UNITED STATES REPORTS

VOLUME 168

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1897

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING COMPANY,
21 MURRAY STREET,
NEW YORK.
1899.

CORRECTION.

In volume 167, page 409 the following corrections should be made. Take out the words "*Mr. H. B. Titus* filed a brief for same" on lines 12 and 11 from bottom, and insert them after "error" on line 13 from bottom.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.[1]
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.

JOSEPH McKENNA, Attorney General.
JOHN K. RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Justice Field, having resigned, ceased to be a member of the court on the first day of December, 1897. The correspondence between him and the other members of the court on the subject of his retirement, will be found in the appendix to this volume.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

PAGE

Adams *v.* Henderson 573
Adams, Shepard *v.* 618
Adams *et al.*, Administrators, *v.* Cowen *et al.*, Trustees . 709
Alabama Midland Railway Company, Interstate Commerce Commission *v.* 144
Alaska Mining Company *v.* Whelan 86
Alford, McHenry *v.* 651
American Grocery Company *v.* Godillot 708
American Surety Company, Continental Trust Company of New York, Trustee, *v.* 708
Arlington Hotel Company, Muse *v.* 430
Armstrong, Ogden City *v.* 224
Aultman and Taylor Company *v.* Syme 709
Austin, Penn Mutual Life Insurance Company *v.* . . . 685

Bacon *v.* Steamer Poconoket 707
Baker *v.* Baker and Company (Limited) 712
Baker and Company (Limited), Baker *v.* 712
Baldwin, Guardian, *v.* County Commissioners of Washington County 705
Baltimore and Ohio Railroad Company, Stewart *v.* . 445
Baltimore and Ohio Railroad Company, Warner *v.* . 339
Baltimore and Potomac Railroad Company, Fletcher *v.* 135
Beardsley *v.* Broom, Administratrix 706
Bent *v.* Miranda 471
Bergere *v.* United States 66
Bergere, United States *v.* 66
Board of County Commissioners of the County of Gunnison, Colorado, *v.* Rollins & Sons 709
Board of County Commissioners of the County of Lake, Colorado, *v.* Dudley 709

Table of Cases Reported.

PAGE

Bonnifield, Thorp *v.* 703
Botany Worsted Mills, Knott *v.* 711
Bowles, Houston and Texas Central Railroad Company *v.* 706
Bram *v.* United States 532
Brauer, Compania de Navigacion La Flecha *v.* . . . 104
Broom, Administratrix, Beardsley *v.* 706
Buford, Virginia *ex rel.*, Southern Express Company *v.* 705
Burke *v.* Pierce 711
Burney, Roff *v.* 218

California, Crossley *v.* 640
Castillo *v.* McConnico 674
Central Transportation Company, Pullman's Palace Car Company *v.* 711
Charleston and South Side Bridge Company *v.* State of West Virginia 704
Chaves *v.* United States 177
Chew Hing Lung and Company *v.* Wise, Collector . 711
Coffin, Stewart *v.* 711
Columbian Equipment Company, Highland Avenue and Belt Railroad Company *v.* 627
Compania de Navigacion La Flecha *v.* Brauer . . 104
Conde *v.* York 642
Continental Trust Company of New York, Trustee, *v.* American Surety Company 708
Cornwall Railroad Company, Miller *v.* 131
County Commissioners of Washington County, Baldwin, Guardian, *v.* 705
Cowen *et al.*, Trustees, Adams *et al.*, Administrators, *v.* 709
Craemer *v.* Washington State 124
Crespin *v.* United States 208
Crossley *v.* California 640
Crossley, Master &c., *v.* Taylor, Master &c. . . . 710
Crosthwaite, United States *v.* 375

Defer *v.* De May 703
De May, Defer *v.* 703
Dennison *v.* United States 241

Table of Cases Reported.

PAGE

Dickerman, Trustee, *v.* Northern Trust Company . . 711
Douglas, Holtzman *v.* 278
Douglas *v.* Kentucky 488
Dudley, Board of County Commissioners of the County of Lake, Colorado, *v.* 709
Durrant *v.* Hale, Warden 705

Ebanks *v.* Hale, Warden 707

Farmers' Loan and Trust Company, Lackawanna Iron and Coal Company *v.* 709
Farmers' Loan and Trust Company, Trustee, Mercantile Trust Company *v.* 710
Fletcher *v.* Baltimore and Potomac Railroad Company 135
Folsom, Schofield, Receiver, *v.* 706
Ford, Springer Land Association *v.* 513
Fuller, Assignee, Missouri, Kansas and Texas Railway Company *v.* 707

Georgia, Nobles *v.* 398
Godillot, American Grocery Company *v.* 708
Goldenberg, United States *v.* 95
Grafton, Executrix, *v.* Paine 704

Hale, Warden, Durrant *v.* 705
Hale, Warden, Ebanks *v.* 707
Hall *v.* United States 632
Hall, Owner &c. *v.* Steamship Alene &c. . . . 710
Hannaman, Karrick *v.* 328
Harrison *v.* Perea 311
Harrison, Perea *v.* 311
Henderson, Adams *v.* 573
Hernandez, Underhill *v.* 250
Highland Avenue and Belt Railroad Company *v.* Columbian Equipment Company 627
Hodgson *v.* Vermont 262
Holtzman *v.* Douglas 278
Houston and Texas Central Railroad Company *v.* Bowles 706

Table of Cases Reported.

PAGE

Houston and Texas Central Railroad Company *v.* Strycharski 706
Hyer *v.* Richmond Traction Company 471

In re Tampa Suburban Railroad Company 583
Interstate Commerce Commission *v.* Alabama Midland Railway Company 144

J. H. Mohlman Company, Western Assurance Company of Toronto *v.* 710
J. J. Warren Company *v.* Rosenblatt 710

Karrick *v.* Hannaman 328
Kentucky, Douglas *v.* 488
Kettenring *v.* United States 703
King *v.* Williamson 708
Knott *v.* Botany Worsted Mills 711

Lackawanna Iron and Coal Company *v.* Farmers' Loan and Trust Company 709
Lambert, Wilson *v.* 611

McColgan, Virginia *ex rel.*, Southern Express Company *v.* 705
McConnico, Castillo *v.* 674
McGavock, Virginia *ex rel.*, Southern Express Company *v.* 705
McHenry *v.* Alford 651
McMullen, Ritchie *v.* 710
Maxwell Land Grant and Railway Company, Thompson *v.* 451
Mercantile Trust Company *v.* Farmers' Loan and Trust Company, Trustee 710
Michigan Land and Lumber Company *v.* Rust . . . 589
Miller *v.* Cornwall Railroad Company 131
Miller, O'Brien *v.* 287
Minneapolis Mill Company *v.* St. Paul Water Commissioners 349
Miranda, Bent *v.* 471
Missouri, Kansas and Texas Railway Company *v.* Fuller, Assignee 707

Table of Cases Reported.

PAGE

Muse *v.* Arlington Hotel Company 430
Musser-Sauntry Land, Logging and Manufacturing Company, Northern Pacific Railroad Company *v.* . 604

National Accident Society *v.* Spiro 708
National Bank of Oxford, Whitman *v.* 710
Neely *v.* Newman 708
Newman, Neely *v.* 708
New York, Turner *v.* 90
Nobles *v.* Georgia 398
Northern Pacific Railroad Company *v.* Musser-Sauntry Land, Logging and Manufacturing Company . . 604
Northern Trust Company, Dickerman, Trustee, *v.* . . 711
Noyes *v.* Silver Queen Mining Company . . . 707

O'Brien *v.* Miller 287
Ogden City *v.* Armstrong 224
Oliver, Reaves *v.* 704

Paine, Grafton, Executrix, *v.* 704
Paris Gas Light and Coke Company, Pratt *v.* . . 255
Peddie and Company, Roemer *v.* 710
Pendleton, Virginia *ex rel.*, Southern Express Company *v.* 705
Penn Mutual Life Insurance Company *v.* Austin . . 685
Perea *v.* Harrison 311
Perea, Harrison *v.* 311
Pickham *v.* Wheeler-Bliss Manufacturing Company . 708
Pierce, Burke *v.* 711
Pierce *v.* Tennessee Coal, Iron and Railroad Company . 709
Pratt *v.* Paris Gas Light and Coke Company . . 255
Pueblo of Zia *v.* United States 198
Pullman's Palace Car Company *v.* Central Transportation Company 711

Reaves *v.* Oliver 704
Resolute, The, Dowsett, Libellant 437
Resolute, The, Wilson, Libellant 437
Richmond Traction Company, Hyer *v.* 471

Table of Cases Reported.

	PAGE
Ritchie *v.* McMullen	710
Rocker Spring Company *v.* Thomas	709
Roemer *v.* Peddie and Company	710
Roff *v.* Burney	218
Rogers, Township of, Rondot *v.*	709
Rollins & Sons, Board of County Commissioners of the County of Gunnison, Colorado, *v.*	709
Rondot *v.* Township of Rogers	709
Rosenblatt, J. J. Warren Company *v.*	710
Rust, Michigan Land and Lumber Company *v.*	589
St. Anthony Falls Water Power Company *v.* St. Paul Water Commissioners	349
St. Paul Water Commissioners, Minneapolis Mill Company *v.*	349
St. Paul Water Commissioners, St. Anthony Falls Water Power Company *v.*	349
Schofield, Receiver, *v.* Folsom	706
Shepard *v.* Adams	618
Silver Queen Mining Company, Noyes *v.*	707
Sioux City Terminal Railroad and Warehouse Company *v.* Trust Company of North America	711
Snow, Union Street Railway Company of Saginaw, Michigan, *v.*	706
Southern Express Company *v.* Virginia *ex rel.* Buford	705
Southern Express Company *v.* Virginia *ex rel.* McColgan	705
Southern Express Company *v.* Virginia *ex rel.* McGavock	705
Southern Express Company *v.* Virginia *ex rel.* Pendleton	705
Southern Express Company *v.* Virginia *ex rel.* Walker	705
Southern Pacific Railroad Company *v.* United States	1
Spiro, National Accident Society *v.*	708
Springer Land Association *v.* Ford	513
State of West Virginia, Charleston and South Side Bridge Company *v.*	704
Steamer Poconoket, Bacon *v.*	707
Steamship Alene &c., Hall, Owner &c., *v.*	710
Stewart *v.* Baltimore and Ohio Railroad Company	445
Stewart *v.* Coffin	711

Table of Cases Reported.

PAGE

Strycharski, Houston and Texas Central Railroad Company *v.* 706
Syme, Aultman and Taylor Company *v.* 709

Tampa Suburban Railroad Company, *In re* . . . 583
Taylor, Master &c., Crossley, Master &c., *v.* . . . 710
Tennessee Coal, Iron and Railroad Company, Pierce *v.* . 709
Thomas, Rocker Spring Company *v.* 709
Thompson *v.* Maxwell Land Grant and Railway Company 451
Thorp *v.* Bonnifield 703
Three Sisters, The 443
Township of Rogers, Rondot *v.* 709
Trust Company of North America, Sioux City Terminal Railroad and Warehouse Company *v.* 711
Turner *v.* New York 90

Underhill *v.* Hernandez 250
Union Pacific Railway Company, United States *v.* . 505
Union Street Railway Company of Saginaw, Michigan, *v.* Snow 706
United States *v.* Bergere 66
United States, Bergere *v.* 66
United States, Bram *v.* 532
United States, Chaves *v.* 177
United States, Crespin *v.* 208
United States *v.* Crosthwaite 375
United States, Dennison *v.* 241
United States *v.* Goldenberg 95
United States, Hall *v.* 632
United States, Kettenring *v.* 703
United States, Pueblo of Zia *v.* 198
United States, Southern Pacific Railroad Company *v.* . 1
United States *v.* Union Pacific Railway Company . 505
United States, Valk *v.* 703
United States, Williams *v.* 382
United States *v.* Wilson 273

Valk *v.* United States 703
Vermont, Hodgson *v.* 262

Table of Cases Reported.

PAGE

Victory, The, and The Plymothian 410
Virginia *ex rel.* Buford, Southern Express Company *v.* 705
Virginia *ex rel.* McColgan, Southern Express Company *v.* 705
Virginia *ex rel.* McGavock, Southern Express Company *v.* 705
Virginia *ex rel.* Pendleton, Southern Express Company *v.* 705
Virginia *ex rel.* Walker, Southern Express Company *v.* 705

Walker, Virginia *ex rel.*, Southern Express Company *v.* 705
Warner *v.* Baltimore and Ohio Railroad Company . 339
Washington State, Craemer *v.* 124
West Virginia, State of, Charleston and South Side Bridge Company *v.* 704
Western Assurance Company of Toronto *v.* J. H. Mohlman Company 710
Wheeler-Bliss Manufacturing Company, Pickham *v.* . 708
Whelan, Alaska Mining Company *v.* 86
Whitman *v.* National Bank of Oxford 710
William M. Hoag, The 443
Williams *v.* United States 382
Williamson, King *v.* 708
Wilson *v.* Lambert 611
Wilson, United States *v.* 273
Wise, Collector, Chew Hing Lung and Company *v.* . 711

York, Conde *v.* 642

Zia, Pueblo of, *v.* United States 198

Appendix

I. Correspondence between Mr. Justice Field and the Other Members of the Court with regard to his Retiring from the Bench . . 713
II. Assignments to Circuits 719
III. Costs in Circuit Courts of Appeals . . 720

Index 721

TABLE OF CASES

CITED IN OPINIONS.

	PAGE
Abraham *v.* Ordway, 158 U. S. 416	698
Ainsa *v.* United States, 161 U. S. 208	85
Albright *v.* Teas, 106 U. S. 613	260
Aldrich *v.* Ætna Co., 8 Wall. 491	648
Alexander *v.* United States, 138 U. S. 353	572
Ambler *v.* Whipple, 20 Wall. 546	337
American Construction Co. *v.* Jacksonville, Tampa &c. Railway, 148 U. S. 372	587, 704
Ansbro *v.* United States, 159 U. S. 695	435
Anthony *v.* Louisville &c. Railroad, 132 U. S. 172	571
Arkansas Midland Railroad *v.* Berry, 44 Ark. 17	669
Atcheson *v.* Mallon, 43 N. Y. 147	477
Atchison &c. Railroad *v.* Shean, 18 Colo. 368	347
Auburn *v.* Union Waterpower Co., 38 Atl. Rep. 561	372
Australasian Steam Navigation Co. *v.* Morse, L. R. 4 P. C. 222	308
Aztec Mining Co. *v.* Ripley, 151 U. S. 79	703
Bacon *v.* Texas, 163 U. S. 207	502
Baerselman *v.* Bailey, 1895, 2 Q. B. 301	118
Bagley *v.* Smith, 10 N. Y. 489; *S. C.* 41 Am. Dec. 756	337
Bagnell *v.* Broderick, 13 Pet. 436	593
Bailey *v.* Bailey, 8 Humph. 230	579
Baltimore &c. Railroad *v.* Griffith, 159 U. S. 603	348
Baltimore &c. Railroad *v.* Hopkins, 130 U. S. 210	133, 435
Baltimore &c. Railroad *v.* State, 60 Md. 449	347
Bank *v.* Carrolton Railroad, 11 Wall. 624	334
Barbier *v.* Connolly, 113 U. S. 27	272
Barden *v.* Northern Pacific Railroad, 154 U. S. 288	581
Barney *v.* Keokuk, 94 U. S. 324	361
Bauman *v.* Ross, 167 U. S. 548	617
Bear Lake &c. Irrigation Co. *v.* Garland, 164 U. S. 1	323
Beery *v.* United States, 2 Colo. 186	560
Behlmer *v.* Louisville &c. Railroad, 71 Fed. Rep. 835	164, 169
Belden *v.* Chase, 150 U. S. 674	426
Belk *v.* Meagher, 104 U. S. 279	571
Berkshire, The, 33 U. S. App. 531	418
Berriman's Case, 6 Cox C. C. 388	557
Betts *v.* Stair, 5 Conn. 550; *S. C.* 13 Am. Dec. 94	60
Bicknell *v.* Comstock, 113 U. S. 149	593
Bierce *v.* Stocking, 11 Gray, 174	261
Billings *v.* Ames, 32 Mo. 265	261
Biscoe *v.* State, 67 Md. 6	560
Bissell *v.* Spring Valley Township, 124 U. S. 225	49, 51
Blaisdell *v.* Portsmouth, Great Falls &c. Railroad, 51 N. H. 483	207
Blake *v.* Dorgan, 1 Greene (Iowa), 537	335
Blanc *v.* Lafayette, 11 How. 104	604
Blanchard *v.* Sprague, 1 Cliff. 288	260
Bliss *v.* Negus, 8 Mass. 46	260
Block *v.* Darling, 140 U. S. 234	571
Boardman *v.* Reed, 6 Pet. 328	297
Bogk *v.* Gassert, 149 U. S. 17	571
Bonaparte, The, 8 Moore P. C. 459	308
Bonds *v.* Tennessee, Martin & Yerger, 142; *S. C.* 17 Am. Dec. 795	408
Borgmeyer *v.* Idler, 159 U. S. 408	435
Botany Mills *v.* Knott, 76 Fed. Rep. 582	118
Boyd *v.* United States, 116 U. S. 616	543
Brady *v.* Parker, 4 Ired. Eq. 430	579

PAGE

Brantford City, The, 29 Fed. Rep. 373 118
Brassell *v.* New York Central &c. Railroad, 84 N. Y. 246 346
Brisbine *v.* St. Paul &c. Railroad, 23 Minn. 114 367
Brooklyn Park Com. *v.* Armstrong, 45 N. Y. 234 616
Brown, *In re*, 135 U. S. 701 94
Brown *v.* Walker, 161 U. S. 591 544
Browne *v.* Strode, 5 Cranch, 303 449
Bryan *v.* Board of Education, 151 U. S. 639 502
Buck *v.* Smith, 29 Mich. 165 336
Burrall *v.* Jewett, 2 Paige Ch. 134 261
Burrowes *v.* High Commission Court, 3 Bulstr. 48 545
Burton *v.* English, 12 Q. B. D. 218 122
Butler *v.* Eaton, 141 U. S. 240 129
Caledonia, The, 157 U. S. 124 118, 121
Camden *v.* Doremus, 3 How. 515 571
Campbell *v.* Rankin, 99 U. S. 261 49, 50
Canal Co. *v.* Hill, 15 Wall. 94 297
Cannon *v.* Brame, 45 Ala. 262 60
Cape Sable Co.'s Case, 3 Bland, 606 335
Cass' Case, 1 Leach, 293 552, 553
Castillo *v.* McConnico, 47 La. Ann. 1473 677
Central Railroad *v.* Keegan, 160 U. S. 259 89
Chaffin *v.* Taylor, 116 U. S. 567 456
Chappell *v.* Waterworth, 155 U. S. 102 258
Charkieh, The, 8 Q. B. 197 442
Chateaugay Ore & Iron Co., *In re*, 128 U. S. 544 626
Cherokee Nation *v.* Georgia, 5 Pet. 1 221
Cherokee Nation *v.* Kansas Railway, 135 U. S. 641 221, 222
Chetwood, *In re*, 165 U. S. 443 587
Chicago &c. Railway *v.* Wellman, 143 U. S. 339 705
Chicago, Milwaukee &c. Railway *v.* Lowell, 151 U. S. 209 344, 345
Choctaw Nation *v.* United States, 119 U. S. 1 221
Chouteau *v.* Eckhart, 2 How. 344 592
Cincinnati, New Orleans &c. Railway *v.* Interstate Commerce Commission, 162 U. S. 184 162, 170, 174
City of Hartford, The, & The Unit, 97 U. S. 323 423
City of New York, The, 147 U. S. 72 426
City of Norwich, The, 118 U. S. 468 303, 304, 306

PAGE

City Railway *v.* Citizens' Street Railroad, 166 U. S. 557 694
Clark *v.* Barnwell, 12 How. 272 423
Clark *v.* Keith, 106 U. S. 464 456
Clopton v. Martin, 11 Ala. 187 579
Clough *v.* Patrick, 37 Vt. 421 261
Cohas *v.* Raisin, 3 Cal. 443 213
Coleman *v.* Foster, 1 Hurl. & Norm. 37; *S. C.* E. L. & E. 489 207
Colorado Central Mining Co. *v.* Turck, 150 U. S. 138 436
Columbus Watch Co. *v.* Robbins, 148 U. S. 266 512
Commonwealth *v.* Fisher, 7 Gray, 492 568
Commonwealth *v.* Meyers, 160 Mass. 530 560
Commonwealth *v.* Nott, 135 Mass. 269 560
Conqueror, The, 166 U. S. 110 123
Continental Stove Service Co. *v.* Clark, 100 N. Y. 365 261
Converse, *Ex parte*, 137 U. S. 624 272, 273
Cook *v.* South Park Com., 61 Ill. 115 616
Cook *v.* Sterns, 11 Mass. 533 207
Cooper, *In re*, 143 U. S. 472 443
Cornelius *v.* Kessel, 128 U. S. 456 593
Cowles *v.* Kidder, 24 N. H. 364; *S. C.* 17 Am. Dec. 287 207
Craemer *v.* Washington, 164 U. S. 704 128
Craemer *v.* Washington, 168 U. S. 124 705
Cragin *v.* Powell, 128 U. S. 691 594
Craighill *v.* Van Riswick, 8 D. C. App. 185 614
Crawshay *v.* Maule, 1 Swanst. 495 334
Cressington, The, 1891, Prob. 152 118
Cromwell *v.* Sac Co., 94 U. S. 351 49, 50, 249
Cross *v.* Evans, 167 U. S. 60 512, 658
Cross *v.* Huntly, 13 Wend. 385 261
Cross *v.* North Carolina, 132 U. S. 131 641
Crow *v.* State, 14 Mo. 237 669
Czech *v.* General Steam Navigation Co., L. R. 3 C. P. 14 120
Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46 260
Davidson *v.* New Orleans, 96 U. S. 97 684
Davies Henderson Lumber Co. *v.* Gottschalk, 81 Cal. 641 525
Davis *v.* Alvord, 94 U. S. 545 524
Davis *v.* Crouch, 94 U. S. 514 704
Davis *v.* Foreman, 1894, 3 Ch. 654 336

PAGE

Denaby Main Colliery Co. *v.* Manchester, Sheffield &c. Railway, 11 App. Cas. 97; *S. C.* 3 Ry. & C. T. Cas. 426 164, 170
Dennick *v.* Railroad Co., 103 U. S. 11 448, 449
Dennis *v.* Maxfield, 10 Allen, 138 337
Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63 134
Dickinson *v.* Hall, 14 Pick. 217; *S. C.* 25 Am. Dec. 390 260
Dietrichsen *v.* Cabburn, 2 Phil. Ch. 52 336
Donner *v.* Palmer, 31 Cal. 500 213
Dow *v.* Johnson, 100 U. S. 158 253
Dowell *v.* Applegate, 152 U. S. 327 51
Dower *v.* Richards, 151 U. S. 658 95
Dows *v.* Chicago, 11 Wall. 108 237, 239, 612
Dredge *v.* Forsyth, 2 Black, 563 571
Dublin Township *v.* Milford Savings Institution, 128 U. S. 510 512
Dunbar *v.* Marden, 13 N. H. 311 261
Dupont *v.* Vance, 19 How. 162 302
Durham *v.* Seymour, 161 U. S. 235 435
Durrant *v.* Hale, 168 U. S. 705 707
Egan *v.* Hart, 165 U. S. 188 95, 405, 456, 677, 679
Eilers *v.* Boatman, 111 U. S. 356 323
Elliott *v.* Chicago, Milwaukee &c. Railway, 150 U. S. 245 345
Elmer *v.* Pennel, 40 Me. 430 260
Emery *v.* Bradford, 29 Cal. 75 239
Energia, The, 56 Fed. Rep. 124 118
Eustis *v.* Bolles, 150 U. S. 361 705
Ewing *v.* Burnet, 11 Pet. 41 284
Fargo *v.* Michigan, 121 U. S. 230 670
Fassett, *In re*, 142 U. S. 479 442
Felton's Case, 3 How. St. Tr. 371 545
Fire Insurance Association *v.* Wickham, 128 U. S. 426 512, 658
Fleming *v.* Page, 9 How. 603 253
Fletcher *v.* Fuller, 120 U. S. 534 284
Florence, The, 68 Fed. Rep. 940 429
Ford *v.* Delta &c. Land Co., 164 U. S. 662 662
Ford *v.* Surget, 97 U. S. 594 253
Forgay *v.* Conrad, 6 How. 201 704
Foster *v.* Mansfield, Cold Water &c. Railroad, 146 U. S. 88 698
Foster *v.* Park Commissioners of Boston, 133 Mass. 321 615
Fourth National Bank *v.* Franklyn, 120 U. S. 747 448
Fowler *v.* Equitable Trust Co., 141 U. S. 411 326
Francis *v.* Atchison, Topeka &c. Railroad, 19 Kan. 303 669
Frasher *v.* O'Connor, 115 U. S. 102 593

PAGE

Freeman *v.* Freeman, 136 Mass. 260 337
Fremont *v.* United States, 17 How. 542 212
French *v.* Fyan, 93 U. S. 169 591
Gaither *v.* Farmers' &c. Bank, 1 Pet. 37 449
Galliher *v.* Cadwell, 145 U. S. 368 697, 698, 699
Garton *v.* Botts, 73 Mo. 274 60
Geiger *v.* Cook, 3 W. & S. 266 261
Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473 259
Gibson *v.* Shufeldt, 122 U. S. 27 232
Gildersleeve *v.* New Mexico Mining Co., 161 U. S. 573 323, 698
Gilham's Case, 2 Moo. 194 547
Gill *v.* Manchester &c. Railway, L. R. 8 Q. B. 186 122
Gillespie *v.* Moon, 2 Johns. Ch. 585 579
Glascott *v.* Lang, 2 Phillips' Ch. 310 307
Glasgow *v.* Hortiz, 1 Black, 595 592
Glenmavis, The, 69 Fed. Rep. 472 118
Gon-Shay-Ee, *In re*, 130 U. S. 343 222
Goode *v.* United States, 159 U. S. 663 637, 640
Goodtitle *v.* Kibbe, 9 How. 471 361
Goodyear *v.* Day, 1 Blatch. 565 260
Gordon, *Ex parte*, 104 U. S. 515 442
Grand Trunk Railway *v.* Ives, 144 U. S. 408 348
Graver *v.* Faurot, 162 U. S. 435 512, 658
Great Pacific, The, L. R. 2 P. C. 254 300
Great Western Telegraph Co. *v.* Burnham, 162 U. S. 339 456
Green *v.* Cornell, 163 U. S. 75 435
Green *v.* State, 88 Ga. 516 549, 560
Gregory *v.* Shelby College Lottery Trustees, 2 Met. (Ky.) 589 499, 502
Gregory Consolidated Mining Co. *v.* Starr, 141 U. S. 222 706
Grignon's Lessee *v.* Astor, 2 How. 319 592
Grill *v.* General Iron Screw Colliery Co., L. R. 1 C. P. 600; L. R. 3 C. P. 476 120, 121, 124
Grinter *v.* Kansas Pacific Railway, 23 Kan. 642 513
Griswold College *v.* Iowa, 46 Iowa, 275 669
Guildhall, The, 58 Fed. Rep. 796 118
Hallinger *v.* Davis, 146 U. S. 314 272
Hamblin *v.* Western Land Co., 147 U. S. 531 607

PAGE

Hamburg, The, B. & Lush. 253; *S. C.* 2 Moore P. C. (N. S.) 289 308
Hamilton *v.* St. Louis County Court, 15 Mo. 3 669
Hamlyn *v.* Talisker Distillery, 1894, App. Cas. 202 118
Hammond *v.* Hopkins, 143 U. S. 224 697
Hanford *v.* Davies, 163 U. S. 273 435
Hanford *v.* St. Paul &c. Railroad, 43 Minn. 104 367, 369
Hanna *v.* Maas, 122 U. S. 24 571
Hanner *v.* Moulton, 138 U. S. 486 698
Hannewinkle *v.* Georgetown, 15 Wall. 547 239
Hardin *v.* Jordan, 140 U. S. 371 363, 366
Harmon *v.* Bird, 22 Wend. 113 261
Harris *v.* Gillingham, 6 N. H. 9 207
Harrison *v.* Perea, 168 U. S. 311 333
Hart *v.* Burnett, 15 Cal. 530 213
Hartell *v.* Tilghman, 99 U. S. 547 260
Hartman *v.* Woehr, 18 N. J. Eq. 383 337
Harvey *v.* Tyler, 2 Wall. 328 283
Haws *v.* Victoria Copper Mining Co., 160 U. S. 303 235, 323, 333
Hayne *v.* Maltby, 3 T. R. 438 258
Head *v.* Stevens, 19 Wend. 411 261
Helene, The, L. R. 1 P. C. 231 120
Henderson Bridge Company *v.* Henderson City, 141 U. S. 679 706
Hendrickson *v.* Ivins, 1 N. J. Eq. 562 579
Henkle *v.* Royal Exchange, 1 Ves. Sen. 317 579
Hill *v.* Palmer, 56 Wis. 123 484
Holder *v.* United States, 150 U. S. 91 572
Holmes *v.* Gilman, 138 N. Y. 369 337
Holt *v.* Somerville, 127 Mass. 408 615
Holy Trinity Church *v.* United States, 143 U. S. 457 103
Hopkins *v.* Lee, 6 Wheat. 109 49
Hopt *v.* Utah, 110 U. S. 574 543, 558, 569
Hopt *v.* Utah, 120 U. S. 430 569
Horner *v.* United States, 143 U. S. 570 695
Hornet, The, 17 How. 100 120
Hornsby *v.* United States, 10 Wall. 224 213
Hoyt *v.* Latham, 143 U. S. 553 698
Hunt *v.* Rousmanier, 1 Pet. 1 580
Huntington *v.* Attrill, 146 U. S. 657 449
Hurtado *v.* California, 110 U. S. 516 272, 705

PAGE

Hutchins *v.* King, 1 Wall. 53 571
Idaho &c. Land Co. *v.* Bradbury, 132 U. S. 509 323
Illinois Central Railroad *v.* Illinois, 146 U. S. 387 372
Illinois Central Railroad *v.* McLean Co., 17 Ill. 291 669
Indianapolis &c. Railroad *v.* Horst, 93 U. S. 291 626
Inskoe *v.* Proctor, 6 T. B. Mon. 311 579
Insurance Co. *v.* Duval, 8 S. & R. 147 301
Interstate Commerce Commission *v.* Atchison, Topeka &c. Railroad, 50 Fed. Rep. 295 164, 169
Interstate Commerce Commission *v.* Baltimore &c. Railroad, 43 Fed. Rep. 37; 145 U. S. 263 165
Interstate Commerce Commission *v.* Cincinnati, New Orleans &c. Railway, 56 Fed. Rep. 925 164, 169
Interstate Commerce Commission *v.* Cincinnati, New Orleans &c. Railway, 167 U. S. 479 162
Interstate Commerce Commission *v.* Louisville &c. Railroad, 73 Fed. Rep. 409 164
Iowa, The, 50 Fed. Rep. 561 118
Iron Silver Mining Co. *v.* Campbell, 135 U. S. 286 593
Isaacs *v.* Clark, 12 Vt. 692; *S. C.* 36 Am. Dec. 372 60
Jackson *v.* State, 56 Miss. 311 559
Jefferson Branch Bank *v.* Skelly, 1 Black, 436 501
Jennison *v.* West Springfield, 13 Gray, 544 60
Jersey City &c. Railroad *v.* Morgan, 160 U. S. 288 650
Jewell *v.* Knight, 123 U. S. 426 658
Jewell *v.* McKay, 82 Cal. 144 526
Jewett *v.* Klein, 27 N. J. Eq. 550 347
John L. Hasbrouck, The, 93 U. S. 405 418
Johnson, The, 9 Wall. 146 418
Johnson Co. *v.* Wharton, 152 U. S. 252 49, 51
Jones *v.* Garza, 11 Tex. 186 213
Jones *v.* United States, 137 U. S. 202 253
Jones *v.* Weathersbee, 4 Strob. (Law) 50 60
Julia Blake, The, 107 U. S. 418 307, 308
Karnak, The, L. R. 2 Ad. & Ec. 289 307
Kaukauna Water Power Co. *v.* Green Bay &c. Canal Co., 142 U. S. 254 364

