the witnesses of my attendance, who saw it made, corrected and amended from the original instruments." The first paper is a restored petition of Lucero, at the foot of which is a grant by the governor and captain general, Bustamente, countersigned by his secretary of state and war. Following this is the certificate of Andres Montoya, chief alcalde, to the effect that on August 6, 1728, he gave to Lucero possession of the lands "expressed and mentioned in this grant," and, having registered the same, took Lucero by the hand and "conducted him over said land in sign of lawful possession, and there being no person whatever, who, under a better right might claim the same, I deemed it good."

The court below was of opinion that this proceeding was wholly void; that it was in the nature of a case against the crown; that the effect of it would be to create evidence to deprive the crown of title to its land, and that alcaldes had no jurisdiction of that kind. We do not find it necessary, however, to determine this question, since, so far as we can judge, this *testimonio*, or official copy, does not differ in any essential particular from the original, except so far as making more definite the westerly boundary of the grant at Sierra de Jemez. That a grant was actually made to Lucero is not disputed. So far as the erasures and mutilations of the original are supplied in the restored grant, they are immaterial, except as connected with the description, which is an exact reproduction of the description in the original grant, except as to the

western boundary, which is declared to be the Sierra de Jemez; and, as we have already found that this is what was intended by the parties, this alleged copy is only a confirmation of the opinion we have already reached from an inspection of the original grant, and from the probabilities of the case. We do not regard this copy as affecting at all the conclusions to be reached from the other evidence in the case.

8. The claimant also relies upon a long-continued adverse possession of this land, maintained for nearly 170 years from the date of the grant, and nearly eighty years from the date of the *testimonio* issued by the alcalde mayor de Baca. Had it been shown that this possession was complete, adverse and undisputed during the whole life of this grant, such possession would probably be regarded as complete evidence of title. Nor are we disposed to deny that the fact that the Luceros, and their descendants pastured stock upon these lands is evidence of such possession, but in order to make it of any particular weight it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The proceedings in the case, first above mentioned, of the intrusion by the Romeros indicate the lands to have been held in common and to have been subject to pasturage by the Indians, and other residents of that neighborhood. Under such circumstances, it should be made to appear that the rights of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact, so notorious that we may take judicial notice of it, that mere pasturage upon these western lands is very slight evidence of possession. The court below was of opinion that "from a practical standpoint the grazing of stock in this country has no value as evidence of practical location." In view of the fact that all, or nearly all, of this testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive, or inconsistent with the use of this vast tract as a pasturage common to all the dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title.

Other ancient documents offered by the claimants may be laid out of consideration. They consist principally of conveyances, to some of which members of the Lucero family were parties, but the descriptions of the lands are too uncertain to afford any definite information upon the extent of the grant, or even of what was claimed by Lucero in that connection.

Upon the whole, we have come to the conclusion that the claimants have not made out their case by a fair preponderance of evidence, or such weight of testimony as is necessary to establish their title to this large tract of land. We should have reached this conclusion without hesitation had it not been for the proceedings connected with the ouster of Antonio Gallego from the Cañada de en Medio in 1785, which is really the only item of testimony at all inconsistent with the Government's theory of the case; but, after all, this is but evidence of a general reputation, or of a judicial ruling in a case to which the crown was not a party; and it is not at all improbable that the alcalde may have considered Lucero's title to be good as against one who had no title at all beyond a mere permit to pasture a few horses, or raise a few sheep thereon, "without having any title or document which might accredit its being his." It does not follow that, if the Government itself had attacked the grant or the extent of it, his ruling upon that point would not have been different; in fact, the ruling in the prior case between the Indians of the pueblo and the Romeros is about as strong evidence that the lands at El Capulin, also within the assumed limits of the grant, were crown lands, as the judgment in this case was that the lands upon the Cañada de en Medio belonged to the Luceros.

These judgments are really of little value except as throwing light upon the occupation or attempted occupation by Lucero of that portion of the tract lying nearest to the Rio Grande, and of the general reputation as to the extent of his grant. The chief reliance must be upon the terms of the petition itself, and it is fortunate that the most important part of this petition, namely, the description of the boundaries, has been best preserved. The only real difficulty in its interpretation is the ambiguity arising from the words "Pueblo

Viejo de Cochiti." The burden of proving the larger grant is upon the claimants. So long as the description is reconcilable with the smaller grant, and with a pueblo located upon the mesa of Cochiti, the Government is entitled to the benefit of that construction. The location of that pueblo seven miles to the northeast is supported by testimony too shadowy to be a safe basis for a legal adjudication in favor of the claimants.

While we agree with the court below upon the main question involved, the different view we have taken regarding the western boundary requires that its decree be

Reversed, and the case remanded for further proceedings in conformity with this opinion.

BAUMAN *v.* ROSS.

ROSS *v.* BAUMAN.

ABBOT *v.* ROSS.

ROSS *v.* ARMES.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 631, 632, 633, 634. Argued December 16, 17, 1896. — Decided May 10, 1897.

Under the Fifth Amendment to the Constitution of the United States, which declares "nor shall private property be taken for public use without just compensation," Congress may direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.

By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent

Names of Counsel.

domain, is not required to be made by a jury; but may be entrusted to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.

Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages.

If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.

The recording by public authority of a map of a proposed system of highways within certain territory, without restricting the use or improvement of lands before the commencement of proceedings for their condemnation for such highways, or limiting the damages to be awarded in such proceedings, does not of itself entitle the owners of lands to compensation or damages.

An act of Congress, providing for the estimate of damages for taking lands for highways in the District of Columbia, and for the assessment of such damages, with interest, upon lands benefited by the highways, is not invalidated by a provision that the proceedings shall be void if Congress, after being six months in session, shall make no appropriation for the payment of the damages.

The act of March 2, 1893, c. 197, entitled "An act to provide for a permanent system of highways in that part of the District of Columbia lying outside of cities," is constitutional and valid.

THESE were appeals in proceedings commenced by petition of the Commissioners of the District of Columbia for the condemnation of a permanent right of way for the public over certain subdivisions of lands in the District of Columbia, outside the limits of the cities of Washington and Georgetown, under the act of March 2, 1893, c. 197. 27 Stat. 532. The cases involved the constitutionality of that act. They were argued together, and are stated in the opinion.

Mr. A. S. Worthington for the Commissioners of the District of Columbia. *Mr. S. T. Thomas*, *Mr. A. B. Duvall* and *Mr. Samuel Maddox* were on his brief.

Mr. Nathaniel Wilson and *Mr. Chapin Brown* for Bauman and others, and Abbot. *Mr. A. H. O'Connor* was on their brief.

Mr. W. L. Cole for Armes. *Mr. C. H. Armes* was on his brief.

Mr. Justice Gray delivered the opinion of the court.

The original plan of the city of Washington, established in 1791, under the direction of President Washington, and by authority of Congress, with its symmetrical arrangements of squares and lots, streets, avenues, circles and public reservations, did not extend north of Boundary street, or affect the roads and highways in the rest of the District of Columbia.

By an act of 1809, the proprietor of any lot or square in the city of Washington was authorized to have it subdivided upon submitting a plat thereof to the surveyor of the District of Columbia, to be certified and recorded in his office upon his being satisfied that its dimensions corresponded with the original lots. Act of January 12, 1809, c. 8; 2 Stat. 511; Rev. Stat. D. C. §§ 477–481.

At a comparatively recent period, owners of lands outside the northern boundary of the city of Washington, from time to time, laid out streets over their lands, and made and recorded subdivisions thereof, as they pleased, often not conforming to each other, or to the general plan of the city of Washington; and Congress, at last, found it necessary to take measures to have the streets throughout the District of Columbia laid out upon a uniform plan.

Congress accordingly, by the act of August 27, 1888, c. 916, entitled "An act to regulate the subdivision of land within the District of Columbia," authorized the Commissioners of the District of Columbia to make and publish general orders regulating the platting and subdividing of all lands and grounds in the District, and required any plat of subdivision made in pursuance of such orders to be approved by them before being admitted to record in the office of the surveyor; and, in section 5, provided that "no future subdivision of land

in the District of Columbia, without the limits of the cities of Washington and Georgetown, shall be recorded in the surveyor's office of the said District, unless made in conformity with the general plan of the city of Washington." 25 Stat. 451; Comp. Stat. D. C. c. 58, §§ 39–43.

It was in order the more completely to carry out the same object, that Congress passed the act of March 2, 1893, c. 197, entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," the constitutionality of which is now impugned. 27 Stat. 532.

The parts of the act chiefly attacked are sections 11 and 15. But the record discloses such differences of opinion in the courts below, and the solution of the questions involved depends so much upon a view of the act as a whole, that it will be convenient to state its various provisions somewhat fully.

The first five sections of the act relate to the making, the recording and the effect of plans for the extension of a permanent system of highways, in conformity, as nearly as practicable, with the general plan of the city of Washington, over all that part of the District of Columbia which lies outside the cities of Washington and Georgetown.

The act begins by enacting that "the Commissioners of the District of Columbia are hereby authorized and directed to prepare a plan for the extension of a permanent system of highways over all that portion of said district not included within the limits of the cities of Washington and Georgetown. Said system shall be made as nearly in conformity with the street plan of the city of Washington as the Commissioners may deem advisable and practicable."

By section 2, "the said plans shall be prepared from time to time in sections, each of which shall cover such an area as the Commissioners may deem advisable to include therein; and it shall be the duty of the Commissioners, in preparing such plans by sections, as far as may be practicable, to select first such areas as are covered by existing suburban subdivisions not in conformity with the general plan of the city of Washington. The Commissioners, in making such plans, shall

adopt and conform to any then existing subdivisions which shall have been made in compliance with the provisions of the act" of August 27, 1888, c. 916, "or which shall, in the opinion of the Commissioners, conform to the general plan of the city of Washington." "Whenever the plan of any such section shall have been adopted by the Commissioners, they shall cause a map of the same to be made, showing the boundaries and dimensions of and number of square feet in the streets, avenues and roads established by them therein; the boundaries and dimensions of and number of square feet in each, if any, of the then existing highways in the area covered by such map; and the boundaries and dimensions of and number of square feet in each lot of any then existing subdivisions owned by private persons; and containing such explanations as shall be necessary to a complete understanding of such map. In making such maps, the Commissioners are further authorized to lay out, at the intersections of the principal avenues and streets thereof, circles or other reservations corresponding in number and dimensions with those now existing at such intersections in the city of Washington." A copy of such map, duly certified by the Commissioners, is to be delivered to a commission created by this act, composed of the Secretary of War, the Secretary of the Interior and the Chief of Engineers, for the time being, who may adopt or alter it, or make a new map instead; and the map which that commission shall adopt and approve in writing is to be delivered to the Commissioners of the District of Columbia, and be at once filed and recorded in the office of the surveyor of the District of Columbia.

The same section proceeds: "And after any such map shall have been so recorded, no further subdivision of any land included therein shall be admitted to record in the office of the surveyor of said district, or in the office of the recorder of deeds thereof, unless the same be first approved by the Commissioners, and be in conformity to such map. Nor shall it be lawful, when any such map shall have been so recorded, for the Commissioners of the District of Columbia, or any other officer or person representing the United States or the District

of Columbia, to thereafter improve, repair or assume any responsibility in regard to any abandoned highway within the area covered by such map, or to accept, improve, repair or assume any responsibility in regard to any highway that any owner of land in such area shall thereafter attempt to lay out or establish, unless such landowner shall first have submitted to the Commissioners a plat of such proposed highway, and the Commissioners shall have found the same to be in conformity to such map, and shall have approved such plat, and caused it to be recorded in the office of said surveyor."

The section concludes with a provision that the Commissioners of the District of Columbia, "in order to enable the said Commissioners to proceed speedily and efficiently to carry out the purposes of this act," may, with the approval of the commission before named, appoint two civilian assistants to the engineer commissioner, who, with him, under the direction of the Commissioners, shall have immediate charge of the work to be done under this act.

Section 3 provides that "when any such map shall have been recorded as aforesaid in the office of the surveyor of the District, it shall be lawful for the owner of any land included within such map to adopt the subdivision, thereby made, by a reference thereto and to this section in any deed or will which he shall thereafter make; and when any deed or will containing any such reference shall have been made and recorded in the proper office, it shall have the same effect as though the grantor or grantors in such deed, or the maker of such will, had made such subdivision and recorded the same in compliance with law."

By section 4, "for the purpose of making surveys for such plans and maps, the Commissioners, and their agents and employés necessarily engaged in making such surveys, are authorized to enter upon any lands through or on which any projected highway or reservation may run or lie." And by section 5, "the Commissioners of the District of Columbia are authorized to name all streets, avenues, alleys and reservations laid out or adopted under the provisions of this act."

Then follow sections 6 to 14 inclusive, containing provisions

for the condemnation of a permanent right of way for the public, and for the assessment of compensation or damages to the owners of lands by a jury of seven men, as follows:

By section 6, "within thirty days after any such map shall have been recorded as aforesaid, which shall alter any highway or highways in any then existing subdivision in the area included in such map, or which shall dispense with any highway or highways, or any part thereof, in any such subdivision, the Commissioners of the District of Columbia shall make application to the Supreme Court of the District of Columbia, holding a special term as a district court of the United States, by written petition, praying the condemnation of a permanent right of way for the public over all the land lying within the limits of such subdivision, not already owned by the United States or the District of Columbia or dedicated to public use as a highway, which shall be included within the highways or reservations laid out by the Commissioners and indicated on such map. Upon the filing of such petition, the said court in special term shall proceed to condemn a permanent right of way for the public over said land, in the manner hereinafter provided."

By section 7, "as to any highway or highways, or part of any highway or highways, laid down upon any such map, which shall not lie within the limits of any existing subdivision, the Commissioners at any time thereafter, when in their judgment the public convenience shall require the opening of the same, or of any part thereof, may make application as aforesaid to the Supreme Court of the District of Columbia, holding a special term as aforesaid, for the condemnation and opening of the same; and said court in special term as aforesaid shall thereupon proceed, in the manner hereinafter provided, to condemn a permanent right of way for the public over all the land, not already owned by the United States or the District of Columbia or dedicated to public use as a highway, included within the highway or highways, or part of a highway or highways, described in such application: Provided, that in such case the court, after public notice shall have been given as hereinafter directed, shall first hear evi-

dence as to whether the public convenience does in fact require the immediate opening of the highway or highways, or part of any highway or highways, described in such application, and shall determine that question on the evidence submitted to it; and if the court shall, as to any part of the land sought to be condemned, decide such question in the negative, it shall proceed no further as to such part at that time. And if the court, after such notice and hearing, shall determine that the public convenience does not in fact require the immediate opening of any highway or highways or any part thereof described in such application, no further proceedings shall be had under such application."

Section 8 provides that "when any application shall have been filed in said court in special term under the preceding sections of this act," the court shall cause public notice of not less than thirty days to be given of such application, "which notice shall warn all persons having any interest in the proceedings to attend the court at a day to be named in said notice, and to continue in attendance until the court shall have made a final order in the premises"; and, "after such notice shall have been given, shall take no further step until the time limited thereby shall have expired, and shall afford all parties in interest a reasonable opportunity to be heard during the proceedings"; and shall, whenever it is practicable to do so, cause a similar notice to be served upon each of the owners of the land sought to be condemned, and upon the attorney of the United States for the District of Columbia.

Section 9 provides that "when the object of any such application to said court shall be, in whole or in part, to rectify or change an existing subdivision, the court, immediately after the expiration of the time limited in such notice, shall proceed without delay to make the required condemnation, so far as it shall relate to any lands within such subdivision; and as to any lands not lying within the limits of an existing subdivision which is sought to be rectified or changed, the court shall proceed in like manner only after it shall have determined, as hereinbefore provided, that the public convenience requires

the condemnation, and then only to the extent which the public convenience shall require."

Section 10 is as follows: "When any right of way is to be condemned under this act, said court in special term shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal; and shall administer to the jury an oath or affirmation that they will, without favor or partiality to any one, to the best of their judgment, determine such questions as may be submitted to them by the court during the proceedings. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide on all such objections, and to excuse any juror, and to cause any vacancies in the jury to be filled. When the jury shall have been organized, the court and the jury shall hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia, or on behalf of the United States, or by any person having any interest in the proceedings; and the proceedings shall be conducted, as nearly as may be, as civil cases triable by jury are now conducted in said district; but the order of proof shall be in the discretion of the court. Upon the motion of any party in interest, the court may direct the jury to view the premises under consideration, under such regulations as the court may prescribe. When the hearing is concluded, the jury, or a majority thereof, shall render a written verdict in such form as may be prescribed or submitted to the jury by the court, which verdict shall be signed by the jurors, or by a majority of them, and filed in the court. The court shall have power to set aside such verdict, when satisfied that the same is unjust or unreasonable. One jury may be sworn, and one trial had, as to all or any of the parcels of land involved in the proceeding, at the discretion of the court; and where the jury shall have rendered a verdict as to more than one parcel of land, the court may set aside the verdict as to one or more parcels, and confirm it as to the others. When the verdict of the jury, in

whole or in part, shall have been so set aside, a new jury shall be summoned, and the proceedings continued, until the court shall have confirmed a verdict as to all the land involved in the proceeding."

Section 11 provides that "where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury, in assessing the damages therefor, shall take into consideration the benefit [that] the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly; and the court may require, in such case, that the damages and the benefits shall be found and stated separately."

Section 12 provides that no trial under this act shall fail by reason of the death or disability of any juror during the proceedings, provided the verdict is "concurred in by a majority of a complete jury."

Section 13 is as follows: "No evidence shall be offered or received by the jury as to the persons who will be entitled to receive the compensation that may be awarded as to any parcel of land. If any question shall arise as to whether any person claiming a right to be heard is in fact interested in the proceedings, the court shall hear and determine the question in a summary way, and in cases of doubt shall permit the party to be heard. The verdict of the jury shall state, as to each parcel of land involved in the proceeding, only the amount of compensation, less the benefits, if any, which it shall award in respect thereof, and shall not contain any finding as to the ownership of the land, or the persons entitled to the compensation."

Section 14 fixes the compensation of each juror at five dollars a day.

Section 15 provides for assessing and charging the amount awarded as damages, one half upon the lands benefited, and other half upon the District of Columbia, as follows: "That the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be one half assessed against the

land benefited thereby, and the other half shall be charged up to the revenues of the District of Columbia; that one half of the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof, and the remainder of said amount shall be charged to the revenues of the District of Columbia. The same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, or by the abandonment of an existing highway or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one half of the damages: Provided, that in making such assessment for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract. The proceedings of the court and the jury, in making assessments for benefits under this section, shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages; and the verdict of the jury, making an assessment under this section as to any parcel of land, shall not be conclusive until the same shall have been confirmed by the court. When confirmed by the court, the assessment so made shall be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia have been collected since February twenty-first, eighteen hundred and seventy-one" (that is to say, as all other taxes are collected; act of February 21, 1871, c. 62, § 37; 16 Stat. 427; Rev. Stat. D. C. § 151); "and shall be payable in five equal annual instalments, with interest at the rate of four per centum per annum from the date of the confirmation of the assessment by the court. That no expense for the improvement of any street, circle, reservation or avenue laid out under the provisions of this act, outside the

cities of Washington and Georgetown, shall be chargeable to the Treasury of the United States, but such expense shall be paid solely out of the revenues of the District of Columbia."

Section 16 prescribes the mode of ordering the payment and distribution of the compensation or damages to and among the persons entitled to receive the same, as follows: "When said court shall have assessed the damages to be paid as to any parcel of land the use of which shall have been condemned, or which shall have been injured by the abandonment of a previously existing highway, and there shall be no controversy as to the persons who are entitled to receive the same, or as to the distribution of the same among them, said court shall decree such payment to be made; and upon presentation of a duly certified copy of such decree to the Treasurer of the United States he shall report the same to Congress for consideration and action, and shall make such payment to the person or persons appearing by such decree to be entitled thereto, as Congress may provide. But where any such controversy shall exist, or where there shall be any doubt as to the proper disposition of the compensation awarded, the court shall order that the damages assessed by it, involved in such controversy or doubt, shall be paid into the registry of the court; and upon the presentation of a duly certified copy of such order to the Treasurer of the United States he shall, when the necessary money is appropriated, pay the amount therein mentioned to the clerk of said court; and the claims of the respective parties thereto shall thereupon be heard and decided by the court as in interpleader suits in equity, under such general rules as may be prescribed by said court in general term."

Section 17, as originally passed, provided for appeals from the Supreme Court of the District of Columbia in special term to the same court in general term; but, as amended by the act of January 21, 1896, c. 5, provides that any party aggrieved may appeal to the Court of Appeals of the District of Columbia, upon questions of law only, from "the final order or decree of said court in special term, fixing the amount of damages, or the assessment for benefits, as to

any parcel of land"; and, upon questions both of law and of fact, "from a final judgment of said court in special term under this act, distributing the damages among contending claimants"; and further provides that "from any judgment or order of said Court of Appeals, involving any question as to the constitutionality of this act, or of any part thereof," any party aggrieved may appeal to this court, and this court "shall determine only the question of constitutionality involved in the case." 29 Stat. 2.

Section 18 makes payment of the damages to the parties, or into court, an absolute condition of the taking possession of the land by the Commissioners, and of the validity of the proceedings, and is as follows: "Whenever any final decree shall have been made by said court, under the provisions of this act, for the payment of the damages to the parties, or into the registry of the court, and when the money has been appropriated and paid, the Commissioners shall be entitled to take immediate possession of the parcel of land in regard to which said order of payment shall have been made, and the court shall enforce such right of possession by proper order, and by process addressed to the marshal of the United States for the District of Columbia. In case the court shall enter judgment of condemnation in any case, and appropriation is not made by Congress for the payment of such award within the period of six months, Congress being in session for that time after such award, or for the period of six months after the meeting of the next session of Congress, the proceedings shall be void, and the land shall revert to the owners."

The nineteenth and concluding section requires the Commissioners of the District of Columbia to include in their annual report a full statement of their action, and an estimate of necessary expenditures, under this act.

Pursuant to sections 1 and 2 of the act of 1893, a plan, in sections, was prepared and adopted by the Commissioners of the District of Columbia, and a map thereof was approved by the commission named in section 2, and was filed and recorded in the surveyor's office, for the extension of a permanent system of highways in so much of the area of the District of

Columbia as is bounded on the east by North Capitol street, on the west by Rock Creek, on the north by the boundary line of the District, and on the south by Florida avenue, formerly Boundary street, and containing forty-seven existing suburban subdivisions.

On September 27, 1895, within thirty days after the recording of the map, the Commissioners presented to the Supreme Court of the District of Columbia a separate petition, under section 6, for the condemnation of a permanent right of way for the public over all the land lying within the limits of each of those subdivisions, among which were one known as Dennison and Leighton's subdivision of a part of Mount Pleasant and Mount Pleasant Plains, and through which Sixteenth street, if extended, would pass; and another known as the Ingleside subdivision, through parts of which would pass extensions of Seventeenth, Eighteenth and Nineteenth streets. Upon the petition relating to each of these two subdivisions, due publication of notice was made, as required by section 6, and some owners of lands appeared and filed answers, alleging that the act was unconstitutional.

Upon the petition relating to the Dennison and Leighton subdivision, a jury of seven was summoned and organized, pursuant to section 10; and, after a trial before Justice Cox, and the introduction of evidence by the petitioners and by the respondents, rendered a verdict, in the form prescribed by the court, setting forth a description of each parcel of land affected; the number of square feet in the parcel; the number of square feet taken; the number of square feet not taken; the compensation for land taken; the compensation for buildings taken; the damages to the remainder of the parcel, including damages to the buildings; the benefits to the remainder of the parcel; and the award, being for compensation and damages, less benefits.

On February 5, 1896, on motion of the respondents, Justice Cox ordered and adjudged that the verdict be set aside, and the petition dismissed, on the ground that the act of 1893 was unconstitutional and void, for the reasons stated in his opinion filed on the same day. In that opinion, the learned judge

admitted it to be established by the weight of authority that, under the right of eminent domain, the special benefits to an individual lot, of which a part was condemned, could properly be set off against or deducted from the amount found due as the value of the land appropriated and as special damage to the remainder of the tract or parcel; and that, under the legislative power of taxation, an assessment might be laid upon such remainder and other lands in the neighborhood, for the general benefits derived from the existence of the new street. But he held that either a deduction for special benefits, or an assessment for general benefits, should be for benefits which, if not immediately realized, should be at least so far present as to be certain and presently ascertainable; that the act of 1893, in a proceeding (such as this was) under section 6, relating to a highway through an existing subdivision, simply required a condemnation of the right of way, and did not, as in a proceeding under section 7 relating to lands not within an existing subdivision, also require an immediate opening of the highway; that the act authorized the taking of private property for public use, and attempted to pay for it partly in future and contingent benefits, and failed to provide for the just compensation required by the Constitution to be made, and was therefore an unconstitutional appropriation of private property, which the courts could not carry out; and consequently that section 11, as applied to the case, was unconstitutional and void, and the whole proceeding must be set aside. He further suggested, although not deciding, that section 15, providing for an assessment of half the damages upon the lands deriving a general benefit from the highway, could not be carried out, because, while committing that assessment to the same jury, it fixed neither the taxing district, nor the rule of apportionment; and also observed that "the recording of the map by the Commissioners, if nothing is done in pursuance of this step, is only a less injury to the lot-owners than taking their property without paying for it." 24 Washington Law Reporter, 65–71.

From that judgment, the Commissioners appealed to the Court of Appeals of the District of Columbia, which, in an

opinion delivered by Justice Shepard, Justice Morris concurring, reached the following conclusions:

1st. That under the last clause of the Fifth Amendment to the Constitution of the United States, "nor shall private property be taken for public use without just compensation," this just compensation means "the actual value of the property taken, payable in money, and without diminution on account of benefits general or special," although special benefits might be considered in respect of a claim for damages done to the adjacent land not actually taken; and therefore that "so much, at least, of section 11, as provides for the diminution of the just compensation for the value of the land taken to the extent of benefits accruing to the remainder, is beyond the power of Congress, and therefore void."

2d. That, "in so far as the general principle of the assessment established by section 15 of this act is concerned, there can be no substantial objection; it is fair, liberal and regular"; but that "section 15 is inoperative by failure to conform to the necessary operation of sections 6 and 7. To accomplish the object of speedy condemnation and rectification of streets in localities, where important, some provision should have been made for the creation of definite taxing districts, including one or several subdivisions and sections adjacent, where it might appear to be expedient and just, so that the work of condemnation, laying off, and assessment of expenses of streets could take place promptly without complication with others. Another defect is that the assessments, when confirmed by the court, shall bear interest from date of such confirmation, notwithstanding the fact that Congress may not accept them, if at all, for a year, possibly, under the provisions of section 18."

3d. "That Congress has made no appropriation for the immediate payment of the compensation that may be assessed does not render the act invalid."

4th. That the invalidity of sections 11 and 15 does not make the act as a whole inoperative and void.

5th. That the record of the maps, provided for in the act, does not amount to "a taking of the land, in the sense that it

interferes with the enjoyment thereof by the owners to an injurious extent, beyond the power of Congress, without a provision for compensation."

The result was that the judgment was reversed, and the cause remanded with directions to modify the judgment in so far as it dismissed the petition, and to reinstate the cause for further proceedings not inconsistent with the opinion of the Court of Appeals. 8 App. D. C. 393.

Chief Justice Alvey filed a separate opinion, holding section 11 to be constitutional and valid, and in this respect dissenting from his associates; but substantially concurring in the rest of their opinion, and holding section 15 to be "impossible of execution," and "nugatory for the want of certainty," in the following respects: "This power of assessment for benefits, as given in this section of the act, is without territorial limitation, and may extend into other subdivisions, and the same lots or parcels of land may be subject to assessments by other juries thereafter called upon to make assessments upon land benefited." "It entirely fails to define or prescribe the district or territory within which the benefits may be assessed. Whether confined to the particular subdivision in which the highway or street may be condemned and established, or whether such benefits may be assessed against land beyond the limits of such subdivision along the line of such improvement, as extended into or through adjoining subdivisions, the act is entirely silent. Nor is there any provision conferring authority upon commissioners, or upon the court, to define such taxing district. And the act wholly fails to provide how the assessment shall be apportioned — whether with reference to the existing value of the land, or to the amount of benefit only that may be derived from the improvement when made." 8 App. D. C. 427–429.

The Supreme Court of the District of Columbia, upon receiving the mandate of the Court of Appeals, set aside the verdict, so far as it allowed or assessed any benefits, and gave judgment thereon, so far as it awarded compensation and damages to the owners of lands. From this judgment the Commissioners, as well as one of the land-owners, appealed to the

Court of Appeals, which affirmed the judgment. Both parties took appeals to this court, being Nos. 633 and 634.

Immediately after the original trial of the case of the Dennison and Leighton subdivision, the case of the Ingleside subdivision was submitted to the same jury, and a verdict was returned in similar form, which, after the first decision of the Court of Appeals, above mentioned, and in accordance with that decision, was partly set aside, and partly affirmed, by a final judgment of the Supreme Court of the District of Columbia. The Commissioners, as well as some of the land-owners, appealed to the Court of Appeals, which affirmed the judgment; and both parties took appeals to this court, being Nos. 631 and 632.

The effect of the decision of the Court of Appeals is that the owner of a parcel of land, a right of way over part of which is condemned under this statute, is entitled to recover the full value of the part taken, free of any deduction for special benefits to the remainder, or of any assessment for the general benefits received by it in common with other lands in the neighborhood.

In entering upon the consideration of the correctness of that conclusion, the precedents in the District of Columbia, bearing upon the subject, are significant, especially as showing the practical construction by Congress of the constitutional provision.

In the city of Washington, the lines of streets and avenues and public squares and reservations were defined and established by the original plan of the city; and the absolute and unqualified title in fee in the lands within those lines was vested in the United States by deeds of conveyance from the proprietors of the lands, or by proceedings of condemnation under statutes of Maryland, upon the original laying out of the city. Burch's Digest, 217–224, 330, 337; Comp. Stat. D. C. pp. 654–660; *Van Ness* v. *Washington*, 4 Pet. 232; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 680, 681; *District of Columbia* v. *Baltimore & Potomac Railroad*, 114 U. S. 453, 460. Congress, therefore, had little or no occasion to provide for the taking of lands,

under the right of eminent domain, for streets and highways within the city of Washington.

But Congress early began to legislate on the subject of laying out streets and highways in other parts of the District of Columbia, and to provide both for taking into consideration benefits as well as injuries in the assessment of damages sustained by owners of lands, and for assessing and charging upon the persons and lands benefited the amount of such damages.

Georgetown was incorporated under the statute of Maryland of 1789, c. 23, amended by the statute of 1797, c. 56. 2 Kilty's Stat. Two early acts of Congress, amending the charter of Georgetown, contained provisions for the opening and extension of streets, as follows:

By the act of Congress of March 3, 1805, c. 32, § 12, the corporation of Georgetown was empowered, in general terms, "to open, extend and regulate streets within the limits of said town; provided they make to the person or persons, who may be injured by such opening, extension or regulation, just and adequate compensation, to be ascertained by the verdict of an impartial jury, to be summoned and sworn by a justice of the peace of the county of Washington, and to be formed of twenty-three men, who shall proceed in like manner as has been usual in other cases where private property has been condemned for public use." 2 Stat. 335. The usual manner, under the statutes of Maryland, thus referred to, of estimating the compensation or damages to be awarded to the owners of land for opening or extending a street, had been by inquiring what damages they would "actually suffer from the passing of the road over the land," "taking into consideration all conveniences and inconveniences, advantages and disadvantages, arising thereby," or "all benefits and inconveniences." Herty's Digest, (1799) p. 459; Maryland Stats. 1790, c. 32, § 8; 1798, c. 77, § 4; 1799, c. 32, § 2; 1792, c. 27, § 3; 1798, c. 19, § 3; 2 Kilty's Stat.

The supplementary act of March 3, 1809, c. 30, after defining anew the limits of Georgetown, provided in section 4 as follows: "The said corporation shall have power to lay out, open, extend and regulate streets, lanes and alleys, within the

limits of the town, as before described, under the following regulations, that is to say: the mayor of the town shall summon twelve freeholders, inhabitants of the town, not directly interested in the premises, who, being first sworn to assess and value what damages would be sustained by any person or persons by reason of the opening or extending any street, lane or alley, (taking all benefits and inconveniences into consideration,) shall proceed to assess what damages would be sustained by any person or persons whomsoever, by reason of such opening or extension of the street, and shall also declare to what amount in money each individual benefited thereby shall contribute and pay towards compensating the person or persons injured by reason of such opening and extension; and the names of the person or persons so benefited, and the sums which they shall respectively be obliged to pay, shall be returned under their hands and seals to the clerk of the corporation, to be filed and kept in his office; and the person or persons benefited by opening or extending any street, and assessed as aforesaid, shall respectively pay the sums of money so charged and assessed to them, with interest thereon at the rate of six per cent per annum, from the time limited for the payment thereof until paid; and the sums of money assessed and charged in manner aforesaid to each individual benefited in manner aforesaid shall be a lien upon and bind all the property so benefited to the full amount thereof: Provided always, that no street, lane or alley shall be laid out, opened or extended, until the damages assessed to individuals in consequence thereof, shall have been paid, or secured to be paid." 2 Stat. 537, 538.

That provision of that act, in its leading features, was singularly like the act of 1893 now in question. Like this act, it provided that the jury, in assessing the damages sustained by any person by reason of the opening or extension of a street, should take into consideration the benefits to him; that the same jury, which assessed the damages, should also ascertain what landowners were benefited by the opening or extension, and what sums they should respectively pay towards the damages; that these sums should be a lien on the property benefited, and should bear interest until paid; and that the street should

not be laid out, opened or extended, until the damages were paid or secured. The act of March 3, 1809, has more than once been brought before this court, without a doubt of its constitutionality being expressed. *Goszler* v. *Georgetown*, (1821) 6 Wheat. 593; *Hannewinkle* v. *Georgetown*, (1872) 15 Wall. 547.

In later acts authorizing the laying out of highways, or the construction of other public improvements, in the District of Columbia, Congress has repeatedly made provision for the deduction of benefits in estimating the compensation to be paid to an owner of land, whether for the value of the part taken, or for damages to the rest, even if the result should be to leave nothing payable to the owner.

The act of Congress of July 1, 1812, c. 117, § 13, authorized the corporations of Washington and Georgetown, or either of them, to build a bridge across Rock Creek; and the mayor to summon a jury of twelve disinterested freeholders, each of whom should be sworn to "justly, faithfully and impartially value all the ground held as private property and intended and required to be used or occupied by reason of the contemplated erection of the permanent bridge, and the amount of damages the proprietor or proprietors of said ground will sustain, (taking into view at the same time the benefits which the said proprietor or proprietors will derive from the erection of the said bridge,) according to the best of his skill and judgment; and the inquisition and valuation thereupon taken shall be signed by the mayor and seven or more of the said jury, and shall be binding and conclusive upon all parties concerned." 2 Stat. 773, 774.

A statute of Virginia of January 27, 1824, incorporating the Chesapeake and Ohio Canal Company, approved and accepted by a statute of Maryland of January 31, 1825, and ratified and confirmed, for the purpose of enabling the corporation to carry into effect the provisions thereof in the District of Columbia, by the act of Congress of March 3, 1825, c. 52, provided, in section 15, that a jury of not less than twelve, out of eighteen summoned for the purpose, should "value the land and all damages the owner thereof shall sus-

tain by cutting the canal through such land, or the partial or temporary appropriation, use or occupation of such land"; and that, "in every such valuation and assessment of damages," the jury should be "instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the said canal through, or erecting any of said works upon his land, and to regulate their verdict thereby; except that no assessment shall require any such owner to pay or contribute anything to the said company where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as aforesaid." 4 Stat. 101, 793, 798, 801.