PAGE

Kearney *v.* Taylor, 15 How. 494 478
Keisselback *v.* Livingston, 4 Johns. Ch. 144 579
Kelly *v.* State, 72 Ala. 244 559
Kemmler, *In re*, 136 U. S. 436 272
Kentucky Railroad Tax Cases, 115 U. S. 321 684
Kirby *v.* Pennsylvania Railroad, 76 Penn. St. 506 135
Kirkland, *In re*, 14 Fed. Cas. 677 259
Kittanning Coal Co. *v.* Commonwealth, 79 Penn. St. 100 669
Kleinwort *v.* Cassa Marittima, 2 App. Cas. 157 308
Kneeland *v.* American Loan Co., 136 U. S. 89 441
Knight *v.* United States Land Association, 142 U. S. 161 593
Koehler, *Ex parte*, 31 Fed. Rep. 315 164
Kohl *v.* Lehlback, 160 U. S. 293 129
Kreiger *v.* Shelby Railroad, 125 U. S. 39 456
Lambe's Case, 2 Leach (4th ed.), 552 547
Lane & Bodley Co. *v.* Locke, 150 U. S. 193 697
Langdeau *v.* Hanes, 21 Wall. 521 592
Laros *v.* Commonwealth, 84 Penn. St. 200 407
Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S. 683 51
Lawrence *v.* Hunt, 10 Wend. 80; *S. C.* 25 Am. Dec. 539 60
Lawton *v.* Sun Ins. Co., 2 Cush. 500 124
Leavenworth, Lawrence &c. Railroad *v.* United States, 92 U. S. 733 609
Leese *v.* Clarke, 3 Cal. 17 213
Leese *v.* Clarke, 18 Cal. 535 213
Lehigh Water Co. *v.* Easton, 121 U. S. 388 707
Leighton *v.* United States, 161 U. S. 291 703
Lessee of Parrish *v.* Ferris, 2 Black, 606 51
Lester *v.* Palmer, 4 Allen, 145 261
Leuw *v.* Dudgeon, L. R. 3 C. P. 17 *n.*; *S. C.* 17 Law Times (N. S.), 145 120
Lewis *v.* Great Western Railway, 3 Q. B. D. 195 123
Lewisohn *v.* National Steamship Co., 56 Fed. Rep. 602 118
Lincoln *v.* Power, 151 U. S. 436 626
Linford *v.* Ellison, 155 U. S. 503 435
Liverpool Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397 117, 120, 302
Lloyd *v.* General Iron Screw Colliery Co., 3 H. & C. 284 120, 122

PAGE

Lodge *v.* Twell, 135 U. S. 232 704
Loeber *v.* Schroeder, 149 U. S. 580 134
Louisiana State Lottery Co. *v.* New Orleans, 24 La. Ann. 86 669
Louisville &c. Railroad, *In re*, 1 Int. C. C. Rep. 31 163, 164, 168
Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683 502
Ludvig Holberg, The, 157 U. S. 60 423
Lumber Co. *v.* Buchtel, 101 U. S. 638 49, 51
Lumley *v.* Wagner, 1 D. M. & G. 604 336
Luxton *v.* North River Bridge Co., 147 U. S. 337 626
Lynch *v.* Swanton, 53 Me. 100 60
McCauley *v.* Furness Railway, L. R. 8 Q. B. 57 122
McClure *v.* Jeffrey, 8 Ind. 79 261
McElroy *v.* United States, 164 U. S. 76 390
McGourkey *v.* Railway Co., 146 U. S. 536 704
Mackall *v.* Casilear, 137 U. S. 556 697
McKee *v.* United States, 164 U. S. 287 103
McLish *v.* Roff, 141 U. S. 661 704
M'Nutt *v.* Bland, 2 How. 9 449
Maine *v.* Grand Trunk Railway, 142 U. S. 217 670
Majestic, The, 166 U. S. 375 118
Mammoth Mining Co. *v.* Salt Lake Machine Co., 151 U. S. 447 323
Manchester &c. Railway *v.* Brown, 8 App. Cas. 703 118, 120
Marble Co. *v.* Ripley, 10 Wall. 339 335
Marks *v.* United States, 161 U. S. 297 703
Marquand *v.* New York Mfg. Co., 17 Johns. 525 334
Marsh *v.* Pier, 4 Rawle, 272; *S. C.* 26 Am. Dec. 131 60
Martin *v.* Atchison &c. Railroad, 166 U. S. 399 89
Martin *v.* Marks, 97 U. S. 345 591, 603
Martin *v.* Waddell, 16 Pet. 367 359
Marx *v.* Hanthorn, 148 U. S. 172 684
Mason *v.* Connell, 1 Whart. 381 335
Maxwell Land Grant Case, 121 U. S. 325 470
Maynard *v.* Hecht, 151 U. S. 324 512, 658
Meehan *v.* Valentine, 145 U. S. 611 334
Mercer *v.* Pittsburg, Fort Wayne &c. Railroad, 36 Penn. St. 99 616

PAGE

Meyer *v.* Western Car Co., 102 U. S. 1 441
Mick's Case, 3 F. & F. 822 557
Middlebrook *v.* Broadbent, 47 N. Y. 443 261
Mighell *v.* Sultan of Jahore, 1894, 1 Q. B. 149 253
Miller *v.* Cornwall Railroad, 168 U. S. 131 704
Miller *v.* Kerr, 7 Wheat. 1 593
Mining Co. *v.* Cullins, 104 U. S. 176 524
Minnesota *v.* Minneapolis Mill Co., 26 Minn. 229 367
Mississippi Mills *v.* Cook, 56 Miss. 40 669
Missouri Pacific Railway *v.* Texas &c. Railway, 31 Fed. Rep. 862 164
Missouri River &c. Railroad *v.* Morris, 7 Kan. 210 669
Missouri Steamship Co., *In re*, 42 Ch. D. 321 118
Mobile &c. Railroad *v.* Tennessee, 153 U. S. 486 502
Monroe *v.* Conner, 15 Me. 178; *S. C.* 32 Am. Dec. 148 335
Montgomery *v.* United States, 162 U. S. 410 637, 640
Moore *v.* Bank of Metropolis, 13 Pet. 302 571
Moore *v.* Robbins, 96 U. S. 530 593
Morewood *v.* Enequist, 23 How. 491 123
Morrill *v.* St. Anthony Falls Water Power Co., 26 Minn. 223 367, 369
Morrison *v.* Darling, 47 Vt. 67 479
Morrison *v.* Watson, 154 U. S. 111 704
Nash *v.* Lull, 102 Mass. 60 260
Neilson *v.* Mossend Iron Co., 11 App. Cas. 298 334
Neslin *v.* Wells, 104 U. S. 428 323
Newhall *v.* Sanger, 92 U. S. 761 609
New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344 119
New Orleans *v.* Benjamin, 153 U. S. 411 435
New Orleans *v.* Citizens' Bank, 167 U. S. 371 51, 52
New Orleans *v.* Davidson, 30 La. Ann. 554 669
New Orleans *v.* Fourchy, 30 La. Ann. 910 669
New Orleans *v.* Houston, 119 U. S. 265 498
New Orleans *v.* Kaufman, 29 La. Ann. 283 669
New Orleans *v.* Paine, 147 U. S. 261 594

PAGE

New Orleans City &c. Railroad *v.* Louisiana, 157 U. S. 219 707
New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18 456, 502
Newsom *v.* Bufferlow, 1 Dev. Eq. 379 579
New York &c. Transportation Co. *v.* Philadelphia &c. Navigation Co., 22 How. 461 418
New York Central Park, *In re*, 63 Barb. 282; 99 N. Y. 569 616
Nordstrom *v.* Washington, 164 U. S. 705 705
Norman *v.* Binnington, 25 Q. B. D. 475 118
Northern Pacific Railroad *v.* Babcock, 154 U. S. 190 449
Northern Pacific Railroad *v.* Barnes, 2 No. Dak. 310 664
Northern Pacific Railroad *v.* Charless, 162 U. S. 359 89
Northern Pacific Railroad *v.* Clark, 153 U. S. 252 661
Northern Pacific Railroad *v.* Ellis, 144 U. S. 458 456
Northern Pacific Railroad *v.* Peterson, 162 U. S. 346 89
Northern Pacific Railroad *v.* Sanders, 166 U. S. 620 609
Notara *v.* Henderson, L. R. 7 Q. B. 225 121
Nudd *v.* Burrows, 91 U. S. 426 625
Nye *v.* Raymond, 16 Ill. 153 258, 261
Ogden City *v.* Armstrong, 168 U. S. 224 613
Ohio Life Ins. Co. v. Debolt, 16 How. 416 502
Ohm *v.* San Francisco, 92 Cal. 437 215
O'Neil *v.* Vermont, 144 U. S. 323 267
Orchard *v.* Alexander, 157 U. S. 372 593, 594
Orleans, The, 11 Pet. 175 444
Oscanyan *v.* Arms Co., 103 U. S. 261 118
Owners of Ground *v.* Albany, 15 Wend. 374 616
Oxley Stave Co. *v.* Butler Co., 166 U. S. 648 435, 705
Packer *v.* Bird, 137 U. S. 661 362
Packet Co. *v.* Sickles, 5 Wall. 580 51
Page *v.* Dickerson, 28 Wis. 694 261
Parsons *v.* Venzke, 164 U. S. 89 593
Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222 124
Paxson *v.* Cunningham, 63 Fed. Rep. 132 440
Payne *v.* Treadwell, 16 Cal. 220 213
Peacock *v.* Peacock, 16 Ves. 49 334

PAGE

Pearce *v.* Ham, 113 U. S. 585 337
Peck *v.* North Staffordshire Railway, 10 H. L. Cas. 473 117
Pekin, The, 1897, App. Cas. 532 419
Pennsylvania Railroad *v.* Jones, 155 U. S. 333 706
Pennsylvania Railroad *v.* White, 88 Penn. St. 327 347, 348
People *v.* Auditor, 7 Mich. 84 669
People *v.* Barrie, 49 Cal. 342 560
People *v.* McMahon, 15 N. Y. 384 559
People *v.* Mondon, 103 N. Y. 211 559
People *v.* Phillips, 42 N. Y. 200 561
People *v.* Roberts, 151 N. Y. 540 94
People *v.* Thompson, 84 Cal. 598 560
People *v.* Turner, 117 N. Y. 227 94
People *v.* Turner, 145 N. Y. 451 94
People *v.* Williams, 51 Ill. 63 616
People *v.* Wolcott, 51 Mich. 612 560
People *v.* Worden, 113 Cal. 569 641
Peoples' Mail Steamship Co., *In re*, 3 Ben. 226 259
Phalen *v.* Virginia, 8 How. 163 496
Phelps *v.* Mayer, 15 How. 160 571
Philadelphia &c. Steamship Co. *v.* Pennsylvania, 122 U. S. 326 670
Philadelphia, Wilmington &c. Railroad *v.* Anderson, 72 Md. 519 347
Phillips *v.* Clark, 2 C. B. (N. S.) 156 120, 121
Phippen *v.* Stickney, 3 Met. 384 478
Phipps *v.* London &c. Railway, 1892, 2 Q. B. D. 229 164, 170
Pierce *v.* United States, 160 U. S. 355 543
Pim *v.* St. Louis, 165 U. S. 273 134
Pittsburg, Cincinnati &c. Railway *v.* Backus, 154 U. S. 421 683
Pointer *v.* United States, 151 U. S. 396 390
Pollard *v.* Bailey, 20 Wall. 520 447
Pollard *v.* Hagan, 3 How. 212 360, 361
Pope *v.* Nickerson, 3 Story, 486 297
Porter *v.* Foley, 24 How. 415 134
Powell *v.* Brunswick Co., 150 U. S. 433 679
Powell *v.* Maguire, 43 Cal. 11 484
Prather *v.* Owens, Cheves (Law), 236 60
Press Publishing Co. *v.* Monroe, 164 U. S. 105 436
Prince *v.* Case, 10 Conn. 375; *S. C.* 27 Am. Dec. 675 207
Prince George, The, 4 Moore P. C. 28 298
Railroad Commission of Georgia *v.* Clyde Steamship Co., 5 Int. C. C. Rep. 326 164
Railroad Co. *v.* Brown, 17 Wall. 445 706

PAGE

Railroad Co. *v.* Lockwood, 17 Wall. 357 117
Railroad Co. *v.* McGinnis, 4 No. Dak. 494 664
Railroad Co. *v.* Smith, 9 Wall. 95 591
Railroad Co. *v.* Traill Co., 115 U. S. 600 660
Railroads *v.* Richmond, 15 Wall. 3 648
Railway Co. *v.* Heck, 102 U. S. 120 571
Railway Co. *v.* Simmons, 123 U. S. 52 704
Ralli *v.* Troop, 157 U. S. 386 122
Reason's Case, 12 Cox C. C. 228 557
Rector *v.* Commonwealth, 80 Ky. 468 560
Reed *v.* Vidal, 5 Rich. Eq. 289 336
Regan's Case, 17 L. T. (N. S.) 325 557
Reg. *v.* Arnold, 8 Car. & P. 621 550
Reg. *v.* Baldry, 2 Den. C. C. 430 553, 555, 556
Reg. *v.* Cheverton, 2 F. & F. 833 555, 557
Reg. *v.* Croydon, 2 Cox C. C. 67 553
Reg. *v.* Drew, 8 Car. & P. 140 550, 553
Reg. *v.* Fennell, 7 Q. B. D. 147 555, 556
Reg. *v.* Fleming, Arm., M. & O. 330 553
Reg. *v.* Furley, 1 Cox C. C. 76 551, 553
Reg. *v.* Garner, 1 Den. C. C. 329 553
Reg. *v.* Harris, 1 Cox C. C. 106 550, 553
Reg. *v.* Johnston, 15 Ir. Com. Law, 60 556, 557
Reg. *v.* Moore, 2 Den. C. C. 522 551, 554
Reg. *v.* Morton, 2 Moo. & Rob. 514 551, 553
Reg. *v.* Taylor, 8 C. & P. 733 551
Reg. *v.* Thompson, 1893, 2 Q. B. 12 555
Reg. *v.* Warringham, 2 Den. C. C. 447 *n.* 555
Rex *v.* Enoch & Pulley, 5 Car. & P. 539 552, 553
Rex *v.* Green, 5 Car. & P. 312 550
Rex *v.* Griffin, Russ. & Ry. 151 552
Rex *v.* Jones, Russ. & Ry. 152 552
Rex *v.* Kingston, 4 Car. & P. 387 552
Rex *v.* Mills, 6 Car. & P. 146 552
Rex *v.* Rudd, Cowp. 331 547
Rex *v.* Simpson, 1 Moo. 410; *S. C.* Ry. & Moo. 410 552
Rex *v.* Spencer, 7 C. & P. 776 551
Rex *v.* Thomas, 6 Car. & P. 353 552, 553
Rex *v.* Thompson, 1 Leach (4th ed.) 291 551

PAGE

Rex *v.* Upchurch, 1 Moo. 465 553
Reynolds *v.* West, 1 Cal. 322 213
Rice *v.* Garnhart, 34 Wis. 453 261
Rice *v.* Sioux City &c. Railroad, 110 U. S. 695 591
Rich *v.* Atwater, 16 Conn. 409 261
Richards *v.* Mackall, 124 U. S. 183 698
Richmond, The, 103 U. S. 540 123
Rio Arriba Co. *v.* United States, 167 U. S. 298 217
Roberts *v.* Northern Pacific Railroad, 158 U. S. 1 699
Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S. 559 592
Romero *v.* United States, 1 Wall. 721 212
Rousillon *v.* Rousillon, 14 Ch. Div. 351 118
Rundle *v.* Delaware &c. Canal Co., 14 How. 80 373
Russell *v.* Place, 94 U. S. 606 49, 50
Russell *v.* Stansell, 105 U. S. 303 232
Ryan *v.* Carter, 93 U. S. 78 592
St. Anthony Falls Water Power Co. *v.* Minneapolis, 41 Minn. 270 367, 370
St. Louis *v.* Myers, 113 U. S. 566 362
St. Louis *v.* Rutz, 138 U. S. 226 364
St. Louis Co. *v.* Griswold, 58 Mo. 175 616
St. Louis, Iron Mountain &c. Railroad *v.* Berry, 41 Ark. 509 669
St. Paul &c. Railroad *v.* Northern Pacific Railroad, 139 U. S. 1 607
St. Paul Plough Works *v.* Starling, 127 U. S. 376 260
Satterthwait *v.* Marshall, 4 Del. Ch. 337 336
Sawyer *v.* Woodbury, 7 Gray, 499; *S. C.* 46 Am. Dec. 518 60
Saxton *v.* Dodge, 57 Barb. 84 261
Schooner Freeman, The, 18 How. 182 302
Schunk *v.* Moline Co., 147 U. S. 500 442
Schurmeier *v.* St. Paul &c. Railway, 10 Minn. 82 367, 370
Scott *v.* Rayment, L. R. 7 Eq. 112 336
Scott's Case, 1 Abb. U. S. 336 259
Servia, The, 149 U. S. 144 426
Sheppard *v.* Taylor, 5 Pet. 675 305, 306
Sherman *v.* Champlain Transportation Co., 31 Vt. 162 261
Sherrington's Case, 2 Lewin C. C. 123 552, 553
Shields *v.* Thomas, 18 How. 253 319

PAGE

Shively *v.* Bowlby, 152 U. S. 1 365
Shoemaker *v.* United States, 147 U. S. 282 613
Simpson *v.* Vaughan, 2 Atk. 31 579
Sioux City Street Railway *v.* Sioux City, 138 U. S. 98 707
Skinner *v.* Dayton, 19 Johns. 513; *S. C.* 10 Am. Dec. 286 335
Slemmer's Appeal, 58 Penn. St. 155; *S. C.* 98 Am. Dec. 248 261, 335
Smith *v.* Greenlee, 2 Dev. (Law) 126; *S. C.* 18 Am. Dec. 564 478
Smith *v.* Kernochen, 7 How. 198 49
Smith *v.* McKay, 161 U. S. 355 442, 622, 623
Smith *v.* Vulcan Iron Works, 165 U. S. 518 588, 630, 705
Snell *v.* Assurance Co., 98 U. S. 85 579
Snow *v.* Fitchburg Railroad, 136 Mass. 552 143
Solomon *v.* Kirkwood, 55 Mich. 256 335
Somerby *v.* Buntin, 118 Mass. 279 336
Soulard *v.* United States, 4 Pet. 511 212
South Carolina *v.* Seymour, 153 U. S. 353 435
Southern Pacific Co. *v.* Denton, 146 U. S. 202 626
Sparf *v.* United States, 156 U. S. 51 543, 558, 569, 572
Spears *v.* State, 2 O. St. 583 558
Speidel *v.* Henrici, 120 U. S. 377 696
Spencer *v.* McDougal, 159 U. S. 62 607
Starin *v.* New York, 115 U. S. 248 259
State *ex rel.* Vail's Executors *v.* Runyon, 41 N. J. Law, 98 669
State *v.* Adams, 78 Me. 486 568
State *v.* Baldwin, 112 U. S. 490 449
State *v.* Bostick, 4 Harr. (Del.) 563 560
State *v.* Clifford, 86 Iowa, 550 559
State *v.* Craemer, 12 Wash. 217 128
State *v.* Crittenden Co., 19 Ark. 360 669
State *v.* Drake, 113 N. C. 624 561
State *v.* Hodgson, 66 Vt. 134 272
State *v.* Matthews, 66 N. C. 106 549, 559
State *v.* North, 27 Mo. 464 669
State *v.* Patterson, 73 Mo. 695 549
State *v.* Rorie, 74 N. C. 148 542
State *v.* Whitfield, 40 N. C. 356 561
State *v.* York, 37 N. H. 175 561
State Tax on Railway Gross Receipts, 15 Wall. 284 670
Steamer Coquitlam *v.* United States, 163 U. S. 346 703

PAGE

Steel *v.* State Line Steamship Co., 3 App. Cas. 72 118, 120, 121
Stephanotis & The Horton, The Shipping Gazette & Lloyd's List, July 26, 1894 427
Stewart *v.* Kahn, 11 Wall. 493 679
Stewart *v.* Wyoming Cattle Ranche Co., 128 U. S. 383 571
Stocker *v.* Wedderburn, 3 K. & J. 393 336
Stone *v.* Mississippi, 101 U. S. 814 496, 498, 503, 504, 505
Stringfellow *v.* Cain, 99 U. S. 610 235, 323
Strother *v.* Lucas, 12 Pet. 410 213, 592
Supervisors *v.* Kennicott, 94 U. S. 498 456
Swift Co. *v.* United States, 111 U. S. 22 277
Syracuse, The, 12 Wall. 167 120
Tameling *v.* United States Freehold Co., 93 U. S. 644 470
Tampa Suburban Railroad, *In re*, 168 U. S. 583 630
Teal *v.* Felton, 12 How. 284 641
Tennessee *v.* Union &c. Bank, 152 U. S. 454 258
Territory *v.* Underwood, 8 Mon. 131 560
Terry *v.* Anderson, 95 U. S. 628 94
Terry *v.* Jewett, 78 N. Y. 338 346, 347, 348
Texas &c. Railway *v.* Bloom's Administrator, 164 U. S. 636 706
Texas &c. Railway *v.* Cox, 145 U. S. 593 449
Texas &c. Railway *v.* Gentry, 163 U. S. 353 348
Texas &c. Railway *v.* Interstate Commerce Commission, 162 U. S. 197 165, 170, 174
Texas &c. Railway *v.* Johnson, 151 U. S. 81 706
Texas &c. Railway *v.* Southern Pacific Co., 137 U. S. 48 134
Thompson *v.* Roberts, 24 How. 233 49, 50
Thorington *v.* Smith, 8 Wall. 1 253
Thorp *v.* Bonnifield, 168 U. S. 703 707
Three Friends, The, 166 U. S. 1 253
Timmerman *v.* Washington Territory, 3 Wash. Ter. 445 130
Tobey *v.* Bristol, 3 Story, 800 336
Transportation Co. *v.* Downer, 11 Wall. 129 120, 423
Trayhern *v.* Colburn, 66 Md. 277 60
Trustees *v.* Greenough, 105 U. S. 527 326

PAGE

Trustees of Schools *v.* Schroll, 120 Ill. 509 366
Tubbs *v.* Wilhoit, 138 U. S. 134 591, 594, 600, 602
Tucker *v.* United States, 151 U. S. 164 572
Umbria, The, 166 U. S. 404 423
Union Depot Street Railway *v.* Brunswick, 31 Minn. 297 367, 368
Union Pacific Railway *v.* Cheyenne, 113 U. S. 516 239, 612
Union Steamship Co. *v.* New York Steamship Co., 24 How. 307 418
United States *v.* Arredondo, 6 Pet. 691 212
United States *v.* Barber, 140 U. S. 177 243
United States *v.* Clarke, 8 Pet. 436 206, 213
United States *v.* Colton Marble & Lime Co., 146 U. S. 615 25, 45
United States *v.* Davenport's Heirs, 15 How. 1 203
United States *v.* Ellsworth, 101 U. S. 170 277
United States *v.* Huertas, 8 Pet. 475 203, 206
United States *v.* Jahn, 155 U. S. 109 588
United States *v.* Jones, 134 U. S. 483 243, 249
United States *v.* Kagama, 118 U. S. 375 222
United States *v.* Kirby, 7 Wall. 482 103
United States *v.* Lawson, 101 U. S. 164 276, 277
United States *v.* Lynch, 137 U. S. 280 435
United States *v.* McDermott, 140 U. S. 151 243, 245
United States *v.* McMasters, 4 Wall. 680 571
United States *v.* Mosby, 133 U. S. 273 275, 278
United States *v.* Percheman, 7 Pet. 51 213
United States *v.* Poinier, 140 U. S. 160 243, 247
United States *v.* Rice, 4 Wheat. 246 253
United States *v.* Rogers, 4 How. 567 222
United States *v.* Sandoval, 167 U. S. 278 85
United States *v.* Sanges, 144 U. S. U. S. 310 389
United States *v.* Santa Fé, 165 U. S. 675 85
United States *v.* Schurz, 102 U. S. 378 593

PAGE

United States *v.* Southern Pacific Railroad, 146 U. S. 570 2, 25, 44, 610
United States *v.* Southern Pacific Railroad, 146 U. S. 615 25, 45
United States *v.* Stone, 2 Wall. 525 593
United States *v.* Union Pacific Railroad, 168 U. S. 505 658
United States *v.* Wight, 38 Fed. Rep. 106 637, 638
United States *v.* Winona &c. Railroad, 165 U. S. 463 66, 582
United States *v.* Workman, 1 Wall. 745 213
Vanderbilt, The, 6 Wall. 225 418
Vanderslice *v.* Hanks, 3 Cal. 27 213
Vaughan *v.* Commonwealth, 17 Gratt. 576 561
Vicksburg, Shreveport &c. Railroad *v.* Dennis, 116 U. S. 665 502
Virgin, The, 8 Pet. 538 297, 309
Wade *v.* Lawder, 165 U. S. 624 260
Walker *v.* Chase, 53 Me. 258 60
Walker *v.* Collins, 167 U. S. 57 258
Walker *v.* Hannibal &c. Railroad, 121 Mo. 575 143
Wallis *v.* Harrison, 4 M. & W. 538 207
Walsh *v.* Walsh, 116 Mass. 377 462
Walton *v.* New York Central Sleeping Car Co., 139 Mass. 556 141
Walworth *v.* Kneeland, 15 How. 348 649
Ward *v.* Cochran, 150 U. S. 597 284, 285
Ware *v.* Galveston City Co., 146 U. S. 102 698
Warner Valley Stock Co. *v.* Smith, 165 U. S. 28 594
Warwick *v.* Underwood, 3 Head, 238; *S. C.* 75 Am. Dec. 767 60
Washington, Alexandria &c. Steam Packet Co. *v.* Sickles, 24 How. 333 49, 50
Watuppa &c. Co. *v.* Fall River, 147 Mass. 548 372
Wesley *v.* Thomas, 6 Har. & J. 24 579
West Chicago Park Com. *v.* Western Union Tel. Co., 103 Ill. 33 616
Wheelock *v.* Boston &c. Railroad, 105 Mass. 203 347
White *v.* Barber, 123 U. S. 392 571

PAGE

Whitney *v.* Fox, 166 U. S. 637 697
Whitney *v.* United States, 167 U. S. 529 73, 79
Whitten *v.* Tomlinson, 160 U. S. 231 129
Whitwood Chemical Co. *v.* Hardman, 1891, 2 Ch. 416 336
Wight *v.* United States, 167 U. S. 512 166
Wilkins *v.* Davis, 2 Lowell, 511 334
Willard *v.* Woods, 164 U. S. 502 697
Williams *v.* Bruffy, 96 U. S. 176 253
Williams *v.* Supervisors of Albany, 122 U. S. 154 682
Williams *v.* United States, 138 U. S. 514 593
Williamson *v.* Barrett, 13 How. 101 424
Wilson *v.* Merry, L. R. 1 H. L. Sc. 326 89
Wilson *v.* Sanford, 10 How. 99 260
Wilson *v.* United States, 162 U. S. 613 541, 543, 548, 569, 573
Winona &c. Railroad *v.* United States, 165 U. S. 483 66
Wisconsin Central Railroad *v.* Forsythe, 159 U. S. 46 607
Wisconsin Central Railroad *v.* Taylor Co., 52 Wis. 37 669
Witherspoon *v.* Duncan, 4 Wall. 210 682
Wolcott *v.* Des Moines Co., 5 Wall. 681 607
Wolsey *v.* Chapman, 101 U. S. 755 607
Wolverhampton &c. Railway *v.* London &c. Railway, L. R. 16 Eq. 433 336
Wood *v.* Mann, 1 Sumner, 578 319
Woods *v.* Morrell, 1 Johns. Ch. 103 319
Worcester *v.* Georgia, 6 Pet. 515 221
Wright *v.* Boston, 9 Cush. 273 239
Wright *v.* Nagle, 101 U. S. 791 502
Wright *v.* Roseberry, 121 U. S. 488 591
Xantho, The, 12 App. Cas. 503 120
York *v.* Conde, 147 N. Y. 486 645
Young *v.* Martin, 8 Wall. 354 571
Youngblood *v.* Sexton, 32 Mich. 406 669
Zeigler *v.* Hopkins, 117 U. S. 683 236
Zeller's Lessee *v.* Eckert, 4 How. 289 571

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1789, Sept. 24, 1 Stat. 73, c. 20 435, 704
1803, Mar. 3, 2 Stat. 244, c. 40 .. 704
1819, Mar. 2, 3 Stat. 492, c. 47.. 360
1820, Mar. 6, 3 Stat. 545, c. 22 .. 362
1824, May 26, 4 Stat. 52, c. 173.. 434
1845, Mar. 3, 5 Stat. 752, c. 71 .. 596
1846, Aug. 10, 9 Stat. 85, c. 175.. 596
1849, Mar. 3, 9 Stat. 354, c. 100.. 596
1850, Sept. 28, 9 Stat. 519, c. 84 590, 591, 595, 596, 598, 600, 601, 603
1850, Sept. 30, 9 Stat. 523, c. 90 596
1851, Mar. 3, 9 Stat. 598, c. 32 .. 596
1851, Mar. 3, 9 Stat. 635, c. 43 .. 303
1853, Mar. 3, 10 Stat. 189, c. 97.. 596
1854, July 22, 10 Stat. 308, c. 103 202
1854, Aug. 4, 10 Stat. 546, c. 242 596
1855, Mar. 3, 10 Stat. 643, c. 175 596
1856, June 3, 11 Stat. 20, c. 43.. 605
1856, Aug. 18, 11 Stat. 81, c. 129 596
1857, Feb. 26, 11 Stat. 166, c. 60 351, 359
1857, Mar. 3, 11 Stat. 251, c. 117 590, 591, 599, 600, 602, 603
1860, June 21, 12 Stat. 71, c. 167 186, 470
1861, Mar. 2, 12 Stat. 239, c. 86.. 664
1861, Aug. 2, 12 Stat. 285, c. 37 377, 378
1862, July 1, 12 Stat. 489, c. 120 512, 513, 576, 577
1864, Apr. 29, 13 Stat. 58, c. 69.. 416
1864, May 5, 13 Stat. 66, c. 80... 605
1864, July 2, 13 Stat. 356, c. 216 512, 577
1864, July 2, 13 Stat. 365, c. 217 606, 610, 653, 654, 667
1866, July 27, 14 Stat. 292, c. 278 2, 3, 5, 25, 26, 30, 35, 39, 40, 41, 46, 48, 54, 57, 61, 62
1868, July 20, 15 Stat. 125, c. 186 386
1869, Mar. 3, 15 Stat. 283, c. 121 378
1869, Mar. 3, 15 Stat. 324, c. 127 512

PAGE

1869, Apr. 10, 16 Stat. 46, c. 25.. 378
1870, June 11, 16 Stat. 149, c. 126 434, 436
1870, June 22, 16 Stat. 162, c. 150 378
1871, Mar. 3, 16 Stat. 573, c. 122 3, 28, 29, 31, 42, 45, 47
1872, June 1, 17 Stat. 196, c. 255 623, 625, 626
1875, Feb. 8, 18 Stat. 307, c. 36 385, 387, 388, 389
1880, June 10, 21 Stat. 173, c. 190 275
1884, May 13, 23 Stat. 21, c. 46.. 246
1884, June 26, 23 Stat. 53, c. 121 303
1885, Feb. 17, 23 Stat. 307, c. 126 446
1885, Mar. 3, 23 Stat. 437, c. 353 128
1885, Mar. 3, 23 Stat. 438, c. 354 419
1886, July 6, 24 Stat. 123, c. 637 3, 4, 29, 31, 39, 46, 48, 53, 60, 62
1886, July 10, 24 Stat. 143, c. 764 660
1887, Mar. 3, 24 Stat. 556, c. 376 66, 581, 582, 606
1888, Aug. 13, 25 Stat. 433, c. 866 436
1888, Oct. 2, 25 Stat. 505, c. 1069 381
1888, Oct. 19, 25 Stat. 565, c. 1210 381
1889, Mar. 1, 25 Stat. 783, c. 333 220
1889, Mar. 2, 25 Stat. 939, c. 411 381
1890, May 2, 26 Stat. 94, c. 182 221, 222
1890, June 10, 26 Stat. 131, c. 407 96
1890, July 2, 26 Stat. 209, c. 647 641
1890, Aug. 19, 26 Stat. 320, c. 802 419
1890, Aug. 30, 26 Stat. 371, c. 837 381, 388
1890, Sept. 27, 26 Stat. 492, c. 1001 612, 613
1890, Sept. 30, 26 Stat, 504, c. 1126 381
1891, Mar. 3, 26 Stat. 826, c. 517 411, 435, 512, 588, 622, 629, 658, 660, 694, 695, 704
1891, Mar. 3, 26 Stat. 854, c. 539 68, 73, 207
1891, Mar. 3, 26 Stat. 862, c. 540 381

PAGE

1891, Mar. 3, 26 Stat. 948, c. 542 381, 388
1891, Mar. 3, 26 Stat. 1095, c. 561 25
1892, July 13, 27 Stat. 120, c. 164 506, 510, 511
1892, July 28, 27 Stat. 282, c. 311 381
1892, Aug. 5, 27 Stat. 349, c. 380 381
1893, Feb. 13, 27 Stat. 445, c. 105 117
1893, Mar. 3, 27 Stat. 572, c. 208 381, 388
1893, Mar. 3, 27 Stat. 646, c. 210 381
1894, Mar. 12, 28 Stat. 41, c. 37 .. 388
1894, Apr. 21, 28 Stat. 58, c. 61 .. 381
1894, Aug. 18, 28 Stat. 372, c. 301 381, 388
1895, Jan. 25, 28 Stat. 636, c. 43 388
1895, Feb. 18, 28 Stat. 666, c. 96 588, 629
1895, Mar. 2, 28 Stat. 843, c. 187 388
1895, Mar. 2, 28 Stat. 910, c. 189 381, 388
1896, Feb. 26, 29 Stat. 17, c. 33 .. 381
1896, Mar. 2, 29 Stat. 42, c. 39 .. 582
1896, June 8, 29 Stat. 267, c. 373 381
1896, June 11, 29 Stat. 413, c. 420 381, 388
1897, June 7, 30 Stat. 96, c. 4 ... 419
Revised Statutes.
§ 1 ... 566
§§ 363, 364 ... 378
§ 365 ... 379, 380, 381
§ 366 ... 379
§§ 691, 692 ... 704
§ 699 ... 260
§ 709 ... 133, 435
§ 711 ... 257, 259, 260

PAGE

Rev. Stat. (*cont.*).
§ 716 ... 587
§ 754 ... 128
§§ 763, 764 ... 128
§ 766 ... 128
§§ 787, 788 ... 624
§ 800 ... 566
§ 911 ... 624
§ 914 ... 623, 624, 625, 626
§§ 915, 916 ... 624
§ 918 ... 625
§ 1024 ... 390
§ 1025 ... 567, 568
§§ 1756, 1757 ... 246
§ 1925 ... 664
§ 2012 ... 243
§ 2020 ... 242
§ 2026 ... 242, 243
§ 2027 ... 247
§ 2031 ... 242, 245
§ 2395 ... 531
§ 2449 ... 593
§ 2853 ... 275
§ 2855 ... 275
§ 2860 ... 275
§ 3169 ... 385, 386, 387, 389
§ 3477 ... 646, 647, 649
§ 3995 ... 641
§ 4233 ... 416
§ 4282 ... 303
§§ 4283–4285 ... 303, 307
§ 4535 ... 440
§ 5440 ... 641
§ 5467 ... 633, 636
§ 5481 ... 388, 389

(B.) Statutes of the States and Territories.