An inquisition under that act, condemning land in Georgetown for the use of the canal, having been returned into the Circuit Court of the United States for the District of Columbia, was objected to by the owner of the land, upon the ground that no provision had been made for just compensation, as required by the Constitution. Chief Justice Cranch, in overruling the objection, said:

"It is contended, that the Constitution provides a positive, not a conjectural compensation; that under the provisions of this charter, it may happen that no compensation at all may be made; that the expected benefits which the jury shall have estimated may never arrive; and that, therefore, the jury should not have been required, by the charter, to consider them in their estimate of value and damages.

"But the Constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority which should give the power to take the private property for public use. All the States, prior to the adoption of the Constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads and other public uses; and they have generally provided for compensation through the intervention of a jury.

"It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the

just compensation. If the jury had not been required by the charter to consider the benefit, as well as the damage, they would still have been at liberty to do so, for the Constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation to give him the full value. If the jury would have a right to consider the benefit, as well the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter it might happen that no compensation at all, or, at most, a nominal compensation, would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public as well as just towards the individual, they ought to do, cannot be considered as repugnant to the Constitution." *Chesapeake & Ohio Canal* v. *Key*, (1829) 3 Cranch C. C. 599, 601.

A year later, a similar inquisition returned into the same court was objected to, because the jury had not found the value of the land and the damages separately, but had included both in one sum. To which Chief Justice Cranch, after reading the provision of the statute, above quoted, answered: "The benefits to be derived, therefore, may be as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum." *Chesapeake & Ohio Canal* v. *Union Bank of Georgetown*, (1830) 4 Cranch C. C. 75, 80.

The very words of that provision were repeated in section 13 of the act of Congress of May 26, 1830, c. 104, incorporating the Alexandria Canal Company. 6 Stat. 419, 424.

This legislation of Congress, and these decisions of the Circuit Court of the District of Columbia, authorizing the setting

off of benefits against the value of land taken, as well as against additional damages, for the construction of a canal, are in accord with the statement of Chief Justice Waite, speaking for this court, in 1881, that the construction of a canal "might confer benefits that would be a just compensation for the private property taken for its use." *Kennedy* v. *Indianapolis*, 103 U. S. 599, 605.

From 1812 to 1890, a period of more than three quarters of a century, the general acts of Congress, authorizing the laying out or altering of public roads in the District of Columbia, outside the cities of Washington and Georgetown, expressly provided for the deduction of benefits in the assessment of damages to the owners of lands.

By section 2 of the act of July 1, 1812, c. 117, the levy court of the county of Washington was authorized to lay out, straighten and repair such public roads; and by section 3 a warrant might be issued to the marshal of the District of Columbia to summon a jury of twelve disinterested freeholders, and to administer to each of them an oath to "justly, faithfully and impartially value the land and all damages the owner thereto will sustain by the road passing through the same, having regard to all circumstances of convenience, benefit or disadvantage, according to the best of his skill and judgment; and the inquisition thereupon taken shall be signed by the marshal and seven or more of the said jury, and shall be conclusive." 2 Stat. 771, 772. Like proceedings for the condemnation of lands were provided for in the similar act of May 3, 1862, c. 63, § 5; 12 Stat. 384.

In 1863, the same court, whenever it should "deem it conducive to the public interests to open a new road, or change the course of an old one," was authorized to order the route to be surveyed, and the road to be recorded and opened; and to direct the marshal "to summon a jury of seven judicious disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof"; "but in doing this they shall take into consideration the benefit it

may be to him or her by enhancing the value of his or her land, or otherwise, and give their verdict accordingly," signed by the jury, or by a majority of them, and attested by the marshal. If the court or any land-owner was dissatisfied with that verdict, the matter might be submitted to a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final. Act of March 3, 1863, c. 106, § 8; 12 Stat. 801, 802.

By the act of May 9, 1866, c. 76, empowering the levy court "to declare and locate as public highways such roads known and used as military roads in said district during the rebellion, as said court may deem advisable," "the damages which the owners of the land over which said roads pass shall sustain by reason of said roads being declared public highways" were to be assessed as provided in the act of July 1, 1812, c. 117, § 3, above quoted. 14 Stat. 45.

In 1871, upon the creation of a government for the District of Columbia, with a governor and a legislative assembly, the levy court was abolished, and its powers over public roads under the act of 1863 were vested in the board of public works. Act of February 21, 1871, c. 62, §§ 1, 18, 40; 16 Stat. 419, 423, 428; Laws of D. C. of 1871, c. 76, § 2. In 1874, when all provisions of law providing for a governor, a legislative assembly and a board of public works in the District of Columbia were repealed, the provisions of the act of 1863 upon the subject of highways were substantially reënacted, substituting "the proper authorities" for the levy court, in the Revised Statutes of the District of Columbia, chapter 11, §§ 252–265; it being provided in section 260 of these statutes that the jury should "decide what damages, if any, each owner may sustain by reason of running the road through his premises," and in section 261 that "in making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly." By subsequent acts, the powers of the board of public works have been vested in the Commissioners of the District of Columbia. Acts of June 20, 1874, c. 337, §§ 1, 2; 18 Stat.

116; June 11, 1878, c. 180, § 2; 20 Stat. 103; Comp. Stat. D. C. c. 29.

Again, by the act of April 15, 1886, c. 50, § 4, authorizing the construction of the Congressional Library Building, the damages occasioned by the taking of land for that purpose were to be ascertained and assessed "in the manner provided with reference to the taking of land for highways in the District of Columbia," that is to say, according to chapter 11 of the Revised Statutes of the District. 24 Stat. 13.

By the act of August 30, 1890, c. 837, § 3, it was provided that "the value of the interests of all persons, respectively," in land taken for the enlargement of the Government Printing Office, should be appraised by three commissioners appointed by the Supreme Court of the District of Columbia, upon the application of the special board created by the act; and it was further provided that thereafter, "in all cases of the taking of property in the District of Columbia for public use," the like proceedings should be had upon the application of the proper officers. 26 Stat. 413. But the object of these provisions would appear to have been to make a change only in the persons who should assess the compensation, not in the rule of assessment. And by the act of August 7, 1894, c. 232, it was enacted that section 3 of the act of 1890 should "not be construed to apply to the condemnation of land for public highways, nor to repeal chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, in regard to public highways, roads and bridges." 28 Stat. 251.

The power of Congress, exercising the right of eminent domain within the District of Columbia, to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, does not appear ever to have been judicially questioned until it was denied by a majority of the Court of Appeals of the District of Columbia within the last two or three years. *District of Columbia* v. *Prospect Hill Cemetery*, 5 App. D. C. 497; *Maryland & Washington Railway* v. *Hiller*, 8 App. D. C. 289; *District of Columbia* v. *Armes*, 8 App. D. C. 393.

The position thus assumed by the majority of that court is

not only against the uniform course of previous legislation and decision in the District of Columbia, but it is opposed to the great preponderance of the authorities elsewhere.

In the Fifth Article of the earliest amendments to the Constitution of the United States, in the nature of a Bill of Rights, the inherent and necessary power of the Government to appropriate private property to the public use is recognized, and the rights of private owners are secured, by the declaration, "nor shall private property be taken for public use without just compensation."

The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, "is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised, except upon condition that just compensation shall be made to the owner; and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl* v. *Lake County School District*, 133 U. S. 553, 562. The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the

street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

Of the overwhelming number of decisions in the courts of the several States, which support this view, a few of the most important may conveniently be referred to.

By the Declaration of Rights prefixed to the constitution of Massachusetts, established in 1780, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. pt. 1, art. 10. By the statute of Massachusetts of 1786, c. 67, § 4, the court of sessions, upon determining it "to be of common convenience or necessity" that a new highway or common road should be laid out, or an old one altered, was authorized to appoint "a committee of five disinterested sufficient freeholders, in the same county, to lay out such highway or road," "according to their best skill and judgment, with most convenience to the public, and least prejudice or damage to private property"; and it was provided that "if any person be damaged in his property, by the laying out or altering such highway," the town in which the way was should make him "reasonable satisfaction, according to the estimation of the committee, or the major part of them"; and any person "aggrieved by the doings of the said committee, in locating said way, or in estimating damages," might have their doings, in both respects, reviewed by a sheriff's jury. Although that statute made no mention of benefits, the Supreme Judicial Court of the State, in 1807, speaking by Chief Justice Parsons, and laying down "the principles of law which ought to direct these proceedings," said: "In estimating the damages, the committee are not confined to the value of the land covered by the road,

and the expense of fencing the ground. The owner may suffer much greater damage by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location. The estimation ought, therefore, to be according to the damage which the owner will, in fact, sustain in his property by the opening of the road." *Commonwealth* v. *Coombs*, 2 Mass. 489, 491.

The same rule was recognized in *Commonwealth* v. *Norfolk Sessions*, 5 Mass. 435, and in *Commonwealth* v. *Middlesex Sessions*, 9 Mass. 388; and, after being constantly acted on in Massachusetts, was embodied in the Revised Statutes of 1836, in this form: "In estimating the damages sustained by any person in his property, by the laying out, altering or discontinuing of any highway, the jury shall take into consideration all the damage done to the complainant, whether by taking his property, or by injuring it in any manner; and they shall also allow, by way of set-off, the benefit, if any, to the property of the complainant, by reason of such laying out, alteration or discontinuance." Those statutes also provided that damages occasioned by the laying out and maintaining of a railroad should be estimated in the manner provided in the case of laying out highways. Mass. Rev. Stat. c. 24, § 31; c. 39, § 56. And both provisions have been reënacted in successive revisions of the statutes. Gen. Stat. of 1860, c. 43, § 16; c. 63, § 21; Pub. Stat. of 1882, c. 49, § 16; c. 112, § 95.

In 1849, the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Dewey, with the concurrence of Chief Justice Shaw and Justices Wilde, Metcalf and Fletcher, held that, in estimating the damages for the taking of land for a railroad, any direct and peculiar benefit, or actual increase of value, thereby caused to land of the same owner, adjoining or connected with the land taken, and forming part of the same parcel or tract, was to be considered and allowed by way of set-off, and in reduction of damages; but not any general benefit or increase of value to be occasioned

to such land, in common with all the lands in the neighborhood, by the establishment of the railroad and the facilities connected therewith. The conclusion of the court was summed up as follows: "The respondents are not to have the benefit of any increase in value of the petitioner's adjacent land, so far as he has been benefited by the railroad, merely in common with all the citizens of the neighborhood or village, by the anticipated general rise of property, by reason of the railroad's passing through the town and in the vicinity of their lands. It is only the increased value of the land of the petitioner, arising from the location of the road over some part of it, which is to be taken into consideration. If such location over the land of the petitioner has raised the value of his adjacent lands, then a reduction or offset is to be allowed the respondents on that account. It is the increase of value occasioned by the location, and of course has reference to the state of things existing at the time when the land is taken by the location." *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291, 298, 299. The rule as thus qualified has ever since been applied in Massachusetts to highways. *Allen* v. *Charlestown*, 109 Mass. 243; *Hilbourne* v. *Suffolk*, 120 Mass. 393; *Cross* v. *Plymouth*, 125 Mass. 557.

In New York, the courts have gone beyond this in allowing benefits to be taken into consideration in diminution of compensation or damages for land taken for a highway. The constitution of 1821, art. 7, sect. 7, declared, in the very words of the Fifth Amendment of the Constitution of the United States, "nor shall private property be taken for public use without just compensation." The Court of Errors, in 1831, affirming a judgment of the Supreme Court of the State, held that the benefit accruing to the owner of land taken for a street in the city of New York, by the increased value of adjacent lands belonging to him, might be set off against the loss or damage caused to him by the taking, and, if equal to such loss or damage, was a just compensation for the land taken; and Chancellor Walworth, delivering the leading opinion, said: "The owner of the property taken is entitled to a full compensation for the damage he sustains thereby; but if the taking of his

property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages. Besides, it is a well settled principle, that where any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expenses of the improvement, and in proportion to the supposed benefit received by each. In this case, if the whole value of the property taken for a street in the city of New York is allowed to the individual owner, the proprietors of the adjacent lots must be assessed for the purpose of paying that amount, and if the individual whose property is taken is the owner of a lot adjacent, that lot must be assessed ratably with others. It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance, and is assessed for his portion of the damage, or whether the one sum is offset against the other in the first place, and the balance only is allowed." *Livingston* v. *New York*, 8 Wend. 85, 101, 102. That decision appears to have since been considered as establishing that both special and general benefits from the laying out of a street may be set off against the value of the part taken, as well as against the damages to the remainder. *In re Furman Street*, 17 Wend. 649, 659, 671; *People* v. *Brooklyn*, 4 N. Y. 419, 435; *Granger* v. *Syracuse*, 38 How. Pract. 308; *Genet* v. *Brooklyn*, 99 N. Y. 296, 305; *Eldridge* v. *Binghampton*, 120 N. Y. 309, 313; *Bohm* v. *Metropolitan Railroad*, 129 N. Y. 576, 586.

In New Jersey, in a very recent case, a statute authorizing the taking of land for a highway, and directing the commissioners "to make a just and equitable estimate and appraisement of the compensation and damages each owner of the real estate and land to be taken will sustain by reason of such taking, considering in such appraisal the condition in which each owner's parcel will be left after taking so much thereof as will be necessary for said opening, and the benefits that will result from such road to the owner or owners of such land and real estate," was held by the Supreme Court, in an opinion delivered by Mr. Justice Dixon, to be consistent

with the provision of the constitution of 1844, art. 1, sect. 16, that "private property shall not be taken for public use, without just compensation," for these reasons: "Just compensation for taking part of an entire tract of land for public use cannot, we think, be ascertained without considering all the proximate effects of the taking. These are the withdrawal of the part taken from the dominion of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken to a certain public use. Just compensation is ascertained by combining the pecuniary value of all these facts; if any be excluded, what is given is more or less than is just. The value of the land taken is no more essential to just compensation than is satisfaction for the damage done to the residue, nor is it more exempt from diminution on account of benefits conferred. There is, however, a possibility of benefit to accrue from certain public uses for which land is taken, like the opening of highways, which should not be considered, for two reasons: first, because this benefit is to arise, if at all, in the indefinite future, while the compensation must be such as is just at the time of the taking; second, because it is so uncertain in character as to be incapable of present estimation. Such benefit is that which may spring from the growth of population, if it should be attracted by the public improvement for which the land is taken, and from similar sources. It is usually styled general benefit, because it affects the whole community or neighborhood. But any benefit, which accompanies the act of taking the land for the contemplated use, and which admits of reasonable computation, may enter into the award." *Mangles* v. *Hudson Freeholders*, 26 Vroom (55 N. J. Law), 88, 92. The like rule has been upheld by the Court of Errors in the case of a railroad. *Packard* v. *Bergen Neck Railway*, 25 Vroom (54 N. J. Law), 553.

In Pennsylvania, the constitution of 1790, art. 9, sect. 10, declared, "nor shall any man's property be taken or applied to public use," "without just compensation being made"; and that provision, without material change, has been retained in

the constitution of 1838, art. 9, sect. 10, and in that of 1873, art. 1, sect. 10. The rule of compensation was tersely stated by Chief Justice Gibson, in 1821, as follows: "The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the *property*, without reference to the person of the owner, or the actual state of his business; and in doing that, the only safe rule is, to inquire what would the property unaffected by the obstruction have sold for, at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation." *Schuylkill Navigation Co.* v. *Thoburn*, 7 S. & R. 411, 422. The rule, as thus stated, was recognized by Mr. Justice Strong in *Watson* v. *Pittsburgh & Connellsville Railroad*, 37 Penn. St. 469, 481; and in accordance therewith it has been uniformly held that when part of a parcel of land is taken, direct and special benefits to the rest of the same parcel, beyond the general increase in the value of property in the neighborhood, are to be deducted. *Plank Road Co.* v. *Rea*, 20 Penn. St. 97; *Railway Co.* v. *McCloskey*, 110 Penn. St. 436; *Setzler* v. *Pennsylvania &c. Railroad*, 112 Penn. St. 56; *Long* v. *Harrisburg &c. Railroad*, 126 Penn. St. 143.

In Ohio, under the constitution of 1802, art. 8, sect. 4, which declared, "private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner," the Supreme Court of the State, in 1846, held that, in assessing the compensation for the taking of part of a lot of land for widening a street, benefits resulting from the improvement to the residue of the lot, might be set off; and said: "That just, full and adequate *compensation* must be made, and *in money*, is certain; more cannot be required; but if, in appropriating property of the value of $4000, when, by the same appropriation, the value of what remains is increased $2000, and the value of the property taken is the rule of damages, the owner actually takes $2000 without the least consideration, and receives more than the constitution enjoins to be paid, because

it is more than a *compensation*. The word *compensation* imports that a wrong or injury has been inflicted, and which must be redressed in money. Money must be paid to the extent of the injury, whether more or less than the value of the property; and then, in our view, is the language of the constitution satisfied. We are confirmed in our opinion of the correctness of the construction we place on the word *compensation*, as employed in the constitution, from the fact that such construction has obtained and been acquiesced in, from a period not far short of the organization of the state government. In the opening of roads, constructing turnpikes and appropriating lands for canals, benefits conferred have been constantly and unceasingly deducted from the value of the property, or damages otherwise sustained. Long contemporaneous construction of an instrument is seldom erroneous, and is always deserving of great consideration, when the meaning of the instrument is obscure." *Symonds* v. *Cincinnati*, 14 Ohio, 147, 174, 175. The same rule was followed so long as the constitution of 1802 was in force. *Brown* v. *Cincinnati*, 14 Ohio, 541; *Kramer* v. *Cleveland & Pittsburgh Railroad*, 5 Ohio St. 140; *Columbus &c. Railroad* v. *Simpson*, 5 Ohio St. 251.

The rule upon the subject was expressed by Mr. Justice Brewer, when a member of the Supreme Court of the State of Kansas, as follows: "Outside of any special constitutional or statutory restrictions, the right of the State to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed." "But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just

that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and, instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles, then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained." "The word 'damages' is of general import, and is equivalent to compensation. It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged, therefore, more than in the value of that which is taken. Conversely, the appropriation of the part taken to the new uses for which it is taken may operate to the direct and special improvement and benefit of that not taken. Surely, this direct increase in value, this special benefit resulting from the improvement the public is making, and for which it must be taxed, reduces the damages he has sustained." *Pottawatomie Commissioners* v. *O'Sullivan*, 17 Kansas, 58–60. And the rule has been applied where the special benefits equalled or exceeded the damages, so that the owner of the land received nothing. *Tobie* v. *Brown Commissioners*, 20 Kansas 14; *Trosper* v. *Sabine Commissioners*, 27 Kansas, 391.

Nothing inconsistent with this view was decided or intimated in the opinion of this court, delivered by Mr. Justice Brewer, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312. All that was there said upon this subject was as follows: "The 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated; and leaves it to stand as a declaration that no private property

shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration." 148 U. S. 326. And on the next page the opinion of the Supreme Court of Mississippi in *Isom* v. *Mississippi Central Railroad*, 36 Mississippi, 300, was referred to and quoted from, not by way of endorsing the peculiar views expressed by that court in another part of its opinion upon the subject of benefits, but only in support of the general proposition that, while the question what property is needed for public purposes is to be determined by the legislature, the ascertainment of what is just compensation is a judicial inquiry. See *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380, 385; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226.

The case, just decided, of *Spokane Falls & Northern Railway* v. *Ziegler*, *ante*, 65, in which the owner of a tract of land, part of which was taken for a railroad, and the rest thereby injured, was allowed to recover against the railroad corporation the full value of the land taken, and also the difference in market value of the part left, "irrespective of the effect on the market value by reason of the building of the road," was governed by the express provision of § 2456 of the Code of Washington Territory, afterwards embodied in art. 1, sect. 16, of the constitution of the State of Washington, requiring, in such a case, compensation to be made, "irrespective of any benefit from any improvement proposed by such corporation." See *Spokane Falls & Northern Railway* v. *Ziegler*, 15 U. S. App. 472, 478; *Enoch* v. *Spokane Falls & Northern Railway*, 6 Wash. St. 393.

The careful collection and classification of the cases upon this subject in Lewis on Eminent Domain, §§ 465–471, shows that in the greater number of the States, unless expressly forbidden by constitution or statute, special benefits are allowed to be set off, both against the value of the part taken, and against damages to the remainder; that in some of those

States general benefits also are allowed to be thus set off; that in comparatively few States both kinds of benefits, or at least special benefits, are allowed to be set off against damages to the remainder, but not against the value of the part taken; and that in Mississippi alone benefits are not allowed to be considered at all. See also Cooley Const. Lim. (6th ed.) 697–702; 2 Dillon Mun. Corp. (4th ed.) §§ 624, 625; Randolph on Eminent Domain, §§ 254–273.

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken.

The suggestion, made at the bar, that section 11 of the act in question, as applied to a proceeding under section 6 relating to an existing subdivision, allows the jury to deduct contingent and speculative benefits to arise in the future from the actual opening and improvement of the highways, may be best met by recurring to the general scope of the act.

In the first section, Congress directed the Commissioners of the District of Columbia to prepare a plan for the extension of a permanent system of highways, throughout that part of the District lying outside of the cities of Washington and Georgetown, in conformity, as nearly as practicable, with the general plan of the city of Washington.

But Congress evidently recognized the importance, for the efficient execution of its scheme, and for the avoidance of un-

necessary expenditures, to begin by dealing with those localities where subdivisions had been made and streets laid out by the owners of the land, regardless of the general plan; and to leave the completion of the system through other parts of the District, in which the land had not been subdivided, and comparatively few streets had been laid out, to be dealt with afterwards.

The Commissioners, therefore, by section 2, were required to prepare their plan of extension in sections, beginning with the areas covered by existing suburban subdivisions not in conformity with the general plan of the city of Washington, and to prepare maps of those sections; and, by section 6, were required, within thirty days after the record of any such map which should alter or dispense with any highway in any then existing subdivision in the area included in the map, to present a petition to the court for condemnation of a permanent right of way for the public over all lands within that subdivision, not already owned by the United States or the District of Columbia or dedicated to public use as a highway. And by section 7, petitions as to lands not within existing subdivisions might be presented to the court at any time thereafter.

The only substantial difference between proceedings for condemnation of a public right of way over lands within an existing subdivision, under section 6, and over lands not within an existing subdivision, under section 7, is that, as to lands within an existing subdivision, the petition to the court must be presented within thirty days after the recording of the map, and the court is then to proceed with the condemnation — Congress, in effect, itself determining that the public convenience requires the immediate establishment of the new highways — while, as to lands not within any existing subdivision, the petition to the court may be presented at any time thereafter, and is not to be presented, nor any condemnation made, until the Commissioners and the court, respectively, have determined that the public convenience requires the immediate opening of the highways in question. Although the word "opening" does not occur in section 6, while it is used

in section 7, yet the authority of the court, as defined in either section, is only "to condemn a permanent right of way for the public" over the lands in question, and does not include the actual laying out and construction of the new highways. Condemnation, and nothing more, is likewise mentioned in the corresponding provisions of section 9.

The provisions of section 8, as to notice to parties interested, and of sections 10–13, as to the summoning and organization of a jury of seven, and as to their duties in assessing the compensation or damages to land-owners, including the provision of section 11 for considering benefits in the assessment of damages, are in terms applicable alike to proceedings under section 6 and under section 7.

So are the provisions of section 15, which direct the compensation awarded to be assessed and charged, one half upon the lands benefited, and the other half upon the District of Columbia; and which, in the use of the various phrases, "highway condemned and established under this act," "laying out and opening of such highway," or simply "opening of any highways," evidently treat condemnation, establishment, laying out and opening of a highway as denoting one and the same thing, the appropriation or setting apart of land for a highway and throwing it open to public travel, and have no regard to the actual grading or construction of the highway.

The provisions of the act which relate to the deduction of benefits in assessing compensation or damages are as follows:

Section 11 provides that, "where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury, in assessing the damages therefor, shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly; and the court may require, in such case, that the damages and the benefits shall be found and stated separately."

Section 13 provides that "the verdict of the jury shall state, as to each parcel of land involved in the proceeding, only the amount of compensation, less the benefits, if any,

which it shall award in respect thereof." And section 15 speaks of the benefits, so deducted, as "the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract."

Construing section 11 in connection with the rest of the act, the words "the purpose for which it is taken," in the provision that, when the use of a part only of any parcel or tract of land is condemned, the jury, in assessing the damages therefor, shall take into consideration the benefit that "the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the remainder of the same," clearly signify the purpose for which it is condemned, the appropriation of the land for a highway, which is distinct from, and necessarily antecedent to, the actual construction and completion of the way; and the benefits, as well as the damages, to be taken into consideration, are to be estimated as of the date of such appropriation. The damages assessed as of that date constitute the entire compensation for such appropriation of land for a highway, including all injuries resulting from any change of the natural grade required in the actual construction of the highway, and also, it would seem, unless expressly provided otherwise by constitution or statute, any which may be caused by a future change of the grade by the public authorities. *Goszler* v. *Georgetown*, 6 Wheat. 593; *Smith* v. *Washington*, 20 How. 135, 149; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Chicago* v. *Taylor*, 125 U. S. 161; *Wabash Railroad* v. *Defiance*, *ante*, 88.

The necessary conclusion is that there is nothing unusual or unconstitutional in the provision of section 11, requiring benefits to be taken into consideration in assessing the compensation or damages to be awarded to the owners of lands affected by the establishment of new highways.

The other principal question in the case is of the constitutionality of section 15, which directs "the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act," to be assessed and charged, one half upon the lands benefited

thereby, and the other half upon the District of Columbia; and, as to the first half, enacts that it "shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof"; that "the same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, or by the abandonment of an existing highway, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one half of the damages: Provided, that in making such assessment for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract"; that "the proceedings of the court and the jury, in making assessments for benefits under this section, shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages; and the verdict of the jury, making an assessment under this section as to any parcel of land, shall not be conclusive until the same shall have been confirmed by the court"; and that, "when confirmed by the court, the assessment so made shall be a lien upon the land assessed," and shall be collected as other taxes are collected, "and shall be payable in five equal annual instalments, with interest at the rate of four per centum per annum from the date of the confirmation of the assessment by the court."

The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court.

It was contended by some of the owners of lands that the public improvement proposed was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the lands affected by the im-

provement. But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole State, or by the district or neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile harbor; and, speaking by Mr. Justice Field, said: "The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure." *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704.

The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356; *Walston* v. *Nevin*, 128 U. S. 578, 582; *Lent* v. *Tillson*, 140 U. S. 316, 328; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 198, 199; *Paulsen* v. *Portland*, 149 U. S. 30. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Shoemaker* v. *United States*, 147 U. S. 282, 286, 302.

The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by

the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer* v. *Merchant*, and *Shoemaker* v. *United States*, above cited; *Fallbrook District* v. *Bradley*, 164 U. S. 112, 167, 168, 175, 176; *Ulman* v. *Baltimore*, 165 U. S. 719. See also the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in *People* v. *Brooklyn*, 4 N. Y. 419, 430.

The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners. *Mattingly* v. *District of Columbia*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Shoemaker* v. *United States*, *Paulsen* v. *Portland*, and *Fallbrook District* v. *Bradley*, above cited.

If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. *Davidson* v. *New Orleans*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Lent* v. *Tillson*, *Paulsen* v. *Portland*, and *Fallbrook District* v. *Bradley*, above cited.

The whole sum directed by section 15 to be assessed upon lands benefited is one half of "the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act." This fixing of the gross sum to be assessed was clearly within the authority of Congress, according to the above cases.

The class of lands to be assessed is defined by directing that the aforesaid sum "shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof," and that the jury "shall ascertain and determine what property is thereby benefited." And the rule of assessment is defined by the further direction that the jury "shall assess against each parcel which it shall

find to be so benefited its proper proportional part of" the sum aforesaid, with a proviso that, as to any tract, part of which only has been taken, due allowance shall be made "for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract."

It was argued that section 15 was too uncertain to be put in execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular subdivision in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular subdivision, or the whole District of Columbia. And there does not appear to be any uncertainty as to which alternative was in the contemplation of Congress. The lands to be assessed being described generally as "the lands benefited" by the condemnation and establishment of the new highway, or by the abandonment of an existing highway, and again as the "property thereby benefited," and as the lands which the jury "find to be so benefited," without any words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment. The question what parcels of lands, within the district so ascertained, are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal entrusted with the authority of making this assessment.

Nor can we entertain any serious doubt as to the rule of assessment which is to govern. The directions that the jury "shall ascertain and determine what property is benefited" by the establishment of the highway, and "shall assess against each parcel which it shall find to be so benefited its proper proportional part of" the whole sum directed to be assessed,

making due allowance, when part only of a tract has been taken, for any deduction already made, in the assessment of damages for such taking, "on account of the benefit to the remainder of the tract," reasonably, if not necessarily, imply that the assessment is to be proportional to the benefit, and not to the market value or any other test; and are equivalent to the words in the Rock Creek Park Act, directing lands in the District of Columbia to be assessed, "as nearly as may be, in proportion to the benefits resulting to such real estate." Act of September 27, 1890, c. 1001, § 6; 26 Stat. 493; *Shoemaker* v. *United States*, above cited.

In support of the judgment below, much reliance was placed upon the opinion of the Supreme Court of New Jersey, delivered by Chief Justice Beasley, in *State* v. *Hudson County Commissioners*, 8 Vroom (37 N. J. Law), 12. But the statute there held unconstitutional left it wholly uncertain whether the cost of the public improvement, or only an undefined part thereof, should be assessed upon the owners of lands benefited; and directed the amount assessed to be apportioned among several townships, without prescribing or indicating any rule of apportionment. Some expressions in the opinion, if wrested from their context, can hardly be reconciled with the decisions of this court, above cited, or with the judgment of the Court of Errors of New Jersey, delivered by Chief Justice Beasley, in a later case, adjudging a statute to be constitutional, which directed the expenses of improving certain public roads to be estimated by commissioners, and to be by them assessed upon lands found by them to be benefited, in proportion to, and to the extent of, the benefit received, and the rest of the expense to be assessed upon the county. *State* v. *Road Commissioners*, 13 Vroom (42 N. J. Law), 608.

It was objected to the validity of section 15, that it commits the assessment of benefits upon lands, whether within or without the particular subdivision, benefited by the establishment of a new highway, to "the same jury" which estimates the compensation or damages, under the previous sections, for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating

the tribunal of seven men, which is to estimate the damages and to assess the benefits, as "a jury," when it is in truth an inquest or commission, appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity. *American Publishing Co.* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 474.

By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Custiss* v. *Georgetown & Alexandria Turnpike Co.*, 6 Cranch, 233; *Secombe* v. *Railroad Co.*, 23 Wall. 108, 117, 118; *United States* v. *Jones*, 109 U. S. 513, 519; *Shoemaker* v. *United States*, 147 U. S. 282, 300, 301; *Long Island Co.* v. *Brooklyn*, 166 U. S. 685.

Likewise, in the matter of assessing benefits, under the right of taxation, it is within the discretion of the legislature, as shown by the authorities already referred to upon this subject, to commit the ascertainment of the lands to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe. See also *People* v. *Buffalo*, 147 N. Y. 675.

Whether the estimate of damages and the assessment of benefits shall be entrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. And there are many precedents for entrusting the performance of both duties to the same persons. Act of March 3, 1809, c. 30, § 4, above cited, 2 Stat. 538; Cooley on Taxation, (2d ed.) 612; *In re Pittsburgh District*, 2 W. & S. 320; *In re Amsterdam Common Council*, 126 N. Y. 158.

It was suggested in argument that section 11, authorizing a deduction of benefits in assessing damages, and section 15, authorizing an assessment for benefits, both fail to make it

certain what benefits are intended, and may subject the landowner to a double assessment. But, upon a view of all the provisions relating to these matters, the reasonable construction is that the benefits to be taken into consideration and deducted, in estimating the compensation or damages under sections 10, 11 and 13, are the special and direct benefits which the appropriation of part of a tract of land for a highway may cause to the remainder of the tract; and that the benefits for which an assessment is to be made under section 15, upon such remainders and upon all other lands benefited, are the general benefits accruing to all lands in the neighborhood from the establishment of the highway; and section 15 carefully guards against the possibility of a double assessment, by directing the jury, in assessing benefits under this section, "to make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract." Both the award of damages and the assessment of benefits are to be made by the jury of seven under the supervision of the Supreme Court of the District of Columbia; neither is conclusive upon the parties until confirmed by that court; and both are subject to revision in matter of law by the Court of Appeals. The instructions given at the trial upon the proper elements of benefits in either stage or aspect of the case have not been, and could not be, brought before this court for revision — the jurisdiction of this court being limited by section 17 of the act of 1893, as amended by the act of January 21, 1896, c. 5, to the determination of the question whether the act of 1893, or any part thereof, is unconstitutional.

All the parties to these proceedings had due notice of the assessment of benefits under section 15, as well as of the assessment of damages under the earlier sections, by the publication of notice, in accordance with section 8, warning them to attend the court, "and to continue in attendance until the court shall have made a final order in the premises." If the lands of any other persons should be sought to be assessed for benefits under section 15, notice would be required to them by the provision thereof that "the proceedings of the court and the

jury, in making assessments for benefits under this section, shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages."

The objection that the owners of lands assessed for benefits under these proceedings will be left liable to be assessed anew under future proceedings for establishing other highways in other subdivisions is without force. Whenever it has been provided by a general law that a part of the expense of establishing any highway shall be assessed upon all lands in the neighborhood benefited thereby, it may often happen that the same land may be benefited by each of two highways laid out at successive periods of time, and be liable to be assessed accordingly. Take a simple example by way of illustration: Suppose a highway is laid out from north to south, increasing the value of the lands through which it runs and of all other lands in the neighborhood, and assessments of a portion of the cost are made upon all such lands and collected; and another highway is subsequently laid out from east to west, crossing the first highway at right angles; it may well happen that thereby the same, or some of the same, parcels of land benefited by the first highway, may be further increased in value, in common with other lands in the neighborhood, by the laying out of the second highway; and, to the extent to which they are so increased in value, they may justly and lawfully be subjected to a new assessment. The like result may take place when a highway, established at first through one subdivision only, is afterwards extended through another subdivision.

Objection was made to that part of section 15, which provides that the assessment, when confirmed by the court, shall be a lien upon the land and be collected like other taxes, and "be payable in five equal annual instalments, with interest at the rate of four per centum per annum from the date of the confirmation of the assessment by the court." But it is within the commonly exercised and indisputable power of the legislature to make taxes of any kind, assessed upon real estate, payable forthwith, and an immediate lien thereon. In the leading case of *Davidson* v. *New Orleans*, the objection that the assess-

ment was actually made before, instead of after, the work was done, was held to be untenable; and Mr. Justice Miller, speaking for this court, said: "As a question of wisdom — of judicious economy — it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise." 96 U. S. 100.

In coming to the conclusion that both section 11 and section 15 are in all respects constitutional, we do not find it necessary to invoke the familiar rule of construction, well expressed in Chief Justice Alvey's opinion in the present case as follows: "Every reasonable intendment should be indulged in order to maintain the act in its entirety, and if there be any reasonable mode of construction by which the entire act, and every provision thereof, may be sustained, as against a mere plausible construction tending to a contrary result, the former mode of construction must prevail. It is only when no other reasonable construction can be supported, that an act of Congress, or any part of it, can be declared to be unconstitutional and void, or invalid for any cause." 8 App. D. C. 421, 422.