California.
1870, Apr. 4, Laws of 1869–1870, p. 883, c. 579 ... 27
Penal Code, § 17 ... 642
§§ 187–189 ... 642
§ 587 ... 642

Colorado.
1877, Mar. 17, Code Proc. of 1877, c. 3 ... 620, 621
1887, Apr. 7, Laws of 1887, p. 97 ... 621
1889, Apr. 19, Laws of 1889, p. 71 ... 621

Dakota.
1879, Laws of 1879, p. 122 c. 46 ... 663
1883, Mar. 9, Laws of 1883, p. 211, c. 99 ... 654, 656, 657, 661, 663, 664, 665, 666, 668, 670, 671, 672, 673

Dakota (*cont.*).
1889, Mar. 7, Laws of 1889, c. 105 ... 654, 655, 656, 661, 662, 671, 672

Georgia.
1856, Laws of 1855–1856, p. 36 ... 403
1859, Laws of 1859, p. 50 ... 403
1874, Laws of 1874, p. 30 ... 403
Code of 1882, § 4666 ... 402, 404
§ 4666 *a* ... 403
Code of 1895, § 1047 ... 402
§ 1048 ... 403
§ 1049 ... 402

Indiana.
Rev. Stat. of 1881, § 1802 .. 558

Kansas.
1855, Laws of 1855, p. 914, c. 86 ... 512

PAGE

Kentucky.
1886, May 17, Laws of 1885–1886, vol. 1, p. 140, c. 1233 492
1890, Mar. 22, Laws of 1889–1890, vol. 1, p. 42, c. 391. 491
Rev. Stat. c. 28, art. 21, § 6 491
Louisiana.
1871, Laws of 1871, p. 118, No. 42..... 681
1877, Laws of 1877, Ex. Sess., p. 154, No. 96..... 681
1884, Laws of 1884, p. 104, No. 82 ...676, 677, 678, 684, 685
Code Proc. art. 43..... 675
Maryland.
Rev. Code of 1878, p. 724... 446
Massachusetts.
1875, Laws of 1875, c. 185 .. 614
Pub. Stat. of 1882, c. 3, § 3 .. 567
c. 213, § 6 567
Michigan.
1851, June 28, Laws of 1851, p. 322 602
Minnesota.
1856, Feb. 26, Laws of 1856, p. 215, c. 137..... 350
1856, Feb. 27, Laws of 1856, p. 236, c. 145..... 350
1881, Feb. 10, Sp. Laws of 1881, p. 743, c. 188... 352, 354, 355, 358
1883, Jan. 25, Sp. Laws of 1883, p. 208, c. 75..... 355
1885, Mar. 4, Sp. Laws of 1885, p. 287, c. 110 355
New Mexico.
Comp. Laws of 1884, tit. 24, c. 1, § 1519..... 521
§ 1520..... 521, 526
§ 1522..... 522, 526
§ 1524..... 522, 524
§ 1526..... 522

PAGE

New Mexico (*cont.*).
§ 1529..... 523, 526
§ 1530..... 523
New York.
1855, Laws of 1855, c. 427.. 93
1885, May 15, Laws of 1885, c. 283 92
1885, June 9, Laws of 1885, c. 448 .....91, 93
Pennsylvania.
1868, Apr. 4, Laws of 1868, p. 58, No. 26.....132, 133
Texas.
Code Proc., art. 750 558
Utah.
1890, Sess. Laws of 1890, c. 41.....233, 240
Vermont.
1886, Laws of 1886, No. 37.. 265
1888, Laws of 1888, No. 42.. 265
Revised Laws of 1880, c. 169, §§ 3802, 3803..... 265
§ 3859..... 265
§ 3860..... 265, 266
§ 4336..... 267
Washington.
1891, Laws of 1891, p. 60, c. 28 130
Code Proc., § 786..... 130
§ 790..... 130
§ 793..... 130
§ 798..... 130
§§ 1097, 1098.... 130
§ 1103..... 130
Hill's Codes, §§ 1319, 1320.. 130
§ 1325..... 130
§ 1351..... 130
§ 1354..... 130
Penal Code, 2 Hill's Codes, 642, § 1 130
644, § 3 130
§ 7 130
646, § 11 130

(C.) Foreign Statutes.

Germany.
General Commercial Code, art. 778..... 305
Great Britain.
1554, 1 & 2 Ph. & M., c. 13.. 549
1555, 2 & 3 Ph. & M., c. 10.. 549
1826, 7 Geo. IV, c. 64..... 550
1848, 11 & 12 Vict., c. 42.... 550
1854, 17 & 18 Vict., c. 31.... 117
Mexico.
1836, Dec. 29, Reynolds' Land Laws, 205 ..... 214, 215

Mexico (*cont.*).
1837, Mar. 20, Reynolds' Land Laws, 221..... 214, 215
Spain.
Laws Indies, lib. iv, tit. 2, law 1..... 188
Laws Indies, lib. iv, tit. 12, law 2..... 188
White's New Recop., vol. 2, pp. 48, 49..... 188
p. 62..... 188

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

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

No. 71. Argued December 2, 3, 1896. — Decided October 18, 1897.

The cases of *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, and *United States* v. *Colton Marble and Lime Co.* and *United States* v. *Southern Pacific Railroad*, 146 U. S. 615, held to have adjudged, as between the United States and the Southern Pacific Railroad Company:

(1) That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of Congress of July 27, 1866, c. 278, 14 Stat. 292;

(2) That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of that act; and,

(3) That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the act of July 6, 1886, c. 637, 24 Stat. 123, forfeiting the lands granted to the Atlantic and Pacific Railroad Company, the property of the United States and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the ownership of the United States.

A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

The 45th Rule of Equity, providing that "no special replication to any answer shall be filed," and that "if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct," means, at most, that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill; and such an amendment is not required in order to set out that which may be used simply as evidence to establish any fact or facts put in issue by the pleadings.

Where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel.

This suit was brought by the United States to quiet its title to a large tract of land in California, acquired under the treaty of Guadalupe Hidalgo, and now set apart by act of Congress and the President's proclamation, issued thereunder, as part of a public reservation.

The facts involved, and the legislation affecting the rights of the respective parties, do not vary materially from those set forth in *United States* v. *Southern Pacific Railroad*, 146 U. S. 570.

In view of the full statement there, and of the still fuller statement in the opinion of the court in this case, it is sufficient, for the purpose of understanding the argument of counsel reported below, to give the following facts:

1. By the act of July 27, 1866, c. 278, 14 Stat. 292, Congress created a corporation called the Atlantic and Pacific Railroad Company; authorized it to construct a railroad from Missouri to the Colorado River, and thence, across the State of California, to the Pacific; and made a grant of public lands to aid in the construction of that railroad. In the same act it further authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad at or near the boundary of California; and it made similar grants

to the Southern Pacific Railroad Company, to aid in its construction.

2. Under the act of July 27, 1866, the Atlantic and Pacific Company constructed a part of its road, but did no work west of the Colorado River, the east line of the State of California.

3. By the act of March 3, 1871, c. 122, 16 Stat. 573, the Southern Pacific Company was authorized to construct a railroad by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, "with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866, provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company."

4. The Southern Pacific Company constructed such contemplated railroad, and claims in this suit that the lands in dispute passed to it under the act of 1871.

5. By the act of July 6, 1886, c. 637, 24 Stat. 123, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company," etc., it was enacted "that all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public land adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act of Congress entitled 'An act granting lands to aid in the construction of railroad and telegraph lines from the States of Missouri and Arkansas to the Pacific Coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and

joint resolutions subsequent thereto and relating to the construction of said road and telegraph line be, and the same are hereby, declared forfeited and restored to the public domain."

6. On April 3, 1871, the Southern Pacific Company filed a map of its route from Tehachapa Pass to the Texas Pacific Railroad, and proceeded to construct its road, and finished the entire construction in 1878. The road crossed the line of the Atlantic and Pacific Company as located. The lands in controversy in the cases reported in 146 U. S., 570 and 615, were within the granted or place limits of both the Atlantic and Pacific Company and the Southern Pacific Company, at the place where the lines crossed each other. The Southern Pacific Company claimed that as it had constructed its road, and as the other company had not done the same, the lands became its property. It was to test this claim of title, and to restrain trespasses by the railroad company and those claiming title under it, that the suits reported in 146 U. S. were instituted.

7. The decisions in those cases were adverse to the Southern Pacific Company. This court held, as stated in the head note, that the Atlantic and Pacific Railroad Company, having duly filed a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean, which was approved by the Secretary of the Interior, the title to the lands in dispute passed thereby to that company under the grant of July 27, 1866, and remained held by it, subject to a condition subsequent, until their forfeiture under the act of July 6, 1886; and that by that act of forfeiture the title thereto was retaken by the United States, for its own benefit, and not for that of the Southern Pacific Railroad Company, whose grant never attached to the lands, so as to give that company any title of any kind to them.

8. Then this suit was brought, in which the principal contention on the part of the United States was that the lands in dispute are in the same category, in every respect, with those in controversy in the cases reported in 146 U. S.; and that, so far as the question of title is concerned, the judgments in those cases conclusively determined, as between the United States and the Southern Pacific Railroad Company

and its privies, the essential facts upon which the Government rests.

9. In the former cases the United States insisted that the controlling matter was, whether the maps of location, filed by the Atlantic and Pacific Railroad Company in 1871, and which were accepted by the Land Department as sufficiently designating that company's line of road, under the act of July 27, 1866, were valid as maps of definite location. The United States contended that they were maps of that character. The Southern Pacific Company contended that they were not. The issue so made was determined in favor of the United States. In this case the United States insisted that, it having been so determined, and the lands here in dispute being within the limits of the line of road so designated, it was not open to the Southern Pacific Company to question the result reached in the suits reported in 146 U. S. Such maps, it was claimed, sufficiently identified the lands granted by Congress to the Atlantic and Pacific Railroad Company by the act of 1866, and were therefore valid maps of definite location.

Mr. Joseph H. Choate (with whom were *Mr. J. Hubley Ashton* and *Mr. Charles H. Tweed* on the brief) for appellants.

The lands involved in this suit are within the limits which would have appertained to a grant to the Atlantic and Pacific upon the 1872 route, if that had been an authorized route, and if a definite location had been duly made thereon so as to attach the grant to specific lands.

I. The decrees in the former cases decided by this court in 1892, 146 U. S. 570, 615, are not conclusive in this suit in favor of the United States, either as *res judicata*, or as an estoppel, or as evidence.

(*a*) The causes of action are different, and the judgment in the former action can operate as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated or determined, according to the principle emphatically decided by this court

in *Cromwell* v. *Sac County*, 94 U. S. 351; *Davis* v. *Brown*, 94 U. S. 423; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 302; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 314, 315; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 687; *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 27, 28, 29.

The main question or point presented for determination in the present case was neither litigated nor determined in the former cases.

We ask the judgment of the court in this case upon new questions of law, arising upon new and different facts.

Stated generally, the decision of the court in the former case against the contention of the defendants was, that, notwithstanding the fact that the line shown upon the four maps of the Atlantic and Pacific Company was a line from the Needles to San Francisco, this was a valid designation of line between the Needles and San Buenaventura, and was not invalid and ineffectual because the line claimed extended from the Needles to San Francisco; that the grant to the Atlantic and Pacific Railroad Company took effect upon the lands in dispute in that suit by relation as of the date of the grant, when (as was assumed in that case) that company filed maps of definite location; that therefore the subsequent grant to the Southern Pacific did not embrace those lands, but they were excluded or excepted from it, so that, when the lands in California claimed in that case adjacent to the unconstructed portion of the Atlantic and Pacific were declared forfeited and restored to the public domain by the act of Congress of 1886, the Southern Pacific, whose grant but for the prior grant to the Atlantic and Pacific would have embraced the same lands, took nothing under its grant by reason of the forfeiture. In passing upon the above questions this court treated the Atlantic and Pacific Maps of 1872 as *bona fide* maps of definite location. The question then litigated was, whether the Atlantic and Pacific had the right to locate a line to San Francisco, or, if not, whether the location was valid between the Needles and San Buenaventura.

Stated generally, the claim of the defendants here is that the Atlantic and Pacific never did file any maps of definite location of a railroad in California; that the maps which they did file, indicating in a rude and wholly inaccurate way a line opposite the lands in question here, were in no sense maps of definite location, were at the best a mere general designation of route, and that therefore the grant to the Atlantic and Pacific never did attach to the lands within the withdrawal limits opposite this line, or to any specific lands in the State of California, and that they were therefore not excluded or excepted from the grant of 1871 to the Southern Pacific, which, by virtue of its designation of general route, and building the road, and filing maps of definite location, became the absolute owner of the lands within the prescribed limits opposite thereto, under that grant.

It is thus manifest at the first blush that the question of the *bona fides* of the maps of the Atlantic and Pacific, as maps of definite location, and the *bona fides* of any claim that these should be so regarded, was never litigated or determined in the former actions. A critical analysis of the proceedings, and the decision in the former actions, makes this absolutely certain.

The three objections raised by the defendants to the validity of the alleged designation of the Atlantic and Pacific line were overruled by the court. These objections were: 1. That the maps were filed at different times, in sections, of segments of its proposed route. 2. That these maps were filed in the office of the Secretary of the Interior instead of the General Land Office; and 3. (which was the objection mainly relied upon), That the route, as originally designated, ran to San Francisco as the ultimate objective point, instead of by the most eligible and practicable route from the Needles to the Pacific Ocean, as prescribed in the act.

These questions as to the validity and effectiveness of the designation of route were raised, discussed and determined adversely to the defendants.

There was, however, no issue in that case as to whether the maps of 1872 were or were not valid maps of definite loca-

tion, as distinguished from maps of preliminary location or designation of route.

We submit that, from the opinion of the court in the former actions, it is beyond dispute that the point now raised by the defendants appears distinctly not to have been litigated or determined, and, the cause of action being different in the present action, the defendants are not by the former judgment precluded from maintaining the ground on which they now stand, namely, that the Atlantic and Pacific Company never did locate, that is, definitely locate its line west of the Colorado River, and that the grant to that company never did take effect upon the lands in suit, or any other specific lands in the State of California, and that there is therefore nothing to interfere with the passage of the title to the Southern Pacific Company.

(*b*) But if we look behind the final decision in the court of last resort to the pleadings as set forth in the former cases, we shall find that the point now relied on was not then put in issue or raised, which is fatal to any claim of *res judicata* or estoppel. *Cromwell* v. *Sac*, 94 U. S. 353; *Davis* v. *Brown*, 94 U. S. 428; *Johnson Co.* v. *Wharton*, 152 U. S. 261. A judgment against a plaintiff who would have had to establish several facts to maintain his case, is not an estoppel as to any specific fact, unless that specific fact was actually litigated. *Long* v. *Baugas*, 2 Ired. (Law), 290; *Angel* v. *Hollister*, 38 N. Y. 378.

It appears from the pleadings in that suit that there was no claim on the part of the complainant that the maps referred to were maps of definite location, but that they were merely maps designating a general route; that the defendant claimed that these maps did not have the effect of properly locating the road under the act and giving title to the Atlantic and Pacific, not because they were not in fact maps of definite location, were not filed or approved as such, were not *bona fide* maps at all, or because the contents of the certificates appended to the maps were false, but for the reasons that they were filed in sections, and when all the sections were filed showed a proposed route to San Francisco (which

was claimed to be a wholly unauthorized line) instead of a line from the Needles, by the most practicable and eligible route to the Pacific, which the act contemplated and expressly prescribed. These were the points in respect to the maps, and the only points which were litigated and judicially determined in the case.

It distinctly appears that, under the issues framed in the former actions, only questions of law were litigated and determined, and no issue of fact as to whether the Atlantic and Pacific Company ever filed maps of definite location was tried or actually litigated at all. Yet the real question of fact now presented was not in any way before the court; and, although all the questions of law involved in the former cases are here involved, there is also here in this action a new issue of fact as to the character and *bona fides* of the maps filed, and a new question of law as to the effect of their character or of their falsity.

It is quite true, as pointed out by this court in its opinion in the prior cases, that the purpose of the litigation by the Government was to procure an adjustment and determination of the extent of its grant to the Southern Pacific Railroad Company, and, if it had included all the land covered by the grant in the same suit, the adjudication would necessarily have been final. If all the eggs had been put into one basket, the company through undue confidence in the safety of its position, or its slip in respect to ascertaining where the real strain existed, might have lost all; but, as only a portion were put at risk in the former cases, it is entitled to save the rest. While, of course, the court did decide, upon the pleadings and evidence before it in those cases, that the lands were lost to the Southern Pacific on account of the vesting of title in the Atlantic and Pacific, it made such decision only as to the lands which were involved in that controversy. While assuming (as it was entitled to do in that case) that a good and sufficient map of definite location was filed by the Atlantic and Pacific Company, it is certainly demonstrable from the record and the opinion that it did not hold it to be good and sufficient against objections not then presented, and

which are now raised for the first time upon wholly new evidence.

The proposition that this court in the former actions in deciding that the title vested in the Atlantic and Pacific, and under them in the complainant, necessarily decided every fact and every question of law involved in the title, is true only in respect to the title of the lands there in controversy; and, if we are right in claiming that a suit for these lands is another cause of action, the proposition has no relevancy here. *Eastman* v. *Cooper*, 15 Pick. 276; *Sawyer* v. *Woodbury*, 7 Gray, 499, 502; *King* v. *Chase*, 15 New Hampshire, 9.

(*c*) No estoppel by former judgment can arise until the former judgment is pleaded, provided there is an opportunity to plead it. The Government has not seen fit to plead any former adjudication as an estoppel, although it had ample opportunity so to do in this cause. An estoppel by a former judgment must be pleaded, if there is an opportunity to plead it, and the failure to plead it, if there is an opportunity to plead it, waives the estoppel. *Fanning* v. *Hibernia Ins. Co.*, 37 Ohio St. 344; *Grey* v. *Pingry*, 17 Vermont, 419, 44 Am. Dec. 345; *Blood* v. *Marcuse*, 38 California, 590; *Isaacs* v. *Clark*, 12 Vermont, 692, 36 Am. Dec. 372; *Hanson* v. *Buckner*, 4 Dana, 251; *Glenn* v. *Priest*, 48 Fed. Rep. 19.

The same rule applies to estoppel by written contract. *Mabury* v. *Louisville & Jeffersonville Ferry Co.*, 60 Fed. Rep. 645; *Wood* v. *Austram*, 29 Indiana, 177; *Robbins* v. *Magee*, 76 Indiana, 381; *Cole* v. *Lafontaine*, 84 Indiana, 446; *Stewart* v. *Beck*, 90 Indiana, 458.

It having been shown that a former judgment is not an estoppel unless pleaded, provided there is an opportunity to plead it, the question arises: Was there an opportunity, in this case, to plead the former judgment?

Rule 45 of the Rules of Equity provides: "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."

Argument for Appellants.

The appellees here, plaintiffs below, availed themselves of the provisions of Rule 45; obtained leave of the court to, and did, amend their bill September 25, 1891. The defendant's answer to this amended bill, filed June 12, 1893, set up title in them for these lands in virtue of its land grants from Congress; specially pleaded that the Atlantic and Pacific Company did not definitely locate its railroad in California, and that the maps filed by it were fraudulent pretences; but the plaintiffs did not, by amended bill, plead the former judgment, as they might have done. There can be no doubt, therefore, that, although the plaintiffs did not plead the former judgment, they had full opportunity to plead it.

The provisions of Section 101 of the Ohio code closely resemble Rule 45 of the Rules of Equity. It provides, however, that the plaintiff may reply by answer to the new matter set up by the defendant, while Rule 45 provides that the plaintiff may reply to such new matter by amendment of the bill. In the case of *Fanning* v. *Ins. Co.*, 27 Ohio, 344, the single question was submitted and determined whether the plaintiff might introduce in evidence a former judgment between the same parties, upon the same demand and cause of demand, the plaintiff having answered without pleading the former judgment. The court, in deciding the case, said: "The former adjudication is new matter, which the Code Practice requires should be pleaded. It is matter *ex post facto*, and should be specially pleaded, so that the court may, as matter of law, determine as to its effect. This was the settled rule at common law whenever there was an opportunity to plead such former adjudication. The code having furnished that opportunity to plead it, we think the record was inadmissible as evidence."

In the case of *Wilson* v. *Stolley*, 4 McLean, 275, the court distinctly held that under Rule 45 the matter which at common law should be set up by replication must be set up by amendment to the bill; and at page 277 said: "The 45th rule of chancery practice declares that 'no special replication to any answer shall be filed. But, if any matter alleged in the answer shall make it necessary for the plaintiff to amend

his bill, he may have leave to amend the same.' As a special replication is not allowed, the question of abandonment can only be brought before the court by an amendment of the bill."

The sense of all which is that, wheresoever the plaintiff was formerly required to present matters by replication, he is now required by Rule 45 to present such matters by amendment to the bill; and, failing so to present such matters, he cannot be heard in evidence as to them.

(*d*) Another rule well settled in respect to estoppel by former judgment is that, if such estoppel exists, it may be waived by the plaintiff's introduction of evidence as to the truth of the matters claimed to have been decided in the former case.

The plaintiff in this case has introduced proof of facts upon which the former adjudication was determined. It therefore cannot rely upon the judicial adjudication of the issue by way of estoppel in the former cases.

The necessary legal effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up an estoppel does open inquiry into the truth of the matter, he cannot complain that the other party pursues it without regard to the estoppel.

If the plaintiff lets down the bar of the estoppel, he must permit the defendant to follow his lead into the field of evidence. *Megerle* v. *Ashe*, 33 California, 74; *Philadelphia, Wilmington &c. Railroad* v. *Howard*, 13 How. 307; *Mack* v. *Levy*, 60 Fed. Rep. 751.

And to the same effect will be found the decision in the case of *Kilheffer* v. *Herr*, 17 Serg. & Rawle, 319, 17 Am. Dec. 661.

The Circuit Court, in determining this case, ignored the former decision, and upon the main issue found substantially that the Atlantic and Pacific Company never did definitely locate its railroad in California, and found the same maps which were before the Supreme Court in the former case to be fraudulent pretences, which amounted at most to but a general designation of its contemplated route. Upon these

findings of facts, as will be shown later, the decree should have been for appellants. And it follows that had the appellees relied on an estoppel the decree would have been against them, because the court could not have reached the facts without first finding against the estoppel. So, in either event, whether the plaintiffs relied on the estoppel or on the truth of the matters, the decree should have been against them.

This, it seems to us, fully disposes of the influence of the former case upon this — considered as to each and every relationship which a former suit can sustain to a subsequent suit.

II. The evidence contained in the record now before the court conclusively shows that the basis of fact on which this court rested its judgment in the former actions never existed, and that in truth the Atlantic and Pacific Railroad Company never did definitely fix, or definitely locate, the line of its road west of the Colorado River, and never filed a map of definite location in California; that the maps which it did file in 1872, showing the route of a proposed line opposite the lands in controversy in this suit, were not maps of definite location, but were at best only maps designating a general route.

As a consequence, we insist with confidence that the grant to the Atlantic and Pacific Company never did take effect; never did attach to the lands in suit or to any other lands in California; and that, therefore, in accordance with the principles laid down in the former decision, the lands passed to the Southern Pacific Railroad Company under its grant upon the construction of its road, and the filing of maps showing its constructed line.

(*a*) There can be no question as to what the law requires to constitute a definite location under a railroad land grant, which shall have the effect of specifically locating the line of the road from which the measurement of the alternate sections granted shall be made.

The object of the Government in making a land grant in every case is to secure the building of the railroad as a public object; the lands granted are in each case to be in alternate

sections immediately adjacent to the railroad as it shall finally be constructed; and, until the precise line on which the railroad is to be built is definitely determined by the company and communicated to the Government, the grant is a mere float.

The route of the railroad is considered to be definitely fixed when "the necessary determinative lines have been fixed on the face of the earth," that is to say, when the company has made its preliminary and final surveys, staked its line upon the ground, and communicated to the Government, by filing a map of the same, its final determination as to the precise line upon which the road is to be built. It is only when this has been done that the line of the road is definitely fixed.

It is settled by *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, and *Sioux City &c. Land Co.* v. *Griffey*, 143 U. S. 32, that a definite location is the result of an actual examination and survey of the route, and the fixing of determinative lines on the face of the earth; locating it over the very ground on which it is intended to build the railroad. The term cannot be satisfied by a line drawn at random over the face of the country, without regard to mountains or valleys, or the other features of topography by which the practicability of a route can be determined.

(*b*) The rule that land grants do not attach to any specific lands at any time prior to the definite location of the line, applies, in all its force, to the grant made to the Atlantic and Pacific Railroad Company by the act of July 27, 1866; and if, as we claim is clearly shown by the evidence in this case, the Atlantic and Pacific road was never definitely located, the grant to that company never vested or became attached to any specific lands, but remained a float until the passage of the forfeiture act, which terminated its existence even as a float.

(*c*) Considering it then as settled for all purposes of the case that a *bona fide* map of definite location adopted by the company as its finally and definitely fixed line of road, from which there would be no change without legislative consent, was the essential and indispensable thing by which only the

grant to the Atlantic and Pacific Company could attach to the lands, if it could attach at all before actual construction, we submit that it is conclusively established by the evidence in this case that no such map ever existed or was filed, no definite location was adopted by the company, and no such definite location was approved by the Secretary of the Interior, and that therefore no title to the lands in dispute ever vested in that company; but, coming within the terms of the grant to the Southern Pacific, they became its property upon the construction of its road and the filing of its maps of definite location as the construction proceeded.

By the act of 1866 the Atlantic and Pacific was authorized to construct a continuous railroad from Springfield, Missouri, by the route laid down in the act, to the Colorado River, at such point as might be selected by that company for crossing, and thence by the most practical and eligible route to the Pacific Ocean; and by the same act the Southern Pacific was authorized to connect with the Atlantic and Pacific road at or near the boundary line of the State of California, and to build a railroad thence to San Francisco. Construing together the language of the two authorizations given to the different companies by the same act, the obvious intent and purpose was that the Southern Pacific should build from the point of junction to San Francisco. The Atlantic and Pacific should do no such thing, but should build across westerly by the most eligible route to the Pacific.

Assuming, however, that the Atlantic and Pacific was, by the act of 1866, authorized to build from the Colorado River to the Pacific Ocean over the lands in controversy (instead of by the more natural route through Cajon Pass since adopted in the interest of the Atchison Company, or the more southerly route to San Diego), it had done nothing towards building there, and indicated no purpose to build there till a year after the time when the Southern Pacific, on the 3d of April, 1871, filed its map of general route, designating its line under the Texas Pacific act from Tehachapa Pass, by way of Los Angeles, to Yuma, on the Colorado River, the point at which it was intended that the Texas Pacific

should cross that river. In fact, up to that time the Atlantic and Pacific had only built from 50 to 75 miles in the far distant State of Missouri, and even that was sold out under foreclosure to another company in 1876.

The line so designated by the Southern Pacific Company passed through the lands now in controversy, and that company afterwards proceeded in good faith to construct its railroad substantially on the general route so designated; and, as the work proceeded, successive sections were duly examined by commissioners appointed by the President and their reports accepted by him.

The company entered into possession of the lands (so far as there was any actual possession of the lands), mortgaged and sold them, and, as rapidly as the circumlocution of the Interior Department would admit, received patents therefor.

Under the act of 1866, the Southern Pacific had also designated the general route of its road from the junction point with the Atlantic and Pacific on the Colorado River to San Francisco, all with the due approval of the Government; and, although controversy arose in the Interior Department as to whether the line designated by the Southern Pacific was authorized by the state law, that matter was definitely settled by the action of Congress by the joint resolution of June 28, 1870, authorizing it expressly to construct its railroad on the route indicated by its map of general route.

The Atlantic and Pacific gave no sign of any purpose of building in California at all for three years and two months after the passage of the act of 1866, by which the two companies had been authorized to build on their respective routes from the Colorado River westward. Then, finding that the Southern Pacific had not only filed its map of general route from the boundary line to San Francisco, but was engaged in the actual and rapid construction of its road upon the line so designated, it began its dog-in-the-manger policy, which, from that time, it uniformly pursued in respect to the Southern Pacific by filing the map of 1869, designating its general route from the point of crossing on the Colorado River, not by the most practicable and eligible route to the Pacific Ocean, but

straight upon the track of the Southern Pacific to San Francisco. The plat so filed showed the same line as that shown upon the map of general route of the Southern Pacific, on which the latter company had for two years been building. That is to say, a line through the Tehachapa Pass running east of Tulare Lake, and then across to the northward of the lake, and running through the coast range of mountains to San Francisco.

This map was duly certified by the president of the company as designating the line of the Atlantic and Pacific, and upon it the company claimed the land grant along the line accordingly.

Secretary Cox, with whom the map was filed, rejected it, declaring that he could not recognize the claim of the Atlantic and Pacific Railroad Company to the reservation of lands upon the route in question, because the act already cited, upon which the company relied, did not, as he construed it, give them a route, or make them a grant of lands, from the Colorado River to San Francisco at all.

So matters stood for two years and a half more, the Southern Pacific vigorously prosecuting the work of building; the Atlantic and Pacific neither doing anything in the way of building, nor manifesting any intention of building, westward from the Colorado River in either direction, either to San Francisco or by the most practicable route to the Pacific.

(*d*) And now we come to the facts in respect to the maps of 1872, which do involve the lands in controversy, and the court will perceive that it was but another step in the same dog-in-the-manger policy of the Atlantic and Pacific.

By this time it was pretty clear that the Atlantic and Pacific would never build in California, but it hoped to defeat the Southern Pacific, which was building on the line designated for it by the act of 1871. It now for the first time designated a route, which was far remote and wholly distinct from its route of 1869.

Starting from the Needles, the point of junction, at the crossing of the Colorado River, it ran westerly to San Buena-

ventura on the coast, and thence by a route west of the coast range of mountains to San Francisco.

We claim in this suit that this route of 1872 was an unauthorized route, and that it was never adopted as a definite location of the Atlantic and Pacific so as to vest in the company title to any specific lands.

Assuming that the point that it was an unauthorized route *in toto* and in all its parts, because it proceeded from the junction point to San Francisco (the route which had been expressly reserved for the Southern Pacific), has been settled adversely to our claim by the previous decision of the court in 146 U. S., we come to the proofs which demonstrate that the line shown upon the 1872 maps was never adopted as the definite location of the Atlantic and Pacific.

The maps running from the western boundary of Missouri to the eastern boundary of California are all maps which, so far as the maps themselves are concerned, are of the character of maps of definite location; but the first or most easterly of these maps is the only one which was tendered by the company as a map of definite location. The map from the Missouri state line to the mouth of Kingfisher Creek was tendered and received as a map of definite location; but, after this map was so tendered and filed, the subject whether the maps should be tendered as maps merely designating the line of the road or as maps of definite location obviously received careful consideration from the company and its counsel, and it was determined that they should thereafter be tendered merely as maps of designation of line, and this was done. The obvious purpose of this method of characterizing the maps was to secure withdrawal without committing itself to definite location, and thus leave open the opportunity for a subsequent change of route as between the company and the Government.

Coming to the map on which the present controversy mainly turns, it appears that it was not presented by the company to the Interior Department at all as a map of definite location by which the company intended to be forever

bound and from which it could not change without legislative consent, but merely as a map of designation of route.

We submit, therefore, as to the characterization of the map by the company in presenting it to the Secretary, that it was presented, not as a map of definite location, but purposely and in pursuance of a settled policy as a map of general route and nothing else.

This mode of designation obviously left it open to the company afterwards to claim the right to diverge from the route designated, and carry a divergence of the land grant with it.

Again, the character of the map itself must be looked to as an important element in determining whether, by its filing, it could secure the attachment of the grant to the lands, and vest the title in the company by relation as of the date of the act, and, therefore, the actual facts as proved in respect to this particular map are of the utmost importance for the consideration of the court.

This map is characterized by the company itself in transmitting it to the Department as a map designating the line or route of the railroad over the lands in question.

It partakes upon its face in no sense or manner of the character of a map of definite location. It neither shows the topography of the country nor the relation of the proposed railroad to any of the features of topography, nor to the natural objects along the line of route.

It is upon its face merely a map of general route, showing a general route somewhere nearly on the course of which a road might be thereafter definitely located and constructed, and it served none of the purposes of a map of definite location, for no man could follow it with map in hand and discover where the road would be built; and the line itself, indicated by the route applied to the earth's surface, shows a line running recklessly over hills and mountain tops, regardless of topography, and one not possible for any engineers or responsible officers of railroad companies to have attempted to adopt as a line of definite location.

Compared with the maps of definite location previously

presented by the company, it appears at once to be a wholly different thing.

No resolution of the company, no certificate of its engineer, could convert such a map from what it is into a map of definite location, and, as Mr. Hillyer's letter shows, it was actually tendered by the company to the Government, not as a map of definite location, but as a map of general route. By a clerical error, misled, perhaps, by the certificate of the engineer appended to this map, as this court was misled on the former hearing, the Secretary, in acknowledging the receipt of it (or the Secretary's clerk in drafting the letter for the Secretary to sign acknowledging the receipt of it), by such clerical error referred to it as a map of definite location. This clerical error, as has clearly been shown, was corrected in the Secretary's office, probably upon the suggestion of the attorney of the company, made after his receipt of the erroneous letter; but, as a similar letter referring to it as a map of definite location was sent by him to the Commissioner of the Land Office, that officer, perhaps, proceeded, before the clerical error was corrected in the letter to him upon the subject, to communicate it to his subordinate officials as a map of definite location.

It was impossible that the company or its engineers, or its attorneys, could have intended to commit the company irretrievably to the particular location of its line or road indicated on the map.

As between the Secretary of the Interior and the company they were unquestionably regarded and treated as maps of general route, and not of definite location, and the subsequent correspondence between the company and the Secretary of the Interior proceeded upon the same view.

The character or quality of the maps as tendered by the company and received by the Secretary as maps of general routes are unequivocally shown by the letter of Hillyer of March 8, 1872, tendering them, and the letter of the Secretary of the 9th of March acknowledging its receipt in the form in which that letter was finally framed in the Department, agreeing with the letter of Hillyer tendering them. In the

former case in this court the map was assumed to be a map of definite location from the false certificate thereon, and from the uncorrected copy of the Secretary's letter of March 9, which was in evidence, and the references in the subordinate branches of the Land Office to the map as being a map of definite location, which was due to the failure to completely correct the error in all the copies of the letter referred to.

But since the decision in the former case a great mass of additional evidence in respect to Map No. 31 has been taken, which demonstrates it to have been in fact, as it was presented and received, and as it appears upon its face to be, not a map of definite location at all, but at best only a map of general route and even in that character can hardly be treated as filed in good faith; for if, as this court in the *Northern Pacific case*, 119 U. S. 55, insisted they ought to do, the officers of the Land Department had "exercised supervision of the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed," this Map No. 31 would necessarily have been rejected; for, if not fraudulent, it is certainly nothing more than an arbitrary and capricious selection of a line irrespective of the character of the country over which the road was to be constructed.

The War Department itself has issued an authentic topographical map which includes a considerable portion of California, covered by the lines shown on Map 31, and, as the record shows, the line shown upon this Atlantic and Pacific Map 31 has been laid down in red upon the Government topographical map, especially in the vicinity of the Soledad Cañon, with the result of demonstrating beyond all doubt, or possibility of doubt, that the route shown on Map 31 does not follow the valley at all, but zigzags across it into hills and mountains where no railroad could possibly be built.

It affords a mathematical demonstration that this route never could have been laid down or designed, or tendered or received, as anything but a map of general route.

But further than this, before the existence of this Govern-

ment topographical map was known by the defendants, the chief engineer of the Southern Pacific Railroad Company took Map No. 31, and followed it on the ground in the vicinity of the Soledad Cañon, and ran his levels to show the vertical position of the points on the line in reference to the sea level. The result of this scientific examination showed that to build a railroad on the line would be impossible for any practical purpose, and that no railroad engineer could have made such a survey for it.

It further appears by the same evidence that the few towns, villages or places purporting to be named on this Atlantic and Pacific map are out of their proper positions — both in latitude and longitude — and not slightly out, but miles and miles out, and all attempts to adapt or shift the map, so as to bring one place into proper position, threw all other places all the more out of position.

It neither followed elevations nor depressions, nor rivers, nor plains, but jumped at random from hill top to mountain top and across valleys.

It necessitated grades wholly impossible in engineering, and in some instances from one quarter to fully one half a mile to the mile, or ten times as steep a grade as is known in use for the ordinary steam locomotive.

The court upon an examination of these proofs cannot but conclude that no competent engineer or honest company could have laid out or adopted this line as a line of definite location.

III. The point upon which the Circuit Court of Appeals based its judgment in favor of the Government is wholly untenable and inapplicable. It is as follows: "Assuming, however, that a survey of a line on the ground is required and that a fraudulent deception was practised upon the Government by the representation that a survey had been made, this is ground upon which the Department might properly reconsider its acceptance and approval of the maps filed; but until such reconsideration the status of the lands is fixed by what was done. The approved maps operated to identify these lands as within the grant to the Atlantic and Pacific

Company without reference to the good faith of the company in preparing them.

"The fact of definite location is settled by the maps, and it is the fact, not the means by which it was procured, that decides a question."

On the contrary, we submit with confidence that we have already demonstrated that the fact of definite location was not settled by the maps, and that inasmuch as the subsequent grant to the Southern Pacific embraced the same lands, and the lands in question could, as this court has held, only be excepted or cut out from that grant by a definite location on the part of the Atlantic and Pacific which alone could attach its grant to the lands, nevertheless, until such definite location was actually and honestly made in good faith, there was no such exception from the grant to the Southern Pacific; and, as no such definite location ever was made by the Atlantic and Pacific, there never was any such exception from the grant to the Southern Pacific.

This view of the Circuit Court of Appeals proceeds upon the assumptions (which are absolutely incorrect) that the Atlantic and Pacific maps were on their face, and that they were accepted by the Interior Department as, maps of definite location, and utterly fails to appreciate the point of our contention.

The court below likens the position of the Southern Pacific in this case to that of an infringer seeking collaterally to avoid a patent by proving that it was procured by fraud from the Government, and relies upon the well-known authorities which prohibit all such attempts upon the ground that fraud, if it existed in such a case, could only be taken advantage of by the Government.

But the very gist of our case, under the former decision of this court in 146 U. S., is that, if the Atlantic and Pacific did not in fact secure these lands by a definite location embracing them, they came to us under our grant, so that, for the very reasons stated in the patent cases referred to, we are here entitled to take advantage of the failure of the Atlantic and Pacific to establish its definite location, and would even have

been so entitled if we had not made out a case of fraud in procuring a map which on its face was not a map of definite location to be accepted as such.

The point so strenuously contended for below by the learned counsel for the Government, but which was not accepted by either of the courts below, that, even though no map of definite location was filed and no route adopted or definitely fixed by the Atlantic and Pacific Railroad Company, any proceedings in the department which assumed that there had been such a map filed are final and conclusive to defeat our rights, has no foundation in law or justice or sense, and there is no authority to support such a proposition as applied to the present case.

Mr. Joseph H. Call and *Mr. Assistant Attorney General Dickinson* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This suit was brought to obtain a decree quieting the title of the United States to a large body of lands in California, acquired under the treaty of Guadalupe Hidalgo.

These lands, it is stated by counsel, aggregate about 700,000 acres, 61,939 acres of which have heretofore been patented to the Southern Pacific Railroad Company, and for 72,000 acres of which that company has made application for patents. They are thus described in the bill filed by the United States: All the sections of land designated by odd numbers in townships 3 and 4 north, ranges 5, 6 and 7 west; township 1 north, ranges 16, 17 and 18 west; township 6 and the south three fourths of township 7 north, ranges 11, 12, 13, 14, 15, 16, 17, 18 and 19 west; all sections designated by odd numbers as shown by the public surveys, embraced within the townships from number 2 north to number 5 north, both numbers included, and ranges from number 8 west to number 18 west, both numbers included, except sections 23 and 35, in township 4 north, range 15 west, and except sections 1, 11 and 13, in township 3 north, range 15 west; also the unsurveyed lands within said area which will be designated as odd-num-

bered sections when the public surveys according to the laws of the United States shall have been extended over such townships — all of the aforesaid lands being surveyed by San Bernardino base and meridian.

The Government suggests that the greater portion of these lands have been set apart under authority of the act of Congress of March 3, 1891, c. 561, § 24, 26 Stat. 1095, 1103, and by the proclamation of the President of the United States of December 20, 1892, 27 Stat. 1049, as a public reservation.

The principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, and *United States* v. *Colton Marble and Lime Co.* and *United States* v. *Southern Pacific Railroad*, 146 U. S. 615; and that, so far as the question of title is concerned, the judgments in those cases have conclusively determined, as between the United States and the Southern Pacific Railroad Company and its privies, the essential facts upon which the Government rests its present claim.

Stated in another form, the United States insists that in the former cases the controlling matter in issue was, whether certain maps filed by the Atlantic and Pacific Railroad Company in 1872, and which were accepted by the Land Department, as sufficiently designating that company's line of road under the act of Congress of July 27, 1866, c. 278, 14 Stat. 292, were valid maps of *definite location;* the United States contending in those cases that they were, and the Southern Pacific Railroad Company contending that they were not, maps of that character; that that issue was determined in favor of the United States; and that as the lands now in dispute are within the limits of the line of road so designated, it is not open to the Southern Pacific Railroad Company, in this proceeding, to question the former determination that such maps sufficiently identified the lands granted to the Atlantic and Pacific Railroad Company by the act of 1866, and were therefore valid maps of definite location.

This position of the Government makes it necessary to ascertain what was in issue and what was determined in the

former cases. Did the former adjudication have the scope attributed to it by the United States? If it did, the decision of the present case will not be difficult.

It is necessary to a clear understanding of the question just stated, that we should first look at the provisions of the several acts of Congress relating to the Atlantic and Pacific and Southern Pacific Railroad Companies, which were referred to and construed in the former cases.

The Atlantic and Pacific Railroad Company was incorporated by the act of Congress approved July 27, 1866, c. 278, 14 Stat. 292, with authority to construct and maintain a line of railroad and telegraph from a point at or near Springfield, Missouri, to the western boundary line of that State, thence by the most eligible railroad route, to be determined by the company, to the Canadian River, thence to Albuquerque on the River Del Norte, thence by way of Agua Frio or other suitable pass to the headwaters of the Colorado Chiquito, thence along the thirty-fifth parallel of latitude, as near as might be found most suitable for a railroad route, to the Colorado River at such point as might be selected by the company for crossing, and "thence by the most practicable and eligible route to the Pacific." § 1. In the aid of the construction of that line Congress granted every odd-numbered section of public land (not mineral) to the amount of twenty alternate sections per mile on each side of such line as the company might adopt through any Territory of the United States, and ten alternate sections per mile on each side of the line through any State, to which the United States had full title, and not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, "*at the time* the line of said road *is designated by a plat thereof* filed in the office of the Commissioner of the General Land Office." § 3.

Section 4 made provision for patents to be issued to the company for lands opposite to and coterminous with each section of twenty-five miles of road, completed in a good, substantial and workmanlike manner.

It was also provided that the President of the United States should cause the lands to be surveyed for forty miles in width

on both sides of the entire line after the general route was fixed, and as fast as the construction of the railroad required; that the grants, rights and privileges specified in the act of Congress were given and accepted subject to the conditions that the company would commence work within two years from the approval of the act, complete not less than fifty miles per year after the second year; construct, equip, furnish and complete its main line by July 4, 1878; and if the company made any breach of the conditions imposed, and allowed the same to continue for upwards of one year, then, at any time thereafter, the United States could do any and all acts and things needful and necessary to insure a speedy completion of the road. §§ 6, 8, 9.

By the eighteenth section of the act the Southern Pacific Railroad Company, a California corporation, was authorized to connect with the Atlantic and Pacific Railroad at such point, near the boundary line of the State, as it deemed most suitable for a railroad line to San Francisco; and to have a uniform gauge and rate of freight or fare with that road; and in consideration thereof, to aid in its construction, "shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

The twentieth section provided, that the better to accomplish the object of the act, "namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard to the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act."

The legislature of California by an act approved April 4, 1870, authorized the Southern Pacific Railroad Company to change the line of its road so as to reach the eastern boundary of the State by such route as the company should determine to be the most practicable. And by joint resolution passed

June 28, 1870, Congress declared that that company might construct its road and telegraph line, as near as might be, on the route indicated by the map filed by that company in the Department of the Interior on the 3d day of January, 1867, and "upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." 16 Stat. 382.

By an act approved March 3, 1871, c. 122, Congress incorporated the Texas Pacific Railroad Company and made to it a grant of public lands. And by the 23d section of that act it was provided: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company." 16 Stat. 573, 579.

The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871.

The Atlantic and Pacific Railroad Company built part of its road east of Colorado River, but did not construct any line west of that river or in California.

In consequence of such failure, Congress, by the act of July 6, 1886, c. 637, 24 Stat. 123, provided "that all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act of Congress entitled, 'An act granting lands to aid in the construction of railroad and telegraph lines from the States of Missouri and Arkansas to the Pacific coast,' approved July 27, 1866, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July 27, 1866, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared *forfeited* and *restored to the public domain.*"

In execution of that act the United States, in 1889, commenced suits in the Circuit Court of the United States for the Southern District of California for the purpose of quieting its title to various tracts of land, aggregating about 5342 acres, and claimed by the Southern Pacific Railroad Company and by other corporations and individuals asserting title under that company. In one of those suits, the Southern Pacific Railroad Company, and D. O. Mills and Garrett L. Lansing, trustees under a mortgage executed by that company on the 1st day of April, 1875, and Joseph Youngblood were made

defendants; in the other, the same company and trustees, together with the City Brick Company, Thomas Goss, Edward Simmons and A. A. Hubbard, were defendants.

These are the cases reported in 146 U. S. 570, 615.

The issues presented by the Government in the former suits are fully shown by an amended bill filed therein November 22, 1889. After referring to the organization of the Southern Pacific Railroad Company, and to the act of Congress of July 27, 1866, it proceeds: "Your orator alleges that by and pursuant to said act of Congress, the Atlantic and Pacific Railroad Company was created and duly organized, and on November 23, 1866, within the time and in the manner provided in said act, accepted said grant, and did *designate the line of its route* from Springfield, Missouri, to the Pacific by maps and plates thereof, which it filed in the office of the Commissioner of the General Land Office in manner following, to wit: On or about March 9, 1872, said company filed in the office of the Commissioner of the General Land Office maps *designating the line of its route*, and showing the general features of the country and vicinity, as follows: First — From San Francisco to San Miguel Mission, in California. Second —Map of its route from San Miguel Mission via Santa Barbara and San Buenaventura, to a point in township 2 south, range 17 west, San Bernardino base and meridian, in California. Third — Map of its route from said point last mentioned to a point in township 7 north, range 7 east, San Bernardino base and meridian, in California. Fourth — Map of its route from said point last named to the Colorado River. And thereafter, on or about March, 1872, said company filed in said office as aforesaid its several other maps, designating its route from said point last named to Springfield in the State of Missouri, making altogether a continuous line designating its entire route, and showing the general features of the country from said town of Springfield, Missouri, by way of the points named in said act of Congress of July 27, 1866, to the Pacific at San Buenaventura, and from there to San Francisco, and in the manner provided in said act, and such designation was accepted by the United States.

Your orator alleges that *said several parts of its map, filed as aforesaid, made and constituted the entire route or line of said Atlantic and Pacific Railroad Company, fully designating the whole thereof.*"

It was further averred that "on March 9, 1872, and on April 22, 1872, the Secretary of the Interior and the Commissioner of the General Land Office, respectively, ordered all the odd sections of land within thirty miles on each side of said designated route of said Atlantic and Pacific Railroad Company reserved from sale and withdrawn"; that said Atlantic and Pacific Railroad Company did construct and complete a portion of its road west of Springfield, Missouri, in the time and manner required by said act, but did not at any time construct or complete any railroad west of the Colorado River; and that by the act of Congress approved July 6, 1886, "all the lands and rights to lands theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed and restored to entry for non-completion of that portion of said railroad to have been constructed in California."

After alleging that the Southern Pacific Railroad Company was not the company of that name organized under certain articles of amalgamation and consolidation, dated October 11, 1870, and amended April 11, 1871, but was the now existing company of that name, and after setting out the 23d section of the act of Congress of March 3, 1871, c. 122, incorporating the Texas and Pacific Railroad Company, 16 Stat. 573, and granting lands to the Southern Pacific Railroad Company for the line therein described, the amended bill in the former suits proceeded: "Said Southern Pacific Railroad Company, the corporation which existed on April 3, 1871, as heretofore shown, pretended to accept said grant on April 3, 1871, and did on that day designate the line of its road by a plat thereof, which it filed in the office of the Commissioner of the General Land Office, and thereupon the Secretary of the Interior ordered all the public lands in odd sections within thirty miles of such route, to which no right or claim had attached, to be withdrawn from market and reserved. And your orator

alleges that the Southern Pacific Railroad Company, which was organized and created on August 12, 1873, by the pretended articles of amalgamation and consolidation of said several railroad companies as heretofore set forth, did construct and complete a railroad from Tehachapa Pass, by way of Los Angeles to the Colorado River, in the manner and within the time prescribed in said act of Congress, *in* which the Southern Pacific Railroad Company therein named was authorized and empowered to do. And thereafter the commissioners appointed under said act for that purpose did unlawfully make and file their alleged acceptance of the whole of said railroad by sections. And there was not, and is not now, any railroad or part thereof constructed or completed under said act or between said points otherwise than as aforesaid."

It was also alleged that "on the south side of said route of the Atlantic and Pacific Railroad Company within 30 miles of said route, but also within 20 miles of the pretended designated route of the Southern Pacific Railroad Company, there was not on July 27, 1866, nor on March 12, 1872, nor on April 3, 1871, and is not now, enough public land in the odd sections to equal in amount ten alternate sections per mile of the line of road of said Atlantic and Pacific Railroad Company, within such limits, for that prior to said date of July 27, 1866, the Mexican Government and the United States had sold, granted, reserved and otherwise disposed of so great a quantity of land in those limits;" also, that "all of the said lands before described are situated on the south side of the said designated route of the Atlantic and Pacific Railroad Company more than 20 miles but less than 30 miles therefrom, but are less than 20 miles from the said pretended designated route of said Southern Pacific Railroad Company."

The amended bill concludes by alleging that the defendants and either of them have no title or interest in or to the lands described, "for that said pretended patents under which defendants solely claim title were issued inadvertently, without authority, and were at their inception, and still are, each void and inoperative to pass title, and that said lands were never granted to said Southern Pacific Railroad Company,

defendant herein, but are still owned by the plaintiff"; and that the Secretary of the Interior, on the 16th day of August, 1887, on behalf of the Government, and in accordance with law, demanded of said company the relinquishment of its claim to all of the lands described in such patents, and a return of the patents, all of which that company refused to do.

The relief asked was a decree cancelling the patents issued to the Southern Pacific Railroad Company, quieting the title of the Government to the lands described therein, and enjoining that company from asserting or claiming any right or title thereto adversely to the United States.

The answer of the Southern Pacific Railroad Company, filed in the former suits December 30, 1889, shows its understanding as to what were the issues tendered by the Government. From that answer these extracts are made:

"The defendant admits that by and under said last mentioned act of Congress, [July 27, 1866,] the Atlantic and Pacific Railroad Company was created and organized, and did duly accept the provisions of the said law within the time and in the manner provided in said act, but it *denies* that said Atlantic and Pacific Railroad Company *did designate the line of its route from Springfield, in the State of Missouri, to the Pacific coast, as required by said act.*

"This defendant denies that on the 9th of March, 1872, or at or about any such time, the Atlantic and Pacific Railroad Company filed in the office of the Commissioner of the General Land Office maps designating the line of its route, or otherwise in accordance with the law, and denies that on or about the 9th of March, 1872, said Atlantic and Pacific Railroad Company filed four maps in the office of the Commissioner of the General Land Office, as stated in said bill. Said company filed two maps and claimed that they were filed for the purpose of locating parts or fragments of a line for its road in the State of California, but the defendant *denies that said maps constituted a valid location of said road in California.* Certified copies of said maps are annexed to the answer heretofore filed in this suit by this defendant and marked 'Exhibit A, Nos. 1 and 2,' which, with the indorse-

ments thereon, are now herein referred to and made part of this answer; and this defendant says that said railroad was not located or attempted to be located on or about March 9, 1872, or at any such time, in California, either in whole or in part, otherwise than as aforesaid by said maps. This defendant denies that the Atlantic and Pacific Railroad Company *by or through the filing of said maps, acquired the right to any lands of the United States lying opposite to the lines or route marked on said maps*, and denies that said company acquired the right to select any public lands along said routes or lines as 'other lands' in lieu of sections within twenty miles that had been granted, sold, 'reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of' by the United States. These maps were sent to the General Land Office by the Secretary of the Interior with a letter dated March 9, 1872, of which a certified copy is annexed to said answer heretofore filed, marked 'Exhibit B.'

"This defendant says that the lands mentioned in the amended bill herein lie opposite to the line of route marked on the said map, designated in said letter as No. 2 of a portion of the proposed road of the Atlantic and Pacific Railroad Company, that is, a piece of road within the State of California, 'from a point on the western boundary line of Los Angeles County, California, to a point in township seven north, range seven east, of San Bernardino meridian in said State.' Neither when filed in March, 1872, nor at any such time, did it appear that said map represented any part of a line that was, or was intended to be conjoined to any other part located before that time for the Atlantic and Pacific Railroad.

"Further answering, this defendant says that the Atlantic and Pacific Railroad Company afterwards, viz., on the 13th day of August, 1872, filed in the Department of the Interior two other maps which it claimed were intended to designate the line of other fragments or portions of its railroad in California. Certified copies of said maps and of the letter of the Secretary of the Interior of April 16, 1874, in respect thereto, are annexed to the answer filed heretofore in this suit by

this defendant, marked 'Exhibit C, Nos. 1 and 2,' and *are now herein referred to and made part of this answer.* And this defendant *denies that said maps constituted a valid location of the parts or fractions of road therein described*, and *denies that the four maps hereinbefore mentioned of four several parts of the road constituted a valid location of the said Atlantic and Pacific Railroad in California.* And it denies that the said Atlantic and Pacific Railroad was ever in any otherwise lawfully located in the State of California. . . . And the defendant says that *there is nothing in or upon said maps to identify the same as the line of road mentioned in the said act of Congress.*"

After referring to the eighteenth section of the act of July 27, 1866, and alleging that the construction of a railroad from the Colorado River to San Francisco was "expressly relegated and appropriated to this defendant," and that the Atlantic and Pacific Railroad Company was never authorized to construct any such line of railroad, or to acquire any lands by reason of or in respect of the construction or proposed construction of any such line, the answer of the Southern Pacific Railroad Company denied that "on or about March, 1872, the Atlantic and Pacific Company filed in the office of the Commissioner of the General Land Office maps designating its route from the Colorado River to Springfield, in the State of Missouri," or that "said maps made altogether the line of railroad from Springfield, in the State of Missouri, to the Pacific coast, which was provided for and required by said act of Congress of July 27, 1866, to be constructed and completed by the said Atlantic and Pacific Railroad Company," or "that the several parts of its map filed made and constituted the whole of its line as provided for in said act of Congress"; that the parts of its map, "when taken together, showed a line terminating at San Francisco, which was not the terminus provided for by said act of Congress." The answer also denied that on March 9, 1872, and April 22, 1872, or at any such times, the Secretary of the Interior and the Commissioner of the General Land Office ordered all the odd sections of land within thirty miles on each side of the desig-

nated route of the said Atlantic and Pacific Railroad Company reserved from sale and withdrawn; that about April 22, 1872, the Commissioner of the General Land Office ordered lands withdrawn for thirty miles on each side of the parts of lines of route attempted to be located March 9, 1872, by the two maps hereinbefore mentioned as filed March 9, 1872, his orders being addressed to the register and receiver of the United States land office at San Bernardino, Los Angeles and Visalia, and were substantially as shown by the certified copy of the Commissioner's letter of said date to the officers at Los Angeles; but the defendant denied that the orders of April 22, 1872, had any effect whatever upon its rights and grants, and were intended only to take effect upon public lands not reserved, sold, granted or otherwise appropriated at the time of filing said maps, March 9, 1872.

The defendant averred that "the lands involved in this suit had previously, on the 3d April, 1871, by the filing of the map of definite location of the defendant's railroad, been duly reserved from sale by and under the said 23d section of the act of Congress of March 3, 1871, and the 6th section of the act of Congress of July 27, 1866, which said sections are quoted in the bill of complaint herein, and avers also that said lands had been duly withdrawn from market and appropriated for the use of this defendant by the order of the Commissioner of the General Land Office to the register and receiver of the U. S. land office at Los Angeles, issued April 21, 1871, a copy of which is hereto annexed, marked 'R,' and made a part of this answer."

Admitting that the Atlantic and Pacific Railroad Company did construct and complete a portion of its road west of Springfield, Missouri, in the time and manner required by said act, but averring that that company did not at any time construct or complete any railroad west of the Colorado River, the defendant averred that "on the 3d April, 1871, it designated the line of its said railroad, as described in said section 23, by a map thereof, filed in the office of the Commissioner of the General Land Office, and thereupon the said Commissioner ordered all the public lands in odd sections

within thirty miles of such route to be withdrawn from market. Certified copy of the map filed by this defendant in the office of the Commissioner of the General Land Office is annexed to the answer heretofore filed by this defendant, marked 'Exhibit D,' and the same is now referred to and made part of this answer"; that "it is the same railroad company that constructed the railroad provided for in the 23d section of said act of Congress of March 3, 1871, and that it fully constructed and completed its road according to said act, and the construction thereof has been accepted and approved by the President of the United States, construction of the last mile of said road having been accepted by President Hayes on the 23d of January, 1878."

The Southern Pacific Railroad Company admitted in its answer that the line which the Atlantic and Pacific Company claimed to have located in California "*crosses the line of the Southern Pacific Railroad located under the act of March* 3, 1871," but alleged "that under and by virtue of said act of March 3, 1871, and the map of location filed on the 3d day of April, 1871, the lands described in said patent were reserved for and appropriated to this defendant, whose title thereto has become perfect and complete by the construction of its road as prescribed in said act," and that "the said Atlantic and Pacific Railroad Company's pretended line was not located until subsequent to the year 1871; that when sought or pretended to be located, it was found to be on a wholly unauthorized route, not prescribed or permitted under any act of Congress in relation to or affecting said Atlantic and Pacific Railroad Company."

The answer of the Southern Pacific Railroad Company, in the former cases, also contained these paragraphs:

"This defendant admits that on the south side of the pretended location of the Atlantic and Pacific road, and within 30 miles thereof, but also within 20 miles of the location of the Southern Pacific Railroad, there was not on April 3, 1871, and is not now, enough public lands in the odd sections to equal ten alternate sections per mile on each side of the pretended location of the line of the said Atlantic and Pacific

Railroad Company within such limits, and this defendant admits that the above described tracts of land are situated more than 20 miles and less than 30 miles from the line of the pretended location of the Atlantic and Pacific Railroad, and less than 20 miles from the said located line of the Southern Pacific Railroad.

"This defendant avers that said tracts of land have been granted, by the 23d section of the act of March 3, 1871, to it, the Southern Pacific Railroad Company. . . .

"This defendant admits that, under date of March 29, 1876, April 4, 1879, and December 27, 1883, the patents were issued to this defendant for the lands hereinabove described, but denies that such patents were issued inadvertently or without authority. On the contrary, this defendant avers that said patents were issued with due deliberation and in strict conformity with the law, and that the signatures of the President of the United States and the Recorder of the General Land Office thereto were affixed fairly and properly and under the authority of law. This defendant here refers to the Exhibit 1, Nos. 1 and 2, annexed to its answer heretofore filed, and makes the same part of this answer.

"When the grant of lands was made to this defendant, March 3, 1871, and its grant was located, April 3, 1871, all the lands involved in this case were public lands of the United States."

To this answer a general replication was filed.

The pleadings in the former suits show that the Government based its claim to relief upon certain grounds that were distinctly controverted by the Southern Pacific Railroad Company. Those grounds were:

That the grant by Congress of public lands to the Atlantic and Pacific Railroad Company was before the grant to the Southern Pacific Railroad Company;

That when the Atlantic and Pacific Railroad Company designated its line by a plat thereof filed in the office of the Commissioner of the General Land Office, as required by Congress, it acquired an inchoate title to the lands granted,

that is, a right to earn them and to obtain a complete title by construction of its road;

That the Atlantic and Pacific Railroad Company, by certain maps and plats filed in the office of the Commissioner of the General Land Office in 1872 and fully identified both in the bill and answer — which maps were accepted by the Interior Department as adequate and valid — sufficiently designated, as required by the act of 1866, an entire line from San Francisco via San Miguel Mission, Santa Barbara, San Buenaventura and the Colorado River to Springfield, Missouri, so as to become entitled, as of the date of the grant of July 27, 1866, to earn the lands appertaining to the line so designated;

That the lands then in controversy appertained to the line of road, and were within the exterior lines of the route, so designated, were among the lands granted to the Atlantic and Pacific Railroad Company, and in consequence of such designation were withdrawn by the Secretary of the Interior from sale or preëmption for the benefit of that company; and,

That the Atlantic and Pacific Railroad Company having failed to meet the conditions of the grant by constructing its road in California, the lands to which it had acquired an inchoate title by means of the accepted map designating its line, were "restored to the public domain," under the above act of July 6, 1886, c. 637, 24 Stat. 123, and were not left, upon such statutory forfeiture, to be earned by the Southern Pacific Railroad Company under the junior grant.