The objections taken in argument to the constitutionality of other parts of the act may be more briefly disposed of.

The recording of the map under section 2 does not constitute a taking of any land, nor in any way interfere with the owner's use and enjoyment thereof. The provision of that section that after the map has been recorded, no further subdivision, not in conformity with the map, shall be admitted to record, goes no farther than the earlier acts of Congress of January 12, 1809, c. 8, and August 27, 1888, c. 916, cited at the beginning of this opinion; and is clearly within the authority of Congress to prevent anything being placed upon the public records, which may tend to defeat its object of securing uniformity in the entire system of highways in the District. The provision of section 3, giving to any deed or will, duly recorded, which refers to the subdivision made by the map, the same effect as if such subdivision had been made and recorded by the grantor or testator, tends to promote the same object, and

benefits rather than injures owners of lands. The provision of section 2, forbidding the Commissioners of the District of Columbia and all other public officers or agents to accept, improve, repair, or assume any responsibility in regard to highways not in conformity with the map, does not touch the rights of owners of lands; but was evidently intended to prevent the District of Columbia from being held responsible to travellers upon such highways, under the law prevailing in the District, as declared by this court, and suffered to remain unchanged by Congress. *Barnes* v. *District of Columbia*, 91 U. S. 540; *Detroit* v. *Osborne*, 135 U. S. 492, 498; *District of Columbia* v. *Woodbury*, 136 U. S. 450, 457. The object of the recording of the map is to give notice to all persons of the system of highways proposed to be established by subsequent proceedings of condemnation. It does not restrict in any way the use or improvement of lands by their owners before the commencement of proceedings for condemnation of lands for such highways; nor does it limit the damages to be awarded in such proceedings. The recording of the map, therefore, did not of itself entitle the owners of lands to any compensation or damages. *Shoemaker* v. *United States*, 147 U. S. 282, 321; *Prosser* v. *Northern Pacific Railroad*, 152 U. S. 59; *In re Pittsburgh District*, 2 W. & S. 320; *In re Forbes Street*, 70 Penn. St. 125; *In re Furman Street*, 17 Wend. 649; *Forster* v. *Scott*, 136 N. Y. 577; *Steuart* v. *Baltimore*, 7 Maryland, 500, 516.

The act throughout clearly manifests the intention of Congress that, especially with regard to the highways in existing subdivisions, all the proceedings, from the preparation of a general plan by the Commissioners of the District of Columbia to the award and payment of damages for lands taken or injured, the assessment of the amount of those damages upon lands benefited, the taking possession of the land condemned, and the actual construction of the highways, shall go on without unnecessary delay. By section 2, the Commissioners are directed to make the plan in sections, beginning with areas covered by existing subdivisions, and, as soon as the map of any section has been approved, to record it; and, in

order to enable them "to proceed speedily and efficiently to carry out the purposes of this act," are authorized to employ assistant engineers to have immediate charge of the work; and by section 4 the Commissioners and their agents are authorized to enter upon lands to make surveys. By section 6, within thirty days after a map has been recorded which changes highways in an existing subdivision, the Commissioners are to present to the court a petition for the condemnation of a permanent right of way, over all lands included within the highways laid out upon the map. By section 10, the damages to all the parcels of lands involved in the proceedings may be estimated by one jury; and by section 15 the same jury may be entrusted with the assessment of those damages upon lands benefited. By section 16, when damages have been assessed, the court is to order payment thereof to the parties or into its registry, and a copy of the order is to be presented to the Treasurer of the United States, to be reported by him to Congress. And by section 18, as soon as the damages have been assessed and paid, the Commissioners are to take immediate possession of the land; but if Congress, during six months of its session, omits to make the necessary appropriation, the proceedings are to be void, and the lands to belong to the owners.

Under the Constitution, and by the express provision of section 18 of this act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings. *Shoemaker* v. *United States*, above cited; *Sweet* v. *Rechel*, 159 U. S. 380.

The last clause of section 18, which provides that if the court enters judgment of condemnation in any case, and appropriation for the payment of the award of damages is not made by Congress, after being six months in session, "the proceedings shall be void and the land shall revert to the

owners," clearly means, by the words "the proceedings," all the proceedings, not merely the award of damages, but also the assessment of benefits, for if the award of damages is void, there remains no sum to be assessed for benefits. The phrase "and the land shall revert to the owners," is not happily chosen, for, the damages not having been paid, the title in the land has never passed out of them; but the clear meaning is that the title to the land shall be held to have remained in the owners as if no proceedings for condemnation had been had. This provision secures the owners from being compelled to part with their lands without receiving just compensation, and is within the constitutional authority of the legislature. *Baltimore & Susquehanna Railroad* v. *Nesbit*, 10 How. 395; *Garrison* v. *New York*, 21 Wall. 196.

The result is that there is nothing in the act of March 2, 1893, c. 197, inconsistent with the Constitution, and therefore the judgments of both of the courts of the District of Columbia must be reversed. So far as the cases are disclosed by the records sent up, it would seem that judgment should be entered upon each of the verdicts as originally returned. But the appellate jurisdiction conferred upon this court being restricted to the determination of the question whether the act of 1893, or any part thereof, is unconstitutional, the safer and more proper form of judgment appears to this court to be

Judgments of the Court of Appeals and of the Supreme Court of the District of Columbia reversed, and cases remanded for further proceedings not inconsistent with this opinion.

THE J. P. DONALDSON.

CERTIFICATE FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 29. Argued April 1, 1896. — Decided May 24, 1897.

No contribution in general average can be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention and the effect of saving the tug.

Opinion of the Court.

THE case is stated in the opinion.

Mr. F. S. Masten for appellant.

Mr. Harvey D. Goulder filed a brief for appellant, upon which were also *Mr. Francis J. Wing* and *Mr. S. Holding.*

Mr. Frank H. Canfield for appellee. *Mr. George L. Canfield* was on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

Two libels in admiralty in the District Court of the United States for the Eastern District of Michigan, against the propeller J. P. Donaldson, by the owners of the barges Eldorado and George W. Wesley, for the loss of the barges, having been consolidated and dismissed in that court; and its decree having been reversed by the Circuit Court upon the ground that the libellants were entitled to recover against the propeller for the loss of the barges as a general average contribution, and a decree accordingly having been rendered for the libellants; and the causes having been taken by appeal from the Circuit Court to the Circuit Court of Appeals; that court, desiring the instruction of this court as to the right of the owners of the barges to recover against the propeller upon the principles of general average contribution, certified to this court the question whether they could so recover upon the following facts:

"The J. P. Donaldson was towing the said barges Eldorado and George W. Wesley from Buffalo, New York, to Bay City, Michigan, having no other connection with them than that she was to tow them, and to receive for her services a portion of freight which the said barges would earn on the trip, according to the custom and usage which prevails upon the Great Lakes. By a violent storm, and without negligence on the part of the J. P. Donaldson, she, with her tow, were driven on a lee shore, and all were in imminent, if not certain, peril of being blown ashore and lost. The J. P. Donaldson strug-

gled against the storm to the last moment she could with safety to herself; and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so, and without negligence on his part, cut the tow-line connecting said barges to her, and the said barges were driven on shore and were wrecked and lost, and the J. P. Donaldson, by reason of being thus disencumbered of her tow, was enabled to reach a port of safety."

By the order of that court there were transmitted to this court, together with the above certificate, copies of the pleadings and decrees, and of the opinions of the District and Circuit Courts, reported in 19 Fed. Rep. 264, and 21 Fed. Rep. 671.

This case presents a novel question in the law of general average, which, briefly stated, is whether a contribution in general average can be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention, and with the effect, of saving the tug.

The decision of this court in the recent case of *Ralli* v. *Troop*, 157 U. S. 386, and the reasons upon which that decision was based, go far towards determining this question.

In that case, upon full review of the authorities, it was held that the right of contribution in general average, whether considered as resting upon natural justice, or upon implied contract, or upon a rule of the maritime law, known to and binding upon all owners of ships and cargoes, could only arise out of the exercise of the power of the master, or of one occupying his place, as the agent by necessity of the owners of ship and cargo, and charged by law with the duty, in case of emergency, of sacrificing part of the property for the safety of the rest. This court there said: "Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office — whatever may be considered the source of his authority — the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of

the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel, *magister navis*, as the person entrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority." 157 U. S. 400. "There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them. The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice, nor a subject of the contribution." 157 U. S. 403. It was likewise shown that by the general law, unless modified by local statute or custom, the right of contribution is limited to the particular ship and cargo, and the sacrifice of one ship for the safety of another does not give rise to any claim of general average. 157 U. S. 404, 406, 408.

The question then is whether the steam tug and her tow of barges were so connected by the contract of towage, as to make the tug and the tow, while navigated under and in accordance with that contract, a single maritime adventure; to entrust the master of the tug with the authority, in case of unforeseen emergency, of sacrificing any of the barges, or the whole or part of the cargo of any of them, for the safety of the rest of the barges and their cargoes, or of the tug, or of her cargo, if any; and, if such safety is thereby secured, to give the owners of the interest sacrificed a right of contribution in general average against the interests saved, or their owners.

While the tug is performing her contract of towing the barges, they may indeed be regarded as part of herself, in the sense that her master is bound to use due care to provide for their safety as well as her own, and to avoid collision, either of them or of herself, with other vessels. *The Syracuse*, 9 Wall. 672, 675, 676; *The Civilta*, 103 U. S. 699, 701.

But the barges in tow are by no means put under the control of the master of the tug to the same extent as the tug herself, and the cargo, if any, on board of her.

A general ship carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier; and the ship and her owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 437. But a tug and her owners are subject to no such liability to the owners of the vessels towed, or of the cargoes on board of them. The owners of those vessels or cargoes cannot maintain any action for the loss of either against the tug or her owners, without proving negligence on her part. As was said by Mr. Justice Strong, and repeated by the present Chief Justice, "An engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." *The Webb*, 14 Wall. 406, 414; *The Burlington*, 137 U. S. 386, 391. See also *The L. P. Dayton*, 120 U. S. 337, 351.

The master of a vessel is appointed by her owners, and is their agent, and they are responsible for injuries caused to third persons by his negligence in navigating the vessel. The master of the tug is appointed by and is the agent of the owners of the tug; he is not appointed by the owners of the vessels towed; and if, by mismanagement of the tug, without any negligence on the part of the tow, the tow is brought into collision with another vessel, the tug and not

the tow is responsible. *The John Fraser*, 21 How. 184; *The Hector*, 24 How. 110. As was said by this court in *The Hector:* "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, nor ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his vessel, and they are responsible for his acts in her navigation." 24 How. 123.

In *Transportation Line* v. *Hope*, 95 U. S. 297, in which the owner of a barge maintained an action against the owner of a tug for negligence of the master of the tug, by which the barge was totally lost, this court, while holding that the tug "had the supreme control of the barge, so far as it was necessary to enable it to fulfil its contract to tow the barge," recognized that the tug "did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply; it did not employ or pay the master and the men in charge of her; nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee." 95 U. S. 300.

It is solely for the purpose of performing the contract of towage, that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo. If the question arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that question ultimately belongs to her own master, and not to the master of the tug. And if the question presented is either whether the barge should be run

ashore for the purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo, or the barge herself, the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and, in either case, any right of contribution in general average cannot extend beyond that barge and her cargo.

The suggestion of the counsel for the libellants, that the barges had no means of self-propulsion and were powerless for any purpose of navigation, is unsupported by the statement of facts in the certificate of the Circuit Court of Appeals, and is inconsistent with the allegations of the libellants themselves. Each of the libels alleged that the barge was "in every respect well manned, tackled, apparelled and appointed." One of the libels alleged that the George W. Wesley was a schooner barge, and on the night before the loss "carried her mainsail, foresail and staysail," and that early in the morning "said sails were taken in," because "the sails would not draw in the course that they were then running." And the other libel alleged that on the day after the loss the master and crew of the Eldorado returned on board of her, and proceeded to strip the wreck "and save from it all that could be saved of her sails, rigging, etc." And each answer alleged that after the storm began the master of the tug signalled the barges "to make sail and get their anchors ready."

The master of the tug, having no authority to decide, as between a barge and her cargo, what part shall be sacrificed for the safety of the rest, and thereby to subject what is saved to contribute in general average for what is lost, can surely have no greater authority, by abandoning all the barges with their cargoes, to subject the tug to a general average contribution.

The fact that the sum to be paid to the tug for towing each barge was measured by a certain proportion of the freight to be earned by that barge is immaterial. It did not create a partnership between the owners of the tug and the owners of

the barges. *Meehan* v. *Valentine*, 145 U. S. 611. Nor could it have the effect of combining the tug and the barges into a single maritime adventure, within the scope of the law of general average.

For the reasons above stated, this court concurs in the opinion expressed in this case by Mr. Justice Brown, when District Judge, that "the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage." 19 Fed. Rep. 272.

Question certified answered in the negative.

Mr. Justice Brown took no part in this decision.

THE GLIDE.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 39. Argued May 1, 1896. — Decided May 24, 1897.

The enforcement *in rem* of the lien upon a vessel, created by the Public Statutes of Massachusetts, c. 192, §§ 14–19, for repairs and supplies in her home port, is exclusively within the admiralty jurisdiction of the courts of the United States.

This was a petition to the Superior Court of the county of Suffolk and State of Massachusetts, under section 17 of chapter 192 of the Public Statutes of Massachusetts (the material provisions of which are copied in the margin[1]) by the Atlantic

[1] Sect. 14. When by virtue of a contract, expressed or implied, with the owners of a vessel, or with the agents, contractors or sub-contractors of such owners, or with any of them, or with a person who has been employed to construct, repair or launch a vessel, or to assist therein, money is due for labor performed, materials used, or labor and materials furnished in the construction, launching or repairs of, or for constructing the launching ways for, or for provisions, stores or other articles furnished for or on account of such vessel in this Commonwealth, the person to whom such money

Statement of the Case.

Works, a corporation established by the laws of that State and having its usual place of business at Boston in that county, to enforce a lien upon the tugboat Glide, whose home port was Boston, for labor performed and materials furnished in

---

is due shall have a lien upon the vessel, her tackle, apparel and furniture, to secure the payment of such debt, and such lien shall be preferred to all others on such vessel, except that for mariners' wages, and shall continue until the debt is satisfied.

SECT. 15. Such lien shall be dissolved unless the person claiming the same files, within four days from the time when the vessel departs from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which the vessel was at such time, a statement, subscribed and sworn to by him, or by some person in his behalf, giving a just and true account of the demand claimed to be due him, with all just credits, and also the name of the person with whom the contract was made, the name of the owner of the vessel, if known, and the name of the vessel, or a description thereof sufficient for identification; which statement shall be recorded by such clerk in a book kept by him for that purpose, and for such recording the clerk shall receive the same fees as for recording mortgages of equal length.

SECT. 16. If the vessel is partly constructed in one place and partly in another, either place shall be deemed the port at which she was when the debt was contracted, within the meaning of this chapter; and the validity of the lien shall not be affected by any inaccuracy in the description of the vessel, if she can be recognized thereby, nor by any inaccuracy in stating the amount due for labor or materials, unless it appears that the person filing the statement has wilfully and knowingly claimed more than is due.

SECT. 17. Such lien may be enforced by petition to the Superior Court for the county where the vessel was at the time when the debt was contracted, or in which she is at the time of instituting proceedings. The petition may be entered in court, or filed in the clerk's office in vacation, or may be inserted in a writ of original summons with an order of attachment, and served, returned and entered like other civil actions; and the subsequent proceedings for enforcing the lien shall, except as hereinafter provided, be as prescribed in chapter one hundred and ninety-one for enforcing liens on buildings and land, so far as the provisions of said chapter are applicable. At the time of entering or filing the petition, a process of attachment against such vessel, her tackle, apparel and furniture, shall issue, and continue in force, or may be dissolved like attachments in civil cases, but such dissolution shall not dissolve the lien.

SECT. 18. The petition shall contain a brief statement of the labor, materials or work done or furnished, or of the stores, provisions or other articles furnished, and of the amount due therefor, with a description of the vessel subject to the lien, and all other material facts and circum-

repairing her at that port, under a contract between the petitioner and Jonathan Chase, one of her owners, all of whom resided in Boston and were named in the petition.

Upon the filing of the petition, the court issued a writ commanding the sheriff to attach the vessel and to summon her owners to answer. The vessel was attached accordingly; and her owners appeared, and moved to dismiss the petition, for want of jurisdiction, because the subject-matter was a matter of admiralty and maritime jurisdiction, and therefore within the exclusive jurisdiction of the courts of the United States. The court granted the motion, and dismissed the petition. The petitioner appealed to the Supreme Judicial Court of the State, the majority of which held that the state court had jurisdiction of the proceedings under the statute, and therefore reversed the order dismissing the petition. 157 Mass. 525.

The respondents thereupon filed an answer, without waiving their motion to dismiss; and at the trial requested the court to rule that it had no jurisdiction, for the reason stated in that motion. But the Superior Court ruled that it had jurisdiction, rendered judgment for the petitioner, and ordered a sale of the vessel in accordance with the statute; and exceptions to the ruling were overruled by the Supreme Judicial Court. 159 Mass. 60. The respondents sued out this writ of error addressed to the Superior Court in which the record remained.

Mr. Edward E. Blodgett for plaintiffs in error. *Mr. Eugene P. Carver* was on his brief.

Mr. Ralph W. Foster for defendants in error. *Mr. Joshua H. Millett* was on his brief.

---

stances, and shall pray that the vessel may be sold and the proceeds of the sale applied to the discharge of the demand.

SECT. 19. Any number of persons having such liens upon the same vessel may join in a petition to enforce the same; and the same proceedings shall be had in regard to the respective rights of each petitioner, and the respondent may defend as to each petitioner, in the same manner as if they had severally petitioned for their individual liens.

Opinion of the Court.

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

The question in this case is whether the lien given by a statute of Massachusetts for repairs made upon a vessel in her home port, under a contract with her owners or their agent, may be enforced against her by petition in a court of the State, as provided in that statute, or can be enforced only in an admiralty court of the United States. The diverse inferences drawn from the previous judgments of this court, in the careful opinions of the Supreme Judicial Court of Massachusetts and of the dissenting judges in the case at bar, have induced us to state with some fulness the reasons and authorities which have influenced our conclusion.

The most convenient way of tracing the development of the law upon this subject will be to consider the principal decisions of this court in chronological order, first referring to the provisions of the Constitution and statutes of the United States which lie at the foundation of the whole matter.

By the Constitution of the United States, art. 3, sect. 2, "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction." And by provisions, still in force, of the Judiciary Act of 1789, the District Courts of the United States "shall have, exclusively of the courts of the several States," "original cognizance of all civil causes of admiralty and maritime jurisdiction," "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Act of September 24, 1789, c. 20, § 9; 1 Stat. 76; Rev. Stat. § 563, cl. 8; § 711, cl. 3.

The leading case in this court upon the subject of admiralty jurisdiction over suits by material men is *The General Smith*, decided at February term 1819, in which a decree of the Circuit Court of the United States for the District of Maryland, sustaining a libel *in rem* filed in the District Court for supplies furnished to a ship in Baltimore, her home port, was reversed by this court, for the reasons stated in its opinion delivered by Mr. Justice Story, as follows:

"No doubt is entertained by this court, that the admiralty

rightfully possesses a general jurisdiction in cases of material men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court. Where, however, the proceeding is *in rem* to enforce a specific lien, it is incumbent upon those, who seek the aid of the court, to establish the existence of such lien in the particular case. Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State; and no lien is implied, unless it is recognized by that law. Now, it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that by the common law, which is the law of Maryland, material men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself. Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion, that there was not, by the principles of law, any lien upon the ship; and, consequently, the decree of the Circuit Court must be reversed." 4 Wheat. 438, 443.

The law there stated, as to repairs or supplies in a foreign port, has been since constantly recognized, and never doubted. *The St. Jago de Cuba*, 9 Wheat. 409, 417; *The Virgin*, 8 Pet. 538, 550; *The Laura*, 19 How. 22, 28; *The Grapeshot*, 9 Wall. 129, 136; *The Lulu*, 10 Wall. 192; *The Kalorama*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Emily Souder*, 17 Wall. 666; *The Kate*, 164 U. S. 458, 466.

Opinion of the Court.

The only point directly adjudged in *The General Smith* was that there was no lien for repairs or supplies in the home port, which could be enforced *in rem* in admiralty, unless such a lien was recognized by the local law of the State. But the opinion clearly implied that, if so recognized, the lien could be enforced *in rem* in a court of the United States sitting in admiralty.

Accordingly, in the case of *The Planter*, at January term 1833, it was decided that a lien upon a vessel, given by the local law, for repairs in her home port, could be enforced by suit *in rem* in admiralty in the District Court of the United States. Mr. Justice Thompson, delivering the unanimous opinion of the court, said: "The proceeding is *in rem* against a steamboat, for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract; and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the State of Louisiana, it will bring the case within the jurisdiction of the court. By the Civil Code of Louisiana, art. 2748, workmen employed in the construction or repair of ships and boats enjoy the privilege established by the code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law, therefore, gives a lien in cases like the present." He then referred to the case of *The General Smith*, as having "decided that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the State"; and, after substantially repeating part of the opinion of Mr. Justice Story, above quoted, ending with the statement that, for repairs or supplies of a ship in her home port, no lien is implied, unless recognized by local law, he added: "But if the local law gives the lien, it may be enforced in the admiralty." 7 Pet. 324, 341.

The principle of the decision in the case of *The Planter* was stated by Mr. Justice Story, at January term 1837, as

follows: "In that case, the repairs of the vessel for which the state laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract; and the lien under the state laws was enforced in the admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties; and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." *The Orleans*, 11 Pet. 175, 184. The libel against the Orleans was dismissed upon the ground that the vessel was not engaged in maritime trade or navigation, and that the admiralty had no jurisdiction of the claims made by a part-owner and by the master.

In the case of *The Yankee Blade*, at December term 1856, the nature of a maritime lien was clearly and exactly defined by Mr. Justice Grier, speaking for this court, as follows: "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category." 19 How. 82, 89.

The question of the extent of the admiralty jurisdiction of the courts of the United States over cases like that now before the court became at one time entangled in the question of the effect of the regulation of pleading and procedure in admiralty by this court under the power conferred upon it by the acts of Congress of May 8, 1792, c. 36, § 2, and August 23, 1842, c. 188, § 6. 1 Stat. 276; 5 Stat. 518.

Opinion of the Court.

The twelfth of the "Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance side of the Court — in pursuance of the Act of the 23d of August, 1842, c. 188" — promulgated by this court at December term 1844, to take effect September 1, 1845, was as follows:

"In all suits by material men for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material men for supplies, repairs or other necessaries." 3 How. iii, vi, xiv.

The last clause of that rule was in accord with the previous judgments of this court as to such proceedings *in rem* in the cases of *The General Smith*, *The Planter* and *The Orleans*, above cited.

At December term 1858, this court made an order, to take effect May 1, 1859, by which Rule 12 was repealed, and a new rule substituted in its place, differing from it only in making the last clause read as follows: "And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs or other necessaries." 21 How. iv.

The effect of that change in the rule was that where the only right created by local statutes was a lien upon the ship, *jus in re*, without in any way affecting personal liability, this new right in the thing could not be enforced in admiralty *in rem*, but only *in personam*; and that much difficulty and embarrassment were thereby created in proceedings in admiralty, which were not wholly removed by the explanations, in succeeding opinions of this court, of the purpose of the change.

In the case of *The Goliah*, at December term 1858, decrees of the Circuit and District Courts of the United States for the District of California, sustaining a libel *in rem* by the assignee of a claim for coal furnished to a vessel at Sacramento, her home port, for which claim a lien existed under the statutes

of California, were reversed by this court and the libel ordered to be dismissed. The principal reason assigned was that the vessel was engaged in the business of navigation and trade in the Sacramento River, in the purely internal commerce of the State, not within the power of Congress to regulate, and therefore not subject to the admiralty jurisdiction. Mr. Justice Nelson, in delivering the opinion, suggested this additional reason: "We have at this term amended the 12th rule of the admiralty, so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of *The General Smith*," "applied and enforced in the case of" *The Planter*, "and afterwards partially corrected in the case of" *The Orleans*. "We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contract, to be enforced by the state courts." 21 How. 248, 250, 251. It appears, by the report and by the briefs on file, that the question of jurisdiction was not argued by counsel; and by the records and docket of this court, that the case was decided by this court February 7, 1859, nearly three months before the rule of 1858 took effect, and in the District and Circuit Courts about three years before.

But that decision, in so far as concerned its principal ground, was expressly overruled in *The Belfast*, 7 Wall. 624, 640-642, as inconsistent with the series of decisions from *The Genesee Chief*, 12 How. 443, to *The Hine*, 4 Wall. 555, declaring the admiralty jurisdiction to extend over all navigable waters; and was not followed in *The Eagle*, 8 Wall. 15, 21, in which the opinion was delivered by Mr. Justice Nelson. And, in so far as it rested on the suggestion of error in *The General Smith* and *The Planter*, or on the change in the twelfth rule, it was in effect overruled by *The St. Lawrence*, 1 Black, 522, and *The Potomac*, 2 Black, 581.

In the *St. Lawrence*, at December term 1861, this court adjudged that the rule of 1858 had no effect upon a libel filed

while the rule of 1844 was in force; and affirmed a decree against a vessel for supplies furnished in her home port, for which the statutes of New York gave a lien; and, in the opinion delivered by Chief Justice Taney, said that in the case of *The General Smith* "the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished upon the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed *in rem* in the admiralty court to enforce it"; that that case was decided in 1819, and had ever since been followed and regarded as a leading case in the admiralty courts; that its authority had been recognized in the cases of *The Planter* and *The Orleans*, and other cases; that while process against the vessel was denied in the case of *The General Smith*, because the laws of Maryland gave no lien or priority, it was used and supported in the case of *The Planter*, upon the ground that the party had a lien upon the vessel by the law of Louisiana, and as the contract was within its jurisdiction, it ought to give him all the rights he had acquired under it; and that "when this court framed the rules in 1844, it, of course, adhered to the practice adopted in the previous cases, and by the 12th rule authorized the process *in rem* where the party was entitled to a lien under the local or state law." 1 Black, 529, 530. And the court treated the rules of 1844 and 1858 as mere regulations of procedure, under the power conferred upon this court by Congress, and liable to be changed from time to time, at the discretion of the court, as convenience might require, so far as regarded the future.

Although, as early as February term 1816, it had been assumed that the admiralty and maritime jurisdiction vested by the Constitution in the courts of the United States was exclusive, and could not be exercised by the courts of a State; *Martin* v. *Hunter*, 1 Wheat. 304, 337, 373; yet the question whether a claim of a maritime nature could be enforced in the courts of a State by process *in rem* under a statute of the State, creating a right in the thing itself, and providing for its enforcement by process essentially like proceedings *in rem* in the admiralty, was not brought into judgment in this court

until December term 1866, when the question was directly presented in two cases, and was determined in the negative. *The Moses Taylor*, 4 Wall. 411; *The Hine*, 4 Wall. 555.

The case of *The Moses Taylor* arose under a statute of the State of California, enacting that claims against any vessel for supplies or materials furnished for her use or repair, and for breaches of contracts for transportation of persons or property, and certain other classes of claims, should constitute liens upon the vessel; that actions upon such claims might be brought directly against the vessel, and the summons served upon the master or any one in charge; that the vessel might be attached as security for the satisfaction of any judgment that might be recovered; and that if the attachment was not discharged, and a judgment was recovered, the vessel might be sold and the proceeds applied to the payment of the judgment. Upon a writ of error from this court to the highest court of the State to which the case could be taken, it was held that a contract for the transportation of a passenger upon an ocean voyage, relating exclusively to a service to be performed on the high seas, and pertaining solely to the business of commerce and navigation, was a maritime contract, and a breach of it an appropriate subject of maritime jurisdiction; and that the statute of the State, in so far as it authorized process *in rem* in the courts of the State against the vessel, was unconstitutional as interfering with the exclusive admiralty jurisdiction of the courts of the United States.

The case of *The Hine* arose under a statute of the State of Iowa, providing for similar proceedings in the courts of the State in the case of any injury to persons or property by a vessel, her officers or crew; and that statute, so far as it gave such process *in rem*, for a collision between two vessels, was held to be unconstitutional, under the decision in *The Moses Taylor*. Mr. Justice Miller, in delivering the opinion, declared it to be "the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exer-

cise it, with the exception always of such concurrent remedy as is given by the common law." 4 Wall. 568, 569.

Each of those two cases was sought to be brought within the saving clause in section 9 of the Judiciary Act of 1789. As to which Mr. Justice Field, in *The Moses Taylor*, said: "That clause only saves to suitors 'the right of a common law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts, which is saved; but a common law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." 4 Wall. 431. And Mr. Justice Miller, in *The Hine*, said: "But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant, without any proceeding against the owners, or even mentioning their names; that a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel; that after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws in the western States. While the proceeding differs thus from a common law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the older States foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part-owner of a vessel, and his interest thus subjected to a sale in a common law court of the State. Such actions may also be maintained *in personam* against a defendant in the common law courts,

as the common law gives; all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act. But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes; for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated." 4 Wall. 571, 572.

Again, at December term 1868, in the case of *The Belfast*, a statute of Alabama, giving a lien upon the vessel under a contract of affreightment, was held unconstitutional, so far as it provided for the enforcement of the lien in the courts of the State by proceedings *in rem* in the nature of proceedings in admiralty, because the lien of the shipper was a maritime lien, and, as was said by Mr. Justice Clifford in delivering the opinion, "authority does not exist in the state courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien"; "but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District Courts of the United States, as provided in the ninth section of the Judiciary Act." 7 Wall. 624, 645, 646. The dictum uttered by the learned justice towards the end of the opinion, and afterwards repeated by him in *Leon* v. *Galceran*, 11 Wall. 185, 192, and in *Norton* v. *Switzer*, 93 U. S. 355, 365, that "such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement," if understood, as contended by the defendants in error, to imply that the States may authorize such liens to be enforced in their own courts by proceedings in the nature of admiralty process *in rem*, is unsupported by the decisions there referred to, or by any other decision of

this court, and is inconsistent with several recent opinions of this court, in which the subject was fully considered.

On May 6, 1872, this court ordered the twelfth rule in admiralty to be amended so as to read as follows: "In all suits by material men for supplies or repairs, or other necessaries, the libellant may proceed against the ship *in rem*, or against the master or owner alone *in personam*." 13 Wall. xiv.

This amendment of the rule left the law in this respect in the same condition in which, as declared by this court in cases above cited, it had been before the promulgation of any rule upon the subject.

In *The Lottawanna*, at October term 1874, the purpose and effect of the amendment were stated by Mr. Justice Bradley (who had taken part in making it) as follows: "As to the recent change in the admiralty rule referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure." "We have now restored the rule of 1844, or, rather, we have made it general in its terms, giving to material men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel." *The Lottawanna*, 21 Wall. 558, 579, 581.

In *The Lottawanna*, this court allowed to a mortgage of a ship precedence over claims of material men in the home port, because they had no lien by the maritime law of the United States, as declared in the case of *The General Smith*, and because their claim had not been recorded as required by the law of the State of Louisiana, which gave them a lien. The decree of the District Court was rendered before the admiralty rule of 1858 was superseded by the rule of 1872. Mr. Justice Bradley, in delivering the opinion of this court, said: "Had

the lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the District Courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the material men to file a libel against the vessel or its proceeds. It seems to be settled in our jurisprudence that, so long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each State by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States." 21 Wall. 579, 580.

In that opinion, as appears by the passages above quoted, this court distinctly affirmed the following positions: First. The admiralty rule of 1872 was intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law. Second. A lien is a right of property, and not a mere matter of procedure. Third. Where a state statute has given to material men in the home port a lien upon the vessel, to be enforced by proceedings like those in admiralty, the District Courts of the United States have jurisdiction to enforce it by libel *in rem*. Fourth. Their jurisdiction *in rem*, in such a case, is exclusive of that of the courts of the State.

At the same term, a process *in rem* to enforce a lien given by a statute of New Jersey for building a ship was held to be within the jurisdiction of the courts of the State, solely because, as previously adjudged by this court, a contract for building a ship was not a maritime contract, but a contract made on land and to be performed on land, and therefore not a subject of admiralty jurisdiction. *Edwards* v. *Elliott*, 21 Wall. 532, 553–556; *The Jefferson*, 20 How. 393; *The Capitol*, 22 How. 129.

Likewise, in *Johnson* v. *Chicago & Pacific Elevator Co.*, de-

cided at October term 1886, the remedy given by the statute of Illinois was *in personam*, and the cause of action was not a maritime tort, but an injury done by a steam tug to a building on land, of which an admiralty court of the United States would have no jurisdiction; and, as was said by Mr. Justice Blatchford in delivering judgment: "This being so, no reason exists why the remedy for the wrong should not be pursued in the state court, according to the statutory method prescribed by the law of the State, even though that law gives a lien on the vessel. The cases in which state statutes have been held void by this court, to the extent in which they authorized suits *in rem* against vessels, because they gave to the state courts admiralty jurisdiction, were only cases where the causes of action were cognizable in the admiralty." "There being no lien on the tug, by the maritime law, for the injury on land inflicted in this case, the State could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under state statutes, enforceable by attachment, in suits *in personam*, are of every-day occurrence, and may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common law remedy, which a court of common law is competent to give." 119 U. S. 388, 397, 399.

In the case of *The J. E. Rumbell*, decided at October term 1892, since the first decision of the present case in the Supreme Judicial Court of Massachusetts, this court, referring to many of the cases above cited, stated the general principles of law upon the subject now before us as follows:

"In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: 1st. For

necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. 2d. For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. 3d. Whenever the statute of a State gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. 4th. This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a State. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure." 148 U. S. 1, 11–13.

In that case, it is true, the single question presented for decision was whether a lien upon a vessel for necessary supplies and repairs in her home port, given by the statute of a State, and to be enforced by proceedings *in rem* in the nature of admiralty process, took precedence of a prior mortgage, recorded as required by act of Congress. But the decision of that question, as in the similar case of *The Lottawanna*, above cited, really depended upon the question whether the contract and the lien of the material men, on the one side, or those of the mortgagee, on the other, were in their nature maritime, and therefore entitled to be enforced *in rem* in a

court of admiralty. The conclusion of this court as to the nature of the claims respectively was that "the lien created by the statute of a State, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage, that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied." 148 U. S. 19.

The form of proceeding against the vessel, provided for in the statute of Massachusetts, now in question, is clearly in the nature of admiralty process *in rem*, and is undistinguishable from the proceedings, provided for in statutes of other States, which have been held by this court to be exclusively within the admiralty jurisdiction of the courts of the United States. The lien upon the vessel is created as soon as money is due for labor performed or materials furnished, and continues until the debt is satisfied, unless the lien is dissolved by failure to record a statement of the claim, as required by the statute; the petition is to be served by an attachment of the vessel, and a summons to the owners, if known; a dissolution of the attachment does not dissolve the lien; and any number of persons having such liens upon the same vessel may join in one petition to enforce them. Mass. Pub. Stat. c. 192, §§ 14–19.

In conclusion, the considerations by which this case must be governed may be summed up as follows: The maritime

and admiralty jurisdiction conferred by the Constitution and laws of the United States upon the District Courts of the United States is exclusive. A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States, or by a local statute, is a *jus in re*, a right of property in the vessel, and a maritime lien, to secure the performance of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the District Courts of the United States. When the lien is created by the general maritime law, for repairs or supplies in a foreign port, no one doubts at the present day that, under the decisions in *The Moses Taylor* and *The Hine*, 4 Wall. 411, 555, above cited, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of the courts of the State. The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime, and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive.