The Southern Pacific Railroad Company controverted the material allegations of the Government's bill and amended bill, and made defence upon these among other grounds:

That the only designation of a line or route ever made by the Atlantic and Pacific Railroad Company was one of an entire line from Springfield to San Francisco, and that it had no authority to establish, designate or locate any such extended line;

That the maps of 1872 filed by the Atlantic and Pacific Railroad Company, which were referred to in the bill, and also made *parts of the company's answer*, were *not sufficient*

to identify any specific lands west of the Colorado River; were not, therefore, maps of definite location; and that that company never made any sufficient location or designation of a line in California, so that it could claim the lands in dispute under the grant made by the act of 1866;

That the lands in question were covered by the location made by the Southern Pacific Railroad Company under the act of Congress granting lands to it, and were part of those withdrawn from sale and in its favor by the Secretary of the Interior; and,

That, in any view, the right of the Southern Pacific Railroad Company to those lands attached and became complete upon the forfeiture of the lands and rights granted to the Atlantic and Pacific Railroad Company, such forfeiture — it was claimed — not affecting the rights previously acquired by the Southern Pacific Railroad Company under the accepted maps of the definite location of its line, and under the withdrawal from sale of the lands appertaining to that line.

In the former suits it was conceded that *if* the maps filed by the Atlantic and Pacific Railroad Company in 1872 were valid maps of *definite location*, sufficiently identifying the lands granted to it, then the lands involved in those suits were within the overlapping limits of the two grants.

The learned counsel for the railroad company in those cases contended that, in order to show a conflict between the claims of the two companies to the particular lands then in controversy, the United States must show that the Atlantic and Pacific Railroad Company designated its route under the act of 1866, and that there was no proof of that fact "except that the Atlantic and Pacific Company from time to time filed certain fragmentary maps pretending to designate routes, and which, if connected, would not constitute a route such as the act of 1866 authorized it to select." This general point, counsel argued, resolved itself into three subsidiary questions, namely: "1. Whether the Atlantic and Pacific Railroad Company *ever designated its route:* 2. Whether such a designation, if made, *operated*, from the mere circumstance that the grant to that company was prior in time to that made to the

Southern Pacific Company, *to exclude the lands in the overlapping limits at the place of crossing from the latter grant:* 3. Whether, if such designation was made, the proviso in the 23d section of the above act of March 3, 1871, protecting the rights, 'present and prospective,' of the Atlantic and Pacific Company, was designed for any other purpose than to save to it any lands which it might eventually earn by a full performance of its undertaking."

Manifestly the fundamental question in the former cases was whether the Atlantic and Pacific Railroad Company ever filed any such maps as the act of 1866 contemplated when declaring that the odd-numbered sections granted should be those on the line of the road to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, "at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office."

In those cases, the Circuit Court denied the relief asked, and dismissed the bills filed by the United States. 39 Fed. Rep. 132; 40 Fed. Rep. 611; 45 Fed. Rep. 596; 46 Fed. Rep. 683. But this court reversed the judgments so rendered, holding —

That the grants to the Atlantic and Pacific and the Southern Pacific Railroad Companies were *in præsenti*, that is to say, the route not being at the time determined, the grant was in the nature of a float, no title attaching to any specific sections until they were capable of identification;

That when the granted lands were once identified by approved maps of definite location, the grants severally took effect by relation as of the dates of the respective acts of Congress — the grant to the Atlantic and Pacific Railroad Company being prior in time to that made to the Southern Pacific Railroad Company;

That the Atlantic and Pacific Railroad Company did file maps of definite location in 1872, which were "received and approved by the Land Department *as maps of definite location*"; that *then* "the specific tracts were designated, and

to them the title of the Atlantic and Pacific attached *as of July* 27, 1866"; that "in fact the line of definite location of the Atlantic and Pacific was established, and maps thereof filed and approved, before any action in that respect was taken by the Southern Pacific Company"; and that "there was never a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands, and the plausible argument based thereon, made by counsel for the Southern Pacific Company, falls to the ground";

That the map filed by the Southern Pacific Railroad Company April 3, 1871, could not have been a map of definite location, but was "only of the general route, and there was *then* no designation of lands *to which the Southern Pacific Company's title could attach*";

That it was immaterial whether the map of definite location of the Southern Pacific road was filed and approved before or after April 11, 1872, "for, when filed, the grant could take effect by relation only as of March 3, 1871 [the date of the grant to it], and *at that time, and for nearly five years theretofore*, the title to these lands had been in the Atlantic and Pacific"; nor was it material that the act of 1871 "in terms purports to bestow the same rights, grants and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866," for that merely defined "the extent of the grant and the character of the rights and privileges" given, and did "not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants as established by *St. Paul and Sioux City Railroad* v. *Winona and St. Peter Railroad*, 112 U. S. 720, and *Sioux City and St. Paul Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406"; that "even if Congress had in terms expressed an intent to that effect in a subsequent act, it was not competent by such legislation to divest the rights already vested in the Atlantic and Pacific Company"; that the case, stating it in the best way for the railroad company, was one "of two companies with conflicting grants, each of whose line of definite location has been

approved by the Land Department"; and that "unquestionably, the grant older in date takes the land";

That whatever right or title was acquired by the Southern Pacific Railroad Company, by its map filed April 3, 1871, was "*absolutely displaced when the Atlantic and Pacific Company's map was filed*"; that Congress intended "no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific"; so that, "whatever may have been the dates of the filing by the respective companies, the case stands as though the lands granted to the Atlantic and Pacific had been identified in 1866 and title had *then* passed, and *there never was a title of any kind vested in the Southern Pacific Company*"; and,

That upon the forfeiture by Congress of the rights granted to the Atlantic and Pacific Railroad Company, the lands to which its grant had attached upon the filing and acceptance of its map of definite location in 1872 *did not inure to the benefit of the Southern Pacific Railroad Company*; that "if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct the road, and that constructing it, its title to these lands would become perfect"; that "no power but Congress could interfere with this right of the Atlantic and Pacific"; that "Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited"; that "it enacted that they be restored to the public domain"; that "the forfeiture was not for the benefit of the Southern Pacific, it was not to enlarge its grant as it stood prior to the act of forfeiture," but was for the benefit of the United States, as shown by the act of Congress declaring that the lands be restored to the public domain; consequently, that by the act of forfeiture, "the title of the Atlantic and Pacific was retaken by the General Government, and retaken for its own benefit and not that of the Southern Pacific Company"; and that the lands belonged to the

United States, and the Southern Pacific Railroad Company had "no title of any kind" to them. *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 607.

Touching the point made in the former cases, that the maps filed by the Atlantic and Pacific Railroad Company designating a line from the Colorado River to San Francisco were inoperative by reason of the want of authority to construct a road to the latter city, the court said: "But it is urged by counsel for defendant that no map of definite location of line between the Colorado River and the Pacific Ocean was ever filed by the Atlantic and Pacific or approved by the Secretary of the Interior. This contention is based upon these facts: The Atlantic and Pacific Company claimed that, under its charter, it was authorized to build a road from the Colorado River to the Pacific Ocean, and thence along the coast up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific Ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles County, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado River westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the Land Department, holding that the Atlantic and Pacific Company was authorized to build not only from the Colorado River directly to the Pacific Ocean, but also thence north to San Francisco, approved them *as establishing the line of definite location.* Subsequently, and while Mr. Justice Lamar was Secretary of the Interior, the matter was reëxamined, and it was properly held that under the act of 1866 the grant to the Atlantic and Pacific was exhausted when its line reached the Pacific Ocean. San Buenaventura was, therefore, held to be the western terminus, and the location of the line approved to that point. The fact that its line was located, and maps filed thereof in sections, is immaterial. *St. Paul & Pacific Rail-*

road v. *Northern Pacific Railroad*, 139 U. S. 1. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is, whether the filing a map of definite location from the Colorado River through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. *We think, unquestionably, it is.* Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant; and when a map of such a line is filed, full information is given, and, so far as that line may legally extend, the law perfects the title. It surely cannot be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its right to lands." 146 U. S. 570, 596.

The closing paragraph in the opinion in the former cases is in these words: "Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean was filed by the Atlantic and Pacific Company and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Railroad Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the General Government and retaken for its benefit, and not that of the Southern Pacific Company, and *that the latter company has no title of any kind to these lands.*" 146 U. S. 607.

In the cases of *United States* v. *Colton Marble and Lime Company* and *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615, it was adjudged that the proviso in the act of March 3, 1871, c. 122, 16 Stat. 573 (giving lands in aid of the construction of the Southern Pacific Railroad), that the grant should "in no way affect or impair the rights, present

or prospective, of the Atlantic and Pacific Railroad Company," operated to except the indemnity lands of the Atlantic and Pacific Company from the grant to the Southern Pacific Company.

The former cases were decided in this court on the 12th day of December, 1892.

A petition for rehearing was presented to the several members of the court, but a rehearing was not granted. In that petition the Southern Pacific Railroad Company insisted that this court had erred in various particulars, among them the following:

In not giving due legal effect to the forfeiture act of July 6, 1886, its contention — as on the original hearing — being that the legal operation and effect of that act were to avoid the grant to the Atlantic and Pacific Railroad Company as of the date of the act of 1866, and to restore to the United States, *as of that date*, the title of all the lands embraced in the forfeiture, leaving nothing in the way of the full enjoyment by the Southern Pacific Railroad Company of the grant made to it; consequently, that all proceedings taken by the Atlantic and Pacific Railroad Company, under the act of 1866, were avoided and defeated as absolutely and effectually as if the grant had never been made and no proceedings taken in execution of it; and,

In respect to the "designation of line under the Atlantic and Pacific Railroad maps and the effect and operation thereof."

The present suit was brought by the United States against the Southern Pacific Railroad Company and D. O. Mills and G. L. Lansing as trustees in a mortgage executed by that company on the 1st day of April, 1875 (the same trustees and mortgage referred to in the former cases), as well as against certain individuals and corporations, to quiet the title of the United States to the lands involved in this suit. It was pending at the time the former cases were decided in this court. The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and

1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas and Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States.

But all the lands now in dispute are within the limits of the grant to the Atlantic and Pacific Railroad Company, *if* the maps filed by that company in 1872, and which were approved by the Land Department, are to be regarded as maps of definite location. This is substantially admitted to be a correct statement of the controlling question before the court; for the defendants, in their very able argument, state that the lands involved in this suit "are within the limits which would have appertained to the grant to the Atlantic and Pacific upon the 1872 route, *if* that had been an authorized route, and *if* a *definite location* had been duly made thereon so as to attach the grant to specific lands."

The contingencies here suggested have been fully met by this court; for it was distinctly adjudged, in the former cases, as between the Government and the Southern Pacific Railroad Company, 146 U. S. 570, 596, that the maps filed in 1872 sufficiently identified the lands granted to the Atlantic and Pacific Railroad Company on the contemplated line between the Colorado River and San Buenaventura on the Pacific coast, although, for want of authority in that company to construct a railroad to San Francisco, they did not secure to the company any lands north of San Buenaventura; that is, those maps were directly adjudged to be maps adequately

fixing or locating the line of the road under the act of 1866. The records of those cases having been introduced in the present suit, there is no room for doubt — if those records are competent evidence — as to what was in issue and what was adjudged in the former cases. The maps which in this case are relied upon by the United States as maps of definite location, and which the Southern Pacific Railroad Company denies to be of that character, *are the identical maps which the Government relied on in the former cases*, and the same which that company referred to *and made part of its answer in the former litigation*, and which were adjudged by this court, in conformity with the contention of the Government, to be valid maps of definite location, the acceptance of which made it impossible for the Southern Pacific Railroad Company to acquire any interest in any lands granted to the Atlantic and Pacific Railroad Company that were forfeited to the United States by the act of 1886.

It is said, however, that, under the pleadings and evidence in this collateral proceeding, it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872 filed by the Atlantic and Pacific Railroad Company and to show that they were not maps of definite location.

Is this position consistent with the settled rule of law as to the conclusiveness, between parties and their privies, of the final determination by a court of competent jurisdiction of matters put in issue by the pleadings?

The importance of this question, independently of the magnitude of the interests to be affected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.

The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact

once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Among the cases in this court that illustrate the general rule are *Hopkins* v. *Lee*, 6 Wheat. 109, 113; *Smith* v. *Kernochen*, 7 How. 198, 216; *Thompson* v. *Roberts*, 24 How. 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles*, 24 How. 333, 340, 341, 343; *Russell* v. *Place*, 94 U. S. 606, 608; *Cromwell* v. *Sac County*, 94 U. S. 351; *Campbell* v. *Rankin*, 99 U. S. 261; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 230; and *Johnson Co.* v. *Wharton*, 152 U. S. 252.

In *Hopkins* v. *Lee* — which was a suit in equity by the purchaser of land to compel the vendor to remove certain incumbrances upon it — it was held that a fact established therein and made the basis of a decree could not be disputed in a subsequent action of covenant brought by the latter against the former for not conveying certain lands, part of the consideration, the court saying that the rule on that subject had found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could not be put to litigation; in *Smith* v. *Kernochen* — which was ejectment by an assignee of a mortgage to recover possession of the mortgaged premises — that a final decree, in a previous suit, brought by the mortgagee against the mortgagor to foreclose the mortgage, adjudging the mortgage to be invalid for want of authority in the mortgagor to execute it, concluded the question of title, the court observing

that the case came within the general rule that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties or their privies upon the same matters when brought directly in question in another court; in *Thompson* v. *Roberts*, that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit; in *Washington, Alexandria & Georgetown Steam Packet Co.* v. *Sickles*, that to the end that rights might be secured and the repose of society preserved, and that limits might be imposed upon the faculties for litigation, the presumption had been adopted that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence "as irrefragable truth," such a presumption being a guarantee of the future efficiency and binding operation of the judgment; in *Cromwell* v. *Sac County*, that a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defeat the claim in controversy, while if the second action 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, the injury in such case being "as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined"; in *Russell* v. *Place*, that "a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties"; in *Campbell* v. *Rankin*, that in an action to recover damages for trespass upon a mining claim, the record of a former suit between the same parties, involving the same question of interfering mining claims, was admissible as evidence, the court observing that "whenever the same question has been in issue and tried and judgment rendered, it is conclusive of the issue so decided in any subse-

quent suit between the same parties"; in *Lumber Co.* v. *Buchtel*, that in a suit for the amount of the first instalment due on a contract for the purchase of timber lands — the defence being that the defendant had been induced to make the contract by false and fraudulent representations — a judgment based upon a finding that no such representations were made, was conclusive in respect of that matter in a subsequent action brought on the contract to recover a different instalment; in *Bissell* v. *Spring Valley Township*, that an adjudication, in an action on coupons of municipal bonds, sustaining the defence that the municipality never executed the bonds, and that the bonds were not its legal obligations, was conclusive in a subsequent action brought by the same party on different coupons of the same bonds; and in *Johnson Co.* v. *Wharton*, that in an action to recover stipulated royalties, for a named period, for guard rails constructed according to the specifications of a certain patent, in which judgment was given for the plaintiff, the defendant in a second suit brought to recover like royalties for a later period could not make the same defence, although, by reason of the small amount in dispute, he was precluded from having the judgment in the first suit reviewed upon writ of error, this court stating that it was a general rule, having its foundation in a wise public policy, that the final judgment of a court, at least one of superior jurisdiction, competent under the law of its creation to deal with the parties and the subject-matter, and having acquired jurisdiction of the parties, concludes those parties and their privies in respect of every matter put in issue by the pleadings and determined by such court. See also *Lessee of Parrish* v. *Ferris*, 2 Black, 606, 608; *Packet Co.* v. *Sickles*, 5 Wall. 580, 592; *Dowell* v. *Applegate*, 152 U. S. 327, 342.

The latest expressions of opinion by this court on this question are in *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 691, and *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the boundaries of certain mining claims,

alleged to have been legally located and to belong to the former company, precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located — the court observing that "a judgment by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest," the essence of estoppel by judgment being that "there has been a judicial determination of a fact, and the question always is, has there been such determination, and not, upon what evidence or by what means was it reached?"

In *New Orleans* v. *Citizens' Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue, duly raised by the pleadings, whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: "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."

In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic and Pacific maps of 1872 as maps of definite location, was a matter in issue and determined, as between the United States and the Southern Pacific Railroad Company. That that matter was in issue and was actually decided in the former cases, is too clear to admit of doubt. That it was material is equally clear; for, upon its determination depended the question whether the grant of public lands to the Atlantic and Pacific Railroad Company attached to any specific lands along its line to which the for-

feiture act of 1886 could apply. If those maps were valid maps of definite location, then, according to the settled adjudications of this court, to which reference has often been made, the right of that company to earn the lands appertaining to its line, thus definitely located, attached, by relation, as of the date of the grant to it in 1866; and in this view the Southern Pacific Railroad Company, holding the junior grant, took none of the lands appertaining to that line by reason of the definite location and construction of its line. Thus, also, those lands were in such condition, at the date of the forfeiture act of 1886, that they could be forfeited as lands in which the Atlantic and Pacific Railroad Company then had an interest, and, in accordance with the act of Congress, be fully restored to the public domain for the exclusive benefit of the United States, unaffected by the later grant made to the Southern Pacific Railroad Company.

The only way in which, in the former cases, the court could have avoided a decision as to the character of those maps, was to have held that whether they were maps of definite location or not, the rights of the Southern Pacific Railroad Company attached, upon the declaration of forfeiture, to the lands then in dispute, and that Congress was without power to restore them to the public domain. So far from sustaining that view, the court expressly adjudged that, upon the acceptance of the Atlantic and Pacific maps of 1872, the rights of *that* company, in the lands granted, attached *as of the date of the grant of* 1866, and that it was not possible for the Southern Pacific Railroad Company, by the location of its road, *whether located before or after the acceptance of the maps of* 1872, to acquire any interest whatever in the lands there in dispute that would prevent Congress, upon forfeiting the rights of the Atlantic and Pacific Railroad Company, from restoring such lands to the public domain to be disposed of by the United States as it saw proper.

It is in effect said that the failure of the Government in the former cases to aver, in words, that the maps of 1872 were maps of "definite location," leaves the question of the sufficiency of those maps open in this case relating to different

lands. It seems to be forgotten that the amended bill was in exact conformity with the act of 1866, which in the third section — the one making the grant — used the words "at the time the line of said road is *designated* by a plat thereof filed in the office of the Commissioner of the General Land Office." The word "designated" in that act meant no more nor less than the words "definitely located" mean. When the Southern Pacific Railroad Company denied that the Atlantic and Pacific line had been sufficiently designated, or that there had been a valid location of it, both litigants, as well as the court, understood, and properly, that the case presented the question whether there had been such a definite location of the Atlantic and Pacific line as the act of Congress required. That that company so understood the word "designated," as used in the third section of the act of 1866, is beyond question; for its answer filed in the former cases on the 30th of December, 1889, in which it claimed the lands then in controversy, refers to the map filed by it on the 3d April, 1871, as one by which "it *designated* the line of its said railroad." And when it was adjudged that the maps of 1872 indicated a definite location of the line of the Atlantic and Pacific Railroad, the settled rules of law forbid that the defeated party should reopen that question in another suit, relating to other lands appertaining to the line so designated. The matter alleged by the Government, and upon which the recovery proceeded, was, we repeat, the sufficiency of the maps of 1872 to entitle the Atlantic and Pacific Railroad Company to earn the lands there in dispute.

It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of the same fact or facts. If the accepted maps filed by the Atlantic and Pacific Railroad Company in 1872 sufficiently located the line of that company, it could not possibly be that they were valid maps of definite location as to part of the lands appertaining to that line, and not maps of that character in respect of

other lands embraced by it. Consequently, the former judgment, while unmodified, determined the character of the maps, as between the United States and the Southern Pacific Railroad Company. If the court had adjudged in the former cases that those maps were neither filed nor accepted as maps of definite location, but were only maps of general route, could it be doubted that the Government would have been estopped from asserting to the contrary in a subsequent suit involving other lands claimed by the Southern Pacific Railroad Company which were covered by the same maps, and appertained to the same line? Must a different principle be applied because the decision was favorable to the Government upon the question whether the maps of 1872 were maps of definite location? Certainly not.

But it is earnestly insisted that a prior judgment cannot operate as an estoppel in a subsequent suit between the same parties, unless it be pleaded when there is an opportunity to do so; that such an opportunity existed in this suit; and that the United States having failed to avail itself of that opportunity, it was open to the court to determine the truth of the matter upon all the evidence now before it.

This contention is based upon the 45th Rule in Equity, providing: "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct." Under this rule, it is said, the United States had an opportunity to amend its bill, and in that mode to have met the allegations of the amended answer of 1893; but having failed to ask leave to amend, it lost the benefit of the former judgment.

The part of the amended answer of 1893 to which counsel refer as making an issue or issues not made in the former cases, and which, it is contended, must have been met by an amended bill if the Government expected to rely upon the prior judgment, is as follows:

"And the said respondents deny that said Atlantic and Pacific Railroad Company did locate on the ground or desig-

nate upon a plat or map the whole of said line of railroad, under or in accordance with said act, from Springfield, Missouri, by way of the points or places named in said act, or otherwise, to the Pacific Ocean, and deny that it ever lawfully located or adopted or designated any part of said line in the State of California; and deny that on or about the — day of ——, 1866, or at any other time, said company did file any such plat in the office of the Commissioner of the General Land Office, and deny that at that, or at any such time, any such designation or location of said line of railroad was approved by the Secretary of the Interior; and deny that the odd sections of public lands on each side of said road for thirty miles were withdrawn from market or reserved; and deny that the lands in suit herein, or any of them, fell within the twenty-mile limits of any such line, or were ever lawfully withdrawn from market, or reserved for, or for the benefit of, the said Atlantic and Pacific Railroad Company; and deny that the Atlantic and Pacific Railroad Company ever designated a line of railroad between the Colorado River and the Pacific Ocean by a map thereof filed in the office of the Commissioner of the General Land Office, or made or filed a map of definite location of a route from the Colorado River to the Pacific Ocean, whether by the most practical and eligible route or otherwise howsoever. The said respondents aver that the said Atlantic and Pacific Railroad Company never made any actual or definite location of its railroad in California, nor constructed any part of a railroad in said State, under or according to the act of Congress approved July 27, 1866, or any amendments, modifications or supplements thereto or otherwise howsoever. The pretended location of a route by said Atlantic and Pacific Railroad Company in California never was or became an actual or definite location, or anything else than an attempted or pretended designation of a general route for a railroad from San Francisco to the Needles, and such pretended location or designation of route was a colorable and fraudulent location or designation of an unauthorized and impracticable line. The Secretary of the Interior never undertook to accept such pretended loca-

tion or designation as anything else than a designation of a general route, and no right to or interest in any public lands was, or could be, acquired by said railroad company by reason of any such attempted location or designation, or any act of acceptance thereof."

Undoubtedly, there are cases in which a party may lose the benefit of a prior judgment, in respect of matters determined by it, when, having an opportunity to plead such judgment, he fails to do so. But that principle has no application in the present case. Under Equity Rule 45, a general replication to the amended answer of the defendant company sufficed, unless that amended answer contained such matter as made it "necessary" that the Government should amend the bill. But when a former recovery is to be relied on by the plaintiff it can only be necessary to amend the bill when the rules of pleading imperatively require that to be done in order to obtain the benefit of such recovery. No amendment of the bill was necessary in this case for the reason that the judgment in the prior suit — the present suit being on a different cause of action — could not be pleaded as an absolute bar arising upon the face of the record, but could be used *as evidence* to support the contention that the maps of 1872 sufficiently identified the lands granted by the act of 1866. The contrary is again asserted by the Southern Pacific Railroad Company in this suit. But that precise issue we have seen was made in the former suit, and was determined for the United States. And to establish that fact, the United States introduced the former record as evidence in its behalf. To say that the Government lost the benefit of its former judgment, covering this issue or question, because it did not amend its bill and plead the judgment as an estoppel, is to say that it was required to set out in its pleading what was merely evidence to support its title to the lands in controversy. The 45th Equity Rule is not to be so interpreted. It means, at most, that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill. Besides, Rule 45 must be construed in connection

with the Equity Rule 19, declaring that the plaintiff, at his discretion, may omit from the bill "what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill." If it was competent for the Government, in this case, to have referred, in its bill, to the former suit, and, in advance, by appropriate allegations, to have met the objections which it supposed the defendant would urge to the former judgment as fixing the character of the maps of 1872, it was not bound to pursue that course nor to amend its bill and set out what was only evidence of its title to the particular lands in controversy.

But there is another reason why the United States was not required to amend its bill. Before the amended answer of 1893 was filed, the Government, by its pleadings, had distinctly alleged that the maps of 1872 sufficiently designated the line of the Atlantic and Pacific Railroad, and identified the lands granted to it, while the defendant's pleadings with equal distinctness averred that they were not valid maps of definite location. Such was the condition of the record when this court decided the former case on the 12th day of December, 1892. That decision, as we are informed by the railroad company, instructed it "as to where the real strain of the controversy came," and having failed "to appreciate the inferences which the court might draw from facts or evidence," leave was obtained in the Circuit Court to file, and it did file in this case, the amended answer of 1893, bringing, it is claimed, into view such new issues and such additional facts as deprived the Government of the right, unless it amended the bill and formally pleaded such judgment as an estoppel, to rely upon the judgment in the prior cases as conclusive of the matters determined by it. That which is claimed to be new in the amended answer was not such matter as even prior to Equity Rule 45 would have required a special replication or an amended bill in order to avoid its effect. The amended answer was, at most, only a more extended statement of the grounds of defence previously set forth. The manifest purpose of it was to relieve the strain of the prior

decision, and, under the guise of presenting new issues of a substantial character, to enable the railroad company, by introducing additional evidence on its behalf, to retry, in this collateral proceeding, the question as to the sufficiency of the maps of 1872. The pleadings in the prior cases distinctly averred an adequate designation of the line of the Atlantic and Pacific Railroad and the identification of the lands appertaining to that line. The averment in the amended answer of 1893, that the location by the Atlantic and Pacific Railroad Company of its route in California "never was or became an actual or definite location," but was only "an attempted or pretended designation of a general route for a railroad from San Francisco to the Needles," and that such designation of its route was "a colorable and fraudulent location or designation of an unauthorized and impracticable line," was not at all necessary, because the defendant company, under its original answer, if not estopped by the former judgment, could have introduced any evidence tending to show that there had been no valid definite location of the line of the Atlantic and Pacific Railroad, and that the maps of 1872 were filed and accepted only for the purpose of indicating a general route. So that if the Government was entitled, under the pleadings as they were when the defendant company filed its amended answer of 1893, to introduce in evidence the record and judgment in the former cases, its right in that respect was not lost by its failure to amend its bill and specially set up that record.

That the record and judgment in the former cases were admissible in evidence, without being specially pleaded, we entertain no doubt. And when before the court as admissible evidence, the only inquiry was whether the sufficiency of the maps of 1872 was a matter in issue and determined between the parties to those cases. There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issues to which it relates, but is only persuasive evidence, and that the court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon prin-

ciple, the former judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it. Mr. Greenleaf correctly says that "the weight of authority, at least in the United States, is believed to be in favor of the position that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel." 1 Greenleaf on Ev. § 531. This view is in accord with the decisions of this court above cited. See, also, *Marsh* v. *Pier*, 4 Rawle, 272, 288; *Lawrence* v. *Hunt*, 10 Wend. 80, 83; *Betts* v. *Stair*, 5 Connecticut, 550; *Sawyer* v. *Woodbury*, 7 Gray, 499, 502; *Jennison* v. *West Springfield*, 13 Gray, 544; *Cannon* v. *Brame*, 45 Alabama, 262; *Trayhern* v. *Colburn*, 66 Maryland, 277, 278; *Garton* v. *Botts*, 73 Missouri, 274, 278; *Walker* v. *Chase*, 53 Maine, 258, 260; *Lynch* v. *Swanton*, 53 Maine, 100, 102; *Prather* v. *Owens*, Cheves (Law), 236; *Jones* v. *Weathersbee*, 4 Strob. (Law) 50, 54, 55; *Warwick* v. *Underwood*, 3 Head, 238, 240; *Isaacs* v. *Clark*, 12 Vermont, 692, 694.

In the present case the railroad company has made an elaborate argument in support of the proposition that the necessary legal effect of the forfeiture act of July 6, 1886 was to restore the title of all lands affected by that act to the United States, *as of the date* of the grant of July 27, 1866, and to "avoid" and "defeat," as of that date, the grant to the Atlantic and Pacific Railroad Company with like effect as if it had never existed; that, upon such forfeiture, the United States became seized of its original estate in the lands as of July 27, 1866, with the same effect as if it had never made any grant to the Atlantic and Pacific Railroad Company; and that it could only enter upon the lands for forfeiture as of its former estate in them. In this view, it is contended that the rights of the Southern Pacific Railroad Company attached immediately upon the forfeiture, and before the lands so forfeited were restored to the public domain. It is sufficient to say, in reference to this contention, that the question as to the effect of the act of forfeiture upon the rights of the Southern Pacific Railroad Company was fully considered and determined in the former cases. It was held that it was

not the intention of Congress that these lands should pass conditionally to the Southern Pacific Railroad Company, or to give to it any lands previously granted to the other company, and that the first proviso of section three of the act of 1866 imports that "Congress was not only not intending to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the later grant." The court said: "Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit."

For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases as between the United States and the Southern Pacific Railroad Company —

1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.

2. That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of the act of 1866; and,

3. That in view of the conditions attached to the grant,

and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and, therefore, appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below.

Even if we were prepared upon a reëxamination of the former cases, or upon the showing made by the present record, to hold that the maps of 1872 were not valid maps of definite location, we could not for that reason, in this proceeding, go behind the former adjudication, and deny to the United States the benefit of the rule making that adjudication, so long as it was unmodified, conclusive, as between the parties to it, of all matters actually determined under the issues in the prior suits.

One other matter deserves attention. The learned counsel for the railroad company in their extended comments upon the evidence in the present record, insist that, under the proof now before the court, it is indisputable that the Atlantic and Pacific Railroad Company did nothing more than file, in the Interior Department, "a map of general or *preliminary* route for the purpose of securing a *preliminary* withdrawal of lands"; that the maps of 1872 were neither filed nor accepted as maps of definite location; and that the proof is of such a peculiar character as to demand an examination of it by the court.

In support of this contention reference was made to duly certified copies of certain letters, appearing in the records of the Interior Department: 1. A letter to Mr. Delano, Secre-

tary of the Interior, from Mr. Hillyer, attorney of the Atlantic and Pacific Railroad Company under date of March 8, 1872, enclosing "the accompanying maps to be filed in the office of the Commissioner of the General Land Office" — the above maps of 1872, four in number — which letter concludes: "The Atlantic and Pacific Railroad Company respectfully request that the lands embraced in the grant to the company under the provisions of the act of July 27, 1866, and coterminous with the portions of the line or route designated by the plats herewith filed or heretofore filed by said company, may be withdrawn from sale, entry or preëmption and reserved for said railroad company according to the provisions of said act." 2. A letter from Secretary Delano to Mr. Hillyer, under date of March 9, 1872, acknowledging the receipt of the latter's letter, "transmitting four maps of the preliminary location of portions of the Atlantic & Pacific Railroad," and saying that said "maps have to-day been transmitted to the Commissioner of the General Land Office for appropriate action." 3. A letter from the Secretary of the Interior to the Commissioner of the General Land Office, under date of March 9, 1872, saying: "I transmit herewith, for appropriate action, four maps of the preliminary location of portions of the Atlantic & Pacific Railroad," and that said "maps were received yesterday from C. J. Hillyer, Esq., atty. of the Co. — in this city."