The necessary result is that the petition ought to have been dismissed; but, in accordance with the usual practice upon reversing a judgment of the highest court of a State, the proper form of judgment is

Judgment reversed, and case remanded for further proceedings not inconsistent with the opinion of this court.

Mr. Justice Brewer did not hear the argument or take any part in the decision of this case.

PECK *v.* HEURICH.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 289. Argued April 26, 27, 1897. — Decided May 24, 1897.

A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error.

Statement of the Case.

By the common law, prevailing in the District of Columbia, an agreement by an attorney at law to prosecute, at his own expense, a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is unlawful and void for champerty.

A deed, conveying lands in the District of Columbia to an attorney at law and another person, in trust that the grantees should sue for, take possession of, and sell the lands, and that the attorney should retain one third of the proceeds, after paying out of it all the costs and expenditures, and that the other two thirds, clear of any costs or charges whatever, should be paid to the grantors, is void for champerty, and will not sustain an action by the grantees to recover part of the lands from third persons.

This was an action of ejectment, brought September 20, 1892, in the Supreme Court of the District of Columbia by Ezra J. Peck and Leo Simmons, trustees, against Christian Heurich, to recover land in the District of Columbia. The defendant pleaded the general issue.

At the trial the plaintiffs, as stated in the bill of exceptions, offered in evidence a deed dated and recorded November 8, 1828, from William A. Bradley, purporting to convey to Ann Bartlett in fee simple the real estate described in the declaration, together with other real estate, in consideration of the sum of $2450; "and thereupon counsel for plaintiffs announced to the court that they proposed to prove that the plaintiffs and defendant traced their respective titles to the land in controversy from said Ann Bartlett as a common source of title — which defendant, by his counsel, then and there denied."

The plaintiffs then called three witnesses who testified that Anna L. Peck and ten other persons named were the heirs of Ann Bartlett. These witnesses were an uncle and aunt of Anna L. Peck, and her husband, Ezra J. Peck. Upon their cross-examination it appeared that the heirs of Ann Bartlett were first informed that they had any title to these lands by Leo Simmons in 1890.

The plaintiffs then offered in evidence the record of a deed dated October 20, 1891, from the persons before shown to be the heirs of Ann Bartlett, and from the husbands and wives of those who were married, describing themselves as all the heirs of Ann Bartlett, and reciting that they executed this

deed, "believing it to be for their interest and convenience to do so," and purporting, for the consideration of five dollars, to convey to Peck and Simmons, trustees, in fee simple, all the real estate in the District of Columbia of which Ann Bartlett died seized, and especially the land conveyed to her by Bradley by the deed of November 8, 1828. The conveyance by the heirs of Ann Bartlett to the plaintiffs was expressed to be upon the following trusts:

"In trust, nevertheless, to and for the following uses and purposes, namely: to take and hold possession of the said real estate, and to institute and prosecute to a final conclusion in their own names any and every action, suit or proceeding, in law and in equity, or otherwise however, for the possession of said real estate, if in their judgment expedient, and to compromise, pay for and purchase any outstanding claim or title against said real estate, if in their judgment expedient, and generally to do any and everything in their judgment expedient, which may be necessary to vest in them a perfect and unencumbered title in fee simple to, and the recovery of possession of, said real estate; and upon the vesting in them of a perfect and unencumbered title in fee simple, and the recovery of the possession of said real estate, or before and without the same, and without such proceedings, acts and doings, as they may think best, and at any time, to sell and convey said real estate, or any part thereof, in fee simple, or in any quantity of estate or estates, to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned, and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase money; and out of the purchase moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture, that the said Leo Simmons, one of the trustees or parties of the second part shall retain 33⅓ per cent, or one third, after paying all expenses, costs and expenditures of the said parties of the second part, in the execution of this trust, out of the same, and the

other two thirds, or 66⅔ per cent, of said purchase money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interest; and it is further understood between the parties to this indenture that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The plaintiffs also offered in evidence records of deeds dated June 22, 1892, of the same real estate from Mr. and Mrs. Peck to H. Austin Clark, as trustee, and from Clark to Peck and Simmons, as trustees under the deed of October 20, 1891.

The defendant objected to the admission of the records of the deeds of October 20, 1891, and June 22, 1892, upon three grounds: First. That they were not recorded until after this suit was brought. Second. That the deed of October 20, 1891, was not recorded within six months after its date. Third. That both deeds were champertous on their face.

The presiding judge sustained the third objection, and declined to admit records of the deeds in evidence, on the ground that they were champertous on their face; and expressed no opinion upon the other objections.

The bill of exceptions stated that "thereupon the plaintiffs' counsel announced to the court that the refusal of the court to admit the aforesaid records of said three deeds in evidence broke the continuity of plaintiffs' title, and that they would therefore rest their case. Whereupon the court instructed the jury to render a verdict for the defendant, which was done."

Judgment was rendered on the verdict; and the plaintiffs duly excepted to the ruling excluding the deeds, and to the instruction to return a verdict for the defendant, and appealed to the Court of Appeals, which, without considering the first and second objections made to the deeds at the trial, affirmed the judgment upon two grounds: First. That the deeds were champertous. Second. That the plaintiffs had not introduced

any evidence that William A. Bradley, the grantor of Ann Bartlett, had any title, or was ever in possession, or had any right to the possession, or that the State had ever granted the property; and the plaintiffs therefore had not been prejudiced by the exclusion of the deeds even if they were valid. 6 App. D. C. 273. The plaintiffs sued out this writ of error.

Mr. Franklin H. Mackey and *Mr. Arthur A. Birney* for plaintiffs in error.

Mr. W. F. Mattingly and *Mr. Leon Tobriner* for defendants in error.

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

One ground taken in the opinion of the Court of Appeals, and at the argument in this court, in support of the judgment for the defendant, was that, independently of the question of the validity of the deeds to the plaintiffs, they could not maintain this action, because they had not complied with the rule of the law of Maryland, in force in the District of Columbia, by which, in order to maintain an action of ejectment, the plaintiff must show that he has the legal title in the land and the right of possession, and cannot establish this without first showing that the land had been granted by the State, unless both parties are shown to claim title from the same source. *Mitchell* v. *Mitchell*, 1 Maryland, 44; *Anderson* v. *Smith*, 2 Mackey, 275.

But this ground is not open to the defendant upon the record. No such objection to the introduction of the deed in evidence was made at the trial. The course of things at the trial, so far as regards this point, was as follows: The plaintiffs gave in evidence, without objection, the deed from William A. Bradley to Ann Bartlett, and said in open court that they proposed to prove the fact that the plaintiffs and the defendant traced their respective titles to the land in controversy from Ann Bartlett as a common source of title; and

the defendant denied that fact. The plaintiffs, by way of proving their own title under Ann Bartlett, which was a necessary step towards proving the fact so controverted, introduced evidence that the grantors in the deed of October 20, 1891, were the heirs of Ann Bartlett, and then offered that deed in evidence, and, upon the court's ruling it out as void for champerty, declared to the court that this ruling broke the continuity of their title, and that they therefore rested their case. The plaintiffs at the outset having given notice of their intention to prove that Ann Bartlett was the common source of the titles both of themselves and of the defendant, and having been prevented from tracing their own title from her, any amount of proof that the defendant derived his title from her became wholly immaterial, and there was no occasion for the plaintiffs to make a specific offer of such proof. It was more respectful to the presiding judge, and sufficient to preserve the plaintiffs' rights in the appellate court, to take the course, which they did, of resting their case, and taking an exception to the exclusion of evidence without which they could not possibly recover. The plaintiffs, by reason of the ruling excluding the deed to them, had never been permitted to introduce the first step in the proof of their case, and, so long as that ruling was unreversed, had no interest in offering any evidence of the defendant's source of title. It cannot be assumed that the plaintiffs would not have introduced such evidence, if the court had given them a standing in the case which would have made it avail them to do so. A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. *Deery* v. *Cray*, 5 Wall. 795, 808; *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, 103; *Jones* v. *Sisson*, 6 Gray, 288; *Jones* v. *Wolcott*, 15 Gray, 541.

We are then brought to the consideration of the principal question in the case, whether the deeds to the plaintiffs were void for champerty.

In many parts of the United States, and probably in Maryland and consequently in the District of Columbia, the ancient

English statutes of champerty and maintenance have either never been adopted, or have become obsolete, so far as they prohibited all conveyances of lands held adversely. 4 Kent Com. 447; *Roberts* v. *Cooper*, 20 How. 467; *Schaferman* v. *O'Brien*, 28 Maryland, 565; *Matthews* v. *Hevner*, 2 App. D. C. 349.

But according to the common law, as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void, as tending to stir up baseless litigation. 4 Kent Com. 447, note; *McPherson* v. *Cox*, 96 U. S. 404, 416; *Stanton* v. *Haskin*, 1 McArthur, 558; *Johnson* v. *Van Wyck*, 4 App. D. C. 294; *Brown* v. *Beauchamp*, 5 T. B. Monroe, 413; *Belding* v. *Smythe*, 138 Mass. 530; *Stanley* v. *Jones*, 7 Bing. 369, 377; *S. C.* 5 Moore & Payne, 193, 206.

The trust declared in the deed under which these plaintiffs claim title is to take possession of the real estate, to bring all suits necessary for that purpose, to pay off outstanding claims if deemed by the trustees to be expedient, and to do everything necessary to vest in them a perfect and unencumbered title and the possession of the lands, and after getting, with or without suit, the title and possession, to sell and convey the lands. The deed states that "it is distinctly understood between the parties" that, out of the purchase money received, "Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent, or one third, after paying all expenses, costs and expenditures of the said parties of the second part in the execution of the trust, out of the same"; that the other two thirds of the purchase money, "clear of any costs or charges whatever," shall be paid to the heirs of Ann Bartlett, their heirs or assigns, according to their respective interests; and "that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a

settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The deed clearly expresses the intention of the parties that Simmons shall receive one third, and the grantors two thirds, of the gross proceeds of the real estate conveyed. The intention that all costs and expenses of obtaining title and possession of the lands, by suit or purchase or otherwise, shall be borne wholly by Simmons, and in no part by the grantors, is clearly shown, in the first place, by the stipulation that he shall receive one third of the proceeds "after paying all expenses, costs and expenditures of" the trustees in the execution of the trust "out of the same" — evidently meaning out of his third part. But any possible doubt which might arise upon this clause, taken by itself, is removed by the next clause, which stipulates that the two other thirds of the proceeds shall be paid to the heirs of Ann Bartlett, "clear of any costs or charges whatever," as well as by the final clause, which stipulates that, should Simmons die after bringing suit and before making a settlement, there shall be paid to his heirs or assigns "such profits as he would have been entitled to after paying said costs and expenditures."

Upon the nature and effect of the agreement made by the attorney with the grantors in this deed, this court concurs in the opinion expressed by the Court of Appeals of the District of Columbia, as follows: "He agreed to pay the costs of the litigation; he agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing; and his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered, or of the money that might be received by way of settlement or compromise; and the character of the enterprise, on the part of the attorney, was so plainly a speculative one, that in the deed the net results to him are mentioned as 'profits.' If this be not champerty, we fail to see

wherein there can be champerty." "We must regard an agreement by any attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty; and that this was the character of the arrangement in the present case we are entirely satisfied. The very thing in dispute was conveyed, or sought to be conveyed, in advance, to the attorney and an associate, for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this he was to retain at the end of the litigation one third of what had been conveyed to him, and was to account to his clients for the other two thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land when recovered was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise." 6 App. D. C. 283, 284.

The deed, as appears upon its face, having been made to carry out the champertous agreement, was unlawful, and passed no title; and the joinder of Peck as co-trustee in the deed could not give it validity.

The result is that this action cannot be maintained by the trustees claiming under the deed, although a similar action might have been maintained by the grantors in their own names. *Burnes* v. *Scott*, 117 U. S. 582, 590, and *Hilton* v. *Woods*, L. R. 4 Eq. 432, 439, there cited.

Judgment affirmed.

INTERSTATE COMMERCE COMMISSION v. DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

APPEAL FROM THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 539. Argued March 16, 1897. — Decided May 24, 1897.

A railroad engaged in interstate commerce does not violate the provisions of §§ 4 and 6 of the interstate commerce act, by furnishing cartage for delivery free of charge to the merchants of one town on its line, and not furnishing similar service to the merchants of another town on its line thirty-three miles distant, nor by failing to publish such free cartage in the schedule published in the first town, when such privilege has been openly and notoriously enjoyed for twenty-five years.

The fourth section of that act has in view only the transportation of passengers and property by rail, and when property transported as interstate commerce reaches its destination by rail at lawful rates, having regard to rates charged upon similar transportation to other points on the line, it does not concern the Interstate Commerce Commission whether the goods after arrival are carried to their place of deposit in vehicles furnished by the railway company free of charge, or in vehicles furnished by the owners of goods; and the same rule applies to the transportation of passengers.

In matters of this kind much should be left to the judgment of the Commission, and, should it direct, by a general order, that railway companies should thereafter regard cartage, when furnished free, as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers.

The Detroit, Grand Haven and Milwaukee Railway Company, a corporation of the State of Michigan, operates a railroad wholly within that State, running westwardly from Detroit to Grand Haven. In connection with eastern roads it is engaged in interstate commerce. Upon its line are the cities of Ionia and Grand Rapids, distant 124 and 157½ miles from Detroit respectively. It has an established tariff of freight rates to these points from New York, Philadelphia and other points east of Detroit.

On September 18, 1888, Stone & Carten, retail merchants at Ionia, filed a petition before the Interstate Commerce Com-

mission, complaining that said railroad company was unduly discriminating against Ionia and preferring Grand Rapids, in violation of certain provisions of the interstate commerce act. The company filed an answer, and the case was heard upon a written stipulation of facts, which constituted the sole evidence on which the case was submitted to the Commission for decision.

The facts found by the Commission were as follows:

"1. The complainants are copartners, doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares and merchandise in the city of Ionia, county of Ionia, and State of Michigan, purchasing said goods, wares and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass. and points east of Detroit, Michigan.

"2. That the respondent railway company is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the State of Michigan, but it does not own and control a line of steamboats plying across Lake Michigan between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under the control and direction of an independent corporation, organized under the laws of the State of Michigan, by the name of the Grand Haven and Milwaukee Transportation Company; that the management of the business of the last-named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

"3. The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges,

a tariff of freights which makes on all freights from Philadelphia, New York and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule or tariff is hereto annexed and made and deemed a part of this stipulation.

"4. The shipments of freight from Philadelphia, New York, Boston and points east of Detroit, which are delivered to the respondent's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia, before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

"5. That the respondent provides, at its own expense, drays, carts and trucks, at the city of Grand Rapids, for the service of transporting merchandise and freight generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston and points east of Detroit between its station at Grand Rapids and the places of business of merchants, traders and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is, on an average, one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business centre of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and

the Grand Rapids, Lansing and Detroit [Detroit, Lansing and Northern?] Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business centre of said city, requiring only a short haul to and from their stations, on an average about one quarter of a mile; that respondent did the carting of freight to and from its station at Grand Rapids substantially in the same manner as at present long prior to the time when either said Michigan Central or Grand Rapids, Lansing and Detroit Railroads was constructed to that place.

"6. That the actual cost of carting or draying freight from respondent's warehouse in the said city of Ionia to the several places in said city of Ionia to and from which traffic has to be hauled is two cents per hundredweight; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders and other patrons of its road at Grand Rapids is two cents per hundredweight.

"7. That there is but slight competition encountered by the complainants and other persons, firms and corporations engaged in business at the city of Ionia interested in shipping over respondent's road, with similar business at the city of Grand Rapids."

"9. That complainants have not brought any suit for the recovery of money or damage for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

"10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 985,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

"11. Cartage by railway companies in similar manner to that at Grand Rapids is conducted by other railway compa-

nies at exceptional stations in the State of Michigan, and more or less extensively practised by companies in other States at exceptional stations."

On April 26, 1890, the Commission decided the case, which is reported in 3 Int. C. C. 613, and made the following order:

"It is ordered and adjudged that the defendant, the Detroit, Grand Haven and Milwaukee Railway Company, be and it is hereby required, within thirty days from and after the service of a copy of the report and opinion in this proceeding and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the State of Michigan, whereby rebates from its lawfully published schedule of rates, fares and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from eastern points to Grand Rapids, aforesaid, are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia, in the State of Michigan."

On November 2, 1891, the Commission, having been informed that the company would not comply with the order until the judgment of the Commission should be judicially confirmed, filed a petition in the Circuit Court of the United States for the Western District of Michigan, seeking to enforce the order. To this an answer was filed by the company, admitting the facts to be as found by the Commission, and alleging certain additional facts, to support which testimony was adduced.

The Circuit Court on August 7, 1894, entered a decree in the following terms:

"It is hereby ordered, adjudged and decreed that the mandatory writ of injunction of this court do issue to said respondent, the Detroit, Grand Haven and Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording free cartage at said city of Grand Rapids, unless a like service or its equivalent in value by reduced rates be at the same time afforded at said city of Ionia, and unless the fact that such free cartage, or such

equivalent reduced rate afforded at both points, shall be noted on the established tariffs of freights and charges published as required by law." *Interstate Com. Commission* v. *Detroit &c. Railway*, 57 Fed. Rep. 1005.

From this decree an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, and that court, on April 14, 1896, entered a decree reversing the decree of the Circuit Court, and directing the dismissal of the Commission's petition. From the decree of the Circuit Court of Appeals an appeal was taken and allowed to this court.

Mr. Assistant Attorney General Whitney for appellant.

Mr. Harrison Geer for appellee.

Mr. E. W. Meddaugh filed a brief for appellee.

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

The petition of Stone & Carten, retail merchants at Ionia, addressed to the Interstate Commerce Commission, alleged violations by the railway company of sections 2, 3 and 4 of the interstate commerce act.

The opinion of the Commission sustained the petition avowedly under section 4 of the act, but their order or decree appears to have been based upon both sections 4 and 6. The Circuit Court, as we gather from the opinion of Circuit Judge Taft and the dissenting opinion of District Judge Severens, treated the case as arising under alleged violations of sections 2, 3 and 4. 27 Fed. Rep. 1005.

The opinion of the Circuit Court of Appeals discusses the case at large. 43 U. S. App. 308.

But the Assistant Attorney General, who appears in this court as counsel of the Interstate Commerce Commission, dispenses, in his elaborate brief, with any consideration of sections 2 and 3, and confines his attention to sections 4 and 6. His language is as follows:

Section 2 of the statute is referred to in the petition of

Stone & Carten, but is not the basis of the decision of either Commission or court. Section 3 also (the undue preference clause) is immaterial at the present stage of the case. Undoubtedly a preference is granted to Grand Rapids over Ionia, but whether the preference is undue or unreasonable within the meaning of the clause in question, was not decided by the Commission. Their decision was based upon other sections of the act. Nor did the Circuit Court base its decision at all upon this provision. Hence we shall submit no argument upon it.

"This leaves for consideration section 4 (the long and short haul clause) and section 6 (the schedule clause). Under section 4 we seek to protect the shippers of Ionia. Under section 6 we seek to protect the humbler and more ignorant shippers of Grand Rapids, that they may not suffer through lack of publicity of the privileges which their larger rivals enjoy."

In our disposition of the case we shall, therefore, consider only the contention now made on behalf of the Commission, namely, that the conduct of the railway company, in furnishing cartage free of charge to the merchants of Grand Rapids, and in not furnishing similar service to the merchants of Ionia, a town thirty-three miles distant, and in failing to publish such free cartage in the schedule published at Grand Rapids, constituted a violation of the provisions of section 4 and section 6 of the Interstate Commerce Act.

One of the findings of the Commission is that the railroad company, as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights which makes on all freights from Philadelphia, New York and Boston, and all other points east of Detroit, consigned over the company's road, the same rates and charges for the complainants which are made and charged for the same class of freights to merchants doing business at the city of Grand Rapids. But there is no complaint made of that fact. Indeed, it is conceded by the Commission that so-called "group rates" are not in violation of the long and short haul clause; and,

therefore, if there were nothing else in the case, except that the company's charges were the same for like kinds of property transported to and from Ionia as those charged to and from Grand Rapids, to and from points outside of the State, no complaint would have been made or entertained.

The sole complaint urged is that the railway company carts goods to and from its station or warehouse at Grand Rapids without charging its customers for such service, while its customers at Ionia are left themselves to bring their goods to and take them from the company's warehouse, and that, in its schedules posted and published at Grand Rapids, there is no notice or statement by the company of the fact that it furnishes such cartage free of charge. These acts are claimed to constitute violations of sections 4 and 6 of the Interstate Commerce Act, 24 Stat. 380, c. 104.

The language of section 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kinds of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The Detroit, Grand Haven and Milwaukee Railway Company is a corporation of the State of Michigan, and its road lies wholly within that State. In addition to its local business it is engaged as a common carrier in interstate commerce, by

arrangements made with connecting railroads. For a period of upwards of twenty-five years before these proceedings this company has openly and notoriously, at its own expense, transferred goods and merchandise to and from its warehouse to the places of business of its patrons in the city of Grand Rapids. The station of the company, though within the limits of the city, is distant on an average one and a quarter miles from the business sections of the city where the traffic of the places tributory to the company's road originates and terminates.

The Compiled Laws of the State of Michigan of 1871 contain act No. 96 of the Laws of 1859, section 3 of which is as follows:

"Every railway company in this State is authorized to make personal delivery of every parcel, package or quantity of goods or property, if the consignee of such property shall reside within two miles of the terminus or railway station or other terminus of the carriage of such property by the main line of such carrier, and they are hereby authorized to employ or own all the means necessary to perform such duty, and to place the men and vehicles therefor under the government and sole regulation of the superintendent or other principal officer of such companies. Such delivery shall be at the house, shop, office or other place of business of the consignee, according to the nature of such property, and where the owner or consignee desires to have the same."

The theory of this enactment evidently is that the duties and powers of a railway company reached no further than the carriage of goods and merchandise, entrusted to it, to its station or warehouse, and that an additional grant of power was needed to enable the company to act as a carrier between its station or warehouse and the house or office of the owner or consignee. However this may be, this record exhibits the case of a Michigan railroad company engaged, for a quarter of a century, in collecting and delivering goods and merchandise at and to the houses and business places of its customers without any charges beyond those made for the railway service.

Undoubtedly, in the case of the Detroit, Grand Haven and Milwaukee Railway Company, during all that period, no just objection could have been made, and no objection was made, to this mode of doing business in the city of Grand Rapids. Nor can it now be pretended that it is unlawful for that company to continue to so receive and deliver goods and merchandise in that city in all cases in which the goods and merchandise are transported by its railway between points within the State. Has the passage of the interstate commerce act rendered it no longer lawful for this company to continue its long-time method of receiving and delivering at Grand Rapids goods and merchandise which form that part of its business which belongs to interstate traffic? Or, rather, is such mode of business an infraction of the fourth section of that act?

It must be conceded that a state railroad corporation, when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the act of Congress. *Cincinnati, N. O. & Texas Pacific Railway* v. *Int. Com. Commission*, 162 U. S. 184. So, likewise, it is settled that when a state statute and a Federal statute operate upon the same subject-matter and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way. *Gulf, Colorado &c. Railway* v. *Hefley*, 158 U. S. 98.

Accordingly, the Commission contends that while it may be lawful for the railway company to collect and deliver articles of domestic commerce without making a charge for cartage, and while it is likewise lawful for the company to establish the same rates of freight and charges for like kind of property carried to Ionia and to Grand Rapids, yet it is unlawful for the company to collect and deliver goods and merchandise free from charge for cartage in Grand Rapids, while it only receives and delivers like goods and merchandise at Ionia at its station or warehouse. And the reason given for this contention is that the fourth section of the Interstate

Commerce Act provides that "it shall be unlawful for any common carrier, subject to the provisions of the act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kinds of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance."

Under the facts as found and the concessions as made, the Commission's proposition may be thus stated: There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities. But as there is an average distance of one and one quarter of a mile between the station at Grand Rapids and the warehouses and offices of the shippers and consignees, such average distance must be regarded as part of the railway company's line, if the company furnishes transportation facilities for such distance; and if it refrains from making any charge for such transportation facilities, and fails to furnish the same facilities at Ionia, this is equivalent to charging and receiving a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

The Circuit Court of Appeals was of opinion that this proposition is based on a false assumption, namely, that the distance between the company's station and the warehouses of the shippers and consignees is part of the company's railway line, or is made such by the act of the company in furnishing vehicles and men to transport the goods to points throughout the city of Grand Rapids. The view of that court was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage. The court, in a learned opinion by District Judge Hammond, enforced this view by a reference to numerous English cases, which hold that the collecting and delivery

of goods is a separate and distinct business from that of railway carriage; that when railroad companies undertake to do for themselves this separate business, they thereby are subjected to certain statutory regulations and restrictions in respect to such separate business; and that they cannot avoid such restrictions by making a consolidated charge for the railway and cartage service. 43 U. S. App. 308.

We agree with the Circuit Court of Appeals in thinking that the fourth section of the interstate commerce act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles or by those furnished by the railway company, would not concern the Interstate Commerce Commission.

It may be that it was open for the Commission to entertain a complaint of the Ionia merchants that such a course of conduct was in conflict with sections 2 and 3 of the act; but, as we have seen, such questions, if they really arose in the proceedings before the Commission and in the Circuit Court, have been withdrawn from our consideration in this appeal from the decree of the Circuit Court of Appeals.

This disposition of the questions arising under section 4 renders it unnecessary to consider whether, upon the facts disclosed, the services rendered by the railway company at Grand Rapids and Ionia respectively were rendered under "substantially similar circumstances and conditions," and whether that phrase when used in section 4 may not have a broader meaning and a wider reach than when used in section 2; and, also, whether if the circumstances and conditions were substantially dissimilar, the railway company could only avail itself of such a situation by an application to the Commission under the terms of the proviso to section 4.

The remaining question is whether, when a railway company furnishes free cartage facilities, even lawfully, that is, in circumstances and conditions that would relieve the company from charges of violating sections 2, 3 and 4, the provisions of section 6 apply. That section is in the following terms:

"That every common carrier subject to the provisions of this act shall print and keep open for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges, and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges."

It is not claimed that the railway company has not otherwise complied with the provisions of this section, but the complaint is that there was no statement in its schedules, printed and kept open to public inspection at Grand Rapids, of the privilege of free cartage. It is contended for the Commission that this failure to publish the fact of free cartage in the schedules might result in ignorance by some shippers of the existence of such a privilege, and that thus the knowing ones would enjoy an advantage not possessed by others.

In view of the finding, that this privilege had been openly and notoriously granted to the shippers and consignees at Grand Rapids for a period of twenty-five years, it is difficult to suppose that this practice was not well known to all who would have occasion to rely upon it. It should also be noticed that no complaint is made, in the present case, by any resident of Grand Rapids. It may well be doubted whether cartage, when furnished without charge, comes within the meaning of the phrase "terminal charges," or can be regarded as "a rule or regulation" which in anywise "changes, affects or deter-

mines" any part or the aggregate of the rates, fares and charges.

Judge Cooley, in expressing the opinion of the Commission, well said: "It must be conceded, however, that cartage is not in general a terminal expense, and is not in general assumed by the carrier. The transportation as between the carrier and its patrons ends when the freights are received at the warehouse, and the charge made is for a service which ends there." 3 Int. C. C. 613.

We are informed by an extract from the annual report of the Commission for 1889, 3 Int. C. C. 309, that there are many railroad companies throughout the country which furnish free cartage at some of their stations, but that in no instance do the rate sheets or schedules contain any statement to that effect.

However, in a matter of this kind, much should be left to the judgment of the Commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers.

But we are not persuaded, by anything we see in this record, that the defendant company has acted in any intentional disregard of the sixth section.

The decree of the Circuit Court of Appeals is affirmed.

SHAPLEIGH *v.* SAN ANGELO.

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

No. 287. Submitted April 26, 1897. — Decided May 24, 1897.

A State, being the creator of municipal organizations, is the proper party to impeach the validity of their creation, and, if it acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked: this rule is recognized in Texas.

Statement of the Case.

An absolute repeal of a municipal charter is effectual so far as it abolishes the old corporate organization; but when the same, or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities: this view of the law has been accepted and followed by the Supreme Court of Texas.

The disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and, upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligations of the old devolved upon the new corporation.

The Texas act of April 13, 1891, c. 77, as construed by the Supreme Court of the State, must be regarded, as respects prior cases, as an act impairing the obligation of existing contracts.

Under the facts disclosed by this record, the new corporation is subject to the obligations of the preceding corporation, as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

This was an action brought by Augustus F. Shapleigh, a citizen of the State of Missouri, against the city of San Angelo, a city incorporated on February 10, 1892, under the laws of the State of Texas. The plaintiff's amended petition, filed in the Circuit Court of the United States for the Western District of Texas on March 9, 1895, contained two counts, the first asking judgment for the amount of certain unpaid coupons for interest on bonds issued by a municipal organization, styled "the city of San Angelo," which, from January 18, 1889, to December 15, 1891, exercised the powers of an incorporated city, within the territorial limits inclusive of all the territory afterwards embraced within the limits of the defendant corporation; and the second count seeking to recover, as money had and received to the use of the plaintiff, the amount paid by him for the bonds.

The essential allegations of the first count were that on January 18, 1889, the county judge of the county of Tom Green, Texas, made an entry upon the records of the commissioner's court of the said county, setting forth that the inhabitants of the town of San Angelo, in that county, were then and there incorporated as a city, within certain described boundaries; that on the said date the city contained more

than one thousand inhabitants; that immediately after that date an election was held in the city, pursuant to an order of the county judge, at which election a mayor, a marshal, and five aldermen were chosen, who thereupon organized a government for the city and entered upon the performance of their duties as such officers; that on May 16, 1889, the city council passed an ordinance entitled, "An ordinance authorizing the issuing of bonds for the purpose of improving the streets and public highways in the city of San Angelo, and to provide for the interest and create a sinking fund for the principal of said bonds," empowering the mayor and secretary of the city to execute, under the corporate seal, coupon bonds of the denomination of $1000 each, and to negotiate the same, and providing that for the payment of interest on the bonds, and to create a sinking fund for the redemption of the same, there should be levied and collected an annual *ad valorem* tax on all property within the city at the rate of twenty-five cents on the $100 of valuation; that in pursuance of the ordinance the mayor signed and the secretary countersigned ten bonds, and the mayor sold the same, sealed with the corporate seal of the city; that attached to each of the bonds were forty coupons, each for the sum of $30, or one semi-annual instalment of interest; that before the bonds were issued the mayor forwarded the same to the comptroller of public accounts of the State of Texas, who registered the same in a book kept for the purpose in his office, and endorsed upon each of the bonds his certificate that the same was so registered; that at the time the bonds were issued the assessed value of the property in the city amounted to $1,500,000, and that the bonds were issued and their proceeds used for the purpose of making streets in the city. It was further stated that at the fall term, 1890, of the district court of the said county, the county attorney, at the instance of a citizen and taxpayer of the city, filed an information against the mayor and the members of the city council of said city, alleging that the city was never legally incorporated and that the defendants were unlawfully exercising the functions of such officers, and praying that the defendants might be cited to appear and show

cause why they should not be ousted from office, and that the incorporation of the city might be declared null and void; that thereupon proceedings were had in the said court which resulted in the entry of a decree on December 15, 1891, ousting the said defendants from their said offices, and declaring the incorporation of the city of San Angelo null and void. It was further alleged that on February 10, 1892, the defendant city was duly incorporated within certain described boundaries; that the territory of the new corporation was all embraced within the boundary lines of the old organization, and, although smaller in area than the territory of that organization, included all the lands thereof actually occupied and inhabited as a town, and all the streets and public buildings of the old city. The plaintiff averred that he was the bearer and owner of sixty of the coupons attached to the said bonds, which were due and unpaid, and asked judgment for the sum of $1800, with interest on the amount of each of the coupons from the maturity thereof.

In the second count the plaintiff repeated the above allegations, and further alleged that prior to December 15, 1891, the city of San Angelo, as first organized in 1889, sold and delivered the said ten bonds to certain persons residing in St. Louis, Missouri, for the sum of $10,000; that the proceeds of the sale were used by the said city of San Angelo in making its streets; that thereafter the said persons sold, for valuable consideration, some of the bonds to the plaintiff and the remaining ones to certain other persons, from whom the plaintiff subsequently purchased the same; that the plaintiff thus became the owner of all the bonds, and of the entire claim against the defendant on account thereof as for money had and received to the plaintiff's use. Upon this cause of action the plaintiff asked judgment for the sum of $10,000, with interest.

The defendant filed its second amended answer on April 2, 1895, which contained various averments of fact, a denial of all the essential allegations of the petition, defences in the nature of pleas of *non est factum* and of the statute of limitations, and a demurrer, of which nine special causes were stated. Two of the causes of demurrer were as follows:

"2d. Because the said amended petition shows that the corporation which is alleged to have issued the bonds the interest of which is the subject-matter of this suit had been, before the institution of the same, declared null and void by a court of competent jurisdiction, and, as shown by the allegations of said fact, were null and void, and that said corporation as organized in 1889 has, therefore, ceased to exist and was, in fact, void, and said petition fails to show or aver that any subsequent corporation has ever assumed the debt sued upon or become liable for the payment of same, or that the requisite number of qualified voters of the city of San Angelo ever at any election voted in favor of or received any property of the old corporation or ever voted to assume or pay for the debt of the old or defunct corporation of the city of San Angelo, and said petition wholly fails to show that the necessary and proper elections and each of them were held as a prerequisite to any liability of said defendant."

"4th. Because said amended petition shows that the territory included in the corporation of 1889 was entirely different from that embraced in the new corporation of 1892, and which is covered by the defendant in this suit, and fails to state any facts which would make said last incorporation liable for said bonds and interest or the debts of the old and first incorporation mentioned therein."

Replication having been filed by the plaintiff, to which the defendant demurred, the case was heard in the said Circuit Court upon the demurrer to the amended petition, and on April 5, 1895, the demurrer, as to the second and fourth specifications, was sustained. The plaintiff elected to abide by the amended petition, and subsequently judgment having been entered in favor of the defendant, he sued out a writ of error, bringing the case here.

Mr. T. K. Skinker for plaintiff in error.

No appearance for defendant in error.

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

Opinion of the Court.

In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case. It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a *bona fide* holder for value.

As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The State, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the State acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: "If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." *Graham v. City of Greenville*, 67 Texas, 62.

But, in 1890, at the fall term of the district court of Tom Green County, an information was filed by the county attorney against named persons, who were exercising and performing the duties, privileges and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the State, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation in-

cluded within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Subsequently, on February 10, 1892, the city of San Angelo was again incorporated, excluding the unimproved lands, but including all the improved part of the prior incorporation, and in which existed the streets and highways in the construction of which the proceeds of the said bonds had been expended.

What was the legal effect of the disincorporation of the city of San Angelo and of its subsequent reincorporation as respects the bonds in suit? Did the decree of the district court of Tom Green County, abolishing the city of San Angelo as incorporated in 1889, operate to render its incorporation void *ab initio*, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the State had continued to acquiesce in the validity of its incorporation?

Such a question was presented in *Broughton* v. *Pensacola*, 93 U. S. 266, and was answered in the following language:

"Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the State for the convenient administration of government, yet, when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guarantees which protect the engagements of private individuals. The inhibition of the Constitution, which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet

it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of or escape from liabilities the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. . . . The principle which applies to the State would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the State, whatever changes may take place in its constitution of government. 'The new government,' says Wheaton, 'succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former government. It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted.'

"So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities." *Mount Pleasant* v. *Beckwith*, 100 U. S. 520.

In *Mobile* v. *Watson*, 116 U. S. 289, it was held that when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation which passes without consid-

eration and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation.

There are other cases declaring the same views, but which it is needless to cite. The conclusions reached by this court may be thus expressed: The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. Dillon's Mun. Corp. vol. 1, § 172, 4th ed.

This view of the law has been accepted and followed by the Supreme Court of the State of Texas.

The city of Corpus Christi, organized under the laws of the State of Texas, entered into a contract with Morris and Cummings, a private firm or partnership, whereby the latter were to make certain improvements and works in the bay of Corpus Christi, and the city was to issue bonds in payment, with authority to the holders to collect tolls on vessels passing through the bay until the bonds were paid. The contract was so far executed that the improvements were made and the bonds issued and delivered. Subsequently, by an act of the legislature of the State, the act incorporating the city of Corpus Christi and all other acts relating to the incorporation and franchises of the same were repealed. It was contended that this repeal operated to extinguish all right on the part of Morris and Cummings to collect tolls for the use by vessels of the channel they had constructed; but the court *held:* That, while the power of the legislature to alter or repeal

an act chartering a municipal corporation is undoubted, yet that this power cannot be exercised to the injury of creditors of the corporation or of persons holding contracts with it, especially when fully performed on their part so as to entitle them to the compensation provided for in the contract — citing *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 — that the repealing act must be considered in reference to the provision of the Constitution of the United States forbidding the States to pass laws impairing the obligation of a contract, and also to a similar provision in the state constitution; that the same obligation to perform its contracts rests upon a corporation as upon a natural person; that whilst the legislature may deprive the corporation of its charterial rights and forbid its exercising any of the governmental powers, it must not be presumed that it intended also to absolve it from its liabilities to creditors, or to contractors whose rights to compensation have become vested; and that, accordingly, the act of the legislature, repealing the charter of the city of Corpus Christi, cannot be construed to interfere with the rights of Morris and Cummings to collect tolls, without violating both the Constitution of the United States and of Texas. *Morris & Cummings* v. *State*, 62 Texas, 728, 730.

This decision was published in 1884, before the transactions in the present case.

The conclusion which is derivable from the authorities cited, and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation.

The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with a gen-

eral law authorizing the formation of municipal corporations, an organization valid as against everybody, except the State acting by direct proceedings. Such an organization is merely voidable, and if the State refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the State intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor.

We come now to consider the legal effect of the act entitled "An act to amend article 541, chapter 11, title 17, of the Revised Civil Statutes of the State of Texas," approved April 13, 1891. That act was in the following terms:

"SECTION 1. When any corporation is abolished, as provided in the preceding article, or if any *de facto* corporation shall be declared void by any court of competent jurisdiction, or if the same shall cease to operate and exercise the functions of such *de facto* corporation, all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioners' court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have the power to levy and collect a tax from the inhabitants of said town or village in the same manner as the said corporation would be entitled to under the provisions of this chapter: *Provided*, That when any town or city shall reincorporate under chapters 1 to 11 of title 17, of the Revised Civil Statutes upon a majority of the legal voters tax-paying property holders of said town or city, all property, real and personal, of the old or *de facto* corporation, shall be vested in the new one: *And provided further*, That the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation: *Provided*, Where cities and towns have reincorporated under chapters 1 to 11 of title 17 of the Revised Civil Statutes, prior to the adoption of this act, upon a majority vote of the tax-paying property owners of said city or town, all property, real or personal, of the old or *de facto* corporation shall be vested in the new one: *And provided further*,

That the new corporation shall assume all the legal indebtedness, contracts and obligations of the old corporation.

"SECTION 2. In all cases where the commissioners' court shall be vested with the authority conferred on them by this act, it shall be the duty of such court to appoint a suitable person to perform the duty of tax collector, whose duty it shall be to collect the taxes within the territory comprised in the dissolved corporation, until such legal indebtedness of such corporation has been paid off or until such city or town has been reincorporated, and shall fix his bond in sufficient penalties to protect any fund collected. *Provided*, That such appointee may be removed at any time for carelessness or insufficiency or other good cause." Gen. Laws Texas, 1891, c. 77, p. 95.

The provisions of this act might be reasonably interpreted as consistent with the principles heretofore stated, and as providing a method of enforcing the rights of creditors. But it appears that the Supreme Court of Texas has construed the act as requiring a vote of the tax-paying voters in favor of assuming the debt before the new incorporation can be held for it. *White* v. *Quanah*, 28 S. W. Rep. 1065.

If this indeed be so — and it is difficult to reconcile such a view with those previously expressed by that court — then it would follow, as we think, that said act so construed must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that, by a voluntary reincorporation and a taking over of the property rights of the old corporation, the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon a vote of the taxpayers.

When the bonds in question were issued and became the property of the plaintiff he was entitled, not merely to the contract of payment expressed in the bonds, but to the remedies implied by existing law. *Bronson* v. *Kinzie*, 1 How. 311; *Seibert* v. *Lewis*, 122 U. S. 284; *Barnitz* v. *Beverly*, 163 U. S. 118.

It is unnecessary to restate what is fully expressed in those cases.

As the city of San Angelo was organized under a general statute, which provided for the offices of mayor and secretary for all cities organized under it, 1 Sayles' Civil Statutes, Title 17, chap. 2 and 11, and if our conclusion be sound that said city, acting as a municipal corporation, though irregularly formed, was competent to contract for municipal purposes, and that the obligations of such contracts devolved by operation of law upon the new corporation, the official action and character of the mayor and secretary in signing and sealing the securities cannot be challenged. Such objection raises merely the same question in another form.

Norton v. *Shelby County*, 118 U. S. 425, is not to the contrary. There certain persons who undertook to act as county commissioners were adjudged to be usurpers as against others who were lawful officers, and it was held that, as the acts of the legislature which created the board of commissioners was unconstitutional, there were no *de jure* offices, and, therefore, no *de jure* officers. But the general rule was recognized that "where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions."

We conclude that the Circuit Court erred in sustaining the defendant's general exception and special exceptions second and fourth, and that the judgment of that court must be reversed and a new trial awarded. But it is proper that we should observe that we do not desire to be understood as holding that the plaintiff can maintain that count of his amended petition whereby he claims to recover the principal amount of bonds which have not matured. The theory of that count apparently is that the liability of the defendant is of an equitable character, and that the outstanding obligations of the old corporation can be regarded as presently due.

When we hold that the new corporation, under the facts disclosed by this record, is subject to the obligations of the

preceding corporation, we mean subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ST. JOSEPH AND GRAND ISLAND RAILROAD COMPANY *v.* STEELE.

APPEAL FROM THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 256. Argued March 31, April 1, 1897. — Decided May 24, 1897.

No Federal question is presented in this bill, on which the Circuit Court could base the exercise of jurisdiction, and such jurisdiction cannot be found in the character of the controversy as one existing between citizens of different states.

A railroad company, owning and operating a line running through several States, may receive and exercise powers granted by each, but does not thereby become a citizen of every State it passes through, within the meaning of the jurisdiction clause of the Constitution of the United States.

THE St. Joseph and Grand Island Railroad Company, describing itself as a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska, and as a common carrier operating a railroad as a continuous line from the city of Grand Island, in the State of Nebraska, to the city of St. Joseph, in the State of Missouri, which railroad passes through Doniphan County, in the State of Kansas, filed, in the Circuit Court of the United States for the District of Kansas, a bill of complaint against R. M. Steele, sheriff of said Doniphan County, and a citizen of the State of Kansas, seeking to restrain the said Steele, as sheriff of Doniphan County, from levying upon and selling the complainant's property situated in said county, for taxes assessed and levied against the same for the year 1892 by the assessing authorities of Doniphan County.

The defendant answered; an agreed statement of facts was filed; and, after argument, a decree was entered dismissing the bill at plaintiff's costs. Thereupon an appeal was taken by the complainant to the United States Circuit Court of Appeals for the Eighth Circuit, where the decree of the Circuit Court was affirmed. 27 U. S. App. 436. The case was then brought to this court on appeal.

Mr. John M. Thurston, with whom was *Mr. John F. Dillon* on the brief, for appellant.

Mr. P. L. Soper and *Mr. J. H. Gillpatrick* for appellee.

Mr. Justice Shiras delivered the opinion of the court.

The St. Joseph and Grand Island Railroad Company, in its petition filed in the Circuit Court of the United States for the District of Kansas against R. M. Steele, sheriff of Doniphan County, Kansas, alleged that the controversy in the case involved the construction of an act of Congress approved July 14, 1870, granting to the St. Joseph and Denver City Railroad Company the right to build a bridge and maintain the same across the Missouri River at or near St. Joseph, Missouri; and also of an act of Congress approved March 5, 1872, authorizing and empowering the St. Joseph Bridge Building Company to construct a bridge across the Missouri River at or near St. Joseph, Missouri; that said bridge was built under these acts, and that all of its revenue-producing facilities were derived therefrom, and that the controversy was over the right to tax this bridge.

But the other allegations of the bill disclose the case of a dispute arising under the taxing laws of the State of Kansas. One half of said bridge is within Doniphan County. On May 16, 1892, the railroad company returned to the auditor of the State a list and schedule of its property and railroad, including that part of said bridge. Thereupon the state board of railroad assessors for the State of Kansas duly assessed, for the purposes of taxation for the year 1892, all the property of

said railroad company; the county commissioners of Doniphan County, in pursuance of law, duly fixed and determined the amount of the tax which the railroad company was to pay for the year 1892; and the company duly paid the same to the treasurer of Doniphan County. Subsequently one George Manville, as trustee and assessor of Washington township in Doniphan County, made an assessment of that part of said bridge lying within said township, claiming that the same was subject to taxation in said township as an independent structure and as a toll bridge. Thereupon the county commissioners of Doniphan County, at their regular meeting in the month of June, 1892, acted upon said assessment, and, against the protest of the railroad company, levied upon said portion of the bridge lying within Washington township a tax for the year 1892.

The railroad company alleges in its bill that neither the county nor township authorities of Doniphan County have or had any authority or jurisdiction to assess and levy any taxes whatever upon the bridge property of the company in Doniphan County, but that the said state board of railroad assessors of Kansas had exclusive jurisdiction for assessing the said property of the company in said county, and asks for an injunction restraining the sheriff of said county from selling or offering for sale the said bridge property for the taxes so assessed against the same for the year 1892 by the local authorities of Doniphan County.

It thus appears that the railroad company does not claim that, by virtue of any provisions of the several acts of Congress under which the bridge was built, the company is exonerated from paying taxes on the same within the jurisdiction of the State of Kansas, but its contention is that the bridge is to be regarded as a component part of its railroad, and as such is only taxable by the state board of railroad assessors, and that the county and township authorities cannot legally tax the bridge as a toll bridge for local purposes. The question thus presented, as we understand it, is one to be decided by and under the laws of the State of Kansas. The power of that State to tax the bridge property is not denied, but the argument is made that

the theory and true meaning of the state taxing laws is to restrict the exercise of that power to the state board of railroad assessors. The contention on the other side is that under the taxing laws of the State of Kansas it was proper for the state board to assess the railroad as an entirety, and for the county authorities to assess the bridge as an independent structure or toll bridge. This position is based on the dual character of the bridge, used, as it is, for both carrying the trains of the railroad company and vehicles and passengers who pay tolls. To give a Federal aspect to this question it is urged that the franchise to exact tolls was conferred on the original builders of the bridge by act of Congress. But this would not raise a Federal question unless it were claimed that, by reason of such grant, the bridge was exempted from state taxation. But the bill and argument of the railroad company, as we have seen, concede the right of the State to tax the bridge, but find fault with the method by which the taxing authorities, state and county, assessed the taxes for 1892, a question to be decided under the laws of Kansas.

We cannot accede to the proposition that, because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the Circuit Court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real substantive question, on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive. *Hanford* v. *Davies*, 163 U. S. 273, 279.

Finding no Federal question actually presented in the bill on which the Circuit Court could base the exercise of jurisdiction, we are now to inquire whether such jurisdiction can be found in the character of the controversy as one existing between citizens of different States.

The allegations of the bill in that respect were as follows: "The St. Joseph and Grand Island Railroad Company is a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska." "The defendant is the duly elected, qualified and acting sheriff of Doniphan County, Kansas, and a citizen thereof."

There is no allegation in the bill as to the nature of such corporation — whether it originated in special laws or under general laws of those States. Nor does it appear in which State the company was first incorporated. Our examination of the state statutes has led us to suppose that this company was formed by proceedings under general laws providing for consolidating railroad companies in adjoining States.

However this may be, such an allegation as we have here does not show that the railroad company complainant was a citizen of a different State than that of which the defendant was a citizen. Indeed, the allegation is, in effect, that the railroad company and the defendants were citizens of the State of Kansas.

Such a state of the record brings the case directly within *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, where it was held that a corporation, endowed with its capacities and facilities by the coöperating legislation of two States, cannot have one and the same legal being in both States; that neither State can confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised; and that two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the States which chartered them.

While a railroad company, owning and operating a line running through several States, may receive and exercise powers granted by each, and may, for many purposes, be regarded as a corporation of each, such legislation does not avail to make the same corporation a citizen of every State it passes through, within the meaning of the jurisdiction clause of the Constitution of the United States. *Memphis & Charles-*

ton Railroad v. *Alabama*, 107 U. S. 581; *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court for the District of Kansas is likewise reversed, and the cause is remanded to that court with directions to dismiss the bill of complaint for want of jurisdiction. The costs in this court to be paid by appellant.

UNITED STATES *v.* REED.

UNITED STATES *v.* REED.

APPEALS FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 189, 190. Argued March 10, 11, 1897. — Decided May 24, 1897.

The act of June 19, 1886, c. 421, 24 Stat. 19, did not repeal the provisions of the act of June 26, 1884, c. 121, 23 Stat. 59, as respects expenditures by shipping commissioners other than for clerks.

THESE were suits brought by James C. Reed, shipping commissioner of the United States at the port of New York, to recover, respectively, the amount expended by him for rent of office and storage rooms for his official use from March 1, 1891, to April 1, 1893, and the amount of certain expenses which he incurred between July 1, 1886, and March 1, 1891, in maintaining his office and discharging his duties, including rent of the said rooms from April 1, 1890, to March 1, 1891.

The petition in No. 189, asking judgment for the sum of $3125, was filed in the Circuit Court of the United States for the Southern District of New York on April 7, 1893. The Government filed a general answer on June 21 of the same year, and the case was referred, by consent, to a referee, who took the evidence presented by the parties and reported the same, together with his opinion, to the court. Upon the com-

ing in of this report, the court, on August 26, 1893, filed its findings of fact and conclusions of law. The facts stated in the findings were substantially as follows:

The petitioner assumed the duties of his office prior to July 1, 1884, and on or about August 26 of that year the Secretary of the Treasury, pursuant to the provisions of the act of Congress entitled "An act to remove certain burdens on the American merchant marine, and encourage the American foreign-carrying trade, and for other purposes," approved June 26, 1884, fixed the compensation of the petitioner at the sum of $4000 per annum, and in addition thereto one half of the net surplus of the receipts of his office from fees earned, less the amount of salaries and expenses paid; limiting the amount of such compensation, however, to the maximum sum of $5000 in any one year. The petitioner continued to hold the office and discharge the duties thereof from July 1, 1884, to the date of the filing of the said findings of fact, and within the period between July 1, 1884, and April 1, 1893, no change was made in the amount of his compensation, and the same was allowed and paid him at the rate of $5000 per year. For the time between the opening of the fiscal year commencing March 1, 1891, and April 1, 1893, the surplus earnings of the office, of service fees, exceeded the necessary expenses incident to the conduct of the business of the office, including the compensation of the petitioner, by the sum of $14,551.29.

From July 1, 1884, to May 20, 1886, the office of the petitioner was situated at 187 Cherry street, in the city of New York, and the rental of the premises, together with all other expenses incident to the office of shipping commissioner, and to the discharge of the duties thereof, were paid by the United States. On or about May 20, 1886, the office was removed, by direction of the Secretary of the Treasury, from Cherry street to the United States barge office, in the said city, a building owned by the Government, and the expenses incident to the removal and to the fitting up of the petitioner's office in that building were paid by the United States.

On or about April 10, 1890, the petitioner, by direction of the Secretary of the Treasury, removed from the barge office,

and procured offices at 25 Pearl street, and storage room for deceased seamen's effects at 19 Pearl street, at an annual rental of $1500. Between March 1, 1891, and April 1, 1893, the petitioner incurred expenses, and was obliged to make and did make disbursements on account of rent of the said premises in Pearl street, amounting in the aggregate to the sum of $3125.

The court further found that the said expenditures were incident to the office of shipping commissioner; that the said sum was a reasonable charge for the said premises, that the United States duly authorized the occupation by the petitioner of the premises and the expenditures incurred and proposed to be incurred therefor; that the petitioner had duly demanded the said amount from the United States, and that no part thereof had been paid.

In No. 190, the petition asking judgment for $4035.17 was filed in the said court on March 27, 1891, and the general answer of the Government on June 10, 1891. The court's findings of fact and conclusions of law were filed April 6, 1893, on which day, reference of the case having theretofore been made as in No. 189, the report of the referee was submitted.

The findings in this case were essentially similar to those in No. 189 concerning the fixing of the petitioner's compensation, his continuance in office and his receipt of the maximum compensation during the time covered by his claim, his occupation of rooms in Cherry street and his removal therefrom to the barge office, and thence, on April 10, 1890, to rooms in Pearl street, and the payment by the United States of the expenses of the office in Cherry street and of the removal to the barge office. The court further found that for the period between the opening of the fiscal year commencing July 1, 1886, and March 1, 1891, the surplus earnings of the office of the petitioner of service fees exceeded the necessary expenses incident to the discharge of the duties of the office, including the compensation of the petitioner, by the sum of $24,795.01; that between July 1, 1886, and March 1, 1891, the petitioner incurred sundry expenses, and was obliged to make and did

make sundry disbursements amounting in the aggregate to $4033.71 for necessaries incident to the duties imposed upon him by statute as shipping commissioner, including rent of the said office and storage rooms in Pearl street from April 10, 1890, to March 1, 1891, furnishing cost of removal, stationery, telephone, Maritime Register, ice, freight on blanks, safe deposit vault, telegrams, repairs, etc.; that the said amount was a reasonable expenditure for the purposes for which it was disbursed; that reports were made monthly by the petitioner to the Secretary of the Treasury, which reports contained the items of the receipts of the office and of the expenditures incurred and proposed to be incurred; that the petitioner had demanded of the United States payment of the said sum, and that no part of the same had been paid.

The court's conclusions of law in each case were "that the Secretary of the Treasury was authorized to determine the compensation of the petitioner as shipping commissioner at the port of New York, and having exercised such authority, the compensation of the petitioner remained as so fixed (to wit, five thousand dollars per annum); that the Secretary of the Treasury is authorized to regulate the mode of conducting the business in the shipping offices; that all expenditures made by shipping commissioners in discharge of their duties imposed upon them by the statutes of the United States or the regulations of the Treasury Department are to be audited and adjusted in the Treasury Department." Further, as conclusions of law, the court found in No. 189 that the petitioner was entitled to have and receive from the United States the sum of $3125, and in No. 190 that he was entitled to have and receive from the United States the sum of $4033.71. Judgment in No. 189, for the sum of $3125, was rendered in favor of the petitioner on August 26, 1893, and in No. 190, for the sum of $4033.71, on April 6, 1893.

In each case an appeal was taken by the Government to the United States Circuit Court of Appeals for the Second Circuit, where on June 4, 1894, and May 2, 1894, respectively, the said judgments were affirmed. On October 5, 1894, the Government appealed in each case to this court.

Mr. G. E. P. Howard for Reed. *Mr. Elihu Root* was on his brief.

Mr. Assistant Attorney General Dodge for the United States. *Mr. Samuel A. Putnam* was on his brief.

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

These are appeals from the United States Circuit Court of Appeals for the Second Circuit.

James C. Reed, the appellee, who for several years was the shipping commissioner at the port of New York, obtained judgments in the Circuit Court for the Southern District of New York, for moneys which he had expended and disbursed between the first day of July, 1886, and the first day of April, 1893, in payment of expenses incident to the discharge of the duties imposed upon him as such shipping commissioner by the statutes of the United States.

In No. 189, the only question involved is the right of the appellee to be reimbursed for the rent of the commissioner's offices.

No. 190 involves both the question of rent, for another period of time, and the further question of the right to be reimbursed for certain other expenses incidental to the office.

Reed was originally appointed shipping commissioner by the Circuit Court for the Southern District of New York on May 12, 1884. At that time the law relating to the duties and compensation of that office was contained in sections 4501, 4505, 4507, 4592, 4593 and 4594 of the Revised Statutes.

By the principal provisions of these sections, affecting the matter in hand, the commissioner was authorized to employ clerks to assist him in the transaction of the business at his own proper cost, and to lease, rent or procure, at his own cost, suitable premises for the transaction of business, and for the preservation of the books and other documents connected therewith — which premises should be styled the shipping commissioner's office. Certain fees for the several acts of

service were made payable to the commissioner, for which a fee bill was to be prepared and conspicuously placed in the office. Out of such fees, for the purpose of reimbursing himself, the commissioner was entitled to deduct and retain any sums not exceeding the sums specified in the schedule, but it was provided, in section 4594, that "in no case should the salary, fees and emoluments of any officer appointed under this title be more than five thousand dollars per annum, and any additional fees should be paid into the Treasury of the United States."

By the act of June 26, 1884, c. 121, Congress amended the law, as follows:

"SEC. 27. That section forty-five hundred and one of the Revised Statutes is hereby amended so as to read as follows:

"SEC. 4501. The Secretary of the Treasury shall appoint a commissioner for each port of entry, which is also a port of ocean navigation, and which, in his judgment, may require the same; such commissioner to be termed a shipping commissioner, and may, from time to time, remove from office any such commissioner whom he may have reason to believe does not properly perform his duty, and shall then provide for the proper performance of his duties until another person is duly appointed in his place; provided, that shipping commissioners now in office shall continue to perform the duties thereof until others shall be appointed in their places. Shipping commissioners shall monthly render a full, exact and itemized account of their receipts and expenditures to the Secretary of the Treasury, who shall determine their compensation, and shall from time to time determine the number and compensation of the clerks appointed by such commissioner, with the approval of the Secretary of the Treasury, subject to the limitations now fixed by law. The Secretary of the Treasury shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners as hereinafter provided, and shall have full and complete control over the same, subject to the provisions herein contained; and all expenditures by shipping commissioners shall be audited and adjusted in the Treasury Department in the mode and manner

provided for expenditures in the collection of customs. All fees of shipping commissioners shall be paid into the Treasury of the United States, and shall constitute a fund which shall be used under the direction of the Secretary of the Treasury to pay the compensation of said commissioners and their clerks and such other expenses as he may find necessary to insure the proper administration of their duties." 23 Stat. 59.

Reed was continued in office by the appointment of the Secretary of the Treasury under this act of 1884, and remained in the discharge of his duties until after the 1st of April, 1893.

In pursuance of that provision of the act of 1884, which directed that the Secretary of the Treasury should determine the compensation of the shipping commissioner, that officer, on September 12, 1884, wrote to Reed that the department, on the 26th August, had determined to allow him compensation as shipping commissioner at the rate of $4000 per annum and one half of the net surplus of the fees collected by him after the payment of salaries and expenses authorized, "such compensation not to exceed the maximum limited by law, it being understood that from such compensation you shall pay all your official expenses except for employés and rent, and that the compensation and all expenses shall not exceed the aggregate of the fees collected and deposited during the year."

Under this arrangement Reed rendered monthly accounts, charging against the fees earned in his office both the rent of the office occupied by him and all the other expenses of the character included in the present judgments, and all of these charges were regularly allowed to him by the Secretary of the Treasury, down to and including the month of June, 1886.

In June, 1886, offices were provided for the shipping commissioner of New York in the barge office, a government building at that port. He removed to the barge office, and the expenses of his removal were audited and allowed by the Secretary of the Treasury under date of June 18, 1886.

On June 19, 1886, the law was further amended by an act which abolished the payment of fees, and which provided that shipping commissioners who theretofore had been paid wholly

or partly by fees should make a detailed report of such services, and the fees provided by law, to the Secretary of the Treasury, under such regulation as that officer should prescribe; and that the Secretary of the Treasury should allow and pay, from any money in the Treasury not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of the act; also such compensation to clerks of shipping commissioners as would have been paid them had the act not been passed; provided that such services had, in the opinion of the Secretary of the Treasury, been necessarily rendered. Act of June 19, 1886, c. 421, 24 Stat. 79.

After and since the passage of this last statute the Secretary of the Treasury failed to allow to Reed any of his expenses, for rent or otherwise, upon the ground that Congress had failed to make any appropriation for that purpose; and Reed continued to pay out of his own pocket said rent and expenses until the expiration of his term of office. During this period the Secretary of the Treasury sent several communications to Congress, reminding that body that since July, 1886, no appropriations had been made to cover the expenses of the office of shipping commissioners, and recommending that such appropriations should be made.

It is not claimed on behalf of the government that the rent and expenses included in the judgment were not proper and necessary and actually incurred and paid by him.

Reed's compensation was fixed by the Secretary of the Treasury, under the act of 1884, at the rate of $4000 and one half of the net surplus collected by him after the payment of salaries and expenses authorized, and it was also directed by the Secretary that Reed should pay all official expenses except for employés and rent. By the act of 1886 it was provided that his compensation would be such as he would have received had that act not been passed.

We agree with the Court of Appeals in thinking that the act of 1886 did not repeal the provisions of the act of 1884 as respects expenditures by shipping commissioners other than for clerks. There is no repealing clause, there is no reference

to such expenditures, nor any implication of any intention to impose the burden of maintaining suitable premises for the transaction of the business upon the commissioner, and we think that the commissioner was not required, under the act of 1886, to pay out of his compensation expenses of the office which before that act were paid by the government. If before the act of 1886, Reed received $5000 for services and the government paid the rent and other expenses, and after the passage of the act he would receive $5000 and pay the rent and expenses himself, he could not, under the latter construction, receive the same compensation as before.

It is true that under the Revised Statutes prior to the act of 1884, the commissioner was to lease, rent or procure at his own cost the premises in which to do business, and had also to pay all the other expenses of his office. But during that period he had all the fees of the office. The fees were taken from him by the act of 1884, and the Treasury was directed by that act to assume payment of all expenses, as is seen in its language, as follows:

"All expenditures by shipping commissioners shall be audited and adjusted in the Treasury Department in the mode and manner provided for expenditures in the collection of customs. All fees for shipping commissioners shall be paid into the Treasury of the United States, and shall constitute a fund, which shall be used under the direction of the Secretary of the Treasury of the United States to pay the compensation of said commissioners and their clerks, and such other expenses as he may find necessary to insure the proper administration of their duties." 23 Stat. 59.

The record discloses that the Secretary of the Treasury construed the act of 1884 as directing him to allow for rent and expenses similar to those included in these judgments; and that he did not contend that the act of 1886 changed the rights of the commissioner in these particulars, but that he excused the non-payment of rent and expenses because Congress had failed to make the proper appropriation.

The government's brief cites the case of *United States* v. *Gunnison*, 155 U. S. 389. But that was a case where it was

held that a shipping commissioner at Mobile was not entitled to moneys paid for clerk hire, for the reason that the Secretary of the Treasury had formally notified the shipping commissioner, previous to the time for which the clerk hire was claimed, that his compensation would be limited to one hundred dollars per month, and that no additional compensation would be allowed. When he presented his vouchers, including the items for clerk hire, the Secretary approved them only for one hundred dollars per month.

The government's claim that the commissioner was to meet rent and expenses out of his salary might result in the application of his entire salary to that purpose. We are not willing to construe the statute so as to require so unreasonable a result.

Without pursuing the subject into further detail, we are of opinion that the Circuit Court did not err in sustaining the commissioner's claims for reimbursement, and the decree of the Circuit Court of Appeals is accordingly

Affirmed.

HEDRICK *v.* ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 154. Argued January 14, 1897. — Decided May 24, 1897.

F. located a bounty land warrant on the west half of range 14, with which he was acquainted. The land office, knowing his purpose and intending to comply with it, by mistake and oversight entered the location as of the half of range 17 instead of range 14. F., being ignorant of the mistake, entered upon the half of range 14 which he had thus located, took possession of it, paid taxes on it, and sold it. His grantees and their successors paid taxes on it, occupied it, and exercised acts of ownership over it. H., by his agent W., who knew all these facts, applied to enter the tract in range 14 so intended to be located by F., and received a patent therefor. In an action instituted by H. to recover possession of a portion of the land, *Held*, that the plaintiff was not entitled to recover, and that he held the legal title, evidenced by his patent, as trustee for those holding under F.

Statement of the Case.

Robert G. Hedrick filed his petition in the Circuit Court of Adair County, Missouri, on October 14, 1890, against the Atchison, Topeka and Santa Fé Railroad Company, seeking to recover possession of the portion of the defendant company's right of way which extended through the west half of the southeast quarter of section 28, township 61, range 14, in said county. The defendant company answered, as did also James G. Wilson and John G. Sanders, who, upon their own application, were made parties defendant. The plaintiff subsequently filed replications, and on May 5, 1891, the said court entered the following decree:

"Now at this day this cause coming on to be heard, the parties appear, by their respective attorneys, and answer ready for trial, and a jury being waived, the cause is submitted to the court.

"And the court having seen and heard the allegations and proofs of the parties, and being fully informed in the premises, doth find that this is an action of ejectment for the premises described in plaintiff's petition brought by the plaintiff against the defendant, the Atchison, Topeka and Santa Fé Railroad Company, and that the defendants, Wilson and Sanders, have, on their own motion, been made parties defendant; that the said defendant railroad company is the lessee of the Chicago, Santa Fé and California Railway Company of Iowa, which company is the grantee of the defendants Wilson and Sanders by general warranty deeds for the land in controversy; that the defendant Sanders is the grantee of said Wilson for a part of the said premises; that said Wilson is the grantee by mesne conveyances of warranty of one William E. Parcells, who is the grantee of one William A. Lane by general warranty deed of date April 15, 1875; that said Lane is the grantee of one Cavil M. Freeman by general warranty deed of date the — day of January, 1860.

"That on July 25, 1860, said Freeman, at the district land office at Milan, Missouri, where said land was subject to entry, located military bounty land warrant No. 8470 (act of Congress of March 3, 1855) upon the west half of the southeast quarter of section 28, township 61 north, range

14 west, of the fifth principal meridian (which includes the land in question), and thereupon received a certificate of entry for said west half from the register of said land office, which entry was duly and properly posted on the books and records of said land office by proper notations and entries in the tract books, the plat book and the monthly abstract book, but by mistake and oversight said land was described in the application as being in range 17 instead of range 14.

"That said Freeman sold said land as aforesaid, and paid taxes thereon, and his grantees have ever since paid taxes thereon and exercised acts of ownership over said land, and since April, 1875, have been in the actual, constant, continuous and uninterrupted occupancy of said premises, making lasting and valuable and permanent improvements thereon, such as fencing, dwellings and barns, and building a railroad thereon; that the plat book in the office of the county clerk of Adair County, certified by the register of the land office in 1866, shows that said west half, in range 14, had been entered and located by said Freeman, and the books in said land office continued to show said entry of said Freeman until some time subsequent to 1874, when first alterations and additions began to be made; and the court finds that said Freeman intended to and did enter said west half, in range 14, and the land officers in the land office at Milan, Missouri, knew said intention of said Freeman, and that he intended to enter said tract, and they intended him to enter said tract; and that thereby he became and was vested and possessed of the equitable right and estate in and to said tract, and became and was entitled to a patent to said land from the government.

"That on September 1, 1885, while defendants Wilson and Sanders were in the actual occupancy and possession of said premises, plaintiff, taking advantage of the mistake made in said application, by his agent, A. C. Widdicombe, who was also his son in law, and an expert lawyer, who had full knowledge of the original entries and notations in said books and records of the land office, as well as of the additions, alterations, erasures and defacements of said books and records then and now existing, made application to enter said tract of land,

and did thereafter, on the 20th day of July, 1886, secure a patent for said land.

"And the court further finds that the plaintiff is not a purchaser of said land in good faith without notice of the defendants' estate therein, but he is chargeable with full knowledge of all the rights, equities and estate of defendants in and to the said premises, and holds the legal title, evidenced by said patent, as trustee for the defendant railroad company's lessor, the Chicago, Santa Fé and California Railway Company, and that plaintiff is not entitled to recover in this action.

"Wherefore it is by the court considered, ordered, adjudged and decreed that plaintiff be, and he is hereby, divested of all right, title, interest and estate in and to the premises described in the petition as follows, to wit: a strip of land 100 feet wide on the north and west of the Santa Fé survey, and 50 feet wide on the south and east of said survey through the northwest quarter of the southeast quarter of section 28, in township 61, of range 14; and also a tract of land 100 feet wide on each side of and along the centre line of said railway company's survey from where it enters the southwest quarter of the southeast quarter of section 28, township 61, of range 14, at station No. 7078–39 for a distance of 111 feet to station No. 7079–50; thence a tract of land 50 feet in width on the north and west side of said survey for a distance of 450 feet to station No. 7084; thence 100 feet on north and west side of said survey and 50 feet on south and east side of said survey for a distance of 1310 feet to station No. 7097–10, to where said survey leaves said last-described 40 acres and as the same is located over and across the said southwest quarter of the southeast quarter of section 28, township 61, range 14; all the said described premises being the same land claimed and occupied by said railway company, situate in the west half of the southeast quarter of section 28, township 61, range 14, in the county of Adair and State of Missouri; and that all the said right, title, interest and estate accruing to plaintiff by reason of said patent be and the same is hereby vested in the said Chicago, Santa Fé and California Railway Company

as fully and completely as plaintiff might or could do so by regular warranty deed, duly executed according to law."

The plaintiff appealed to the Supreme Court of the State of Missouri, and upon the affirmance by that court of the said decree, he sued out a writ of error from this court.

Mr. Marcus T. C. Williams for plaintiff in error. *Mr. Albert C. Widdicombe* was on his brief.

Mr. Samuel W. Moore for the railroad company. *Mr. Gardiner Lathrop* and *Mr. B. E. Guthrie* were on his brief and also *Mr. Joseph Park* as attorney for Wilson and Sanders.

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

This was an action of ejectment brought and tried in the circuit court of Adair County, Missouri. At the trial a jury was waived, and the court made a finding of facts, and thereupon entered judgment in favor of the defendants. Upon a writ of error to the Supreme Court of Missouri the findings by the circuit court were received as conclusive upon all the facts in issue, although, indeed, as we learn from its opinion, that court reviewed all the evidence, reaching the same conclusions with those found by the circuit court. 120 Missouri, 516.

The findings of fact by the trial court and by the Supreme Court of the State are, in this writ of error, conclusive upon us. *Republican River Bridge Co.* v. *Kansas Pac. Railroad*, 92 U. S. 315; *Dower* v. *Richards*, 151 U. S. 658, 672; *Egan* v. *Hart*, 165 U. S. 188, 193.

Our only inquiry, therefore, is whether, upon the facts so found, the defendants in the court below were entitled to the judgment therein rendered.