From these documents it appears that the attorney of the railroad company described two of the maps as "designating," and the remaining two as "showing," the line or route of the railroad, while the two letters of the Secretary describe them as maps of the "*preliminary* location of portions" of the road. It is conceded that in the letters of the Secretary, *as originally written*, the maps were referred to as maps of *definite location* of portions of the Atlantic and Pacific Railroad. And it was shown that the word "preliminary," inserted in place of "definite," in the two letters of the Secretary, was in the handwriting of a former (now deceased) clerk in the Land and Railroad Division of the Interior Department, who, it is claimed, made the change with the knowledge

or in conformity with the directions of the Secretary; also, that corresponding memoranda, in pencil and in the handwriting of that clerk, appear upon those letters, and upon the jackets containing them.

Upon the part of the United States it is contended that there is no evidence whatever tending to show that the Secretary had any knowledge of or directed the word "definite" to be stricken out and "preliminary" inserted; on the contrary, that the Department, at all times, subsequently to March 9, 1872, treated the maps in question as maps of definite location. In support of its position the Government refers to the fact that in the letter-press copy, as well as in what is called by counsel the permanent record of letters, in the Department, the letter of the Secretary to the Commissioner of the General Land Office contains the words "definite location," not "preliminary location," and the letter of the Secretary to Mr. Hillyer of March 9, 1872 reads "four maps of the definite location," not "four maps of the preliminary location." The Government also refers to the fact that when the Commissioner of the Land Office received the letter from the Secretary of the Interior the indorsement placed on the back of the map was in these words: "Map of definite location of the Atlantic and Pacific Railroad through the county the Los Angeles, and part of San Bernardino, Cal. Received at the G. L. O. with Secretary's letter of March 9, 1872"; also to the letter of the Commissioner, dated April 22, 1872, and addressed to the local land officers in California, in which the former said: "Gentlemen: I transmit herewith a diagram showing the definite location of the Atlantic and Pacific Railroad under the act of July 27, 1866, Stat. Vol. 14, p. 292, from a point on the western boundary of Los Angeles Co. to a point in T. 7 N., R. 7 E. of the San Bernardino, in your district, showing also the twenty and thirty-mile limits of the land grant under said act," etc. It also appears that Assistant Attorney General Smith, in an official communication addressed to the Secretary of the Interior, under date of March 16, 1874 — in which he considered the question of the right of the Atlantic and Pacific Railroad Company to locate its

line from the Colorado River, by way of Tehachapa Pass to San Francisco — referred to and treated the maps of 1872 as maps of definite location. And they were so referred to and treated by Secretary Lamar in his opinion of March 23, 1886, holding that that company was not entitled to construct a road from San Buenaventura to San Francisco. 4 D. L. O. 458.

We cannot concur in the view that the evidence upon this branch of this case is of such nature as to compel the court, in the interest of truth and justice, not only to consider it but to pass again upon the issue made in the former suits as to the character of the maps of 1872. Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*. Without, therefore, expressing any opinion as to the effect of this new evidence relating to matters once finally adjudged, we hold that the Southern Pacific Railroad Company cannot, in this proceeding, question the validity of those maps as maps of definite location.

One of the objects of this suit was to obtain a decree quieting the title of the United States, not only to the lands claimed by the Southern Pacific Railroad Company, but to those claimed by numerous individual defendants by purchase from or contract with that company. The decree which was passed declares that it is not to "affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March 3, 1887." Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the

Southern Pacific Railroad Company, the Circuit Court should have determined, by its final decree, what rights those defendants have by virtue of the above act of March 3, 1887, 24 Stat. 556, c. 376, in the lands or any of them now in dispute and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. The Government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of Congress. *United States* v. *Winona & St. Peter Railroad*, 165 U. S. 463; *Winona & St. Peter Railroad* v. *United States*, 165 U. S. 483. But as the Government has not appealed, the decree cannot be reversed for the error of the Circuit Court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company.

The result is that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the Government to proceed in the Circuit Court to a final decree as to those defendants, and it is so ordered.

BERGERE *v.* UNITED STATES.

UNITED STATES *v.* BERGERE.

APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS.

Nos. 43, 46. Argued April 19, 1897. — Decided October 18, 1897.

On a petition to the governor of the province of New Mexico, in 1819, for a grant of public land, made by a resident in that province, the governor directed possession to be given by the alcalde, and the expediente to be transmitted by that officer to the office of the governor, so that, if ap-

proved by him, the proper testimonio might be ordered to be given to the petitioner. *Held,*

(1) That no grant was made until return should be made by the alcalde, and that, until his action should be approved by the governor, it was without effect;

(2) That as there was no evidence in this case, either in the papers presented in support of the petitioner's claim, or in the facts and circumstances proved, from which an approval could properly be presumed, the petitioner must be held to have failed in a material part of her case;

(3) That in consequence of such failure, the petitioner was not entitled to judgment for eleven square leagues of the land claimed, under the 7th subdivision of § 13 of the act of March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims.

THE case is stated in the opinion.

Mr. J. D. O'Bryan and *Mr. James W. Vroom* for Bergere and others. *Mr. T. B. Catron* was on their brief.

Mr. Matthew G. Reynolds for the United States. *Mr. Solicitor General Conrad* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

These are cross-appeals from a judgment of the Court of Private Land Claims, confirming in the petitioner Bergere, for herself and the other heirs of Manuel Antonio Otero and Miguel Antonio Otero, the title to eleven square leagues of land in the Territory of New Mexico. The petition was filed in the court below, asking that the validity of the title to a very much larger tract of land in the above territory, alleged to have been granted in 1819 to one Bartolomé Baca by acting Governor Melgares, might be confirmed to the heirs and legal representatives of Baca, of whom, she alleged, she was one.

The number of acres contained in the alleged grants was not stated, but it has been variously estimated at from half a million to a million and a half.

The judgment of confirmation was granted upon the ground, as stated by the court, that the grant to Baca was imperfect at the time of the cession of the department of New Mexico

to the United States by the treaty of Guadalupe Hidalgo, and hence it could only be confirmed by the court for the amount of eleven square leagues, under the seventh subdivision of section thirteen of the act of Congress of March 3, 1891, c. 539, 26 Stat. 854, 860, creating the Court of Private Land Claims. That subdivision reads as follows:

"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."

The petitioner thought the court below should have confirmed her title to the whole of the land described in the alleged grant, while the counsel for the Government was of the opinion that the judgment ought not to have confirmed her title to any portion thereof. Both parties have therefore appealed from the judgment to this court.

In the course of the trial certain papers were put in evidence on the part of the petitioner, for the purpose of proving the alleged grant. They were written in the Spanish language, and a sworn translation thereof, also appearing in the record, reads as follows:

"To the Acting Governor:

"Don Bartolomé Baca, captain of the volunteer militia company of cavalry of the villa of Albuquerque, residing in the jurisdiction of Tome, before you with the greatest respect and subordination, as by law required, represents: That he has a number of sheep, horned cattle and horses, without legitimate property on which to keep them together under shepherds, cattle herders and horse herders, to take care of them and secure their safety, they now roving over different places, exposed to all the contingencies arising from their being

scattered. There being vacant on the other side of the Abó Mountain a tract called the Torreon, and which extends, on the north, to the Monte del Cibolo; on the south to the Ojo del Cuervo; on the east to the springs called the Estancia Springs; on the west to the said Abó Mountain; he prays you to be pleased to grant the same in real possession, in the exercise of the powers upon you conferred by His Majesty, in order to establish thereon a permanent ranch or hacienda, which he engages to occupy with his stock, sustaining the same with armed servants, who may defend it against the incursions of the enemy without abandoning it; and he will also, if possible, open lands for cultivation, whether irrigable or dependent upon the seasons, for the advancement of agriculture, and although the water sources it contains are small and uncertain, he proposes to improve them with reservoirs and other appliances which will secure every advantage possible; and he affirms that it has at present no owner, and that it never has had any known owner.

"Wherefore, he prays you to be pleased to grant this his petition in conformity with law, and to direct the royal judge of his district to give him legal possession, with the proper documents and other formalities which are required, whereby he will receive favor, grace and justice. I swear that I do not act in bad faith, and in that which is necessary, etc.

"San Fernando, February 4, 1819.

"BARTOLOME BACA. [RUBRIC.]

"SANTA FÉ, *July* 2, 1819.

"As he asks it according to law, and I understand that no injury results to any third party, but, on the contrary, increase of stock raising and agriculture under the conditions asked:

"Don José Garcia de la Mora will proceed to give the possession, designating limits and doing what is proper, which being concluded he will transmit the expediente to this superior office, so that if it be approved the proper testimonio may be ordered to be given to the petitioner.

"MELGARES. [RUBRIC.]

"In execution of the decree of July 2, 1819, I, José Garcia de la Mora, the judge commissioned by Lieutenant Colonel Facundo Melgares, governor of the province of New Mexico, proceeded in company with captain of volunteer militia, Bartolomé Baca, who by his merits and conduct in the service of both majesties, as has been proved by the offices which have been conferred upon him of alcalde mayor, and in other services in the field, the governors always appointing him commander of campaigns and scouting parties, which he always led with honor and valor, and in addition to all this he has always surpassed others in voluntary contributions, setting a good example to his inferiors. Wherefore, in reward of all these merits and services I have proceeded in his company to examine the tract he applies for, and knowing that it is wild land, and that no injury results to any third party, I have placed him in possession in the name of the King (whom may God preserve), and I took him by the hand and led him over the whole tract, he shouting and plucking up grass and throwing stones in the name of the King, saying, 'Long live our beloved monarch, Don Fernando VII., whom God may preserve,' with hurrahs and shouts, and I shed tears of delight at his acclamations; and I designated to him for his boundaries: On the south, the Ojo del Cuervo, following its line to the Ojo del Chico; on the east, the Cerro del Pedernal; on the north, the Ojo del Cibolo; on the west, the Altura de la Sierra (summit of the mountain range); the said gentleman being satisfied and grateful to the said governor for the benefit conferred upon him, binding himself to increase by his intelligence the limited waters which have been donated to him in order that his herds may be maintained, to which he is bound, transmitting the whole for your approval, he will satisfy the fees which may be charged to him.

"Wherefore, I transmit this to the superior authority in order that, it being examined by you, you may decide as you may deem just.

"San Fernando, September 12, 1819. To which I certify with my two assisting witnesses.

"José Garcia de la Mora. [rubric.]

"Assisting witness:
"José Andres Caller. [rubric.]
"Assisting witness:
"Franco Galiz. [rubric.]
"[Torn] the boundaries by [torn].
[rubric.]
"[Torn] elgares."

The original of the last portion of the above paper, from the words "San Fernando," etc., reads in Spanish as follows:

"San Fernando, doce de sepre. de mil ochocientos diez y nueve años. De qe. doy fee, con los dos de mi asistencia.
"José Garcia de la Mora. [rubrica.]
"De assa.:
"José Andres Caller. [rubrica.]
"De assa.:
"Franco Galiz. [rubrica.]
"[Roto.] de los limites por [Roto].
[rubrica.]
"[Roto.] elgares."

The petitioner claims that the evidence shows an approval by the governor of the action of the alcalde in delivering juridical possession of the land described in the petition of Baca, and that thereby the grant became effective and absolute. Also that there is sufficient evidence of an adverse possession of such land by Baca from 1819 to the time of his death in 1834 and after that time by his heirs and representatives.

The court below found the following facts:

"First. That on February 4, 1819, Bartolomé Baca presented a petition to the then governor of the province of New Mexico, Facundo Melgares, setting forth that he had registered a piece of vacant land which was called the Torreon; that the said governor made the said grant as petitioned for on July 2, 1819, and directed José Garcia de la Mora to give possession, designating the limits and officiating duly; that afterwards, to wit, on September 12, 1819, the

said official gave to the said Bartolomé Baca the actual possession of the said tract of land, called the Torreon, petitioned for.

"Second. That the said tract of land, called the Torreon, had been in the actual possession of Bartolomé Baca for more than four years from the date of the grant on said September 12, 1819.

"Third. That the said petitioner, who filed her petition for herself and other heirs of Manuel Antonio Otero and Miguel Antonio Otero, are the legal successors in interest to the rights of the said heirs of the said Bartolomé Baca.

"The court finds as a matter of law that the grant to said Bartolomé Baca was imperfect at the time of the cession of the department of New Mexico to the United States of America by the treaty of Guadalupe Hidalgo, and that the petitioner for herself and other heirs of Manuel Antonio Otero and Miguel Antonio Otero, as the legal representatives of the said Bartolomé Baca, is entitled to a confirmation of eleven square leagues of land within the outboundaries of the tract of land, called the Torreon, granted to said Baca, and of which he was put in actual possession.

"It is therefore ordered, adjudged and decreed by this court that the claim of the petitioner for the land hereinbefore described and set out be, and the same is hereby, confirmed to the extent of eleven square leagues to the heirs and legal representatives of Bartolomé Baca, provided that this confirmation shall not confer any right or title to any gold, silver or quicksilver, mines or minerals of the same."

In regard to the character of the grant involved in this proceeding, it is conceded on the part of counsel for petitioner that the approval of the governor was necessary in order to make the grant effective. In their brief they say: "Now this grant was not finally made until return was made by the alcalde and approval had. Before that time it had no existence. The confirmation of the government was the one act that fixed the right of the grantee, and that final act was based upon the return and, necessarily in this case, in confirmation of the return."

Opinion of the Court.

We have no doubt of the correctness of this view. The governor, in his reference of the case to the alcalde, bids him transmit the expediente to his office, *so that if approved* the proper testimonio may be ordered to be given the petitioner. Until approved, the action of the alcalde was of no effect.

The burden of showing this approval rested with the petitioner, and unless she has sustained it she has failed in this branch of her case.

In speaking of the burden cast upon a petitioner who asks confirmation of an alleged grant of land under the act of 1891, above referred to, this court, in *Whitney* v. *United States*, 167 U. S. 529, at page 547, said: "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."

Counsel for the petitioner claim that, assuming the burden as above stated, there is a presumption, arising from an inspection of these papers and from a consideration of the other evidence in the case, that there was an approval of the action of the alcalde by the governor, and that the grant was thus made effective. We do not concur in this view, and we are of opinion that the papers themselves show no approval by the governor, and that there is no evidence of other facts or circumstances from which such approval could properly be presumed.

There is no approval to be found upon the papers themselves. This is too plain for argument. The torn portion of the paper following the report of the alcalde has no word of approval thereon. There is part of a sentence which, as translated, means "the boundaries by," and under it is the signature of Melgares, with the exception that the first letter of his name is lacking. This does not and cannot in and of itself constitute an approval in fact, and there must be something more than this torn paper upon which to found a presumption of such approval.

It is, however, urged that the presumption arises from an inspection of all the papers above referred to, aided by a consideration of the other evidence in the case.

We think no such presumption can be indulged in from an inspection of all of the papers in question even when aided by the other evidence.

Such an inspection shows that the alcalde proceeded on his own account to deliver juridical possession of a much larger tract of land than Baca had petitioned for in his petition to the governor. This larger tract the alcalde described in his report to the governor, and submitted his action to the governor for his final approval.

The action of the alcalde is sufficient to prevent a presumption of approval founded solely on an inspection of the papers. The difference between the amount of the land asked for and that delivered by the alcalde is too great to permit of any presumption of approval. There must be some proof of it. We are not aided in making this presumption by a consideration of the other evidence.

Counsel for the petitioner refer to the fact of the possession of these papers by Baca as an important piece of evidence in aid of this presumption. The possession alluded to was proved by one of the grandsons of Baca, who was a witness for the petitioner. He testified that his mother was a daughter of Baca, and that his father was Baca's administrator. The papers of Baca were in the possession of his father as such administrator. His father died somewhere about 1880, and after his death the witness took the box of papers that had belonged, as he said, to his grandfather and kept it. He did not know its contents until he was looking for some papers belonging to his father, when he found what he describes as a part of the grant of a tract to Bartolomé Baca. Witness took the paper to Manuel Antonia Otero, who said: "Let us search for the other part, and I will buy it from you and the other heirs"; and then after a further search the other part was found, and these papers thus found are the ones above set forth.

Upon these facts it is said that it appears that the papers were in possession of Baca, and that they were delivered to him by or on behalf of the governor, and it therefore follows that the grant was approved by him, or otherwise the papers

would not have been delivered. The bare fact of possession of the papers as above stated is all that the evidence shows. There is not one word of proof of any delivery of the papers to Baca, and we cannot see, from the mere fact of possession of the papers under these circumstances, sufficient ground upon which to base a presumption of delivery, and therefore of approval.

We are asked to presume the fact of delivery because the papers were found in the box of papers once belonging to Baca, and we are then further asked to presume an approval because of the presumed delivery. This requires an entirely too free use of presumptions unsupported by evidence tending in the direction of proof of the facts to be presumed. If the papers had contained an approval by the governor, it might perhaps have been admissible to presume a delivery from the fact of possession. It is too much to ask us to presume both facts from the sole fact of the possession of the papers. The other evidence in the case, viewed in connection with these facts, is wholly insufficient to permit of the presumption. It is directed only to the fact of possession of the land by Baca; the character and weight of which evidence will be spoken of hereafter. It is enough to say here that it is insufficient to be used as lending any strength to the presumption of approval which we are at present discussing.

In the condition in which the papers were found, some evidence further than mere possession of them should have been given. The papers were not found together or at the same time. They were torn, and part of the name of the governor had disappeared; they were not of a character to be probably found in the hands of Baca. The proof as to the manner in which Spanish grants were evidenced, as ascertained from an examination of the records in the surveyor general's office in the Territory, is unimportant. The witness was simply unable to give an opinion as to the general custom. Here, however, the papers themselves showed that something other than those papers was to be given the grantee. The papers formed the expediente and belonged in the archives of the government when approved, and they show on their face that

if the government approved, there was to be given in that case a proper testimonio to the petitioner, which it was evidently contemplated should be something other than this expediente. There is no proof of the existence of any such paper or that it was ever given.

Under all these circumstances, some explanation as to the possession of these papers by Baca should have been given, showing they were intended as in place of the testimonio, so that the presumption of a delivery and an approval by reason thereof would not necessarily rest solely upon the fact that the papers without any approval endorsed on the return were found as stated.

Evidence of the delivery of juridical possession of the land to Baca is also referred to as aiding the presumption of the subsequent approval by the governor and the delivery of the papers to Baca, and the further alleged fact of the retention of such possession by Baca up to his death in 1834, is also mentioned for the purpose of strengthening this presumption. The alcalde in fact delivered to Baca juridical possession of much more land than was asked for by Baca in his petition. This fact is attempted to be explained upon the theory that the petition of Baca did not describe in detail the land he asked for, and that the governor in referring the petition to the alcalde directed him to designate the limits, and do what was proper, etc. There is, however, a sufficient description of the land contained in the petition of Baca. It was in regard to that particular land thus described that the acting governor said that "as he asks it according to law," etc., "Don Mora will proceed to give the possession, *designating the limits.*" Was this an authority to Don Mora to designate such limits as might seem good to him, or was it simply an authority to designate those limits which were described in the petition of Baca? We have no doubt it was the latter, and hence when the alcalde made return that he had delivered juridical possession of a much larger tract of land than had been asked for, it would naturally be supposed there might be hesitation and refusal to approve on the part of the governor. Certainly, no presumption of approval would arise from these

facts. Therefore the delivery of juridical possession, as shown in this case, has not the usual importance that is attached thereto when such delivery takes place as the concluding act in a grant of an absolute character. This delivery was concededly conditional, and could have no final effect until the approval by the governor, and this approval must be shown by the petitioner to have been given, and cannot be presumed to follow the delivery of juridical possession.

Actual possession of the land described in the alleged grant for four years by Baca, as found by the court below, is also claimed as an important fact upon which, in addition to the evidence already alluded to, the presumption of approval may properly be sustained. The evidence upon which the finding is based is not substantially contradicted, and it shows that after the delivery of juridical possession by the alcalde, Baca built some small buildings on a portion of the land, for the use of his herders and servants, who occupied them, and who were attending to the business of looking after his horned cattle, sheep and horses, for which Baca wanted pasture. He never himself resided on the land, but subsequently to his taking possession from the alcalde and at different times prior to his death in 1834, other persons, embracing in all a number of families, had come upon Baca's portion of the land, and had dwelt there, without any molestation from him, and probably with his consent, on account of the protection their presence would afford to his interests against the Indians. During the years subsequent to the grant in question there were granted within the boundaries thereof small grants to settlements or towns, which the petitioner says were granted with the assent of Baca and his legal representatives. There is also evidence of some small attempts at cultivation within a narrow range of land contained in the grant, hardly enough to speak of. Some of the witnesses for the petitioner said the place was called Torreon because Baca built a torreon there, and the people gave it that name for that reason. The accuracy of this evidence becomes doubtful, to say the least, when, by referring to the original application of Baca to the acting governor for

the grant, he describes it therein as "a vacant ——— ——— tract called the Torreon, and which extends," etc., as described. Two of the sons of Baca occupied at one time a log house that was built by Baca upon the land, and they occupied it while superintending the herders who were caring for the cattle being pastured in the vicinity. Petitioner's witnesses also said that since 1819 and up to the death of Baca, he was recognized as the owner of the property, and after his death the property was recognized and respected as that of Baca.

Who were the persons thus recognizing ownership is not stated, whether servants and agents of Baca, or independent third persons. Some of the witnesses making these statements were wholly ignorant, as they said, of the fact that grants of portions of this land had been made by the Mexican government as vacant and unoccupied lands. Subsequently to the date of 1819 such conveyances were in fact made; and whether the title conveyed by them was good or bad, it appears conclusively that the Mexican government, during the time when this possession of Baca is claimed to have been in existence, regarded the tract as vacant and unoccupied so far as to permit of its conveyance to others of various portions of the land now claimed. Another witness thought that Baca occupied about three hundred varas in width from east to west and from north to south, but he was ignorant as to the boundaries of the grant, although so far as he knew Baca claimed no more than three hundred varas, and this was under some cultivation for a distance of about one hundred varas from north to south, and this was as late as 1829 or 1830. Other persons during this time came in and made application to the judge of first instance, as witness remembered, for other portions of land embraced in this alleged grant, on the theory that such portions were vacant and unoccupied.

This in substance is the evidence of possession, and it cannot, as we think, at all strengthen the presumption of an approval of the grant and a possession in accordance with it.

Nor do we think there is any evidence upon which to base a claim of adverse possession of this land as of right or under

some claim of title. There is no evidence showing a possession exclusive in its nature and founded upon a claim of right to the land so possessed. If there had been evidence of an approval of the grant, the delivery of juridical possession, as stated in the return of the alcalde, might be sufficient evidence of title at one time to the whole land, yet, in the absence of such evidence of approval, we are of opinion that the actual possession, as proved, was totally insufficient to support a claim of title to this immense tract of land; nor is it sufficient to support a presumption that the acting governor did approve the grant and that what appears upon the torn expediente is in reality part of his written approval thereof. The recognition of the property as belonging to Baca was very probably a recognition of the occupancy by him of the three hundred varas above alluded to, and is surely not definite enough to base a claim that the possession of this large amount of land by Baca was either notorious or in any degree exclusive, or that any portion of it was ever used by him for any purpose other than the pasturing of his cattle, sheep and horses, and purposes connected therewith, but in no way exclusive of other persons.

In regard to proof of the fact of pasturing cattle as evidence of an adverse possession upon which to base a claim of title, we have held that such fact is of very slight weight when applied to cases arising under alleged grants of land of the nature of the one under consideration. In the case of *Whitney* v. *United States*, already above cited, 167 U. S. 529, 546, this court said, speaking through Mr. Justice Brown, as follows:

"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 of 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 the 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."

These remarks apply with great force to this case, so far as the evidence herein goes to show actual possession by reason of the pasturing of stock, which is really all the evidence of possession the case affords. It is entirely lacking in evidence of an *exclusive* possession under a claim of right, and the testimony is consistent with a mere occupancy of but a small portion of the land by Baca and his servants for purposes of pasturage, and without claim of further or exclusive right or title.

There is another fact that we think bears with a good deal of force upon the question whether there ever was an approval by the governor and, as connected therewith, whether Baca himself ever thought that he had or claimed to have any title to or property in the land described in his petition or in the report of the alcalde, and that fact is that he makes no mention whatever of this property in his will, and does not in

that instrument claim to have any title to or interest in the same. The will was put in evidence only for the purpose of showing the written declarations of Baca as to his ownership of property and his omission to name the property in question, and we think it sufficiently proved for that purpose.

The failure to enumerate in his will a particular piece of property owned by a testator would, in ordinary cases, be of not the slightest significance. But a perusal of the will under examination shows, as we think quite plainly, that the testator was in effect marshalling his assets and mentioning in the instrument all his property and making specific dispositions thereof. He speaks in great detail of his different pieces of property, both real and personal. The paper cannot be read without giving the impression that the testator was naming therein every piece of real property which he claimed to own. A reading of the will is the most satisfactory and the best proof of the correctness of this statement, and the instrument, with the exception of the formal parts, is therefore given in full in the margin.[1]

---

[1] WILL OF BARTOLOMÉ BACA.

First, I commend my soul to God, our Lord, who from nothing created it, and my body to the earth from which it was made, which when a corpse, I direct be shrouded in the habit of our seraphic father, San Francisco, and to be buried in the church of the Pure and Spotless Concepcion de Tome.

It is my will that my burial be humble and with mass with the body present. I also declare that I am lawfully married, in *facie ecclesiæ*, to Dona Maria de la Luz Chaves, from which marriage we have had and have, as our legitimate children, Maria Rita, Manuela Antonia, Maria Manuela, Juan, Manuel and Maria Lugarda. I also declare as my property the house where I live, containing seventeen serviceable and three unserviceable rooms, with a chapel where the holy sacrifice of private mass is celebrated, adorned with thirty-five images in sculpture and pictures, a pulpit, twenty-four mirrors, a censer with its boot of silver, five chasubles with their corresponding accessories, two capes, two albes, two sashes, six altar draperies, two missals, one chalice with its accessories, two cruetes with their salvers, eight metal candlesticks, and its vestry with a chest in which the ornaments are kept. I also declare as my property the utensils of my house, consisting of eight mirrors, eleven silver plates, twelve spoons, and eight forks also of silver, three copper kettles, two large chests, four carts with trappings, five trunks, three hampers, one silver vase and a tankard of the same, one wardrobe, one carriage, four serviceable and three

After reading the will the inference is, as we think, irresistible, that Baca did not suppose he owned, and made no claim to own, the property in question here. If he had owned it or

---

unserviceable wagons, one flask case with twelve flasks, eight hoes, three axes, two adzes, three bars of iron, two American saws, one thousand six hundred dollars in money, one copper boiler. I also declare as my property nine small houses in this place of San Fernando, four small houses at El Cerro, the farming land I have at this place and at El Cerro, with the purchase I have in this said sitio, which is coterminous with the sitio of Valencia. I also declare as my property a house I have in the sitio of the Peraltas, a broken field, and an interest in the

[Good for seal third for the years 1833 and '34. Rubric.]

said sitio. I also declare as my property a house and lands in the sitio of the Aragons, and interest in said sitio which I bought of the late José Aragon.

I also declare as my property a ranch which I bought of Don Luciano Garcia on the other side, in front of Bernalillo, which consists of a house and lands, the value of which is one thousand dollars, which I gave for it. I also declare as my property two ranches in the sitio of Tome, with its houses, which I purchased of José Manual Apodaca and Andres Mirabal, and two large fields purchased of Felipe Montoya. I also declare as my property two fields and an interest in the sitio of Las Enlames, which I purchased of the late Antonio José Baca. I also declare as my property that which I have in a room in my house set apart as a store, and in which there are forty-five pieces of calico, domestic and muslin. I also declare as my property two houses I have in La Joya de Sevilleta, together with their share of lands in the sitio. I also declare as my property a house I have in the village of El Paso del Rio del Norte, with its vineyard and corresponding land, as appears from the document executed for me and which is in my possession. I also declare as my property the land I have in the sitio of Sansal, which Juan Antonio Baca paid me and which was received by Tomas Sanchez. I also declare as my property the broken lands I have in the sitio of Mansano and my interest therein, together with the will under the management of José Antonio Torres. I also declare as my property a mill I have in this place of San Fernando. I also declare as my property four hundred and fifty head of cattle from the brand up, seven thousand head of small stock, eight hundred ewes of mine which Don Francisco Ortiz has on shares, one thousand ewes which Gonzalez, who resides at Seboyeta, has on shares. I also declare as my property forty broken mules, a little more or less, twenty-four aparejos, with accessories, one hundred horses between unbroken and broken, twenty-four young mules one and two years old, two asses. I also declare th't Don Mateo Sandoval owes me

[Good for seal third for the years 1833 and '34. Rubric.]

four hundred and thirty dollars in money, which I order collected. I also

claimed to own it, there can be no doubt it would have been mentioned in the will. A grant containing at the lowest estimate half a million acres of land would be much too large

---

declare that, according to the cash book in my use and the obligations that have been made to me, collections be made of all the individuals who owe me and are not credited on their accounts and obligations. I also declare that I owe the house of the late Francisco Chaves four thousand and odd dollars in money and five thousand ewes I had from said house on shares. I order that it be paid. I also declare that I owe as tithes at El Paso del Norte four thousand dollars. This is being paid, and what is found not to have been paid, I order that it be paid. I also declare that I owe to Don Santiago Arichavala for one thousand two hundred sheep. I order that they be paid for. I also declare that I owe Don Rafael Ortiz for six hundred sheep for the year eighteen hundred and thirty-four. I order that they be paid for. I also declare that I owe my stepson José Luna, for five hundred sheep. I also declare that Don Ricardo Ester owes me four thousand five hundred dollars. I order that it be collected. I also declare that Don Ignacio de la Campa, who lives in Sonora, owes me one thousand five hundred and fifty-six dollars, two reals. I order that it be collected. I also declare that Don Alexandro Legren owes me four hundred dollars, two hundred of which appear in an obligation he executed for me, and for the other two hundred he made no obligation. I order that it be collected. I also declare as my property a tract of land in the sitio of Lunas, which Antonio José Padilla paid me. I also declare that Ruybali de Savinal owes me for three hundred ewes. I order that it be collected. I also declare that Vicente Provencio, who resides at Oposura, in the State of Sonora, owes me five hundred dollars in money. I order that it be collected. I also declare that all the servants of my house, according to their accounts, are obligated to earn them in the house, even to the last real, and he who does not wish to serve shall pay in full. I also declare as my property forty she goats, which are in the possession of Gertrudis Montoya, who resides in Belen. I also declare as my property one iron cot and two bells.

[Good for seal third for the years 1833 and '34. Rubric.]

I also declare as my property a cross with its iron weather vane, which is used on the belfry. I also declare that I leave to my wife, Dona Maria de la Luz Chaves, my dwelling and all the household furniture within the doors thereof, it being observed that I have given houses to all my children; to Manuelita the house I have in Santa Fé, with its corresponding land, and to all the others I have also given houses in this place of San Fernando, with their respective lands. I also declare that I leave to my wife, Maria de la Luz Chaves, the land enclosed by a wall I have in this place and orchard.

In order to carry out all the wishes this will contains and which the codicil will contain, in case I leave one, I appoint as my executor, in the first place, my wife, Maria de la Luz Chaves; in the second, Don Jacinto Sanches,

for the testator to have overlooked or ignored in a declaration of ownership of property such as is contained in this will.

We should infer from this omission that Baca knew he did not own the land and was aware of the fact that the action of the alcalde had never been approved by the governor.

From the fact of Baca's omission to name this land as his property we must infer that such actual possession as he had taken of a small portion of this land never led him to suppose that he was the owner of it or that he had any title to it.

It was in fact an occupation of a comparatively small piece of the land in question, for the purpose of pasturage, but in no way exclusive in its nature and under no claim of right or title. Hence the omission of Baca to mention the land as his property or to refer to it in any way.

The action of the Mexican government in making grants to third parties of certain portions of these lands, as vacant and unoccupied lands, is also of some importance. The grants were made at times which were long subsequent to the petition of Baca and the making of the return of the alcalde, and were made after an official examination of the lands then granted and a certificate that they were vacant.

We express no opinion as to the validity of these grants, and we allude to the subject only for the purpose of pointing out how the facts appeared to the Mexican officials, who, at

---

and in the third, Don Enrique Luna, and each one *in solidum*, and I give them ample power to take possession of my property as soon as I die and to pay all I owe, and that their collection be lawful and real, and that they make it with the legality their good conscience may indicate to them, which charge shall continue for the legal year and as much more time as they may need, since I extend it. And after it is completed and everything is paid, in the sale of my property, furniture, real property, rights and shares, present and future, I constitute as my sole and universal heirs my wife, Dona Maria de la Luz Chaves, and my said children, Maria Rita, Manuela Antonia, Maria Manuela, Juan Clemente, Manuel, and Maria Lugarda, who, after paying all I owe (except what I have given them), shall make a lump of what is left, the half for my said wife and the other half to be shared in equal parts by my children that they may enjoy it with the blessing of God and my own. And by these presents I revoke and cancel the wills and other testamentary provisions I may have made heretofore.

that time, were engaged in an investigation of the question of occupancy, and who reported the lands mentioned in the respective grants as vacant and unoccupied, which we may assume they would scarcely have done had Baca or his heirs then been in the actual possession and occupation of those very lands.

We have now referred to the substance of all the evidence contained in this record and we are compelled to conclude that the petitioner has failed to make out a title of any kind to the land in question. While the court below failed to give judgment to the petitioner for the full amount of her claim, yet it did give her judgment for the amount already stated of eleven square leagues of land. The court found that the grant was an imperfect grant at the time of the cession of the territory to the United States.

In our view of the case no grant, perfect or imperfect, was in existence at that time, and hence the finding of the court that the petitioner was entitled to a confirmation of eleven square leagues within the limits of the outboundaries of the tract, cannot be sustained.

The act creating the Court of Private Land Claims (above cited) provides in the first subdivision of section 13 for the confirmation of imperfect grants.

This court has construed the language there used to mean "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." *Ainsa* v. *United States*, 161 U. S. 208, 223.

The same construction was upheld in *United States* v. *Santa Fé*, 165 U. S. 675, 714, and it is again approved in *United States* v. *Sandoval*, 167 U. S. 278, 293. After a full consideration of the case we must hold there is not sufficient evidence to show that at the time of the cession of the Territory of New Mexico to the United States the predecessors or grantors of the petitioner had any title of any kind whatever, perfect or imperfect, to the land described in the petition herein, and,

consequently, there could be no confirmation of any alleged imperfect title or grant.

The judgment of the Court of Private Land Claims must, therefore, be reversed on the appeal of the United States, and the record remanded to that court, with directions to enter judgment in conformity with this opinion.

ALASKA MINING COMPANY *v.* WHELAN.

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

No. 33. Submitted March 17, 1897. — Decided October 18, 1897.

Where the business of a mining corporation is under the control of a general manager, and is divided into three departments of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men.

This was an action brought in the District Court of the United States for the District of Alaska against a mining corporation by a workman in its employ. The complaint alleged that "on November 23, 1891, and for nearly six months prior thereto, this plaintiff was in the employ of said defendant, as a workman in the mine of said defendant, in breaking and preparing rock for the chutes, and doing other work as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders; that on November 23, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company; that in compliance with the orders of the foreman of said

Statement of the Case.

defendant, and as became his duty so to do, the plaintiff proceeded to his place immediately above and over said chute, and commenced to break said rock as he had been ordered so to do; and that while so engaged, and carefully and skilfully and without negligence performing his duties as aforesaid, and without the knowledge of this plaintiff, and carelessly and negligently, the foreman of said defendant drew or caused to be drawn the gate at the mouth of said chute over which this plaintiff was working, thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance about thirty feet, and completely covering him with great quantities of rock and debris," thereby greatly injuring him.

At the trial, the plaintiff being called as a witness in his own behalf, gave evidence tending to support the allegations in the complaint; and testified that on the night of November 23, 1891, he was sent by Samuel Finley, the boss in the pit, to the top of a chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled and orders given to draw it; that Finley's custom was to come upon the top of the chute to see if the rock was broken fine enough, and, if it was all right, to tell the men to come down as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw.

Finley, being called as a witness for the defendant, testified that he did give notice to the men before drawing the chute. The defendant introduced evidence, which was uncontradicted that its business was under the control of a general manager, and was divided into three departments, the mine, the mill and the chlorination works, each of which departments had a foreman or superintendent under the general manager; that the mine department had three shifts or gangs of workmen, two by day and one at night; and that Finley was boss of the one at night.

There was conflicting evidence upon the question whether Finley had authority to engage and discharge the workmen under him.

No other material testimony was introduced as to the relation of the plaintiff and Finley to each other or to the defendant.

At the close of the whole evidence, the defendant requested the court to direct the jury to return a verdict for the defendant, upon the ground that the plaintiff's injuries were the result of the negligence of a co-employé, or fellow-workman, Samuel Finley, for which the defendant was not liable. The court overruled the motion, and the defendant excepted to the ruling.

The court afterwards instructed the jury as follows: "The true test is whether the person in question is employed to do any of the duties of the master; if so, he cannot be regarded as the fellow-servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master. You have heard the testimony as to Finley's authority and duties, and whether or not he had any power to employ men or discharge them, or whether he simply acted under another man who had the same power over him that was exercised over other laborers."

The jury returned a verdict for the plaintiff, and judgment was rendered thereon, and affirmed by the Circuit Court of Appeals. 29 U. S. App. 1. The defendant sued out this writ of error.

Mr. T. Z. Blakeman for plaintiff in error.

Mr. Oscar Foote for defendant in error.

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

The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to sup-

port a verdict for him; and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow-servant of the plaintiff, should have been granted.

Finley was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow-servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men.

The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one. *Central Railroad* v. *Keegan*, 160 U. S. 259; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359; *Same* v. *Peterson*, 162 U. S. 346; *Martin* v. *Atchison &c. Railroad*, 166 U. S. 399. See also *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.

This ground being decisive of the case, no opinion need be expressed upon other questions argued at the bar.

Judgments of the Circuit Court of Appeals and of the District Court reversed, and case remanded to the District Court with directions to set aside the verdict and to order a new trial.

The Chief Justice and Mr. Justice Harlan dissented.

TURNER *v.* NEW YORK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 41. Argued April 19, 20, 1897. — Decided October 18, 1897.

The statute of New York of 1885, c. 448, providing that deeds from the comptroller of the State of lands in the forest preserve sold for nonpayment of taxes shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitations, and does not deprive the former owner of such lands of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

This was an action of replevin, brought April 11, 1887, in behalf of the State of New York by the forest commissioners of the State against Turner, in the Supreme Court of the county of Franklin and State of New York, to recover a quantity of logs cut by him upon lands in that county and within the forest preserve of the State, between September 1, 1886, and March 25, 1887. The answer denied the allegations of the complaint, and alleged that at the time mentioned therein the defendant was the owner and in possession of the lands.

The material facts of the case, as found by a referee, were as follows: On October 12, 1877, the lands, being then owned by one Norton, were sold by the comptroller of the State of New York for unpaid taxes of the years from 1866 to 1870 inclusive, and were bid in by the comptroller in behalf of the State, and conveyed by him to the State by deed dated June 9, 1881, and recorded June 8, 1882. The defendant, more than nine years after that sale, acquired Norton's title in the land. The land was wild forest land, uncultivated, unimproved, unenclosed, and with no dwelling house or other building thereon. Neither the State nor any officer thereof ever took actual possession of the land; and no part of it was in occupancy of any person on October 12, 1879, when the

period of two years allowed by law for redemption from the comptroller's sale expired.

At the trial before the referee, the defendant, in order to prove the invalidity of the comptroller's deed by reason of illegality in the assessment of the taxes for the years 1867 and 1870, offered to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the third Tuesday of August; and that the assessors omitted to meet on the third Tuesday of August, 1870, to review their assessments for that year.

The plaintiff objected to the evidence as immaterial, because the comptroller's deed was made conclusive evidence of those matters by the statute of New York of 1885, c. 448, which is copied in the margin.[1] The defendant contended that this

---

[1] An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes."

SECT. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller; and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto; and all other conveyances or certificates, heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of

statute was invalid as contrary to the first section of the Fourteenth Article of Amendment to the Constitution of the United States. But the referee sustained the plaintiff's objection to the evidence, and directed judgment for the plaintiff, which was accordingly rendered by the court, and affirmed by the Court of Appeals. 145 N. Y. 451. The defendant sued out this writ of error.

Mr. Frank E. Smith for plaintiff in error. *Mr. Thomas F. Conway* was on his brief.

Mr. T. E. Hancock, Attorney General of the State of New York, and *Mr. William Henry Dennis* for defendant in error.

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

On May 15, 1885, the legislature of New York, by the statute of 1885, c. 283, declared that all the lands then owned or thereafter acquired by the State of New York within certain counties (one of which was Franklin county) should constitute and be known as the forest preserve; and established a forest commission of three persons, styled forest commissioners, to "have the care, custody, control and superintendence of the

---

two years from the date of recording such other conveyances, or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Sect. 2. The provisions of this act are hereby made applicable only to the following counties, viz. Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

Sect. 3. This act shall take effect immediately.

forest preserve," and "to maintain and protect the forests now in the forest preserve, and to promote as far as practicable the further growth of forests thereon;" and authorized them to appoint a warden and other officers, and to exercise various powers to carry out its object.

At the date of the passage of that statute, the time allowed by law for the redemption of lands from sale by the comptroller for non-payment of taxes was two years from the time of sale. New York Stat. 1855, c. 427, § 50.

On June 9, 1885, the legislature of the State passed the statute of 1885, c. 448, to take immediate effect, which provided that all conveyances, thereafter executed by the comptroller, of lands, in the same counties, sold by him for non-payment of taxes and having been recorded for two years in the clerk's office of the county in which the lands lay, should, "six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular" and as required by law; but that all such conveyances and the taxes and tax sales on which they were based, should "be subject to cancellation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

The land now in question was sold by the comptroller to the State October 12, 1877; the time allowed by law for redeeming the land from that sale expired October 12, 1879; the comptroller's deed to the State was made June 9, 1881, and recorded June 8, 1882. It had therefore been on record for three years when the statute of June 9, 1885, was passed and took effect; and by the terms of this statute, on December 9, 1885, the comptroller's deed became conclusive evidence that there was no irregularity in the assessment of any of the taxes for non-payment of which the land had been sold and

conveyed to the State. This action was brought April 11, 1887.

The statute, according to its principal intent and effect, and as construed by the Court of Appeals of the State, was a statute of limitations. *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 451. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632, 633; *In re Brown*, 135 U. S. 701, 705–707.

The statute now in question relates to land sold and conveyed to the State for non-payment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded; and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale, and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the State in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States.

It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights, even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months, he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the Court of Appeals in the case at bar, and in the subsequent case of *People* v. *Roberts*, 151 N. Y. 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct appli-

cation to the comptroller to cancel the sale, or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws.

It was also argued that the plaintiff in error was in possession of the land and could not be put to his action. But the decision below that he was not in possession involved no Federal question, or any other question of law, but a mere inference of fact from the evidence, which this court is not authorized to review on writ of error. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188.

Judgment affirmed.

UNITED STATES *v.* GOLDENBERG.

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

No. 85. Argued and submitted October 14, 1897. — Decided October 25, 1897.

Where imported foreign goods are entered at a custom house for consumption, the payment by the importer of the full amount of duties ascertained to be due upon the liquidation of the entry of the merchandise, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, is not necessary in order to enable a protesting importer to have the exaction and classification reviewed by a board of general appraisers and by the courts, under the provision in section 14 of the act of June 10, 1890, c. 407, 26 Stat. 131, 137, "That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or pay-

ment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used; and the cases are few and exceptional in which the letter of the statute is not deemed controlling, and only arise when there are cogent reasons for believing that the letter does not fully justify and accurately disclose the intent.

The 14th section of the act of Congress, approved June 10, 1890, c. 407, 26 Stat. 131, 137, is as follows:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port, or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such who shall liquidate the entry accord-

ingly, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in section fifteen of this act."

Upon this section, after stating the facts of this case showing its pertinency, the Circuit Court of Appeals of the Second Circuit has certified to us the following question:

"Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise, required to be made by the importers, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, where the goods, as in the present case, were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the board of general appraisers and by the courts?"

Mr. Attorney General, for the United States, submitted upon the brief filed April 1, 1897, by *Mr. Edward B. Whitney, then Assistant Attorney General.*

Upon the present record the point appears very technical. The importer failed by but a single day to pay his dues within the time limited. Such accidents are rare and due to the importer's own carelessness or that of his agents. The question is an important one, however, because under the importers' construction of the statute they may and sometimes do indefinitely postpone a review of the collector's decision by simply refusing to pay the duties.

The practice was stated as follows by the Secretary of the Treasury to Attorney General Miller. "The practical result of this ruling is an accumulation in the custom houses of large numbers of protests, which may be made for speculative purposes, and which are not promptly transmitted to the Board of General Appraisers because of the failure of the importers to pay the increased duties against the exaction of which they file their protest. The importers are thus enabled to take the initiatory step in suits for recovery of duties, full payment of which has not been made, and delay indefinitely

the decision by the General Appraisers of the question raised by the protest, with a view of taking advantage of decisions which may hereafter be made in other cases, thereby defeating one of the chief purposes of the administrative act, which was to secure the prompt disposition of questions arising under the tariff laws and discourage the filing of mere speculative protests."

Attorney General Miller therefore states the question as follows: "Whether the payment of duties thereby required must, like the protest, be made within ten days after liquidation, or, to state the question differently, whether Congress intended to favor the importer, by permitting him not only to have possession of his goods, but to keep the Government out of its revenue at pleasure, or, certainly, until judgment could be recovered against him in a plenary suit outside the statute of June 10, 1890; for it is precisely this advantage that is given the importer by the decision of the Board of General Appraisers of November 26, 1890, as the obstructive practice complained of shows."

A literal interpretation of the statute favors the importers. This is due to the repetition of the word "shall" before the words "pay the full amount of the duties." If this second "shall" were omitted, the literal interpretation of the statute would favor the Government contention.

The consequences of a literal interpretation of the statute are so remarkable that even Judge Townsend, in sustaining the importers' contention in the present case, does not adhere to it. He in effect inserts after the second "shall" the ambiguous words "within a reasonable time."

The Government contends that the second "shall" was inadvertently used and should be disregarded.

The general principles of construction applicable to this case are familiar. Revenue laws, like other laws, "should be so construed as to carry out the intention of the legislature in passing them." *Cliquot's Champagne*, 3 Wall. 114, 145; *United States* v. *Stowell*, 133 U. S. 1, 12. If, therefore, the wording of a clause is such as clearly to indicate that it requires correction in order to effectuate the intent of the

legislature, the correction will be made either by striking out a word which has inadvertently crept in, or substituting one word for another. *Union Ins. Co.* v. *United States*, 6 Wall. 759, 764. A recent instance of the rule that the intent governs the letter is to be found in *McKee* v. *United States*, 164 U. S. 287.

These cases are especially applicable when, as here, the sentence to be construed is long and involved, so that an error might easily creep in and remain unnoticed; and still more, when the sentence bears indubitable evidence of carelessness of construction. The quotation marks about the words "but not before" in this sentence show that it was never revised by a skilful hand. Such errors of style as the repetition of this word "shall" at the wrong place are common, and are much less likely to catch or offend the eye than these sporadic quotation marks.

Strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity. As, however, it contains the strongest evidence of unskilful construction, the court is at liberty to correct a plain mistake if it is impossible to reconcile the literal interpretation of the statute with its clear intent.

The statute makes a distinction between merchandise entered in bond and merchandise entered for consumption. The former words are equivalent to merchandise entered for warehouse. Since 1846 imported merchandise (regularly entered) has been classified into merchandise entered for consumption and merchandise entered for warehouse. The provisionally estimated duties upon the former class of merchandise must be paid before the importer can get possession of his property. Duties upon the latter class are payable at any time within three years at the importer's option. The history of this system is set forth in *Barney* v. *Rickard*, 157 U. S. 352, and the system still exists.

The reason for omitting the requirement of payment in the case of merchandise entered for warehouse is clear. If the requirement were extended to that class of merchandise, it would prevent any settlement of the legal questions involved

until the importer was ready to withdraw his goods from warehouse; or it would require him to pay the duties while the goods were still in warehouse, and thus destroy the advantages of the warehouse system.

On the other hand, it is clear that the requirement is unnecessary as to the estimated duties which the importer must pay in order to get possession of goods which are entered for consumption.

The importance of the question is in relation to duties upon goods which have gone into the possession of the importer upon payment of the amount estimated by the collector at the time of the original entry, which estimate is thereafter found to have been too low. This class of importations contains a considerable proportion of those which are accompanied by fraud. The provisional estimate of duties is of course usually based upon the statements in the invoice. When the collector finds upon the final estimate or so called "liquidation" of the duties that his estimate was too low, the goods have passed into the importer's hands, and the Government's sole remedy is by suit. Instances of such suits are to be found in *United States* v. *Schlesinger*, 120 U. S. 109, and *Patton* v. *United States*, 159 U. S. 500.

What is the effect of a literal interpretation upon such entries?

The finality of the collector's decision is destroyed by filing the protest. Until decision by the Board of General Appraisers, it remains open to review. No decision from the Board of Appraisers can be obtained until the importer pays the full amount of the duties and charges. The importer thus has it in his power to postpone indefinitely or forever any decision of these questions under the Customs Administrative Act. Meanwhile the Government may sue him; but the questions of fact, being undecided by the proper tribunal, will have to be submitted to a jury. The dutiable valuation of the goods is, indeed, already settled under § 13 of the act (replacing § 2930 of the Revised Statutes), but many questions of fact may remain open, such as "the controlling use of the article in question; or its similitude to some other article; or

the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation." *Sonn* v. *Magone*, 159 U. S. 417, 422.

These questions of fact, together with the questions of law involved, must be submitted to the Board of Appraisers if the importer so elect, by paying the duties and charges. Otherwise they go to the court and jury. Is there any reason why the importer should be given such a right of election? Is it consonant with the intent and purpose of the Customs Administrative Act, as shown either by its well known history or by its internal evidence? Was it not the main purpose of the act to provide a special tribunal for the trial of all such questions of fact and law, and withdraw all questions of tariff interpretation from juries?

That this cannot be the true construction of the statute is recognized by Judge Townsend, who, therefore, instead of striking out the second "shall," inserts thereafter the words "within a reasonable time." But does this interfere any less with the letter of the statute than does the simple emendation which we suggest? Does it not rather import into it an altogether unworkable condition? Who is to decide whether the payment was made within a reasonable time? The collector, by transmitting or withholding the papers? Is he an officer who is likely to be charged by Congress with the decision of such a question as reasonableness of time? Yet his decision, if he shall see fit to withhold the papers, is final and conclusive. It cannot be controlled by a writ of mandamus outside of the District of Columbia. *McIntire* v. *Wood*, 7 Cranch, 504; *M'Clung* v. *Silliman*, 6 Wheat. 598. Nor even in the District of Columbia can the courts interfere, either by mandamus or by mandatory injunction, with the decision of an executive officer upon a question involving the exercise of discretion. *Decatur* v. *Paulding*, 14 Pet. 497; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Redfield* v. *Windom*, 137 U. S. 636; *International Contracting Co.* v. *Lamont*, 155 U. S. 303.

Yet, if reasonableness of time is the test, it must be the

collector who is to decide it. It cannot be intended that his ruling should be reviewed upon a jury trial afterwards.

The learned District Judge, in attempting to escape from the manifest impossibility of a literal interpretation of this statute, fell into another untenable position. It is impossible to believe that Congress intended to give the importer a choice of forum while denying that privilege to the United States. It is almost as hard to believe that Congress intended to make the right of review when the payment is not made within ten days dependent upon the permission of the collector, or even of his superior, the Secretary of the Treasury.

If, however, this court shall adopt Judge Townsend's theory, and thus in effect give the Secretary of the Treasury the right to impose a limit by general regulation upon the time within which the importer may obtain a review in such cases, the decision in the case at bar will avoid all evils.

Mr. Edwin B. Smith for appellees.

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

The question must be answered in the negative. Such answer is demanded by the obvious and natural import of the language, giving to it the ordinary grammatical construction. This is practically conceded by counsel for the Government, for he says in his brief "a literal interpretation of the statute favors the importers"; and again, referring to the opinion of District Judge Townsend, he adds, "strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity." There are two separate clauses, each prescribing a condition. One is, "shall within ten days after 'but not before' . . . give notice," etc., and the other, "shall pay the full amount of the duties," etc. In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other.

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the lan-

guage that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; *Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall. 482; *McKee* v. *United States*, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally with protest follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them. Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition.

An answer in the negative must be certified to the Circuit Court of Appeals.

COMPANIA DE NAVIGACION LA FLECHA *v.* BRAUER.

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

No. 39. Argued March 29, 30, 1897. — Decided October 28, 1897.

A contract, made at New York to carry cattle on deck of a steamboat from New York to Liverpool, contained these provisions: "On deck at owner's risk, steamer not to be held accountable for accident to, or mortality of, the animals, from whatever cause arising." "The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" "by barratry of the master or crew;" "by collisions, stranding or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner." *Held*, that by the terms of this contract, whether governed by the law of this country or by the law of England, the carrier was not exempted from responsibility for the loss of sound cattle, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea.

THIS was a libel in admiralty in the District Court of the United States for the Southern District of New York by William W. Brauer and Frederick C. Brauer, residing and doing business as partners under the name of William W. Brauer & Company at Richmond in the State of Virginia, and by the Reliance Marine Insurance Company, Limited, of Liverpool, a corporation organized under the laws of Great Britain, against the Compania de Navigacion la Flecha, a corporation organized under the laws of Spain, and owner of the steamship Hugo, to recover for the loss of cattle shipped by the partnership October 24, 1891, on deck of the Hugo at New York for Liverpool under a bill of lading, the material parts of which are copied in the margin, the parts there

printed in ordinary type being in print, and those in italics being in writing, in the original.[1]

The libel alleged that the vessel, having one hundred and

---

[1] Received in apparent good order and condition, by the *Spanish steamer Hugo*, from *Wm. W. Brauer & Co.*, to be transported by the good steamship *Hugo*, now lying in the port of New York, and bound for *Liverpool*, *one hundred and sixty-five live cattle on deck. On deck at owner's risk, steamer not to be held accountable for accident to, or mortality of, the animals, from whatever cause arising;* being marked and numbered as per margin (weight, quality, contents and value unknown), and to be delivered in like good order and condition at the port of *Liverpool* (or so near thereto as she may safely get) unto *shippers' order* or to his or their assigns. *Freight prepaid in New York.* General average payable according to York-Antwerp rules.

It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause and wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest and restraint of princes, rulers or people, riots, strikes or stoppage of labor; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull or machinery, or appurtenances; by collisions, stranding, or other accidents of navigation, of whatsoever kind, (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager); nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, or numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

* * * * * * *

14. Also, that this contract shall be governed by British law, with reference to which law this contract is made.

And, finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written

sixty-five head of live cattle on board, sailed for the port of Liverpool on October 24, 1891; that "about October 31, 1891, the said vessel having encountered some rough weather, the master and crew of said vessel became panic stricken, and drove overboard one hundred and twenty-six head of cattle; the said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew;" that the vessel afterwards arrived safely at Liverpool, and delivered to the shippers or their agents thirty-eight of the cattle in good condition, one having died; and that the insurance company, having insured the cattle, paid the partnership for the loss, and took an assignment of its rights of action against the steamer and her owners.

The answer alleged that the receipt, transportation and delivery of the cattle were subject to the terms and conditions of a contract between the shippers and the respondents, dated October 10, 1891, (which is copied in the margin,[1]) and of the

---

or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

[1] White Star Line. Cattle contract — Memorandum of agreement concluded at New York the tenth day of October, 1891, between H. Maitland Kersey, agent of the Spanish steamer Hugo, and Messrs. William H. Brauer & Co., of Richmond, Virginia.

The agent agrees to let to the said shipper suitable space, as undernoted, for the transportation of live cattle; this is to say:

On the steamer Hugo, intended to sail from New York about Oct. 24th, 1891, for Liverpool, England.

For about one hundred sixty live cattle on the upper deck.

No other cattle to be carried this voyage.

The shipper agrees to ship all the cattle, as above mentioned, at the rate of fifty shillings, British sterling, for each animal shipped on open decks.

The shipper especially agrees to prepay freight on the above mentioned shipments on date of sailing, in current funds at the rate for which prime bankers are selling sight bills on London, on the number of cattle shipped at New York, vessel lost or not lost, and irrespective of the number landed at the port of destination, and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

bill of lading; admitted the sailing of the vessel with the cattle on board, and a loss of the cattle; denied the other allegations of the libel; and contained the following averments:

Stalls to be put up at ship's expense, and to be constructed to the satisfaction of the inspector or underwriters interested, and to the satisfaction of shipper, who will assume all responsibility for same, and for the various appliances for ventilation after shipment of cattle.

The steamer undertakes to supply sufficient good condensed or fresh water for the use of the animals during the voyage; also, water casks and hose.

Steamer to provide space, free of charge, for corn and strictly compressed fodder for animals, but freight, if demanded, shall be payable on any unusual excess of fodder landed at port of destination. If fodder be supplied that is not strictly compressed, a proportionate quantity may be carried on deck.

Steamer to supply suitable gangways and elevators for loading cattle.

Steamer to give free passage, over and back, and to supply bedding to drovers in charge of animals, (not exceeding one man to every thirty cattle,) and if not returning direct to port of sailing, to provide free intermediate passage back for foreman, and free steerage passage back for other attendants, by first available steamer of this line.

Steamer to give six running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be delivered to her, but such notices to be given or received are subject to become inoperative in case of strike or stoppage of labor.

Steamer guarantees to sail as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at the rate of 50c. per head per day in full.

Steamer has privilege of exceeding her net register tonnage in grain, upon payment to shippers the extra premium charged by the underwriters with whom the animals are insured.

Shippers to deliver the cattle to the vessel between sunrise and sunset, at the dock or in the stream, at their option.

Shippers guarantee to deliver animals by expiry of notice, provided vessel is ready for them, or to pay for detention of steamer at the rate of £50 per day.

In case of non-arrival of vessel in time to sail from New York on or before November 4, 1891, shipper has option of cancellation.

The line form of live stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein, subject to U. S. Government inspection.

Any dispute arising under this contract to be settled by arbitration in the usual way.

Dated New York, October 10th, 1891.

H. Maitland Kersey.
Wm. W. Brauer & Co.

Statement of the Case.

"Further answering the said libel, the respondent avers that by the terms and conditions of the contract and bill of lading, under which the said cattle were received for transportation and delivery, it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the master, mariners or other servants of the shipowner, and that the cattle were carried on deck at the owner's risk, and under a special provision that the steamer should not be held accountable for accident to or mortality of the animals from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the law as administered in the courts of Great Britain, with reference to which law the contract was stated to be and was made.

"And the respondent avers that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle-houses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard, and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways, they were washed over by the seas."

"And the respondent avers that the care given to said cattle was according to the best judgment of the master of said steamer, and that, if he erred in his judgment or was in any degree negligent, which the respondent denies, still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners or other servants of the respondent."

It was stipulated by counsel "that the English judicial

decisions, as contained in the printed decisions of the law or admiralty courts, may be referred to by either party as evidence of the English common or maritime law as administered in the English courts."

The conclusions of fact of the District Judge were summed up in his opinion as follows:

"During three days from October 30 to November 1, inclusive, the vessel met heavy weather, during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few forward under and near the turtle-back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches, forward and aft of the engine room, in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday the 31st, the wind and seas coming first and heaviest from the northwest, but on Saturday hauling to the northward and to east northeast, with cross seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday the 31st, but these were repaired and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about ten or twelve cattle that had become maimed and helpless were sent overboard through those gangways. The chief loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways also, and the whole deck was cleared of all the cattle save the thirty-nine under the turtle-back."

"Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navigation he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle; and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship, and the necessary determination of the master's own judgment at the time, that in the circumstances

testified to I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

"The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension; and I am further persuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the maimed. Even the master says, in answer to the question, 'Were these cattle standing up that went overboard? Ans. They were down. Some may have been up; I don't know.' His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate or save any. His state of mind is shown by his concluding words: 'We all breathed happily when we saw it open' (No. 3 hatch)."

The District Judge was of opinion that the stipulations of the bill of lading, so far as they undertook to exempt the respondent from accountability for the negligence of the master or crew, though valid by the law of England, were invalid by our law; and therefore decreed "that the libellants recover damages for such of the oxen as were of any market value and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which oxen were cast overboard or negligently suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous;" and referred the case to a commissioner to ascertain and report the amount of such damage. 57 Fed. Rep. 403.

The commissioner reported that sixty-three of the cattle were thus voluntarily and unnecessarily sacrificed, and assessed damages for that number of cattle. The District Court confirmed his report, and entered a decree accordingly for the libellants. 61 Fed. Rep. 860.

Argument for Compania la Flecha.

Both parties appealed to the Circuit Court of Appeals, which adopted the conclusions of fact of the District Court, and affirmed the decree upon the ground that the case was not within the exceptions in the bill of lading. 35 U. S. App. 44.

The respondent applied for and obtained a writ of certiorari from this court.

Mr. Wilhelmus Mynderse for Compania de Navigacion la Flecha.

The action is prosecuted in the courts of the United States in attempted evasion of the agreement "that the contract shall be governed by British law."

The libellants, attracted apparently by the decision in the case of the *Brantford City*, 29 Fed. Rep. 373, have sought to build a similar case against the respondent, and have come far out of their way to bring suit in the same jurisdiction. Liverpool was the port of destination. It was there that the Insurance Company, the principal libellant herein, and the only libellant that profits by the decree, had its principal offices, and it was there that the claim should have been presented and pressed, if presented and pressed at all. Apparently no claim was presented there. But six months later the Insurance Company came to New York and instituted this suit.

The libellants did not make proper provision for the cattle.

The storm encountered by the Hugo was one of notable severity, and the losses of the cattle were due to the perils incident to the storm. The steamer itself was intelligently and prudently managed and navigated during the time of it, and the courts below were in error as to the facts.

The bill of lading provides that "this contract shall be governed by the British law," with reference to which law the contract was made.

In *Liverpool Steamship Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, this court said (page 458): "The review of the principal cases demonstrates that according to the great preponderance,

if not the uniform concurrence, of authority, the general rule that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

The court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties did look to the law of England; that they deliberately chose it; that it was not an exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to. The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and shipowners would naturally be submitted to the law of the place where their relations terminated. Moreover, the Reliance Marine Insurance Company, which represents the entire interest of the libellants, is a British corporation having its principal office in Liverpool, the port of the Hugo's destination.

The validity of the provisions of the bill of lading should be determined by the standard of what is just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 380, 382. It is just and reasonable to apply the British law, the law of the port of destination.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States. A similar provision has, however, been sustained in the District Court of Maryland. *The Oranmore*, 24 Fed. Rep. 922, 927. The United States Circuit Court of Appeals avoided any discus-

sion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material.

The provision in the bill of lading that the contract be governed by British law is not invalid.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit shipowner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 378. The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a

carrier by sea and of a carrier by land. Nor, indeed, was there any such distinction at the time these cattle were shipped upon the Hugo. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an act, known as the Harter Act, which provides in terms that: "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors of navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters," etc. Act of February 13, 1893, c. 105, 27 Stat. 445.

If this loss had occurred subsequent to July 1, 1893, there would have been no recovery for the libellants under the laws of the United States.

Prior to July 1, 1893, there could be no recovery for the libellants according to the laws of Great Britain, and to those laws they should be remitted.

But if this court will not reëxamine the facts, and accepts the facts as found by a majority of the Judges of the Circuit Court of Appeals, still no liability rests upon the shipowner for the loss of libellants' cattle under the contract of shipment, such contract being governed by the law of Great Britain.

It was recited in the bill of lading that the cattle were shipped "on deck at owner's risk." That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due allowance for the risks assumed by the owner of the cattle was undoubtedly made in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton* v. *English*, 12 Q. B. D. 218, a similar

Argument for Compania la Flecha.

clause, "The steamer shall be provided with a deck cargo, if required at full freight, but at merchant's risk," was considered by the Judges of the Court of Appeal, who substantially held that it relieved the shipowner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Brett, M. R., said: "It is obvious that this is a stipulation in favor of the shipowners, for, in order to earn a larger freight, they may require part of the cargo to be deck cargo, and then it is to be at the merchant's risk. My brother Cave, who delivered the judgment of the Divisional Court, held that this stipulation absolved the shipowners from liability to contribute to general average. It must be admitted that if there were an *improper jettison* by the master and crew, this stipulation would relieve the shipowners from liability. . . . If the liability is in consequence of any act of any of his servants for which the shipowner would be liable but for this stipulation, then it follows that the defendants are freed from liability. I should say that this stipulation would cover any act of the master or crew, which being done by them as servants of the shipowner would otherwise make him liable; it therefore covers the case of improper jettison, also a loss caused by a collision or stranding owing to the negligence of the master or crew."