The decisive facts were that, on July 25, 1856, Cavil M. Freeman, at the district land office at Milan, Missouri, where the land in controversy was subject to entry, located military bounty land warrant number 8470, issued under act of Con-

gress, March 3, 1855, upon the west half of the southeast quarter of section 28, township 61 north, range 14 west, of the fifth principal meridian, which includes the land in question, and thereupon received a certificate of entry for the same from the register of said land office, which entry was duly and properly posted on the books and records of said land office by proper notations and entries in the tract books, the plat book and the monthly abstract book, but by mistake and oversight said land was registered in the application as being in range 17, instead of range 14; that said Freeman, having entered upon said land and paid taxes thereon, sold the same, and that his grantees have ever since paid taxes thereon, have exercised acts of ownership, and since April, 1875, have been in the actual and uninterrupted possession of said premises, and have made lasting and valuable and permanent improvements thereon, such as fencing, dwellings and barns, and a railroad thereon; that the plat book in the office of the county clerk of Adair County, certified by the register of the land office in 1866, shows said west half, in range 14, had been entered and located by said Freeman, and the books in said land office continued to show said entry of said Freeman until some time subsequent to 1874, when first alterations and additions began to be made; that said Freeman intended to and did enter said west half, in range 14, and that the land officers in the land office at Milan knew said intention of said Freeman, and that he intended to enter said tract, and that they intended him to enter said tract; that thereby he became and was vested and possessed of the equitable right and estate in and to said tract, and was entitled to a patent to said land from the government; that on September 1, 1885, whilst defendants were in the actual occupancy and possession of said premises, plaintiff, taking advantage of the mistake made in said application by his agent, A. C. Widdicombe, who was also his son in law, and an expert lawyer, who had full knowledge of the original entries and notations in said books and records of the land office, as well as of the additions, alterations, erasures and defacements of said books and records then existing, made application to enter said tract of

land, and did, thereafter, on the 20th day of July, 1886, receive a patent for said land; that the plaintiff was not a purchaser of said land in good faith, without notice of the defendants' estate therein, but was chargeable with full knowledge of all the rights, equities and estate of defendants in and to the said premises.

The legal conclusion reached by the state courts upon such a state of facts was that the plaintiff was not entitled to recover, and that he held the legal title evidenced by said patent as trustee for the defendants. The propriety of that conclusion can be manifested by the citation of a few decisions of this court.

Wirth v. *Branson*, 98 U. S. 118, was like the present, the case of a contest between the locator of a military bounty land warrant and a party who had subsequently obtained a patent for the same tract; and it was held that, as the land in question was shown to have been located under a regular military land warrant, a subsequent location, though followed by a patent, would be void; that, as everything was done by the locator of the warrant to entitle him to a patent, the land became segregated from the public domain, and was subjected to private ownership and all the incidents and liabilities thereof; and it was said that "the rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location of entry be vacated and set aside."

Widdicombe v. *Childers*, 124 U. S. 400, came to this court on a writ of error to the Supreme Court of Missouri. In its facts it closely resembles the present one. The suit was brought by Widdicombe to recover the possession of the S. E. ¼, sec. 36, T. 64, R. 6, Clarke County, Missouri. He claimed title under a patent of the United States, bearing date of

December 15, 1871, issued upon a location of agricultural scrip on May 10, 1871. As an equitable defence to the action, such a defence being permissible by the laws of Missouri, the defendants alleged in substance that they claimed title under Edward Jenner Smith, who, on July 6, 1836, went to the proper land office and made application for the purchase of the land in dispute; that his application was duly accepted and he completed the purchase by the payment of the purchase money as required by law; that the entries made at the time by the proper officers in the plat and tract books kept in the office showed that he had bought and paid for the S. E. $\frac{1}{4}$, but that the register, in writing his application, described the S. W. $\frac{1}{4}$ by mistake; that he signed the application without discovering the error; that he immediately went into possession of the S. E. $\frac{1}{4}$ as and for the land he had purchased, and he and those claiming under him have asserted title thereto, and paid taxes thereon ever since; that afterwards the entries on the plat and tract books were changed, without authority of law, so as to show that his purchase had been of the S. W. $\frac{1}{4}$ instead of the S. E. $\frac{1}{4}$; that Widdicombe located his scrip on the S. E. $\frac{1}{4}$ with full knowledge of all the facts, and that he now held the legal title under his patent in trust for those claiming under Smith, whom the defendants represented in the suit. The trial court found the facts to be substantially as stated in the answer; and the Supreme Court of Missouri affirmed the finding and rendered judgment in favor of defendants, requiring Widdicombe to convey in accordance with the prayer of the answer. The case was brought to this court on a writ of error, and the judgment of the state court was affirmed. In the course of the opinion it was said by Mr. Chief Justice Waite:

"The mistake in this case does not appear to have been discovered by Smith, or those claiming under him, until after Widdicombe had got his patent, and after they had been in the undisputed possession for thirty-five years and more of what they supposed was their own property under a completed purchase, with the price fully paid. Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith, and as their equities were superior to

his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. . . . The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons. *Townsend* v. *Greeley*, 5 Wall. 326; *Johnson* v. *Towsley*, 13 Wall. 72; *Wirth* v. *Branson*, 98 U. S. 118; *Marquez* v. *Frisbie*, 101 U. S. 473."

Further discussion is unnecessary. The judgment of the Supreme Court of Missouri is

Affirmed.

MACKALL *v.* WILLOUGHBY.

SAME *v.* SAME.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 274, 281. Argued April 21, 22, 1897. — Decided May 24, 1897.

Willoughby, being counsel for Mackall in three cases numbered 2373 and 8118, both against Alfred Richards and 8038 *Mackall* v. *Mackall*, respectively, the latter agreed with him, after reciting the fact that, "in consideration of the services of said W. Willoughby as such counsel performed and to be performed, he hereby agreeing to conduct . . . No. 2373 to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow and pay to him as compensation for such services, in addition to what has already been received by him, a sum equal to fifty per cent of such money as may be adjudged to the said B. Mackall, Jr., . . . in . . . No. 8118, by way of mesne profits, damages and costs, provided that if such fifty per cent be less than $5000, the said W. Willoughby shall have such sum of $5000, and . . . shall have a lien

Statement of the Case.

therefor upon said judgment and property as may be recovered against the said Alfred Richards." The litigation referred to in the agreement related to lot 7, in square 223 in the city of Washington, on a portion of which the Palace Market was erected. *Held* that the lien thus given to Willoughby was on all the property that might be recovered in the three cases.

In May, 1892, Westel Willoughby filed a bill of complaint in the Supreme Court of the District of Columbia against Brooke Mackall, the Mutual Fire Insurance Company, Samuel C. Wilson, trustee, and Leonard Mackall, trustee, and Oliver Thompson, trustee. The principal object of the bill was to establish an alleged indebtedness of Brooke Mackall to the complainant and to charge such indebtedness on certain land situated in the city of Washington. To this bill a demurrer was filed on the part of Brooke Mackall, which was sustained, and a decree was entered that the bill be dismissed. On appeal to the Court of Appeals of the District of Columbia at November term, 1893, the decree of the Supreme Court of the District was reversed, and the cause was remanded to that court for further proceedings. The other defendants disclaimed, and proceedings against them were discontinued, but Brooke Mackall answered and filed a cross bill. The cause was put at issue and evidence adduced. On May 29, 1894, the Supreme Court of the District, upon final hearing, dismissed the original bill and the cross bill, but without prejudice to a certain action at law pending between the parties. On January 24, 1895, a mandate was issued by the Court of Appeals of the District, reciting that the decree of the Supreme Court of the District had been reversed, and remanding the cause to that court with directions to pass a final decree in conformity with the opinion of the Court of Appeals.

In the Supreme Court of the District on January 30, 1895, a final decree was entered, adjudging an indebtedness of Brooke Mackall to the complainant in the sum of five thousand dollars, with interest from November 24, 1884, and decreeing that the same was a lien upon the land described in the bill and that said land be sold, etc. On February 7, 1895, an appeal was taken from this decree to the Court of Appeals,

which court, on motion, dismissed said appeal on May 17, 1895. 5 App. D. C. 162.

It appears by the record that on January 23, 1895, the defendant moved, in the Court of Appeals, at No. 361, January term of that court, for allowance of an appeal from the decree of the Court of Appeals, entered in January, 1895, to the Supreme Court of the United States, and this appeal appears to have been allowed on May 3, 1895, and constitutes No. 274, October 7, 1896, of the records of this court. An appeal from the decree of the Court of Appeals of April 23, 1895, 6 App. D. C. 125, dismissing, on motion, the appeal to that court was taken on April 23, 1895, and constitutes No. 281, October term, 1896, on the records of this court.

Mr. Henry E. Davis for appellant.

Mr. Arthur A. Birney for appellee.

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

The vital question depends for its answer on the interpretation to be given to the contract between the parties. It is in the following words and figures:

"This agreement made this 10th day of April, 1883, between Brooke Mackall, Jr., and Westel Willoughby, witnesseth:

"That whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of *Albert Richards and others* v. *Brooke Mackall and others*, No. 2373, in equity, in the Supreme Court of the District of Columbia, and which is now pending before the Supreme Court of the United States, for the defendants in said suit, and whereas he is counsel for the plaintiff in the case of *Brooke Mackall, Jr.*, v. *Alfred Richards and others*, in equity, No. 8118 in the Supreme Court of the District of Columbia, and he is also counsel for the defendant in the case of *Leonard Mackall and others* v. *Brooke Mackall, Jr.*, No. 8038, in equity in said court:

"Now, therefore, in consideration of the services of said W. Willoughby as such counsel, performed and to be performed, he hereby agreeing to conduct the said above-mentioned suit of Richards and others, No. 2373, to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow and pay to him as compensation for such services, in addition to what has already been received by him a sum equal to fifty per cent of such money as may be adjudged to the said B. Mackall, Jr., as aforesaid, and which may be recovered in said suit of *Brooke Mackall, Jr.* v. *Richards and others*, in equity, No. 8118, by way of mesne profits, damages and costs, provided, that if such fifty per cent be less than $5000, the said W. Willoughby shall have such sum of $5000, and the said W. Willoughby shall have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards; and the above compensation shall be received by the said W. Willoughby in full satisfaction for his services in the aforesaid matters in controversy as counsel, he to have no other compensation for such services.

"It is provided further, that if said causes Nos. 8038 and 8118, are not finally determined in the court sitting in special term, and an appeal is taken, for such services as may be necessary in appellate courts an additional compensation shall be allowed, which shall hereafter be agreed upon by the parties, and he shall also be allowed an additional compensation for services in No. 2373, which may be necessary after the decision of the Supreme Court of the United States upon the points now pending therein."

The construction put upon this agreement by the complainant is that he was entitled, on performing the services which he thereby agreed to render, to have a fee of not less than five thousand dollars, and to have the same declared a lien upon all the property that may have been recovered in the three cases named in said agreement as Nos. 2373, 8118 and 8038 on the docket of the Supreme Court of the District of Columbia, in which he had acted as counsel for the defendant, Brooke Mackall.

Opinion of the Court.

The theory of the defendant is that the compensation, in addition to what he had already received, was exclusively contingent upon recovery in cause No. 8118; that it was to be a sum equal to fifty per cent of such recovery; and that the lien contemplated was to be upon the property recovered in that cause, and upon that property only. And he now contends that, as there was no recovery in No. 8118, the complainant was entitled to nothing, and his bill should have been dismissed.

The litigation mentioned and contemplated in the agreement was over lot 7, in square 223, in the city of Washington. On a portion of the lot was erected a building known as the Palace Market. One Richards, who had furnished material for its construction, filed a mechanic's lien thereon and on the lot on which it stood. In proceedings to enforce payment of this lien, a sale was had by the marshal, at which sale Richards became the purchaser. The marshal's deed to Richards described the property sold as follows: "Beginning at the northeast corner of said square, and running thence south forty-four feet; thence westerly to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; then with said northerly line to the place of beginning."

Cause No. 2373 was a bill filed by creditors of Mackall, including Richards, seeking to subject to sale for the satisfaction of their judgments all of the lot No. 7 not before sold by the marshal of the District to Richards, and asserting that Mackall had such an interest therein as rendered it liable to the satisfaction of such judgments. On May 1, 1873, the court adjudged and decreed as follows: "That the title to said real estate in the proceedings in the said cause mentioned — that is to say, to all of lot numbered seven, in square numbered two hundred and twenty-three, in the city of Washington, not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards — is vested in the defendant Brooke Mackall, Jr.," and appointed trustees to sell the same. Upon exceptions to the sale and report thereof by the trustees, the court sustained the exceptions on the ground of the imperfect

description of the property to be sold, and subsequently directed another sale of "all that portion of lot seven in square 223, in the city of Washington, lying south of a line drawn from a point on the line of Fourteenth street, northwest, westwardly and parallel with New York avenue, to the west line of the said lot seven. This order is made without passing upon the validity of the said marshal's sale."

These exceptions were filed on behalf of Mackall by Willoughby. From the decree of the general term affirming this decree of sale an appeal was taken to this court, where it was held that the part sold to Richards in the mechanic's lien proceedings was only the part of the lot upon which the Palace Market stood. 112 U. S. 369.

Upon this decision Mackall paid the judgment creditors, and there was no sale of any part of the lot to satisfy them. The result, therefore, of case No. 2373 was that Richards' title, derived from his purchase under the mechanic's lien proceedings, was restricted to the Palace Market and that portion of the lot on which it stood; and that Mackall's title was affirmed to the rest of the lot.

In the meantime, on April 11, 1882, cause No. 8118 had been instituted. It was a suit in equity, the object of which was to recover possession of that part of lot seven which had been sold to Richards by the marshal in 1870, and also to recover the mesne profits while Richards had been in possession. The court below in special term dismissed the bill; but that decree was reversed in general term, the sale and conveyance by the marshal to Richards being set aside as void and of no effect. As between the parties to the suit, Mackall was declared to be the owner of the property, with a right to have the legal title conveyed to him, upon his paying Richards' claim as judgment creditor, as well as his disbursements in connection with said premises. The ground upon which the general term proceeded was that on account of the ambiguity and uncertainty in the description of the property, both in the advertisement and in the marshal's deed, the sale could not be sustained. *Mackall* v. *Richards*, 3 Mackey, 271.

From this decree an appeal was taken to this court, by

which on January 9, 1888, the decree below was reversed, and the cause remanded with directions to dismiss the bill, the court holding that the complainant was guilty of laches, and refusing relief on that ground alone. *Richards* v. *Mackall*, 124 U. S. 183.

It appears that after the decision of this court in 112 U. S. 369, restricting Richards' title to that portion of the lot on which the Palace Market stood, Richards regarded that decision as final, and abandoned all claim except to that part of the lot actually occupied by that building, and that Mackall took and remained in possession ever since.

Upon this state of facts, the Court of Appeals interpreted the agreement as providing that Willoughby was to receive a fee of not less than $5000, and to have the same declared a lien upon all the property recovered in the cases named in the agreement, and in which he had acted as counsel for Mackall.

The conclusion of that court was thus expressed:

"Whilst Willoughby's right to the sum of $5000, as a fee for his services in all this litigation is not now denied, it is contended, and was so held in the court below, that his lien therefor is limited to such property as was actually recovered, and cannot attach to this lot or any part of it, because it was not actually recovered in any of said suits, the only suit for actual recovery being No. 8118 aforesaid, which was defeated, as we have seen. We think that the word 'recovered' should not be so restricted in its meaning. There is no reason why the agreement should not be liberally construed. Its object was to give Willoughby a lien on the property which might be recovered — that is to say, secured or realized — by and through the litigation conducted by him, offensive and defensive. Richards, recognizing, as he was bound to do, that the title to the lot, outside the walls of the building, had been settled adversely to his claim, abandoned any possession he might have had and submitted it to Mackall. Mackall entered without opposition, and has since held peaceable, undisturbed and unquestioned possession. In the general sense of the word, he actually recovered his land through the services

rendered by Willoughby in cause No. 2373. He failed of recovery in 8118, through which he lost the title to the Palace Market lot, and Willoughby lost the contingent interest in the mesne profits expected to be recovered therein, in addition to the land. Willoughby's fee to the extent of the $5000 claimed was not contingent, but certain and fixed. Having as a matter of fact, through success in No. 2373, settled the title to a very valuable part of the lot, and enabled Mackall to retake peaceable possession thereof without further litigation necessary to assure him therein, we think his lien attached thereto under the construction of the contract declared on the former appeal, and which is adhered to."

We have not overlooked the ingenious argument of the counsel for the appellant, based on the phraseology of a prior agreement, and on statements of the briefs filed on behalf of Mackall, in the case of *Richards* v. *Mackall;* but, even if it were open for us to regard those papers, we do not perceive that they clearly point to a different construction of the present agreement than that imported by its own terms.

Upon the whole, we accept the interpretation put upon the contract by the Court of Appeals as a reasonable one; and the decree of the Court of Appeals is

Affirmed.

MacGREAL *v.* TAYLOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 75. Argued October 28, 1896. — Decided May 24, 1897.

An infant female was the owner of an unimproved lot in the city of Washington upon which there were valid liens for unpaid purchase money and taxes. In order that those liens might be discharged and the property improved, she borrowed $8000, and executed a deed of trust upon the lot to secure the loan. Part of the money so borrowed was used to pay off prior liens and taxes, and the balance was applied by her, or under her directions, in improving the lot. Upon arriving at majority, she disaffirmed her contract and deed of trust, and refused to pay the money

borrowed by her. At the time the deed of trust was executed, no inquiries were made as to her age, nor did she make any representations in regard to it. *Held*,

(1) An infant's deed is voidable only, unless it appears upon its face to be to his prejudice, in which case it may be deemed void; and the infant is not estopped by his acts or declarations, or by his silence, during infancy, from asserting, on arriving at full age or within a reasonable time thereafter, the invalidity of such deed;

(2) If the money borrowed by the infant had been expended by her otherwise than in the improvement of her lot, the lender would have been without remedy; for it is not a condition of the disaffirmance by an infant of a contract made during infancy that the consideration received be returned, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed and cannot be returned;

(3) Upon the disaffirmance by an infant of his contract, the contract is annulled on both sides, and the parties revert to the same situation as if the contract had not been made;

(4) In this case, the infant having disaffirmed her deed, she is not entitled, as between herself and the lender, to be protected except in the enjoyment of such rights in the property in question as she had at the time the deed of trust was executed; and the money borrowed by her having gone into the property which she holds in its improved condition, it is to be deemed to be in her hands within the meaning of the rule which entitles the other party to recover such of the consideration as remains in the infant's hands at the time of disaffirmance. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate; but as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her altogether of the interest she had at the time the deed of trust was executed;

(5) The decree of sale in the present case was proper, but it was error to give to the lender a preference in the distribution of the proceeds for the *entire* debt secured by the deed of trust, without reference to the amount for which the property in its improved condition might sell. The decree should direct the proceeds to be applied, first, in repaying to the lender, with interest, the sums paid in discharge of the prior liens and taxes; second, in paying to the infant an amount equal to the value of the lot at the institution of the suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with the money borrowed. Any other decree will

make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured to the lender.

The case is stated in the opinion.

Mr. Henry E. Davis for appellant. *Mr. W. P. Black* was on his brief.

Mr. Job Barnard and *Mr. William F. Mattingly* for appellees. *Mr. James S. Edwards* was on their brief.

Mr. Justice Harlan delivered the opinion of the court.

By deed dated March 8, 1886, and duly recorded, an unimproved lot or parcel of land, in the city of Washington, known as lot 49 in square 111, was conveyed by Henry C. Porter to Seymour Cunningham and John S. Blair to secure the balance of the unpaid purchase money therefor due to one William Brough, evidenced by Porter's two promissory notes, each for twelve hundred and fifty dollars, bearing even date with the above trust deed, and payable to the order of Brough.

On the 3d day of September, 1887, Porter conveyed the same property to Robert E. Moore and his wife Carlotta M. Moore, to have and to hold the same to the grantees, their heirs and assigns as tenants by the entirety. As part of the consideration for this last conveyance, the grantee, Carlotta M. Moore, agreed to assume and pay the debt to Brough.

By deed bearing the same date as the one from Porter to Moore and wife, and executed contemporaneously therewith, Robert E. Moore and Carlotta M. Moore conveyed the premises to Charles Early and Joseph T. Dyer in trust to secure the sum of sixteen hundred dollars, being the balance of the deferred purchase money due to Porter, and evidenced by the promissory note of Moore and wife, payable to the order of Porter.

On the 29th day of April, 1888, Robert E. Moore died, and the premises in question became the absolute and separate property of Carlotta M. Moore in fee simple, subject to the prior liens.

Opinion of the Court.

In 1889 Mrs. Moore borrowed from Sarah Utermehle the sum of eight thousand dollars for which she executed her note, dated October 22, 1889, payable three years after date, with interest at six per cent per annum, payable quarterly. In order to secure the payment of that note, she conveyed by deed on the same day the above premises and appurtenances to William R. Woodward and Leroy M. Taylor and their heirs as joint tenants, with the usual provisions for a release of the lien in case of the payment of the note; and also in trust to permit her, her heirs or assigns, to use and occupy the described land and premises, and the rents, issues and profits thereof, to take, have and apply to and for her and their sole use and benefit, until default should be made in the payment of the debt thereby secured or any instalment of principal or interest, as the same became due and payable, or any proper cost, charge, commission or expense in and about the same. That deed contained the clause usually found in such instruments, authorizing the trustees, upon any default in the payment of the debt or of any instalment of principal or interest, as the same should become due and payable, or any proper cost, charge, commission or expense in and about the same, to sell the land and premises at public auction upon such terms and conditions, at such time and place, and after such previous public advertisement as they or the survivor of them should deem advantageous and proper; and to convey the same in fee simple to and at the cost of the purchaser or purchasers thereof, who were not required to see to the application of the purchase money.

The last-named transaction was consummated pursuant to an agreement between Mrs. Moore and Mrs. Utermehle, and under the following circumstances. Mrs. Moore was in default in respect of the payment of the sums secured by the above trust deeds of 1886 and 1887, and being threatened with a foreclosure and sale under those deeds, and having no property except the premises in question, and desiring also to improve the same by the erection of a substantial building for the purposes of a home, applied to Mrs. Utermehle for a loan of eight thousand dollars for the period above named, to be

secured by a deed of trust, in the usual form, on the land and premises. She represented the title to the premises to be good and unincumbered otherwise than by the above trust deeds. Her application, the bill states, was accompanied by an assurance upon her part that she would immediately commence the construction of a substantial brick building upon the lot and premises, with suitable provisions to secure the payment or application of all the proceeds of the loan "not required to take up the said overdue notes, representing said unpaid purchase money, taxes then due, expense of examination of title to said land and premises, conveyancing and other incidental expenses incurred on account of the negotiation of said loan, all of which were also to be taken up or paid therefrom towards such construction." Relying upon said premises and the proposed security offered by her, eight thousand dollars was loaned by Mrs. Utermehle to Mrs. Moore. Out of that sum, pursuant to the agreement or understanding between Mrs. Moore and Mrs. Utermehle, the latter took up the notes representing the unpaid purchase money secured by the above trust deeds, and paid the taxes then due on the property, together with the expense of examining the title and other expenses, all amounting to $3291.99, which sum was paid directly by Mrs. Utermehle to the holders of the notes and the parties to whom the expenses and taxes were payable. Thereupon Mrs. Moore procured the services of J. W. Myers, a builder, and entered upon the construction of a substantial brick dwelling upon the lot and premises, as agreed upon, and as the condition of the loan to her, and the balance of the eight thousand dollars was expended in the purchase of materials furnished for and used in its construction, and to pay laborers, mechanics and others for work done thereon. The house was completed, and is known as No. 1612 Nineteenth street northwest. Mrs. Moore moved into it about two months after its completion.

Subsequent to the loan, Mrs. Moore married the appellant Wilburne P. MacGreal, and the house and lot is occupied by them as a home.

Before the present suit was instituted, Mrs. MacGreal,

under date of June 13, 1890, addressed to Mrs. Taylor a communication, as follows: "In response to your recent communication calling attention to my non-payment of interest upon the note held by you as the representative of Mrs. Utermehle, I would say that I consider that I have not been well treated in the entire transaction, and inasmuch as the property now owned by me is threatened with a suit to enforce mechanics' liens now already filed, I have taken legal advice upon the subject. As I was a minor at the time of these transactions — the execution of the deed of trust, etc. — I am advised that the affirmance or disaffirmance of the contract rests in my *direction* [discretion] when I become of age. I therefore will not pay the interest demanded and at the proper time will take such action as I may be advised to protect my rights."

Subsequently, on the 23d of June, 1890, she executed and placed of record an instrument, in which she gave notice that she disaffirmed the deed of trust of October 22, 1889, and the note described in it. On the same day she executed the following paper: "I hereby disaffirm a certain contract alleged to have been entered into between one Joseph W. Myers and myself October 28, 1889, and I disclaim any and all liability thereunder, for the reason that at the time of the making of said alleged contract I was a minor under the age of twenty-one years, and became of age June 20, 1890; of all which take due notice." And on June 27, 1890, she executed, and recorded July 14, 1890, a deed disaffirming the deed of trust executed to Taylor and Woodward, upon the ground that said deed had been executed and delivered when she was a minor.

The quarter-yearly instalment of interest due the 22d day of April, 1890, on the debt secured by the deed of October 22, 1889, not having been paid, after notice to Mrs. MacGreal of its non-payment this action was instituted by Mrs. Utermehle on the 23d of June, 1890, for the recovery of the amount due on the note given to her, and for a decree for the foreclosure of the deed of trust of October 22, 1889, and a sale of the property in satisfaction of the amount due to her.

She asked for such other and further relief in the premises as the nature of the case required.

Admitting the execution of the deed to Woodward and Taylor, and the note therein described, Mrs. MacGreal resisted the relief asked upon the ground that at the date of the execution of the deed and note she was under the age of twenty-one years, and within a reasonable time after reaching full age she made and placed upon record an absolute disclaimer of the alleged contract; of which disclaimer and the reasons assigned therefor, it is claimed, Mrs. Utermehle, the original plaintiff and testatrix of the appellees, had due notice. Her husband disclaimed in his answer any personal knowledge of the matter in dispute, and insisted that the bill did not state facts entitling the plaintiff to the relief asked. Woodward and Taylor, trustees, answered, admitting the allegations of the bill, and expressing their submission to any decree that might be just and proper. Indeed, the arrangement between Mrs. Utermehle and Mrs. MacGreal was made in good faith on each side.

It is not disputed that Mrs. MacGreal arrived at full age on the 20th day of June, 1890. And it may be stated, as the result of the testimony, that when the deed of October 22, 1889, was executed no inquiry was made as to her age, nor did she make any representation on that subject.

In the Supreme Court of the District of Columbia a decree was rendered dismissing the bill. But in the Court of Appeals of the District that decree was reversed, and a decree passed which adjudged that there was due from Mrs. MacGreal to the executrices of Mrs. Utermehle the sum of $8000 with interest at the rate of six per cent per annum until paid, and the costs of suit; and directing that, on default in the payment of principal, interest and costs aforesaid by a day named, the lot in question with the improvements thereon be sold and the proceeds applied in payment of such sum. 1 App. D. C. 359.

The principal propositions made on behalf of the appellants are:

That the mortgage sought to be foreclosed and the note

described therein having been executed by the maker during her minority, and without any fraud on her part, and nothing in the way of ratification having occurred, it was competent for the mortgagor, upon arriving at full age, to disaffirm the contract altogether, and thus defeat the lien created by that mortgage upon her property;

That while a minor may not, upon reaching his majority, disaffirm his contract and retain such of the fruits of the contract as are in his hands "in specie" at the time of disaffirmance, if he has parted with the specific thing received by him under the contract, or if its form has been so changed that its return in specie is impossible, his right to disaffirm cannot be questioned; and,

That the exercise of the right of disaffirmance is not, in law, a fraud, although it may work hardship upon the other party to the contract, nor is a failure to disclose the fact of infancy at the time of entering into the contract a fraud that will affect such right.

These propositions, it is said, are sustained by *Tucker* v. *Moreland*, 10 Pet. 58, 70, 71, 73, 74, 77, and *Sims* v. *Everhardt*, 102 U. S. 300, 301, 312.

Tucker v. *Moreland* was an action of ejectment, in which plaintiff's right of recovery depended upon his having the benefit of a deed of trust executed by an infant, but which he disaffirmed after reaching full age. This court, speaking by Mr. Justice Story, said: "It is apparent, then, upon the English authorities, that however true it may be, that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if upon its face, it is apparent that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide, that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void." "To give effect to such disaffirmance it was not necessary that the infant should first place the other party in *statu quo*." "The result of the American decisions,"

the court continued, "has been correctly stated by Mr. Chancellor Kent, in his learned Commentaries, 2 Com. Lect. 31, to be, that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them; and that the doctrine of *Zouch* v. *Parsons*, 3 Burrow, 1794, has been recognized and adopted as law. It may be added, that they seem generally to hold, that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation of the instrument." Again: "In many cases, the disaffirmance of a deed made during infancy, is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection, which the law intends to throw around him to guard him from the effects of his folly, rashness and misconduct. In *Saunderson* v. *Marr*, 1 H. Bl. 75, it was held, that a warrant of attorney, given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in *Conroe* v. *Birdsall*, 1 John. Cas. 127, a bond made by an infant, who declared at the time, that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in *Austin* v. *Patton*, 11 Serg. & Rawle, 309, 310. Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson* v. *Pie*, 1 Lev. 169; *S. C.* 1 Sid. 258; 1 Kebb. 913."

In *Sims* v. *Everhardt* it appeared that Mrs. Sims, a minor, — her husband uniting with her — sold and conveyed her land to Mrs. Everhardt, who paid the purchase money. Some doubt being expressed as to the age of the grantor, she stated in writing on the deed that she was then over twenty-one years of age. The purchaser went into possession, paid off a

mortgage and taxes on the property, continued in possession, and made improvements up to her death. Subsequently Mrs. Sims was divorced from her husband, for his fault, and shortly afterwards she gave notice to the devisees of Mrs. Everhardt that she disaffirmed the deed in question, and demanded possession of the land. That demand not having been complied with, she brought suit against the devisees of her grantee to set aside the deed and for an account of the rents and profits of the land, "as well as of the amount she was in duty bound to pay to the defendants on account of the purchase money by the grantee, and the mortgage aforesaid." The court below, upon final hearing, dismissed the bill. This court reversed the decree, holding that, under the peculiar circumstances of the case, including the fact that Mrs. Sims labored under the disability of coverture when she made the deed, her disaffirmance of it was within a reasonable time, and that she was entitled to the decree asked. Mr. Justice Strong, delivering the opinion of the court, said: "The remaining question is whether she is estopped by anything which she has done from asserting her right to the land in controversy. In regard to this very little need be said. It is not insisted that she did anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown* v. *McClune*, 5 Sandf. Super. Ct. 224; *Keen* v. *Coleman*, 39 Penn. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is

implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." It may be observed that the court did not decide, in that case, that Mrs. Sims was entitled to the land without accounting to the estate of Mrs. Everhardt for the purchase money, and for the amount paid in order to discharge the mortgage debt upon it.

These cases do not determine the vital questions arising in the one before us. They undoubtedly do hold that an infant's deed is voidable only, unless it appears upon its face to be to his prejudice, in which case it may be deemed void; also, that he is not estopped by his acts or declarations, however fraudulent, or by his silence, during infancy, from asserting, upon arriving at full age or within a reasonable time thereafter, the invalidity of such deed.

In the present case, it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied and was applied in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted or consumed and cannot be returned. In *Boyden* v. *Boyden*, 9 Met. 519, 521, Chief Justice Shaw, after observing that a contract with an infant is binding upon the other party until it is disaffirmed by the infant, said that if the infant "elects to disaf-

firm it, he annuls it on both sides, *ab initio*, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor." In *Green* v. *Green*, 69 N. Y. 553, Chief Justice Church, delivering the opinion of the court, said: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether." In *Monumental Building Association &c.* v. *Herman*, 33 Maryland, 128, 133, it was said: "If the infant disaffirm an executed contract, and the specific consideration can be restored, in whole or in part, the infant is treated as a trustee of the other party, and must give it up; but where the articles received by him are consumed or the money spent, the party advancing them is without a remedy." So in *Chandler* v. *Simmons*, 97 Mass. 508, 514, the court said: "Another ground relied on by the defendant is that the deed [by the infant] cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that this right is maintained. *Gibson* v. *Soper*, 6 Gray, 279, 282; *Boody* v. *McKenney*, 23 Maine, 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same; and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all; so that it will no longer protect him in the retention of the consideration. *Badger* v. *Phinney*, 15 Mass. 359; *Bigelow* v. *Kinney*, 3 Vermont, 353. Or, if he

retains the use or disposes of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. *Boyden* v. *Boyden*, 9 Met. 519; *Robbins* v. *Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana* v. *Stearns*, 3 Cush. 372, 376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*. *Tucker* v. *Moreland*, 10 Pet. 58, 65, 74; *Shaw* v. *Boyd*, 5 S. & R. 309." See also 1 Am. Lead. Cases, 5th ed. *224, *232, *249, *259; *Mustard* v. *Wohlford's Heirs*, 15 Gratt. 329, 340; *Cresinger* v. *Welch's Lessee*, 15 Ohio, 156; *Eureka Co.* v. *Edwards*, 71 Alabama, 248, 256; *Corey* v. *Burton*, 32 Michigan, 30; *Price* v. *Furman*, 27 Vermont, 268, 271; *Robinson* v. *Weeks*, 56 Maine, 102, 107; *Carpenter* v. *Carpenter*, 45 Indiana, 142, 146; *Harvey* v. *Briggs*, 68 Mississippi, 60, 66; *St. Louis &c. Railway* v. *Higgins*, 44 Arkansas, 293, 297; *Reynolds* v. *McCurry*, 100 Illinois, 356, 359; Tyler's Infancy & Coverture, § 37, and authorities cited.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between

herself and the estate of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was incumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts when the deed of 1889 was executed cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8000 to be used in meeting those debts and in improving the lot in question. 1 Jones on Mortgages, §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held — and gross injustice will be done in this case if it be not so held — that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.

But we are of opinion that the court below erred in adjudging, as, in effect, it did adjudge, that the appellees are entitled to have their *entire* debt first paid, even if all the proceeds of sale be required for that purpose. The decree should have been so framed as to place Mrs. MacGreal, so far as it could be done, in the position occupied by her at the time the deed

of trust was given; for only by such a decree can the privilege of infancy, resulting from incapacity to contract, be effectively protected. A decree giving the appellees a preference in the distribution of the proceeds of sale for their entire claim necessarily must rest upon the ground that one who obtains from an infant a deed of trust conveying his real estate to secure the repayment of money loaned to him, and to be applied, and which is applied, in improving such estate, may thereby make the disaffirmance of the infant ineffectual in every case where the property, upon being sold, does not bring more than the debt attempted to be secured. But no such result can properly happen if the court enforces the established rule that, upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance. As Mrs. MacGreal ought not to hold the property in its improved state without accounting, as far as possible, for the money used in protecting it from sale for existing liens, and in improving it, there must be a sale in order that justice may be done. But as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her of the interest she had at the time the deed of trust was executed. The decree for a sale was proper, but, upon the showing made by this record, it should direct the proceeds to be applied, first, in repaying to the appellees, with interest, the sums paid by Mrs. Utermehle in discharge of the prior liens created by the deeds of 1886 and 1887 and by the taxes then upon the property; second, in paying Mrs. MacGreal an amount equal to the value of the lot at the institution of this suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with Mrs. Utermehle's money. *Lynde* v.

McGregor, 13 Allen, 182, 185. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured. If the property, in its improved condition, does not bring enough to pay the whole debt due the appellees, they will be without remedy for the deficiency. If any balance should remain after satisfying the above claims in the order mentioned, it will belong to Mrs. MacGreal.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

The Chief Justice and Mr. Justice Brown are of opinion that the judgment should be affirmed.

MENOTTI *v.* DILLON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 309. Submitted April 28, 1897. — Decided May 24, 1897.

The land in controversy, being 240 acres situated in California, was settled upon and improved in good faith by H., in 1858, with the intention of taking, at the proper time, the necessary steps to acquire the title thereto from the United States, by procuring its location in part satisfaction of the grant made by the United States to the State of California of 500,000 acres of land; and then of purchasing the land in question from the State. In June, 1864, H., in proper form, made application to the State, under the act of California approved April 27, 1863, for the sale of certain lands, to locate this land as a "lieu school land location," and to purchase it from the State. This application and offer to purchase were approved by the State's locating agent upon the condition that "if said location should be made and approved by the United States, it should be for the use and benefit of said applicant upon his complying with all the conditions and provisions of the said act of April 27, 1863." Subsequently, February 28, 1865, the State's agent, proceeding under the state law, located this land in lieu of a portion of those which had been lost to the State, at the request and for the use of H., by filing an application for the same in the United States land office at San Francisco. This application to purchase was completed, so that on the 31st day of August, 1865, H. received from the State a certificate of purchase in due form. Menotti, the plaintiff in error, claims under H. At the time the above application was filed in the land office at

Syllabus.

San Francisco, the lands in controversy were withdrawn from preëmption, private entry and sale, by order of the Land Department, for the benefit of a railroad company which had filed its map of *general* route under the acts of Congress of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, granting lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. By the act of Congress of July 23, 1866, 14 Stat. 218, c. 219, quieting land titles in California, it was provided that "in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State." This act excepted from its operation "lands to which any adverse preëmption, homestead or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town or village, or within the county of San Francisco." The railroad company filed its map of definite location in 1870. In 1872 the plaintiff in error, claiming under the purchaser from the State, made application to the proper officers of the United States Land Department for a confirmation of the right of said State to said land so selected by said State for his benefit, under the provisions of the above act of Congress July 23, 1866, and thereupon, and upon due notice to the railroad company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing had, that on the 15th day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said State this 240 acres of land "as confirmed to said State of California." In 1875, Menotti received a patent from the State. The railroad company received a patent from the United States in 1872, but this was after the above proceedings under the act of 1866 were initiated. *Held*,

(1) That the act of July 1, 1862, as amended by the act of July 2, 1864, did not grant to the railroad company any lands which had been sold, reserved or disposed of by the United States, nor impair any existing "lawful claim," at the time the line of railroad was "definitely fixed."

(2) The act of 1866 did not except from its operation lands within the exterior lines of the general route of the railroad, and which, for the benefit of the railroad company, had been withdrawn by executive order from preëmption, private entry and sale. The withdrawal order of 1865 did not stand in the way of the passage of the act of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose

of the odd-numbered sections, within certain limits on each side of the road, or any of them, at any time prior to the definite location of the line of the railroad; second, both acts reserved to Congress the power to alter, amend or repeal them; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a "float," and title does not attach to any specific sections until they are identified by an accepted map of definite location of the line of the road. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. Consequently, at the date of the definite location of the railroad in 1870, there was a "lawful claim" upon these lands based on the act of 1866, which confirmed to the State, for the benefit of those who had purchased from it in good faith, lands embraced by its provisions.

The case is stated in the opinion.

Mr. S. F. Leib for plaintiff in error.

Mr. A. L. Rhodes for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

This action was commenced in the District Court of the third judicial district of California.

The complaint alleged that on the 23d day of April, 1873, the original plaintiff, Charles McLaughlin, became the owner in fee simple and entitled to the possession of the south half of section twenty-one, in township seven south, of range three west, of the Mount Diablo base and meridian, according to the United States survey; that thereafter he continued to be the owner and was entitled to the possession of said land; but that on the above date the defendant Menotti entered into possession, ousted him and continued to hold possession, to his damage in the sum of one thousand dollars.

The answer of the defendant denied each allegation of the complaint. McLaughlin died, and his estate was distributed to the present appellees who were substituted as plaintiffs.

There have been two trials of the case, each time by the court without the intervention of a jury. The first judgment, which was for the defendant, was reversed by the Supreme Court of California because of the insufficiency of the finding of facts bearing upon the question of title. 89 California, 354. The last judgment was also for the defendant; but it was reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs for the lands in controversy, and for rents and profits. *McLaughlin* v. *Menotti*, 105 California, 572. From that decree a writ of error was sued out to this court.

The case made by the agreed statement of facts, and by the evidence introduced at the trial, was substantially as follows:

The Central Pacific Railroad Company of California executed, October 31, 1864, an assignment to the Western Pacific Railroad Company of the right to construct its road between San José and Sacramento, and of its right accruing to it by virtue of the acts of Congress of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, to the land in controversy in this action. This assignment was ratified by Congress March 3, 1865. 13 Stat. 504, c. 88.

On the 8th day of December, 1864, the Western Pacific Railroad Company filed in the office of the Secretary of the Interior a map designating the general route of its road. A copy of that map was received at the United States land office at San Francisco on the thirtieth day of January, 1865, accompanied by an order from the Secretary reserving from preëmption, private entry and sale for the benefit of the railroad company the odd-numbered sections of land within twenty-five miles on either side of the line of such general route. This reservation was in force from the day last mentioned.

On February 20, 1870, the Central Pacific Railroad Company filed in the Department of the Interior the map of the definite location of its railroad between San José and Sacramento; but the road opposite the land in controversy, between San José and Niles, was completed about the first day of September, 1866.

Opinion of the Court.

On June 22, 1870, the Central Pacific Railroad Company of California and the Western Pacific Railroad Company consolidated under the name of the Central Pacific Railroad Company.

The official map of township seven south, range three west, Mount Diablo base and meridian was filed by the United States surveyor general for California in the United States land office at San Francisco on February 27, 1865. Prior to that date, and on or about the 10th day of June, 1864, a survey was made by a deputy United States surveyor for California of the part of that township embracing the land in controversy; but that survey was not made by authority of the Government of the United States. No actual survey of any portion of that township had ever been made before June, 1864, and up to that time no attempt had been made by any person, or by the Government, to have its boundaries ascertained, or to establish the lines of sections in that township.

The land in controversy in this action is within twenty miles of the line of definite location of the Central Pacific Railroad Company, and within twenty-five miles, but not within ten miles, from the line of the general route of the railroad.

On the third day of April, 1872, the United States duly executed and delivered to the Central Pacific Railroad Company a patent for the land in controversy, with other lands. It was in the usual form of patents issued under the Pacific railroad acts. And on the third day of April, 1873, that company executed to McLaughlin a deed conveying to him all its right, title and interest in this land.

At the commencement of this action the defendant was in the possession of the south half of the southeast quarter, and the southwest quarter of section twenty-one, of township seven south, range three west, Mount Diablo meridian, being two hundred and forty acres of the land described in the complaint, and of no more. No part of these lands are or were mineral lands, or were returned or denominated as mineral lands.

It was found that one Philip Hirleman settled upon and

improved this land as early as 1858; that it was "then used for pasturage, had a house upon it and was enclosed partly by a post and rail fence, and for the balance by gulches forming a natural enclosure"; that in June, 1864, and until December 6, 1866, it was occupied by him, and he had on the land during that time a house, barn, corrals, a small field of wheat and potatoes, and cows and horses. The finding states that he "was there all the time; had possession of about 1000 acres of land, including the land in controversy, which was enclosed by two fences and two gulches; each fence at each end thereof connecting with the gulches; the gulches and fences constituting an enclosure of the tract of about 1000 acres, including the land in controversy. The fences ran east and west; the northerly fence was between a half a mile to a mile in length and ran partly across section 21, and the south fence was upon a section lying south of section 21."

It was also found that "on January 30, 1865, the said Hirleman was, and had been prior thereto, and during the year 1864, and was, subsequent to the said 30th day of January, 1864, up to the time of the execution by him of the deed to Jean Peter, a settler in good faith on the land involved in this action, to wit, said 240 acres; and that the improvements hereinabove designated were made on the said land by him in good faith, and that such settlement by him, and the said improvements, were made with the intention in good faith of taking, at the proper time, the necessary steps to acquire the title to said land from the Government of the United States, by procuring its location in part satisfaction of the grant made by the Government of the United States to the State of California of 500,000 acres of land, by act of Congress of date ——; and then of purchasing the land involved in this action from the State of California."

During the years 1864 and 1865 Hirleman was a naturalized citizen of the United States; was then and had been since 1858 a resident in good faith of California and of the county of Santa Cruz, in which county the land involved in this action was then located; and was the head of a family, possessing all the qualifications necessary to enable him to acquire the

title from the Government of the United States to the land in controversy.

It also appears from the finding of the court that under and by virtue of the act of the legislature of the State of California of April 27, 1863, entitled "An act to provide for the sale of certain lands belonging to the State of California," Hirleman, on June 13, 1864, "in due and proper form, made application to Leander Ransom, who was then and there the duly appointed, qualified and acting locating agent of the State of California, under said act, to locate as a lieu school land location, and to purchase from said State, the said 240 acres of land involved in this action; which said application was accompanied with the affidavit of said applicant, in due and proper form, required by the act of April 27, 1863, and also with the affidavit of loyalty, in due and proper form, required by the act of April 27, 1863, and also the affidavits of three disinterested witnesses as to the character of said land, and the fact that no valid claim existed thereto adverse to said applicant's claim, as required by said act of April 27, 1863; and that said locating agent on June 16, 1864, duly accepted said application and affidavits and offer to purchase, upon the condition that if said location should be made and approved by the United States, it should be for the use and benefit of said applicant upon his complying with all the conditions and provisions of said act of April 27, 1863; and that said locating agent on February 28, 1865, in conformity with the provisions of said act, located in lieu of a portion of the lands of said State, which had been lost to said State, the said 240 acres of land involved in this action, at the request, and for the use of said Hirleman, by filing an application for the same in the name and for the State of California, in the United States land office at San Francisco, said land being within the San Francisco land district, with the consent of John F. Swift, who was then the duly appointed, qualified and acting register of said district; which said location made upon said Hirleman's application was filed in the state land office of the State of California on April 4, 1865, and was, by the surveyor general of said State, approved May 13, 1865; and that the treas-

urer of Santa Cruz County, within which county said land was then included, was, in the said order of approval, directed to receive in payment of said location, within fifty days from the recording of said approval, twenty per cent of the purchase money and one year's interest on the balance in advance, at the rate of ten per cent per annum, from the date of the location in the locating agent's office."

On the fourth day of June, 1865, and within fifty days after the recording of the approval of Hirleman's location of June, 1864, payment was made by him to the treasurer of Santa Cruz County, in all respects as directed; and on the thirty-first day of August, 1865, a certificate of purchase, in due form, covering the land, was issued to him by the State of California upon his application.

On December 6, 1866, Hirleman conveyed by deed all his right, title and interest in and to these 240 acres of land to Jean Peter, who thereupon took and held possession of the same until March 9, 1867, when he conveyed, by deed, all his right, title and interest to the defendant Menotti, who thereupon entered into possession, and ever since has been and still is in possession.

The finding further states that after the twenty-third day of July, 1866, — the date of the passage of the act of Congress quieting land titles in California, — to wit, about the thirteenth day of March, 1872, "the defendant made application to the proper officers of the United States Land Department for a confirmation of the right of said State to said land so selected by said State for his benefit, under the provisions of the act of Congress entitled 'An act to quiet land titles in California,' approved July 23, 1866, 14 Stat. 218, c. 219; and thereupon, and upon due notice to said Western Pacific Railroad Company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing in said department had, that on the fifteenth day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said State the 240 acres of land as confirmed to said State of California."

On December 31, 1874, full payment upon this location was made to the State, through the proper county treasurer, by Menotti as assignee of Hirleman. And on February 25, 1875, the State issued to him, as such assignee, its letters patent, granting the 240 acres of land in question upon the application above mentioned.

It appears from the above statement that Menotti and those under whom he claims title have been in actual possession of the lands in controversy since 1858. Of Hirleman's good faith in settling upon, improving and purchasing them, no question can be made under the findings of fact. Nor is any question made as to the good faith of those claiming under him. It may also be stated that fifteen years had expired after Hirleman settled upon the land and commenced improving it before McLaughlin, the original plaintiff, obtained a deed from the Central Pacific Railroad Company.

The case is, therefore, one that appeals strongly to the court for the protection of the defendant who claims under an actual settler who in good faith purchased these lands from the State, and whose right thereto, as a claimant under the State, has been confirmed by the action of the Land Department.

It is necessary to a clear understanding of the precise question to be determined that reference be made to certain legislation by the United States and California.

By the act of Congress of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes," 10 Stat. 244, 246, c. 145, it was provided "that all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preëmption laws of September fourth, eighteen hundred and forty-one, with all

the exceptions, conditions and limitations therein, except as is herein otherwise provided." § 6. By the same act it was provided "that 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, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress, approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the Secretary of the Interior." § 7.

The act of Congress of July 1, 1862, 12 Stat. 489, c. 120, relating to the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, contained a grant of the odd-numbered sections of public lands (excluding mineral lands) on each side of the road within certain limits "not sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed." (§ 3.) It provided that "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act." (§ 18.) And by the act of July 25, 1864, 13 Stat. 356, c. 216, the above grant was enlarged, and it was provided (§ 4) — using the words of the act as published by the authority of Congress — that any lands granted by it, or by the above act of July 1, 1862, of which it was amendatory, "shall not defeat or impair any preëmption, homestead, swamp land, *or other lawful claim*, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the preëmp-

tion laws." That act provided that "Congress may, at any time, alter, amend or repeal this act." (§ 22.)

The legislature of California by the act of April 27, 1863, entitled "An act to provide for the sale of certain lands belonging to the State," Stat. Cal. 1863, c. 397, p. 591, made provision, among other things, for the sale of "the unsold portion of the 500,000 acres granted to the State for school purposes,"[1] and "the sixteenth and thirty-sixth sections granted for the use of the public schools, or lands in lieu thereof." § 2.

The same act of California (April 27, 1863) (§ 4) provided: "Whenever any resident of this State desires to purchase any portion of a sixteenth or thirty-sixth section of any township in this State, or lands in lieu thereof, if the lands sought to be purchased have not been surveyed by authority of the United States, he shall file in the office of the county surveyor of the county in which said lands are situate, an application for a survey and plat and field notes of the lands sought to be purchased, which, when obtained, he shall file with the locating agent of the district, together with an affidavit that he is a citizen of the United States, or has filed his intentions to become a citizen, that he is of lawful age, and is a resident of the State, that the lands sought to be purchased are unoccupied except by the applicant, and that there are no improvements on said lands other than his own, and that to the best of his knowledge and belief there is no valid claim existing to said land adverse to his own, and if the applicant be a

[1] This reference was no doubt to the act of September 4, 1841, 5 Stat. 453, c. 16, by which Congress granted to each of certain States named, and to each new State, as it was admitted into the Union, five hundred thousand acres of land for purposes of internal improvement, "the selections in all of said States to be made within their limits respectively in such manner as the legislatures thereof shall direct," § 8; and to the act of the California legislature of May 3, 1852, which authorized the issue of land warrants to be sold and the proceeds invested in bonds to be kept as a special deposit to the credit of the "school fund," and which act also provided that "the parties purchasing such warrants and their assigns are hereby authorized in behalf of this State to locate the same upon any vacant and unappropriated land belonging to the United States within the State of California subject to such location," etc. — *Laws of California*, 1852, p. 41, c. 4.

female, that she is entitled to purchase and hold real estate in her own name under the laws of this State; all of which shall be verified by the affidavit of three disinterested witnesses."

By another section (§ 5) it is provided: "Whenever a settlement is or has been made by occupation or improvement upon any portion of a sixteenth or thirty-sixth section of any of the public lands in this State, the locating agent of the district in which such land is situated shall, if such occupant has not acquired a preëmption right to such land, notify such occupant or claimant of the fact that he is upon lands belonging to the State, and that he must make application to purchase the same of the State within sixty days, or forfeit all rights to the land. If such occupant or claimant shall neglect or refuse to make such application to purchase within the sixty days above named, such land shall be subject to location and sale in the manner provided for the sale of other sixteenth and thirty-sixth sections, with the exception that the affidavits in regard to occupancy and improvement may be omitted, in all of which cases the application to purchase shall be accompanied by the affidavit of the locating agent of the district, that he has duly notified the occupant or claimant of the land as provided by this section, and that for a period of sixty days after such notice the occupant or claimant has refused or neglected to apply for said lands."

We have seen that before the passage of this act of Congress, namely, on the 13th day of June, 1864, Hirleman made application in proper form to the State, under the act of April 27, 1863, "to locate as a lieu school land location and to purchase from said State, the said 240 acres of land involved in this action." That application and offer to purchase were accepted by the State's agent on the 16th of June, 1864, upon the condition that if the location was made and was approved by the United States it should be for the use of the applicant upon his complying with the conditions of the act of April 27, 1863. The location was made by the State's locating agent on the 28th day of February, 1865, by filing an application in its name in the land office at San Francisco. The

application was approved by the surveyor general of California on May 13, 1865. And on August 1, 1865, Hirleman, having made payment as required, a certificate of purchase covering the lands was given to him by the State. These things all took place before the railroad company filed its map of definite location, and before the passage of the act to be presently referred to quieting land titles in California.

As Congress expressly declared that neither the act of 1864 nor that of 1862 should defeat or impair "any preëmption, homestead, swamp land or other lawful claim," the controlling question in the case is whether, within the meaning of that act, Hirleman's claim ever became a "lawful claim" upon these lands? In determining this question, the words in the act of 1862, "not sold, reserved or otherwise disposed of by the United States . . . at the time the line of said road is definitely fixed," must be taken in connection with the words in the amendatory act of July 2, 1864, "shall not defeat or impair any . . . other lawful claim." Construing those acts together it is clear that no lands were embraced by the grant to which any "lawful claim" had attached *at the time the line of railroad was definitely fixed* on the 20th day of February, 1870. By the express terms of the granting act, as we have seen, only odd-numbered sections were granted which, at the date of the definite location of the road, were *not* sold, reserved *or otherwise disposed of* by the United States, and to which no preëmption, homestead or other lawful claim had attached. *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 639, 644.

What, then, was the situation at the time of the definite location of the road?

By the act of Congress of July 23, 1866, 14 Stat. 218, c. 219, entitled "An act to quiet land titles in California," it was provided (§ 1) that "in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State: *Provided*,

That no selection made by said State contrary to existing laws shall be confirmed by this act for lands to which any adverse preëmption, homestead or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town or village, or within the county of San Francisco: *And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law." The second section related to selected lands that had been surveyed by authority of the United States; the third section to selected lands that had not been surveyed by authority of the United States, but which had been surveyed by authority of and under the laws of the State, and sold to purchasers in good faith under the laws of the State.

This act was passed several years before the railroad company filed its map of definite location. Its object is manifest upon its face. It was a statute of repose in respect of land titles in California. Referring to the provisions of the act of March 3, 1853, 10 Stat. 244, 246, c. 145, requiring surveys of the public lands as a means of extending to California the system of surveys, sales and preëmptions provided for other States and Territories, this court, speaking by Mr. Justice Miller, in *Huff* v. *Doyle*, 93 U. S. 558, 559, said: "The State of California, impatient of the delay of the United States authorities in making these surveys, undertook to perform that duty herself; and, assuming from data furnished by her own surveys, that a great many acres of the sixteenth and thirty-sixth sections were within one or the other of the exceptions of the granting clause, for which the State was to select other lands, the legislature authorized selections and locations to be made in lieu thereof, according to state surveys. The land in controversy was so selected by the State and sold

to the plaintiff, who settled on it in 1865, and received from the State a certificate of sale. The officers of the Land Department, when the matter was brought to their attention, refused to recognize the surveys made by the State, or to acknowledge the validity of selections and locations made under the state laws; and as many such selections and actual settlements under them had been made, the hardships and embarrassments growing out of the action of the state government caused the passage of the act of July 23, 1866." In *Rowe's case*, the Land Department said: "The act of July 23, 1866, is remedial in its character and should be construed liberally. It is entitled an act to quiet land titles in California, and was evidently intended by Congress to be curative of irregularities in selections made by the State under various grants, and to confirm titles in innocent purchasers from the State notwithstanding irregularities in selections." 7 L. D. 397, 399.

While guarding the rights of settlers "under the laws of the United States," and taking care to exclude from its provisions all lands previously reserved for naval, military or Indian purposes by the Government; mineral lands; lands held or claimed under valid Mexican or Spanish grants; and lands which at the time were within any city, town or village, or within the county of San Francisco; Congress intended that justice should be done to those who in good faith had purchased from the State, under its laws, lands which the State had selected from the public domain in part satisfaction of grants by Congress. In accomplishing that result, it used in the act of 1866 language that clearly covered all cases of that character. No case of that kind was excepted from the operation of the act. The present case belongs to that class. The lands in controversy were selected by the State in part satisfaction of a grant to it of public lands. And they were disposed of by the State to a purchaser in good faith under its laws. All this occurred, as we have seen, before the passage of the act of 1866; for Hirleman, under whom Menotti claims, received from the State, on the 1st day of August, 1865, a certificate of purchase. And Menotti made application to the Land Department, under the act of

July 23, 1866, for the confirmation of the right of the State to the land so selected by it for his benefit; and *upon due notice to the Western Pacific Railroad Company and the parties claiming under it*, such proceedings were had in that department, such proofs submitted, and such hearing had, that on the 15th day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to the State the 240 acres of land "as confirmed to said State of California." Thereupon Menotti, as assignee of Hirleman, on the 31st day of December, 1874, made full payment upon such location to the State, and on the 25th day of February, 1875, the State issued to him its letters patent, based upon the original application in 1864 for the lands in question.

In *Wilkinson* v. *Merrill*, 52 California, 424, 426, the Supreme Court of California said: "Under the act of Congress of July 23, 1866, it was a question for the Land Department — first, whether the State had selected the land in controversy in part satisfaction of any grant made to the State by any act of Congress; second, whether the State had disposed of the land to a purchaser in good faith under her laws; third, whether the land was within any of the exceptions by which lands are reserved from the validating effect of the act; fourth, whether the defendant had proved up his claim before the register and receiver in the manner and within the time required by the validating act. These were questions in which no one but the United States and the defendant were interested; and the act of Congress confers upon the Land Department the jurisdiction to determine them. On deciding these questions in favor of the applicant claiming as a purchaser from the State, it is made the duty of the Commissioner of the General Land Office to certify the lands over to the State for the benefit of the purchaser. The case shows that the selection by the State for the use of the defendant was approved by the Commissioner of the General Land Office and by the Secretary of the Interior after proper investigation, and thereupon the land was duly listed to the

State. Up to this point the rights of no third person had intervened, and the Land Department, to whom the decision of all the questions of law and fact pertaining to the proceeding were specially confided, having decided in favor of their regularity and validity, the decision was conclusive as against the United States, and is conclusive as against the plaintiff, who subsequently attempted to acquire the title from the State." In *Huff* v. *Doyle*, above cited, this court said that it admitted of grave doubt whether in a suit at law the validity of the action of the Land Department confirming lands to the State under the act of 1866 could be impeached, and that it certainly could not be impeached on any other ground disclosed by the record of that case than that it confirmed lands to the State which were expressly excepted from confirmation. We are of opinion that while the decision of the Land Department was conclusive as to all facts upon which it necessarily rested, it was not conclusive as to the question of law involved in it, namely, whether the act of 1866 confirmed to the State any lands which, at the time, were withdrawn by executive order from "preëmption, private entry and sale" for the benefit of the railroad company.

It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that these lands having been withdrawn from preëmption, private entry and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the State, "in all cases," lands which the State had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of the passage of the act, were withdrawn from preëmption, private entry and sale pursuant to the filing by the railroad company of its map of *general* route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to

hold that Congress had no power to confirm to the State lands which, at the time, were simply withdrawn from preemption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands, in aid of the construction of a railroad, is, until its route is established, in the nature of "a float," and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 639, 644; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 593. In *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 634, we said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper."

It is true, as said in many cases, that the object of an executive order withdrawing from preëmption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-

numbered sections, within certain exterior lines, "*not* sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed," the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true, where the grant is made subject to the reserved power of Congress to add to, alter, amend or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were *not* sold, reserved or disposed of, or to which no preëmption or homestead claim had attached, at the time of the definite location of its road. That act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes stated in its provisions, and to that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, 174. That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road.

We cannot doubt that the act of 1866 was a legal exertion

of the power of Congress over the public domain; and as its provisions embraced the present case, it must be adjudged that, at the date of the definite location of the line of the railroad referred to, there was a "lawful claim" upon the lands in controversy, based on the act of 1866; in other words, that act confirmed to the State, for the benefit of those who had purchased from it in good faith, all lands embraced by its provisions, and not expressly excepted therefrom. The subsequent definite location of the line of the railroad did not withdraw from its operation any lands confirmed to the State. This doubtless was the view taken by the Land Department, which, after due notice to all parties interested, confirmed these lands to the State. The circumstance that the railroad company had, before that action of the Land Department, obtained a patent covering these with other lands, is not material, for the reason that they had been segregated from the public domain by the act of 1866, and were thereby excluded from the grant of 1862, notwithstanding they were within the exterior lines of the general route of the railroad. Besides, Menotti's proceedings under the act of 1866 were instituted in that department before the railroad company obtained its patent.

Without considering other aspects of the case, we are of opinion that the defendant was entitled, upon the findings of fact, to a judgment in his favor. A judgment in favor of the plaintiffs was a denial of rights secured to the defendant by the laws of the United States.

As the views we have expressed determine the case for the plaintiff in error, it is unnecessary to consider whether, as held by the Supreme Court of the State, the words in the fourth section of the printed act of July 2, 1864, 13 Stat. 356, c. 216, "the improvements of any *bona fide* settler, *or* any lands returned and denominated as mineral lands," should read "the improvements of any *bona fide* settler *on* any lands returned and denominated as mineral lands."

The judgment is reversed, and the case remanded to the Supreme Court of California for further proceedings not inconsistent with this opinion.

DOMINGUEZ DE GUYER *v.* BANNING.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 24. Argued January 8, 1897. — Decided May 24, 1897.

The Board of Commissioners appointed under the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, confirmed to Manuel Dominguez and others, claimants under a Mexican grant, a certain tract of land known as the Rancho San Pedro. Upon appeal to the District Court of the United States for the Southern District of California, the action of the Board was approved, and it was adjudged, February 10, 1857, that the claimants had a valid title to that ranche, the decree giving the boundaries to the lands so confirmed. In execution of the decree, the lands were surveyed under the direction of the United States surveyor general of California. The survey upon its face excepted, reserved and excluded from the claim surveyed the inner bay of San Pedro. Within the exterior lines of that bay is Mormon Island, containing at mean low tide 18.88 acres, and at mean high tide, about one acre. The survey having been filed in the Land Department, a patent was issued February 19, 1858, to the claimants under the decree of confirmation, conveying lands that were outside the exterior lines of the inner bay of San Pedro, and containing eight square leagues more or less. The patent followed the survey, and did not include that bay or any lands within its exterior lines. The present action was brought by various parties, asserting title under the decree of confirmation, to recover possession of the above 18.88 acres. The defendant claimed under a patent issued to him by the United States in 1881. No application was ever made to the District Court of the United States to correct any error in the decree of 1857, nor was any step taken to have a new survey or to obtain a patent conveying all the lands apparently embraced by that decree: *Held*,

(1) If the surveyor general misinterpreted the decree of confirmation, and made a survey which excluded from the surveyed claim any of the lands within the lines given by that decree, it was within the power of the District Court to have its decree properly executed, and to that end to order a new survey;

(2) While it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, a patent issued avowedly in execution of a decree passed under that act, was conclusive between the United States and the claimants, and until cancelled, such patent alone determines, in an action to recover possession, the location of the lands that were confirmed by the decree;

(3) The patent in question having been accepted by the patentees, and

being uncancelled, the plaintiffs in this action, claiming under the patentees, cannot recover lands not embraced by it, even if such lands are embraced by the lines established by the decree of confirmation — the conclusive presumption being that the patent, being uncancelled, correctly locates the lands covered by the confirmed grant.

The court further said it was unnecessary to decide whether the defendant was entitled to a judgment on his cross-complaint, or whether the lands under the navigable waters of the inner bay of San Pedro, and those here in controversy or any part thereof, passed to the State of California upon its admission into the Union, or after the issuing of the patent of 1858.

THE case is stated in the opinion.

Mr. Jefferson Chandler for plaintiffs in error.

Mr. Stephen M. White for defendant in error.

Mr. Solicitor General filed a brief for the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action is in form ejectment. It was brought May 17, 1886, in the Superior Court of the county of Los Angeles, California, by Ana J. Dominguez De Guyer and others to recover the possession of a certain island known as Mormon Island in the inner bay of San Pedro, California. At mean high tide the island has an area of less than one acre; at mean low tide, about 18.88 acres. The area of the bay, including the island, is 1100.59 acres.

The defendant Banning filed an answer, in which he denied the allegations of the complaint; also, a cross-complaint asserting title in himself, and asking a judgment declaring him to be the owner and of right in possession of the premises in controversy.

A jury having been waived, and the cause having been tried by the court, judgment was rendered that the plaintiffs take nothing by their action, and that the defendant was the owner, seized in fee and entitled to the possession of the lands described in the pleadings. That judgment was reversed by the Supreme Court of California. Three of the members of that court as then constituted — Justices Fox, Sharpstein and

Paterson — were of opinion that the island, as well as the whole of the inner bay within the exterior lines of a grant alleged to have been made by the Mexican government to Christobal Dominguez, belonged to the claimants under that grant, and that the title was vested in the plaintiffs. Mr. Justice Thornton was of opinion that the plaintiffs were entitled to recover the island and such other portion of the land sued for as contained 18.88 acres, and was not covered by the navigable waters of the inner bay. Chief Justice Beatty and Justice McFarland dissented.

Upon a rehearing the court, then constituted of Chief Justice Beatty and Justices De Haven, McFarland, Harrison, Garoutte and Sharpstein, unanimously affirmed the judgment of the inferior court. 91 California, 400.

The present appeal was prosecuted by the Los Angeles Terminal Land Company and George Carson, trustee, they having, after the final decision in the state court, become vested with all the right, title and interest of the original plaintiffs.

The case has been twice orally argued in this court, and we have, in addition, the benefit of a brief filed by leave of court, on behalf of the United States in support of the judgment below, the Solicitor General having stated that the Government has a deep interest in the result of the litigation by reason of the fact that it has heretofore expended vast sums of money in improving the navigation of the inner bay of San Pedro, and the entrance thereto; and that this bay is regarded as one of the most important points on the Pacific Coast as a harbor of refuge.

The history of the title to the lands in controversy, as shown by acts of Congress, public documents and records is substantially as follows:

By the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, provision was made for the appointment of a Board of Commissioners to ascertain and settle private land claims in California.

That act declared that every person claiming lands in that State by virtue of any right or title derived from the Spanish

or Mexican government should present the same to that Board, together with such documentary evidence and testimony of witnesses as the claimant relied upon in support of his claim — the decision when rendered to be certified, with the reasons on which it was founded, to the District Attorney of the United States for the District in which it was rendered. § 8. In case of the rejection or confirmation of a claim, provision was made for a review of the decision by the District Court of the District in which the land was situated; and an appeal was allowed from the judgment of that court to the Supreme Court of the United States. §§ 9, 10. When deciding on the validity of any claim the Board, as well as the courts, were to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States as far as they were applicable. § 11.

By the thirteenth section of the act it was provided "that all lands, the claims to which have been finally rejected by the Commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and 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; and for all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act 'to create the office of surveyor of the public lands for the State of Louisiana,'

approved third March, one thousand eight hundred and thirty-one. . . ."

It was further provided "that the final decrees rendered by the said Commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." § 15.

On the 19th day of October, 1852, Manuel Dominguez, Conception Roche and others presented to the Board of Commissioners appointed under the above act a petition, claiming a certain tract of land in the county of Los Angeles, known by the name of San Pedro, containing ten square leagues, more or less. The petition stated that some of the plaintiffs claimed by inheritance and a portion by purchase from the heirs of Christobal Dominguez, who, it was alleged, died seized in fee thereof, having inherited from his uncle, Juan José Dominguez, who also died seized thereof in fee about the year 1809 or 1810; that the latter previous to his death obtained "a perfect grant or concession of the said tract, but at what particular date or from what precise governor cannot now be discovered, owing to the fact that during his lifetime the papers issued and granted, it is believed by José Dario Arguello, governor of the peninsula, in pursuance of the power duly vested in him, were burnt or lost; which said papers, it is averred, contained a complete or perfect grant to the said Juan José"; that such title had been frequently and repeatedly acknowledged by both the Spanish and Mexican governments, and particularly by Don Pablo Vincente de Sola, governor of the province of California, by decree bearing date December 31, 1822; that the said Christobal Dominguez, the father and grandfather of the majority of the petitioners, possessed the tract peaceably and quietly up to his death, and died in the full and legal seizure thereof about 1823; that since that time his heirs and representatives have held and still hold the full, recognized and peaceable possession thereof, except as thereafter stated in the petition, which possession was known to the Mexican government and

approved, ratified and confirmed by it in numberless instances; that the lines and boundaries of the tract were and had always been well known, defined and respected; and that about the year 1817 the judicial possession thereof was given by competent authority, and its lines and boundaries marked out and clearly defined.

The petitioners, after stating their relationship to Christobal Dominguez, averred that they claimed "in fee the said Rancho of San Pedro as tenants in common in the shares and proportions as aforesaid in virtue of the aforesaid grants, of their long pacific possession, and of the ratification, approval and acknowledgment of their title by the Mexican government."

The prayer of the claimants was that their title to the Rancho San Pedro be confirmed.

The Board of Commissioners sustained the claim of the petitioners, and an appeal was prosecuted by the Government to the District Court of the United States for the Southern District of California. In that court, on the 10th day of February, 1857, the following judgment was rendered:

"It is ordered, adjudged and decreed that the decision of the said Board of Land Commissioners be, and the same hereby is, affirmed. And it is further adjudged and decreed that the claim of the appellees to the lands claimed in this case is good and valid and the same are hereby confirmed to them as follows: The lands of which confirmation is hereby made are those known as the 'Rancho of San Pedro,' situate in Los Angeles County, and bounded as follows:

"Commencing at the large sycamore tree (aliso) standing on the side of the high road leading from San Pedro to Los Angeles, thence running in a westerly direction to a stone placed near the high road above mentioned and near a small arroyo or creek; thence crossing the plain and following the line of said stones, which are placed as landmarks along said boundary line, to a large stone placed as a monument in said line on the top of a sand hill; thence to the sea, passing by and including the salt ponds known by the name of Las Salinas; thence along the sea until it reaches a point opposite the northern line of the Rancho Palos Verdes, occu-

pied by and confirmed by said commissioner to the Sepulvedas; thence following said line in an easterly direction to some sand hills for about twelve thousand varas; thence southerly to a point called La Goleta on the sea coast; thence following the sea coast easterly to the river San Gabriel; thence up said river to a point where a line drawn from the stone first mentioned through said sycamore tree would strike said river; thence along such line to the place of beginning, containing eight and a half ($8\frac{1}{2}$) square leagues, a little more or less."

The United States asked and was allowed an appeal from this decision. But the Attorney General of the United States having given notice that the Government would not prosecute the appeal, the parties stipulated in writing that the order granting the appeal be vacated, and that the claimants might proceed under the decree as under a final decree. That stipulation was filed in the cause on the 4th day of June, 1857, and on the same day an order was made, vacating the allowance of the appeal, and giving the claimants leave to proceed as under a final decree.

On the 18th day of December, 1858, a patent was issued by the United States to the persons in whose behalf the decree of confirmation was made. The patent did not set out the decree, nor give the boundaries of the confirmed tract as described in it, but after referring to the petition presented to the Board of Land Commissioners and stating generally that the petitioners claimed therein the comfirmation of the tract known by the name of San Pedro, proceeded:

"And whereas the Board of Land Commissioners aforesaid, on the 17th day of October, 1854, rendered a decision that 'the claim of the said petitioners is valid, and it is therefore decreed that the same be confirmed to them, to hold and possess the same as tenants in common in the respective shares and proportion which they hold in and to the premises thereby confirmed by title deduced from Christobal Dominguez, deceased, by heirship or mesne conveyances, it being the intention to confirm to each of said petitioners the respective title held by him at the time of his becoming a party to this proceeding, derived from the source above mentioned'; which

decree or decision was confirmed by the District Court of the United States for the Southern District of California on the tenth day of February, 1857; and whereas it further appears from a certified transcript on file in the General Land Office that the Attorney General of the United States having given notice that the appeal to the Supreme Court of the United States in this cause would not be prosecuted, the aforesaid District Court, on the fourth day of June, 1857, 'ordered that the order of this court made on the twenty-fourth day of February, A.D. 1857, granting an appeal to the Supreme Court from the decree of confirmation of this court, filed on the tenth day of February, 1857, be, and is hereby, vacated, and that the said claimants have leave to proceed under said decree as under a final decree.'

"And whereas, under the thirteenth section of the act of Congress of the third of March, 1851, there have been presented to the Commissioner of the General Land Office a plat and certificate of the survey of the land confirmed as aforesaid, authenticated on the 19th day of February, 1858, by the signature of the surveyor general of public lands in California; which plat and certificate are in the words and figures following, to wit:

"'U. S. SURVEYOR GENERAL'S OFFICE,

"'*San Francisco, California.*

"'Under and by virtue of the provisions of the thirteenth section of the act of Congress of the third of March, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and of the twelfth section of the act of Congress approved on the 31st of August, 1852, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the thirtieth of June, eighteen hundred and fifty-three, and for other purposes," and in consequence of a certificate of the United States District Court for the Southern District of California, of which a copy is annexed, having been filed in this office, whereby it appears that the Attorney General of the United States having given notice that it was not the intention of the United States to prosecute the appeal from the

decision of the said District Court by which it affirmed the decision of the Board of Commissioners appointed under the provisions of the said act of the third of March, eighteen hundred and fifty-one, to ascertain and settle the private land claims in the State of California, by which they recognized and confirmed the title and claims of Manuel Dominguez *et al.* to the tract of land designated as the Rancho "San Pedro," containing eight and a half square leagues, a little more or less, the said appeal has been vacated by the said District Court, and thereby the said decisions in favor of the said Manuel Dominguez *et al.* have become final, I have caused the said tract to be surveyed in conformity to the boundaries specified in the said confirmatory decree, and do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field-notes of the survey thereof made by Henry Hancock, deputy surveyor, in the month of December, 1857, under the directions of this office, which, having been examined and approved, are now on file therein.

"'And I do further certify that, under and by virtue of the said confirmation and survey, the said Manuel Dominguez *et al.* are entitled to a patent from the United States upon the presentation hereof to the General Land Office for the said tract of land, the same being described as follows, to wit:

[Here follows a description, by metes and bounds, of the exterior lines of the Rancho San Pedro, within which is Mormon Island in the inner bay of San Pedro.]

"'Excepting, reserving and excluding from the tracts as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following-described lines, to wit: Beginning at the stake on the high-water line of the inner bay of San Pedro on the line between stations twenty-three and twenty-four of the survey of the rancho, and which stake is two hundred and twelve chains south seven degrees thirty-two minutes east from said station number twenty-three.

[Here in the body of the certificate is a table showing the metes and bounds of the entire survey, and also a table headed

"Traverse of inner bay of San Pedro to be excluded from survey of the claim," and showing the metes and bounds of the part so excluded; and immediately below the last table are these words: "Area within the exterior lines of the confirmed tract, 44,219.72 acres; area within lines '7' to '16,' being the lands covered by the navigable waters of the inner bay of San Pedro, connected with the ocean, and therefore to be excluded, 1100.50 acres; area included in the boundaries specified by the confirmatory decree, exclusive of bay, 43,119.13 acres."]

"'Thence according to the true meridian (the variation of the magnetic needle being thirteen degrees thirty minutes east) along the high-water line of the inner bay of San Pedro south eighty degrees forty-five minutes east ten chains and eighty-four links to station. . . . Thence north thirty-one degrees thirty minutes west, crossing the channel or entrance to the bay, nineteen chains and forty-four links to "La Goleta," exterior boundary station number twenty-four, and thence north seven degrees thirty-two minutes west, crossing the said "inner bay," one hundred and twenty-five chains and twenty links to the stake on the high-water line of the bay and commencement of this survey thereof.

"'Containing exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro, forty-three thousand one hundred and nineteen acres and thirteen hundredths of an acre, and being designated upon the plats of the public survey as lots numbered thirty-seven, thirty-eight and thirty-nine, in township three south, of range twelve west; lot number thirty-seven, in township three south, of range thirteen west; lot number thirty-seven, in township three south, of range fourteen west; lot number thirty-seven, in township four south, of range thirteen west; lot number thirty-seven, in township four south, of range fourteen west; lot number thirty-seven, in township four south, of range fifteen west, and lot number thirty-seven, of township five south, of range thirteen west of the San Bernardino meridian line.

"'In testimony whereof I have hereunto signed my name

and affixed the seal of said office this nineteenth day of February, A.D. 1858.

"'[L. S.] J. W. MANDEVILLE,

"'*U. S. Sur. Gen'l, Cal.*'"

"Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3d March, 1851, have given and granted, and by these presents do give and grant, unto the said Manuel Dominguez, Conception Roche, Bernardino Roche, José Antonio Aguirre, Maria Jesus Cotta de Dominguez, Madalena Dominguez, Andres Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, José Dominguez, Maria, widow of Manuel Roche, and Antonio Jacinto Roche, and to their heirs, the tract of land embraced and described in the foregoing survey in the respective shares and proportions which they hold in the premises 'by them deduced from Christobal Dominguez, deceased, by heirship or by mesne conveyances, but with the stipulation that in virtue of the fifteenth section of the said act the confirmation of the said claim and this patent shall not affect the interest of third persons,' to have and to hold," etc.

This patent appears to have been recorded December 28, 1869, at the request of Manuel Dominguez.

At the trial the plaintiffs read in evidence the petition of claimants before the Board of Land Commissioners for the confirmation of the Rancho San Pedro; the decree of the Board confirming the same; the decree of the District Court confirming the decision of the Commissioners, and the orders therein made as above stated; and a copy of the above patent from the United States.

At this stage of the trial it was stipulated between counsel that "whatever title vested by said confirmation and patent in said petitioners and confirmees had passed to and become vested in the plaintiffs in this action, who are now owners of whatever title passed under said confirmation and patent to the said petitioners and confirmees."

A witness for the plaintiff, who was a surveyor, testified that "the lines of the decree of confirmation and the exterior lines of the patent and the patent map were identical; that the survey was made in conformity to the decree of confirmation, and from that survey the description contained in the patent was made"; and that the inner bay of San Pedro, within which was Mormon Island, was within the exterior lines called for in that decree and defined on the patent map.

Banning, in support of his claim to the premises, introduced in evidence a patent from the United States, of date December 30, 1881, for lot one of section eight, in township five south, of range thirteen west, of San Bernardino meridian in California, "containing 18.88 acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general"; and a quitclaim deed to him from A. A. Polhamus, navigator, for "a certain tract of land situate in the bay of Wilmington, county of Los Angeles, State of California, known as Mormon Island, and all the land adjoining thereto, to which I [the grantor] have any title or claim."

Banning testified in his own behalf that he entered into possession of Mormon Island in 1880, his possession beginning by his buying out the person then on the island. But he does not state who that person was or by what right he was in possession. He also testified that when he took possession he claimed that the title was in the United States, and he continued to so claim until he obtained a patent from the United States, when he claimed the property for himself; and that he has been in possession since 1890, no one else claiming the right of possession until the present plaintiffs set up their claim by this suit. He said: "This tract of land known as Mormon Island is an island; at about half tide it is an island, and is now an island at low water; at low water it is only partly surrounded by water; at low water it would not be surrounded with water; at mean tide there would be about two feet of water around it; at high tide it is almost all covered with water. . . . A very small portion of the island is above ordinary high water. At mean tide, I don't think there is an acre above water. The

descriptive clause in the patent to me extends to mean low water. I think to include eighteen acres would carry it to mean low water. We occupied a portion of it that was covered with water. I have shipways there and houses on piles. About an acre is covered in that way. Another portion of the island we run lighters on and pile lumber on when the high tide falls. We use in that way sometimes a couple of acres on the west side, the channel side of the island, and that kind of occupation would cover about three acres."

There was some evidence as to how certain lands, including Mormon Island, were assessed from 1880 to 1887 inclusive. But in the view the court takes of the case it is not necessary to advert to it.

The map which accompanied and was made part of the patent of 1858 shows the exterior lines of the survey made under the decree of confirmation. Those lines include the whole of the inner bay of San Pedro. The map also shows the exterior lines of the bay itself. But across that part of the map which designates the bay are the words "inner bay of San Pedro (Exception)." And, as already stated, the map has on its face not only a table showing the exterior lines of the entire boundary run by the surveyor general, but a table of courses and distances, under the heading "Traverse of inner bay of San Pedro to be excluded from survey of the claim." It is not disputed that Mormon Island is within the exterior lines of this inner bay, and is almost covered with water at high tide. That the part excluded or excepted from the survey embraced the navigable waters of the inner bay cannot be doubted. Was it not also intended to exclude Mormon Island, which, according to the opinion of the court below on the original hearing, consisted, at high water, "of a pile of rocks, covering not much more than an acre?" This question was answered in the negative by the Supreme Court of California, which, on the rehearing of the case, said: "The remaining question is, whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception properly construed embraces all the lands within the exterior boundaries of the inner bay of

San Pedro, as shown on the map accompanying the patent and is not confined simply to such land as is covered by the navigable waters of that Bay. That this is the true meaning of the exception is made to appear not only from the fact that the inner bay of San Pedro is marked 'excepted' upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, 'exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro,' as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro, as marked on said map." We entirely concur in that view. The purpose of the surveyor general was to set apart to the claimants under the decree of confirmation, 43,119.13 acres, and not to include in, but distinctly to exclude from, the surveyed claim the 1100.50 acres within the exterior lines of the inner bay. And that there might be no doubt where and how the confirmed tract was located, the survey describes the 43,119.13 acres as being designated upon the plats of the public survey as certain numbered "lots." Mormon Island is not within any of those lots. The Island, therefore, was not included within, but was excluded from, the surveyed claim, nor patented to the claimants who obtained the decree of confirmation.

The plaintiffs, therefore, contend that we have a case in which the survey made in execution of the decree of confirmation under the act of 1851, and the patent based on that survey, except and exclude lands which, although within the exterior lines of the bay, are within the exterior lines of the confirmed tract as described in such decree.

But does it follow that in this action to recover possession the plaintiffs can recover lands that were excluded from the survey, and are not embraced by the patent based upon that survey? The plaintiffs offered in evidence in support of their title a patent which manifestly did not grant lands that were excluded from the surveyed claim; and yet it is contended

that they may go behind both the survey and patent, and recover the possession of the lands so excluded, precisely as they could do if the lands had been included in both the survey and patent.

In our opinion, if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the District Court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851, it was within the power of the District Court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The surveyor general was required by the statute (§ 13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree; if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants, the court had authority to compel the proper execution of its decree.

In *United States* v. *Fossatt*, 21 How. 445, 450, decided in 1858, which case arose under the act of 1851 for the settlement of private land claims in California, this court, speaking by Mr. Justice Campbell, said: "It is asserted on the part of the appellants that the District Court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done. The thirteenth section of the act of the 3d of March, 1851, makes it the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same. It was the practice under the acts of 1824 and 1828, 4 Stat. 52, 284, for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case *Ex parte Sibbald* v. *United States*, 12 Pet. 488, the duty of the surveyor to fulfil the

decree of the court, and the power of the court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions, and are declared in similar language, in the acts of 1824, 1828 and of 1851. The opinion of the court is, that the power of the District Court over the cause, under the acts of Congress, does not terminate until the issue of a patent, conformably to the decree." To the same effect was *United States* v. *Berreyesa's Heirs*, 23 How. 499.

The power of the District Court over proceedings taken in execution of its decree was distinctly recognized by, although existing before, the act of June 14, 1860, 12 Stat. 33, c. 128, which provided that "the District Courts of the United States for the Northern and Southern Districts of California are hereby authorized, upon the application of any party interested, to make an order requiring any survey of a private land claim within their respective districts to be returned into the District Court for examination and adjudication, and on the receipt of said order, duly certified by the clerk of either of said courts, it shall be the duty of the surveyor general to transmit said survey and plat forthwith to said court."

Referring to the act of 1860, in *United States* v. *Halleck*, 1 Wall. 439, 454, (1863) — in which case a second survey had been ordered prior to the act of 1860, and was pending when that act was passed — Mr. Justice Field, speaking for the court, said that whatever question might be raised as to the jurisdiction of the District Court to supervise the survey previous to that act, there could be none after its passage. And in *Fossat's case*, 2 Wall. 649, 712 (the same one above reported in 21 How.), Mr. Justice Nelson, delivering the opinion of the court, said: "The fundamental error in the argument is in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment; as much so as the execu-

tion of any other judgment or decree rendered by the court. This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction, as may be seen by the cases referred to in the opinion of the court in this case when last before us, and in many others to be found in the reports. The powers of the surveyor general under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before."

So far from the claimants under the decree of confirmation rendered in 1857 bringing the survey before the District Court in order that any error therein might be corrected, they accepted it as filed. We say this because the statute requires a patent to issue to the claimant "upon *his* presenting to the General Land Office an authentic certificate of the confirmation, *and a plat or survey of said land, duly certified and approved by the surveyor general of California.*" If the claimants under the decree of confirmation did not themselves present the survey to the General Land Office, and ask a patent in accordance therewith, they accepted a patent based upon that survey, and plainly showing that it conformed to a survey that did not embrace, for the purposes of a patent, anything within the exterior lines of the inner bay of San Pedro. If the Secretary of the Interior upon inspecting the survey and the decree of confirmation had authority to order a new survey or to disregard the part of it excluding lands within the exterior lines of the inner bay, the record does not show that any effort was made in the Land Office to bring about such a result. On the other hand, if the Land Office had only a ministerial duty to issue a patent in exact accordance with the decree of confirmation, no steps were taken to compel the performance of that duty. We have therefore a case brought in 1886 in which the plaintiffs seek to recover the possession of lands alleged to have been confirmed in 1857 to those under whom they claim, but which lands in 1858, nearly thirty years before the commencement of this action, were expressly excluded as well from the survey to which no

objection was urged, as from the patent issued to and accepted by the claimants under that decree.

We are of opinion that while it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants, and, until cancelled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

An instructive case upon the subject is *Beard* v. *Federy*, 3 Wall. 478, 491, in which this court considered the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico. The court said: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners. *Landes* v. *Brant*, 10 How. 373. In the second place, the patent is a record of the action of the Government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former Government. The treaty of cession also stipulated for such protection. The obligation, to which the United States thus succeeded, was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the Government; authorized appeals from the

decisions of the tribunal, first to the District and then to the Supreme Court; and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the Government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the Government upon the title of the claimant. By it the Government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former Government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the Government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the Government by title subsequent. It is in this effect of the patent as a record of the Government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the fifteenth section. The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but

only those who hold superior titles, such as will enable them to resist successfully any action of the Government in disposing of the property."

These principles were recognized in *More* v. *Steinbach*, 127 U. S. 70, 83, and again in *Knight* v. *United States Land Association*, 142 U. S. 161, 187. See also *Meader* v. *Norton*, 11 Wall. 442, 457; *Adam* v. *Norris*, 103 U. S. 591, 593; *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Russell* v. *Maxwell Land Grant Co.*, 158 U. S. 253.

The decisions of the Supreme Court of California have been to the same effect.

In *Teschemacher* v. *Thompson*, 18 California, 11, 25, 26, the court, after referring to the statute of 1851, said: "As the last act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record by the Government of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former Government, and is correctly located by the new Government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the Government itself cannot question its verity, nor can parties claiming through the Government by title subsequent."

In *Chipley* v. *Farris*, 45 California, 527, 538, which involved the title to lands alleged to have been covered by a Mexican grant, and in respect of which there were proceedings under the act of Congress of March 3, 1851, it was contended on one side that the patent was conclusive upon all points in the case, and put an end to all questions of lines and boundaries. On the other side, it was insisted that the confirmation of the claim gave the claimant a perfect title, and that he could not be divested of title to any lands embraced in the decree of confirmation by a patent that excluded a portion of them. The

Supreme Court of California said: "A patent, issued under the act of 1851, is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former Government, and for the segregation of such lands from the public lands of the United States; and it is a record which binds both the Government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. *Leese* v. *Clark*, 18 California, 535. While it stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. . . . It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree — which is also incorporated into the patent — for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting — as he must — the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect, in an action of ejectment." See also *Moore* v. *Wilkinson*, 13 California, 478; *Cassidy* v. *Carr*, 48 California, 339; *Gallagher* v. *Riley*, 49 California, 473, 477; *Carey* v. *Brown*, 58 California, 180, 185; *People* v. *San Francisco*, 75 California, 388; *Wright* v. *Seymour*, 69 California, 122. And as said by Mr. Justice Field in *Moore* v. *Wilkinson*, 13 California, 488, "the fifteenth section of the act of Congress of 1851 provides that the final decree of confirmation and

patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties."

In our opinion the adjudged cases and the evidence in the cause leave no room to doubt the soundness of the conclusions announced by the Supreme Court of the State, namely: 1. That the lands in controversy are not embraced by the patent issued to the petitioners under the proceedings before the Board of Land Commissioners appointed under the act of 1851; 2. The patent having been accepted by the patentees, and being uncancelled, the plaintiffs in this action, claiming under the patentees, cannot recover lands not embraced by it, even if such lands are embraced by the lines established by the decree of confirmation — the conclusive presumption being that the patent correctly locates the lands covered by the confirmed grant.

It is proper to say that the court decides nothing more in this case than that the plaintiffs are not entitled to recover possession of the specific lands here in controversy. In this view it is unnecessary to decide whether the defendant Banning was entitled to a judgment on his cross complaint, nor whether the lands under the navigable waters of the inner bay of San Pedro, and those here in controversy or any part thereof, passed to the State of California upon its admission into the Union, or after the issuing of the patent of 1858.

Judgment affirmed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 298. TEXAS AND PACIFIC RAILWAY COMPANY *v.* GAY. Error to the Supreme Court of the State of Texas. Submitted April 27, 1897. Decided May 10, 1897. *Per Curiam.* Judgment affirmed with costs on the authority of *Railway Company* v. *Johnson*, 151 U. S. 81; *Railway Company* v. *Anderson*, 149 U. S. 237; *Sayward* v. *Denny*, 158 U. S. 180; *Railway Company* v. *Bloom's Admr.*, 164 U. S. 636. *Mr. John F. Dillon*, *Mr. Winslow S. Pierce* and *Mr. D. D. Duncan* for plaintiff in error. *Mr. W. Hallett Phillips* for defendant in error.

No. 573. BOSTON SAFE DEPOSIT AND TRUST COMPANY *v.* WILKINS. Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Submitted April 12, 1897. Decided May 10, 1897. Decree affirmed with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the Northern District of Georgia. *Mr. Henry B. Tompkins* for Boston Safe Deposit and Trust Company. *Mr. H. J. May*, *Mr. L. H. Spilman*, *Mr. C. E. Lucky* and *Mr. Alex. C. King* for Wilkins and others.

No. 798. MERRITT *v.* PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE. Appeal from the Circuit Court of the United States for the Northern District of California. Submitted May 10, 1897. Decided May 24, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687; *Chappell* v. *United States*, 160 U. S. 499, 507 and 508, and cases therein cited. (The Chief Justice did not sit and took no part in the consideration and disposition of this motion.)

Mr. Thomas H. Hubbard, *Mr. E. S. Pillsbury* and *Mr. Robert Y. Hayne* for motion to dismiss. *Mr. Charles H. Lovell* opposing.

No. 804. Blythe *v.* Hinckley. Error to the Supreme Court of the State of California. Submitted May 10, 1897. Decided May 24, 1897. *Per Curiam.* Dismissed for the want of jurisdiction. *Mr. W. H. H. Hart*, *Mr. John H. Boalt*, *Mr. Thomas B. Bishop*, *Mr. W. W. Foote*, *Mr. A. R. Cotton*, and *Mr. John Garber* for motions to dismiss or affirm. *Mr. Jefferson Chandler*, *Mr. E. Burke Holladay* and *Mr. L. D. McKisick* opposing.

Decisions on Petitions for Writs of Certiorari.

No. 795. United States *v.* Dudley. Second Circuit. Granted May 24, 1897. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. C. A. Prouty* and *Mr. J. P. Tucker* opposing.

No. 800. Barrow *v.* Milliken. Fifth Circuit. Denied May 24, 1897. *Mr. Edgar H. Farrar*, *Mr. Benjamin F. Jonas* and *Mr. E. B. Kruttschnitt* for petitioner.

No. 805. Mexican Central Railway Company *v.* Evey. Fifth Circuit. Denied May 24, 1897. *Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioner.

No. 817. Willis *v.* Eastern Trust and Banking Company. Court of Appeals of the District of Columbia. Granted May 24, 1897. *Mr. William A. Maury*, *Mr. Calderon Carlisle* and *Mr. William G. Johnson* for petitioners.

No. 813. Hyer *v.* Richmond Traction Company. Fourth Circuit. Granted May 24, 1897. *Mr. Robert Stiles* and *Mr. Addison L. Holladay* for petitioner.

INDEX.

ADMIRALTY.

1. A cargo of wheat shipped on a British steamer at New York, for Lisbon, was insured by an English assurance company through its agents in Philadelphia "free of particular average unless the vessel be sunk, burned, stranded or in collision"; all losses to be paid in sterling at the offices of the corporation in London; "claims to be adjusted according to the usages of Lloyds." The cargo was loaded and the lines were cast off, ready to sail, when it was found that there was a defect in the machinery, which detained them a few hours. During the detention a lighter, being towed out of the dock, ran into the steamer, breaking two plates in the bulwarks and doing other damage. This resulted in a further detention of two days. After sailing, the steamer encountered heavy gales and seas. She took large quantities of water on her decks, some of which came through the cracks caused by the collision, and was so strained that the water got into the wheat. The machinery becoming strained the captain made for Boston, and on arrival there had a survey made, which resulted in the taking out of the cargo, and its sale for the benefit of all concerned. This libel was then filed by the owners of the cargo to recover for their loss. The District Court gave judgment in favor of the owners, and referred it to a commissioner to assess the damages, and gave judgment accordingly. The Court of Appeals having affirmed that judgment, it was brought here by writ of certiorari, for review. *Held*, (1) That under the circumstances the contract of insurance was to be interpreted according to English law; (2) That, if a ship be once in collision during the adventure, after the goods are on board, the insurers are, by the law of England, liable for a loss covered by the general words in the policy, although such loss is not the result of the original collision, and, but for the collision, would have been within the exception contained in the memorandum, and free from particular average as therein provided; (3) That the question whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and no opinion is expressed on that question; (4) That under the facts stated in the opinion of the court, the cargo was necessarily sold at the port of refuge, and the loss,

CONSTITUTIONAL LAW.

CONTEMPT OF COURT.

as the Wabash system, and for its reorganization, the claim of the appellant which forms the subject of this appeal was considered. His claim was for equipment bonds for equipment furnished the Ohio division. Among the proceedings was a suit in Indiana, involving the question of the lien of such bonds upon the portion of the road in Indiana, in which it was decreed that there was no lien. The various proceedings resulted on the 23d of March, 1889, in a decree of foreclosure in the several Circuit Courts in Ohio, Indiana and Illinois, by which the entire line was to be sold as a unit, and further it was provided that the rendering of that decree in advance of the trial and determination of the appellant's claim should not affect the rights of the appellant, but that they should be preserved and enforced in the manner provided for by the decree. The sale under the decree was made and confirmed. August 17, 1889, it was ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein upon and concerning said claim and lien, and reserved in the former decree herein saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson as special master," etc. The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest, in full. The Circuit Court sustained the master in holding Compton's lien valid, but decided that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Appeal was taken to the Circuit Court of Appeals. That court, after making a full statement, requested the instructions of this court upon the following questions: First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only? Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser? Third. Is the decree of the Circuit Court of the United States for the District of Indiana between the same parties, and unappealed from, *res judicata* upon the foregoing questions in this court? *Held*, (1) That the decree of sale of March 23, 1889, conferred upon Compton, in event that his claim should not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien; (2) That, in event of such sale, and in applying the proceeds thereof, Compton would be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division; (3) That the decree rendered in the Circuit Court of the United States for

ESTOPPEL.

EVIDENCE.

FRAUD.

HABEAS CORPUS.

INFANT.

INTERSTATE COMMERCE COMMISSION.

JURISDICTION.

A. Jurisdiction of the Supreme Court of the United States.

were made respecting the conduct of the business, and the manner of fixing from time to time the price of the cane. The thirteenth article was as follows: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar-house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid." The twentieth article was as follows: "The parties of the first part agree to keep all such books and records as are required by the United States Government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The lessees, with the consent of the lessors, transferred their rights and their interests under the lease to a corporation which assumed their obligations thereunder. This corporation became involved and a receiver was appointed in an equity suit brought by the Burdon Company. The lessors intervened in this suit, claiming that their claim for the balance due on the purchase price, and also their claim for cane delivered to the lessees were secured by a lessor's privilege, under Louisiana law, on the property of the lessees at the sugar-house, and the latter also by an equitable lien on any bounty that might thereafter be collected by the receiver. The Circuit Court decided that the intervenors were entitled to the lessor's privilege, and to an equitable lien on the bounty. An appeal having been taken from this decision, the Circuit Court of Appeals certified the facts to this court and propounded the following questions: "*First.* It being shown that the cane sold by appellees, J. U. Payne & Company et als., to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the limits of the premises leased to the Ferris Sugar Manufacturing Company, Limited, are the appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane? *Second.* Under the terms of the thirteenth article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar-cane sold and delivered under said contract, have the appellees H. M. Payne, J. U. Payne and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit? *Third.* If the second question shall be answered in the affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the

MASTER AND SERVANT.

See RAILROAD.

MINERAL LAND.

1. The clear import of the language of Rev. Stat. § 2320 is to give to a tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length in that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire; and is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a surface patent before the discovery of the vein. *Enterprise Mining Co.* v. *Rico-Aspen Mining Co.*, 108.
2. *Enterprise Mining Co.* v. *Rico-Aspen Mining Co.*, 167 U. S. 108, affirmed and applied, and the court further decides that the failure of the tunnel owner to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed does not destroy his right to the veins he discovers in the tunnel. *Campbell* v. *Ellet*, 116.

MUNICIPAL CORPORATION.

1. In 1887, the municipal authorities of Defiance authorized the erection of bridges over the Wabash Railroad, and about eighteen feet above its track, by the railroad company, to take the place of two existing bridges. In 1893, the common council of Defiance changed the grade of the streets crossing on said bridges to the level of the railroad, and changed the approaches to it by causing them to descend to the level of the railroad. *Held*, that the common council acted within its powers in changing the grade of the streets in question, and that the railroad company had no legal right to complain of its action. *Wabash Railroad Co.* v. *Defiance*, 88.
2. The legislative power of a city may control and improve its streets, and a power to that effect, when duly exercised by ordinances, will over-

NATIONAL BANK.

provided for the deposit of securities in fixed amounts by each bank as collateral for their daily settlements; and another for the hours in the day in which settlements were to be made, and the mode of making the exchanges. The Keystone Bank made its deposit in conformity with the rule; but, having become indebted to the clearing house by reason of the receipt of clearing house certificates to a large amount, the securities deposited by it were surrendered, and were redeposited by it as security for the payment of the certificates. In the clearing of March 19, 1891, the Keystone Bank presented charges against other banks to the amount of $155,136.41, and the other banks presented charges against it for $240,549, making the Keystone Bank a debtor in the clearing for $75,359.08. In accordance with the rule, the Keystone Bank between the hours of eleven and twelve paid the $75,000 in cash or its equivalent, and gave its due bill to the manager of the clearing house for the fractional sum of $359.08, which was deposited by the manager and checked against by him as cash. In the runners' exchange of that day, the Keystone Bank owed a balance of $23,021.34, which balance it settled by giving its due bill to the manager for deposit in accordance with the system above stated. In operating the clearing on the morning of March 20, the Keystone Bank, through its runner, delivered to the respective clerks of the various banks packages containing claims held by the Keystone Bank amounting to $70,005.46, and the settling clerk of the Keystone Bank received from the runners of the other banks packages containing $117,035.21, leaving the Keystone Bank debtor in the clearing for $47,029.75. The packages containing the demands which the Keystone Bank held against other banks, and which had been delivered to the agent of each of those banks, were by them taken away at the termination of the clearing. The packages containing the charges presented against the Keystone Bank, which in the aggregate amounted to $117,035.21, instead of being taken away by its settling clerk, were, under the arrangement which we have stated, turned over by him to the manager of the clearing house, to be retained until at the hour named the Keystone Bank paid the balance due by it. Before the hour for making the payment, however, the Keystone Bank, by order of the Comptroller of the Currency, was closed, and subsequently was placed in the hands of a receiver. On the failure of the Keystone to make the payment of $47,029.75, the committee of the association instructed the manager to call on the banks, by whom claims had been presented against the Keystone, "to redeem the packages against the Keystone Bank." The manager thereupon gave the proper notification, and the various banks notified sent their checks and redeemed the packages in question. Among the obligations for $117,035.21, however, were due bills amounting to $41,197.36. These due bills came from the fractional amounts arising by the settlement made on the morning of the 19th,

PATENT FOR INVENTION.

a bare preponderance of evidence which leaves the issue in doubt; and that if this be the settled rule in respect to suits between individuals it is much more so when the Government attempts to set aside its solemn patent: and if this is true when the suit is to set aside a patent for land, which conveys for all time the title, *a fortiori* it must be true when the suit is one to set aside a patent for an invention which only grants a temporary right. *Ib.*

3. The case which the counsel for appellant presents may be summed up in these words: The application for this patent was duly filed. The Patent Office after the filing had full jurisdiction over the procedure; the applicant had no control over its action. We have been unable to offer a syllable of testimony tending to show that the applicant ever in any way corrupted or attempted to corrupt any of the officials of the department. We have been unable to show that any delay or postponement was made at the instance or on the suggestion of the applicant. Every communication that it made during those years carried with it a request for action, yet because the delay has resulted in enlarged profits to the applicant, and the fact that it would so result ought to have been known to it, it must be assumed that in some way it did cause the delay, and having so caused the delay ought to suffer therefor. There is seldom presented a case in which there is such an absolute and total failure of proof of wrong. *Ib.*
4. Before the Government is entitled to a decree cancelling a patent for an invention on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing and satisfactory. *Ib.*
5. Congress has established a department with officials selected by the Government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and entrusted the entire management of affairs of the department to those officials; and when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of the officials, or through his inducement, or at his instance: and proof that they were in fault, that they acted unwisely, unreasonably, and even that they were culpably dilatory, casts no blame on him and abridges none of his rights. *Ib.*
6. The evidence in this case does not in the least degree tend to show any corruption by the applicant of any of the officials of the department, or any undue or improper influence exerted or attempted to be exerted by it upon them, and on the other hand does affirmatively show that it urged promptness on the part of the officials of the department, and that the delay was the result of the action of those officials. *Ib.*

PUBLIC LAND.

1. A railroad company whose road is laid out so as to cross public lands cannot take a part thereof in possession and occupation of a settler who is entitled to claim a preëmption right thereto, and who has made improvements thereon, without making him proper compensation. *Spokane Falls & Northern Railway Co.* v. *Ziegler*, 65.
2. Such a preëmption settler, who has paid to the United States the price of the preëmpted land, is entitled to recover damages as owner of the fee, although the patent may not be acquired till after the seizure. *Ib.*
3. This case arose under § 2456 of the code of Washington Territory which required compensation to be made to the owner of the land irrespective of any increased value by reason of the proposed improvement. *Ib.*
4. It is no defence against an action to recover for timber cut from public land, that the defendant was indicted criminally for cutting such timber and was acquitted. *Stone* v. *United States*, 178.
5. The provision in the act of March 3, 1875, c. 152, that the railroad companies therein provided for have "the right to take from the public lands adjacent to the line of said road material," etc., means lands in proximity, contiguous to, or near the road. *Ib.*
6. As between the Government and a settler, the title to public land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. *Ib.*
7. The fact that claimants to lands under the homestead and preëmption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful. *Ib.*
8. Under the laws of the Indies lands not actually allotted to settlers remained the property of the king, to be disposed of by him or by those on whom he might confer that power; and as, at the date of the Treaty of Guadalupe Hidalgo, neither the municipalities nor the settlers within them, whose rights are the subject of controversy in these suits, could have demanded the legal title of the former Government, the Court of Private Land Claims was not empowered to pass the title to either, but it is for the political department of the Government to deal with any equitable rights which may be involved. *United States* v. *Sandoval*, 278.
9. *United States* v. *Santa Fé*, 165 U. S. 175, involved the same considera-

for the use of H., by filing an application for the same in the United States land office at San Francisco. This application to purchase was completed, so that on the 31st day of August, 1865, H. received from the State a certificate of purchase in due form. Menotti, the plaintiff in error, claims under H. At the time the above application was filed in the land office at San Francisco, the lands in controversy were withdrawn from preëmption, private entry and sale, by order of the Land Department, for the benefit of a railroad company which had filed its map of *general* route under the acts of Congress of July 1, 1862, 12 Stat. 489, c. 120, and July 2, 1864, 13 Stat. 356, c. 216, granting lands to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. By the act of Congress of July 23, 1866, 14 Stat. 218, c. 219, quieting land titles in California, it was provided that "in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said State." This act excepted from its operation "lands to which any adverse preemption, homestead or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town or village, or within the county of San Francisco." The railroad company filed its map of definite location in 1870. In 1872 the plaintiff in error, claiming under the purchaser from the State, made application to the proper officers of the United States Land Department for a confirmation of the right of said State to said land so selected by said State for his benefit, under the provisions of the above act of Congress of July 23, 1866, and thereupon, and upon due notice to the railroad company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing had, that on the 15th day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said State this 240 acres of land "as confirmed to said State of California." In 1875, Menotti received a patent from the State. The railroad company received a patent from the United States in 1872, but this was after the above proceedings under the act of 1866 were initiated. *Held*, (1) That the act of July 1, 1862, as amended by the act of July 2, 1864, did not grant to the railroad company any lands which had been sold, reserved or disposed of by the United States, nor impair any existing "lawful claim," at the time the line of railroad was "definitely fixed"; (2) The act of 1866 did not except from its

TRUST.

VERDICT.

WILL.

See TRUST, 5.