Bowen, L. J., said, respecting the clause: "Now, that clearly is a stipulation in favor of the shipowners, and *prima facie* it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible."

Baggallay, L. J., concurred in the view of Justices Brett and Bowen. See, also, *Lewis* v. *Great Western Railway*, L. R.

3 Q. B. D. 195; *McCauley* v. *Furness Railway*, L. R. 8 Q. B. 57.

If the immediate cause of loss is to be deemed an accident of navigation, the shipowner is freed from liability, even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship. Carver's Carriage by Sea, 2d ed. § 101, p. 110; *The Duero*, L. R. 2 Ad. & Ec. 393 (1869); *Grill* v. *General Iron Screw Colliery Co.*, L. R. 1. C. P. 600 (1866); *The Cressington*, (1891,) Prob. 152.

Finally, it is a matter of peculiar interest that this court should declare the effect of a clause which provides that the bill of lading should be governed by a law other than the law of the place of issue.

The question has arisen in numerous cases, but there is as yet no authoritative decision in any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland. *The Oranmore*, 24 Fed. Rep. 922. It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts. *The Brantford City*, 29 Fed. Rep. 373, 396; *The Guildhall*, 58 Fed. Rep. 796; *The Iowa*, 50 Fed. Rep. 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this court.

There is not involved any question as to abandoning the declarations of public policy already made by this court respecting the exemption of a carrier from the consequences of his servants' negligence.

There is not involved even the question of a modification of such declarations, because of the provisions of the Harter Act.

There is not involved any question of introducing the law of a foreign country for the construction of the terms of contracts made and performed here.

The question is, whether a shipper and a shipowner may in

contracting here for the transportation of cargo from this country to a foreign country, validly stipulate that any disputes or differences under the contract shall be determined by the law of the country where the shipment is to be delivered.

We submit that it is "reasonable and just in the eye of the law" for the parties to agree to submit their rights to the law of the place where their relations will naturally terminate. If the court holds that such a stipulation is "reasonable and just in the eye of the law," then the contract must be sustained, even though such foreign law does differ from the law of the United States. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 380, 384.

Mr. W. W. MacFarland for Brauer and others.

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

The contract sued on was made in October, 1891, more than a year before the passage of the Harter Act, and the case is unaffected by its provisions. Act of February 13, 1893, c. 105; 27 Stat. 445.

By the law of this country, before that act, as declared upon much consideration by this court, common carriers, by land or sea, could not, by any form of contract with the owner of property carried, exempt themselves from responsibility for loss or damage arising from negligence of their own servants; and any stipulation for such exemption was contrary to public policy and void. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397.

By the modern decisions in England, on the other hand, made since it has become to us a foreign country, common carriers, except so far as controlled by the provisions of the Railway and Canal Traffic Act of 1854, were permitted to exempt themselves by express contract for responsibility for losses occasioned by negligence of their servants. *Peck* v. *North Staffordshire Railway*, 10 H. L. Cas. 473, 493, 494;

Steel v. *State Line Steamship Co.*, 3 App. Cas. 72; *Manchester &c. Railway* v. *Brown*, 8 App. Cas. 703; *In re Missouri Steamship Co.*, 42 Ch. D. 321; *The Cressington*, (1891) Prob. 152.

In the case at bar, the decision of the District Judge proceeded upon the ground that any stipulation directly exempting the carrier from all liability for negligence of his servants being void by our law as against public policy, the equivalent stipulation that the contract should be governed by the law of England was equally void, and could not be enforced in the courts of the United States. That decision is in accordance with the previous decision of the same judge in *The Brantford City*, 29 Fed. Rep. 373, and with several subsequent decisions of his. *The Energia*, 56 Fed. Rep. 124; *The Guildhall*, 58 Fed. Rep. 796; *Botany Mills* v. *Knott*, 76 Fed. Rep. 582. The like view has been taken by Judge Nelson in the District of Massachusetts in *The Iowa*, 50 Fed. Rep. 561; by Judge Benedict in the Eastern District of New York in *Lewisohn* v. *National Steamship Co.*, 56 Fed. Rep. 602; and by Judge Butler in the Eastern District of Pennsylvania in *The Glenmavis*, 69 Fed. Rep. 472. See also *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Hamlyn* v. *Talisker Distillery*, (1894) App. Cas. 202, 209, 214; *Rousillon* v. *Rousillon*, 14 Ch. Div. 351, 369.

But it is unnecessary to express a decisive opinion upon the validity of the contract, because, assuming it to be valid and to govern the case, this court concurs with the Circuit Court of Appeals in the opinion that the respondent was liable for the loss in question.

Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him. *The Caledonia*, 157 U. S. 124, 137; *The Majestic*, 166 U. S. 375, 386; *Norman* v. *Binnington*, 25 Q. B. D. 475, 477; *Baerselman* v. *Bailey*, (1895) 2 Q. B. 301, 305.

By the laws of both countries, the ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods; and an exception, in the bill of lading, of perils

of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed.

This rule of construction was fully established in this court before it had occasion to decide the question whether it was within the power of the carrier by express stipulation to exempt himself from all responsibility for the negligence of himself or his servants.

In the leading case of *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, a crate of William F. Harnden, in which was money belonging to the bank, was shipped upon a steamboat of the navigation company under an agreement stipulating that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden, and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner in the boats of the said company." This court held that the navigation company was not thereby exonerated from loss by fire arising from the negligence of that company or its servants; and the reasons for the decision were stated by Mr. Justice Nelson as follows: "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risks incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." "If it is competent at all for the carrier to

stipulate for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." 6 How. 383, 384. See also *The Hornet*, 17 How. 100; *Transportation Co.* v. *Downer*, 11 Wall. 129; *The Syracuse*, 12 Wall. 167; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438.

In England, likewise, it has long been recognized as a settled rule that under a contract to carry goods, containing an exception such as of "breakage or leakage," or of "barratry of the master or mariners," or of "perils of the sea," there still rests upon the carrier, not merely the duty to carry the goods if not prevented by the excepted perils, but also the obligation that he and his servants shall use due care and skill and shall not be negligent in carrying the goods. *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; *The Helene*, L. R. 1 P. C. 231; *Lloyd* v. *The General Iron Screw Colliery Co.*, 3 H. & C. 284; *Grill* v. *Same*, L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 87, 88; *Manchester &c. Railway* v. *Brown*, 8 App. Cas. 703, 709, 710; *The Xantho*, 12 App. Cas. 503, 510, 515.

The English case most resembling in its circumstances the case at bar is *Leuw* v. *Dudgeon*, briefly reported in L. R. 3 C. P. 17 note, and more fully in 17 Law Times, (N. S.) 145, by which it appears to have been as follows: Cattle were shipped, some of them on deck, under a bill of lading containing these clauses: "Ship free in case of mortality, and from all damage arising from the act of God, the Queen's enemies, fire, accidents from machinery, or boilers, steam, or other dangers of the seas, rivers, roadsteads or steam navigation whatsoever." "The ship not liable for accident, injury, mortality, or jettison, whether shipped on deck or in the hold." On the vessel putting out to sea, she experienced fine weather and the sea was smooth, but there was a ground swell, and after she had been out some time she suddenly rolled over on her beam ends; the cattle pens gave way, and the cattle fell over to the starboard side, and in order to save the vessel it was

necessary to throw those on deck overboard. It was held that if the accident was owing to the vessel putting to sea with insufficient ballast, the owners were liable, notwithstanding the exemptions in the bill of lading, which included "jettison" as well as "accidents from dangers of the seas."

In that case, indeed, (as in the case in this court of *The Caledonia*, above cited,) the fault of the shipowner consisted in sending the ship to sea in an unseaworthy condition. But Mr. Justice Willes, who delivered the leading opinion, laid down the general rule that "the exceptions were intended to save the shipowner from liability for the effects of accident, and not to absolve him from the duty of exercising reasonable diligence." 17 Law Times, (N. S.) 146. And he treated the case as coming within the principle of that rule as affirmed in the cases, above cited, of *Phillips* v. *Clark* and *Grill* v. *General Iron Screw Colliery Co.*, in the one of which the clause "not to be accountable for leakage or breakage," and in the other the clause "accidents or dangers of the seas, rivers or navigation, of whatever nature or kind soever, excepted," was held not to cover a loss, otherwise within the exception, caused by the negligence of the master or crew. So in *Steel* v. *State Line Steamship Co.*, above cited, Lord Blackburn said, in the House of Lords, that in construing such exceptions in a bill of lading exactly the same considerations would arise as to the duty of the shipowner to furnish a ship really fit for the purpose, as had been applied, in the series of cases of which *Phillips* v. *Clark* was the leading one, to the duty of himself and his servants to use due care and skill in carrying the goods.

In *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 236, the Court of Exchequer Chamber, in a considered judgment delivered by Mr. Justice Willes, held that the words "loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind, excepted," did not exempt the owner from negligence in omitting to take out and dry the cargo at a port of distress, because the authorities (specially mentioning *Grill*

v. *General Iron Screw Colliery Co.*, above cited,) "and the reasoning upon which they are founded are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill and diligence, and that it is inapplicable to the case of a loss arising from the want of such care and the sacrifice of the cargo by reason thereof."

In *Gill* v. *Manchester &c. Railway*, L. R. 8 Q. B. 186, the Court of Queen's Bench, applying the same rule of construction, held that a provision in a contract for the carriage of cattle by railway, by which the railway company was not to be responsible for any loss or injury to the cattle "in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging or restiveness of the animal," did not relieve the company from liability for negligence of its servants in delivering a restive cow.

In *Lloyd* v. *General Iron Screw Colliery Co.*, above cited, Lord Bramwell said that the words "accident or damage from machinery, boilers, steam," could not apply to an explosion caused by the wilful act of the engineer. 3 H. & C. 292.

The passages quoted by the respondent from *Burton* v. *English*, 12 Q. B. D. 218, 220, 223, as showing that the words "on deck at owner's risk" exempt the carrier from liability for unlawful jettison or for negligence of the master and crew, were *obiter dicta*, the only point decided being that those words did not exclude the right of the owner of the goods to recover in general average for a lawful jettison. See *Ralli* v. *Troop*, 157 U. S. 386, 396. The two other cases cited by the respondent were cases in which railway companies were held not to be responsible for the negligence of their servants under contracts essentially different from that now in question. One was an action by a passenger travelling as a drover accompanying cattle under a free pass, one of the terms of which was that he should travel at his own risk. *McCauley* v. *Furness Railway*, L. R. 8 Q. B. 57. The other was an action by a person who, knowing that the defendant had two rates of carriage, a higher rate when it took the ordinary liability of a carrier, and a lower rate when it was

relieved from all liability except that arising from the wilful misconduct of its servants, delivered goods to be carried at the lower rate under a contract in which the only words defining the carrier's liability were "owner's risk." *Lewis* v. *Great Western Railway*, 3 Q. B. D. 195.

Upon consideration of the conflicting testimony, with the aid of the careful arguments of counsel, no ground is shown for reversing or modifying the conclusions of fact reached by both courts below. Their concurrent decisions upon a question of fact are to be followed, unless clearly shown to be erroneous. *Morewood* v. *Enequist*, 23 How. 491; *The Richmond*, 103 U. S. 540, and cases cited; *The Conqueror*, 166 U. S. 110, 136.

By the facts so found, it appears that the cattle, for the loss of which a recovery has been permitted, were sound and uninjured animals, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea.

The clauses of the bill of lading, (other than the reference to British law,) on which the respondent relies, are those in the first paragraph, "on deck at owner's risk; steamer not to be held accountable for accident to, or mortality of the animals, from whatever cause arising;" and those in the third paragraph, by which "it is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" "by barratry of the master or crew;" or "by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner."

The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words "on deck at owner's risk" cannot have been intended by the

parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading.

The wrongful jettison of the sound cattle by the act of the carrier's servants cannot reasonably, or consistently with the line of English authorities already cited, or with our own decisions, be considered either as an "accident to, or mortality of the animals," or as a "loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters," or yet as a loss or damage "by collisions, stranding, or other accidents of navigation." There having been no collision, stranding, or other accident of navigation, there was nothing to which the only stipulation in the bill of lading against the consequences of negligence, default, or error in judgment of the master and crew, could apply.

There was no barratry, because there was neither intentional fraud or breach of trust, nor wilful violation of law, one of which, at least, is necessary to constitute barratry. *Patapsco Ins. Co.* v. *Coulter*, 3 Pet. 222; *Lawton* v. *Sun Ins. Co.*, 2 Cush. 500; *Grill* v. *General Iron Screw Colliery Co.*, above cited.

The facts of the case, therefore, do not bring it within any of the exceptions of the bill of lading, assuming them to be valid.

Decree affirmed.

CRAEMER *v.* WASHINGTON STATE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

No. 466. Submitted October 12, 1897. — Decided October 25, 1897.

In the case of a petition for *habeas corpus* for relief from a detention under process alleged to be illegal, by reason of the invalidity of the process or proceedings under which the petitioner is held in custody, copies of

such process or proceedings must be annexed to, or the essential parts thereof set out in the petition, mere averments of conclusions of law being necessarily inadequate.

In this case, which was an indictment for murder, the verdict being "guilty as charged"; and judgment of condemnation to death thereon being affirmed by the Supreme Court of the State; and this court having determined, on a former petition by the petitioner, that it had no jurisdiction to review that judgment, *Craemer* v. *Washington State*, 164 U. S. 704; and the time appointed for execution having passed, pending all these proceedings, it was within the power of the state court to make a subsequent appointment of another day therefor, and to issue a death warrant accordingly, and a judgment to that effect involved no violation of the Constitution of the United States.

This was an appeal from a final order of the Circuit Court of the United States for the District of Washington refusing a writ of *habeas corpus* on the face of the petition therefor. The petition averred that Henry Craemer, the petitioner, was a citizen of the United States, residing in the county of King in the State of Washington; that he was unlawfully held in custody by the sheriff of that county, who was about to take his life, under certain alleged process and authority, "wholly without authority of law, without the jurisdiction of any court, contrary to the law, and contrary to the rights of your petitioner as a citizen of the United States under the Constitution of the United States."

"That on or about the 23d day of August, 1894, he was charged by the State of Washington by information of three separate crimes in one count, to wit, the crime of murder in the first degree, to which the penalty of death attached upon conviction; murder in the second degree, to which a penalty of not less than ten nor more than twenty years' imprisonment in the penitentiary attached, and the offence of manslaughter, to which not less than two nor more than ten years' imprisonment in the penitentiary attached.

"That your petitioner was tried upon the said information upon issue joined in the Superior Court of King County.

"That to said issue a jury trying your petitioner did return him guilty of no greater offence than the offence of murder in the second degree, and by legal construction granting inferences and all presumptions in favor of your petitioner as

accused, finding your petitioner guilty of no higher offence than that of manslaughter.

"That the said jury in nowise found your petitioner guilty of murder in the first degree, to which the sentence and penalty of death could be inflicted.

"That the said verdict was rendered about the 12th day of September, 1894.

"That your petitioner appealed from the decision finding your petitioner guilty of murder in the second degree or of manslaughter to the Supreme Court of the State of Washington upon errors assigned, and the said judgment was affirmed.

"And, further, upon the validity of the process under which your petitioner was charged, to wit, as to whether or not your petitioner could be tried upon an information for his life, your petitioner appealed to the Supreme Court of the United States upon that point and that point alone, and the said Supreme Court dismissed said appeal, returning the said cause and all process to the Supreme Court of the State of Washington, to be dealt with as in manner and form of the law was both just and proper."

That no death warrant had been issued while the cause was on appeal, and that there had been no opportunity or occasion to complain in the Supreme Court of the State, or in any other court, as to the right to issue such warrant; that the cause was tried before Judge Humes, one of the judges of the Superior Court of the county of King; "that after the said cause had been disposed of in the Supreme Court of the State of Washington, and the Supreme Court of the United States, and returned to the Superior Court of the State of Washington for the execution of such process as would be legal in the premises," Judge Humes had been succeeded by Judge Jacobs; that on February 6, 1897, the State of Washington moved that petitioner be brought up for judgment and other process against him and that Judge Jacobs issue a warrant of death, and that petitioner duly objected to Judge Jacobs' passing sentence of death upon him and issuing a death warrant to the sheriff, and insisted that the court was without

jurisdiction to make such an order, and that such order would be in denial of due process of law and in violation of Article VI and of Article XIV of the Federal Constitution; but, notwithstanding his objections, petitioner was ordered to be executed on April 23, 1897.

That under the laws of the State of Washington, there was no time allowed further to appeal from that order to the Supreme Court of the State; that the governor of the State respited petitioner and stayed the execution of the death sentence until July 23, 1897; "that the next term of the Supreme Court of the State of Washington is not until the month of October, 1897, in which there would be any authority on the part of the court by any proceedings to review the unauthorized act of the said Judge Jacobs and of his honor the judge of the Superior Court," and the only remedy left petitioner as a citizen of the United States was application to the Circuit Court.

Petitioner prayed for the writ of *habeas corpus* and for the writ of certiorari to the Superior Court of the county of King ordering the record of the cause to be certified to the Circuit Court "for information, particularly the alleged information, the verdict, the judgment and the death warrant made in the premises, and all other journal entries and orders in the cause."

The appeal came before this court on motions to dismiss or affirm.

Mr. W. C. Jones for the motion. *Mr. Patrick Henry Winston* and *Mr. James F. McElroy* were on his brief.

Mr. James Hamilton Lewis opposing. *Mr. Charles A. Riddle* and *Mr. John W. Pratt* were on his brief.

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

Under existing statutory provisions appeals may be taken to this court from final decisions of the Circuit Courts in

habeas corpus, in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and if the restraint is by any state court or by or under the authority of any State, further proceedings cannot be had against him pending the appeal. Rev. Stat. §§ 763, 764, 766; act of March 3, 1885, c. 353, 23 Stat. 437.

Such being the law, it has happened in numerous instances that applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice.

From the petition in this case it appeared that petitioner was held by the sheriff of King County, Washington, to be executed in pursuance of a judgment and sentence of death rendered by the Superior Court of that county, and warrant issued thereon; that that judgment had been affirmed by the Supreme Court of the State; and that this court had heretofore determined that it had no jurisdiction to interfere in revision of that judgment. See also *State* v. *Craemer*, 12 Washington, 217; *Craemer* v. *Washington*, 164 U. S. 704.

Nevertheless petitioner insisted that the judgment against him was void because in contravention of the Constitution of the United States, and that the judgment of this court in dismissing his writ of error was not to be regarded, as he had not in fact seen fit to raise in maintenance of that writ the particular point on which he now relied.

That point seems to be that the verdict returned against him on the information on which he was tried was either so uncertain that judgment could not be entered thereon, or amounted to no more than a verdict finding him guilty of murder in the second degree, or of manslaughter, in respect of either of which crimes the punishment of death was not denounced.

By section 754 of the Revised Statutes it is provided that the complaint in *habeas corpus* shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known." The general rule is undoubted that if the deten-

tion is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate. *Whitten* v. *Tomlinson*, 160 U. S. 231; *Kohl* v. *Lehlback*, 160 U. S. 293; Church on Habeas Corpus, 2d ed. § 91, and cases cited.

Copies of the information, the verdict, and the judgment thereon were not attached to this petition, nor the essential parts thereof stated, nor any cause assigned for such omission. In that regard the petition was wholly insufficient.

But reference was made to the record of the case in the Superior Court of King County, in the Supreme Court of the State, and in this court. The record here, to which we may properly refer, *Butler* v. *Eaton*, 141 U. S. 240, shows that the information charged Craemer with the crime of murder in the first degree; that the jury "found him guilty as charged;" that he was adjudged guilty of the crime of murder in the first degree, and sentenced to death; that the judgment was affirmed; and that the writ of error to the state court was dismissed.

If the point now suggested was not in fact specifically raised in the Supreme Court of the State on appeal, or in this court on writ of error, it must not be assumed that any point on which the jurisdiction might have been sustained was overlooked.

Moreover, the settled law of the State was adverse to petitioner's contention as urged before the Circuit Court, and no ground existed which could justify that court in refusing to accept it.

The statutes of Washington define murder in the first degree and prescribe the punishment of death upon conviction; the crime of murder in the second degree, and punishment by imprisonment in the penitentiary for a term not less than ten nor more than twenty years; and the crime of manslaughter, and punishment by like imprisonment not less than one year nor more than twenty years, and a fine in any sum not ex-

ceeding five thousand dollars. 2 Hill's Codes, 642, 644, 646; Wash. Penal Code, §§ 1, 3, 7 and 11. On an indictment or information charging an offence consisting of different degrees a jury may find the defendant not guilty of the degree charged, but guilty of any degree inferior thereto, and in all other cases defendant may be found guilty of an offence, the commission of which is necessarily included within that with which he is charged. The form of the verdict is also prescribed as follows: "We, the jury, in the case of the State of Washington, plaintiff, against ———, defendant, find the defendant (guilty or not guilty, as the case may be)." 2 Hill's Codes, 509; Penal Code, §§ 1319, 1320 and 1325; Laws Wash. 1891, 60, c. 28, §§ 75, 76. The Code of the Territory was to the same effect. §§ 786, 790, 793, 798, 1097, 1098 and 1103.

In *Timmerman* v. *Washington Territory*, 3 Wash. Ter. 445, the defendant was indicted for the crime of murder in the first degree, and the jury returned a verdict in the statutory form. It was argued, on error, that the verdict was defective in that the defendant might have been found guilty of murder in the first or second degree, or of manslaughter, and that, therefore, the verdict was uncertain and sentence could not be pronounced upon him; but the Supreme Court of the Territory held upon consideration of sections 1097, 1098 and 1103 of the Code, which are sections 1319, 1320 and 1325, as numbered in Hill's Codes of the State, that if the jury found the defendant guilty of an offence of an inferior degree to that charged, the verdict must specify it, but if the verdict was intended to be guilty of the degree charged, there would be no necessity for so specifying it, and that the jury having used the statutory form there was no uncertainty as to the fact thus found; and that the objection was untenable.

In this case the verdict was "guilty as charged," and judgment of condemnation to death thereon was affirmed by the Supreme Court of the State as has been said. 12 Washington, 217. The time appointed for execution having passed, the subsequent appointment of another day and the issue of the death warrant were in accordance with statute. Hill's Codes, §§ 1351, 1354.

Statement of the Case.

Apart then from the insufficiency of the petition and the legal effect of the previous judgment of this court, the final order of the Circuit Court must be held to have been properly entered, in that the rendition of the judgment complained of involved no violation of the Constitution of the United States.

Affirmed.

MILLER v. CORNWALL RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 18. Argued October 18, 1897. — Decided November 1, 1897.

The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied.

Under Rev. Stat. § 709, if the ground on which the jurisdiction of this court is invoked to review a judgment of a state court is, that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court is in favor of its validity, this must appear on the face of the record before the decision below can be reëxamined here.

A suggestion of such appearance, made on application for reargument, after the judgment of the trial court is affirmed by the Supreme Court of the State, comes too late.

This court has no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with the state constitution.

An objection in the trial of an action in a state court that an act of the State was "unconstitutional and void," when construed in those courts as raising the question whether the state legislature had power, under the state constitution, to pass the act, and not as having reference to any repugnance to the Constitution of the United States, is properly construed.

The report of this case in the Supreme Court of Pennsylvania shows that it assumed that it was dealing, under the assignments of error, only with the state constitution.

Lewis Miller brought his action against the Cornwall Railroad Company in the Court of Common Pleas of Lebanon County, Pennsylvania, to recover damages for personal injuries sustained through the company's negligence while he was

being carried on one of its trains. At the trial, the case was left to the jury, but the court reserved "the question as to whether there is any evidence of the defendant's negligence to go to the jury." A verdict was returned in plaintiff's favor, notwithstanding which, judgment was entered for defendant on the point reserved. The decision turned on the conclusion that Miller was to be treated as if he was, at the time of the accident, an employé of defendant because, though not in fact such employé, he came within the terms of the first section of an act of the General Assembly of Pennsylvania, approved April 4, 1868, Laws Penn. 1868, p. 58, No. 26, § 1, which reads as follows:

"SECTION 1. That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé: *Provided*, That this section shall not apply to passengers."

The court was asked by plaintiff to instruct the jury, among other points, as follows: "1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury." "2. The act of April 4, 1868, is unconstitutional and void." "3. The right of the plaintiff to have remedy for his injury was a well known and clearly defined common law right, one of the inherent indefeasible rights guaranteed to all citizens by the Constitution. The act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the due course of law." But the court refused to do so. The case was taken by appeal to the Supreme Court of Pennsylvania and the first, second and third errors assigned were to the refusals to give the foregoing points, in their order. The words "inherent indefeasible rights" and "remedy by the due course of law" were placed in quotation in point three, as given in the third assignment. The judgment was affirmed by the Supreme Court, on February 27, 1893,

at the January term of that year. 154 Penn. St. 473. On January 8, 1894, appellant Miller filed a motion for reargument on these grounds:

"1. Because of material errors of fact into which the court fell, in the consideration of the case, and which, we believe, led to the affirmance of the judgment of the court below.

"2. Because the plaintiff desires to present the case for review on the point raised, by the second assignment of error, as to the constitutionality of the act of April 4, 1868, under the XIV Amendment to the Constitution of the United States. The question was not orally argued for want of time and the judgment is not in shape for such a review.

"3. General reargument."

A reargument was refused, and this writ of error then sued out.

Mr. Benjamin Morris Strouse and *Mr. A. Frank Seltzer* for plaintiff in error.

Mr. Wayne McVeagh for defendant in error. *Mr. Howard C. Shirk* was on his brief.

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

The contention of plaintiff in error is that the first section of the act of April 4, 1868, is invalid because in contravention of the Fourteenth Amendment, in that it deprives him of due process of law and denies him the equal protection of the laws.

The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied. *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 224. And under section 709 of the Revised Statutes, if the ground on which the jurisdiction of this court is invoked is that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court was in favor of its validity, this must appear

on the face of the record, before the decision below can be re-examined here. *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 70.

The record in this case discloses no attempt to question the validity of the particular statute, in the state courts, as in contravention of the Federal Constitution, unless in the points requested to be given in the trial court and the refusal to give them, for even if it could be held that such question was raised on the application for reargument, nearly a year after the judgment of the Common Pleas was affirmed by the Supreme Court, the suggestion came too late. *Texas & Pacific Railway* v. *Southern Pacific Company*, 137 U. S. 48; *Loeber* v. *Schroeder*, 149 U. S. 580; *Pim* v. *St. Louis*, 165 U. S. 273.

We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution, and it was long ago held that where it was objected in the state courts that an act of the State was "unconstitutional and void," the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter* v. *Foley*, 24 How. 415.

By the constitution of Pennsylvania, it has always been declared that all men "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness"; and also "that all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay." Const. Penn. 1790, Art. IX, §§ 1, 11; Const. Penn. 1838, Art. IX, §§ 1, 11; Const. Penn. 1873, Art. I, §§ 1, 11.

The presumption as to point two is that it referred to the state constitution, and this was made certain by point three, which quotes from that instrument.

From the report of this case in 154 Penn. St. 473, it is appar-

ent that the state Supreme Court assumed that it was dealing under the assignments of error only with the state constitution, as was also the fact in *Kirby* v. *Pennsylvania Railroad*, 76 Penn. St. 506, where the question of the constitutionality of the first section of the act in question was directly passed upon, and the section sustained.

We agree with counsel in the statement, made on the application for reargument, in respect of a review of this judgment by this court because thereby the state Supreme Court had decided in favor of the validity of the act when drawn in question as repugnant to the Constitution of the United States, that "the judgment is not in shape for such a review."

Writ of error dismissed.

FLETCHER *v.* BALTIMORE AND POTOMAC RAILROAD COMPANY.

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

No. 56. Argued October 20, 21, 1897. — Decided November 1, 1897.

The plaintiff in error was a workman employed by the defendant in error at its workshop in Washington. Returning from his day's labor, he stopped at the intersection of South Capitol Street and Virginia Avenue, to enable a repair train to pass him. It was and for a long time had been the custom of the railroad company to allow its workmen, who went out on the repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing their pieces off the train while in motion, at the points nearest their own homes, being cautioned on the part of the company not to injure any one in doing it. As the train passed the plaintiff in error, such a piece of refuse wood was thrown from it by one of the men. It struck the ground, rebounded, struck the plaintiff in error, and injured him seriously and permanently. He sued the company to recover damages. After the plaintiff's evidence was in and he rested, the defendant moved for a verdict in its favor, which motion was granted. *Held*, that this was error; that the question whether the defendant was negligent should have been submitted to the jury; and that it was for the jury to say whether the custom on the part of the workmen was known to the company, whether

if known it was acquiesced in, whether it was a dangerous custom from which injury should have been apprehended, and whether there was a failure, on the part of the defendant, to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act.

The duty to use ordinary care and caution is imposed upon a railroad company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by any one on the train, either a passenger, or an employé, acting outside of and beyond the scope of his employment.

A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could have been prevented by the exercise of reasonable diligence on the part of the company.

If, through and in consequence of its neglect of such duty, an act is performed by a passenger or employé, which is one of a series of the same kind of acts, and of which the company had knowledge and in which it acquiesced, and the act is in its nature dangerous, and a person lawfully on the street is injured as a result of it, the railroad company is liable.

The fact that the custom had existed for some time without any injuries having been received by any one is not a legal bar to the liability of the company.

The case is stated in the opinion.

Mr. Franklin H. Mackey for plaintiff in error.

Mr. William Henry Dennis for defendant in error. *Mr. Enoch Totten* was on his brief.

Mr. Justice Peckham delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages from the defendant corporation, for personal injuries which he alleged he received by reason of the negligence of its agents and servants.

The evidence given upon the trial upon the part of the plaintiff tended to show that on or about the 16th day of May, 1890, the defendant was a railroad corporation doing

business in the District of Columbia, and that on the day above mentioned, at the city of Washington in that District, the plaintiff was in the employment of the defendant and had been working at its workshop; that he had finished his work for the day at about a quarter of six in the evening, and leaving the shop had started for his home. When he reached the intersection of South Capitol Street and Virginia Avenue he stopped for a moment, and while standing on the pavement on the south side of the railway track, which was in the middle of Virginia Avenue, a repair train of the defendant corporation passed by him on its return from work for the day. Some of the testimony showed that the train was passing at the rate of twenty miles an hour, while other testimony showed a much less rate of speed. As the train passed the plaintiff one of the workmen on board threw from the car on which he was standing a stick of bridge timber about six inches square and about six feet long. It struck the ground and rebounded, striking the plaintiff and seriously and permanently injuring him. The defendant had been in the daily habit for several years of running out of Washington and Alexandria a repair train of open flat cars loaded with its employés, and the train returned every evening about six o'clock and brought the workmen back to their homes. These men were allowed the privilege of bringing back with them, for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, cross-ties, etc. It was the constant habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other person waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt any one in throwing the wood off. The foreman of the gang was the man who usually gave such instruction.

This evidence having been given, the plaintiff rested, and the defendant then moved for the direction of a verdict in its

favor, which motion was granted, and the judgment entered on the verdict having been affirmed by the Court of Appeals, 6 App. D. C. 385, is now before us for review.

In this ruling of the courts below we think there was error.

We are not called upon to say that the defendant was in fact guilty of negligence. The courts below have held as matter of law that the company was not liable, and hence a verdict in its favor was directed. On the contrary, we think the question whether the defendant was negligent was one which should have been submitted to the jury.

The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not bring it within this rule. A railroad company is bound to use ordinary care and caution to avoid injuring persons or property which may be near its track. This is elementary. Shearman & Redfield on Negligence, (3d ed.) § 477 and cases cited in notes. The duty to use ordinary care and caution is imposed, as we think, upon the company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by any one on the train, either a passenger or an employé acting outside and beyond the scope of his employment. The company does not insure against the performance of such an act, but it rests under an obligation to use reasonable diligence to prevent its occurrence. An act of such a nature, either by a passenger or by an employé outside the scope of his duties and employment, is not to be presumed, and therefore negligence on the part of the company in failing to prevent the act could not probably be shown by proof

of a single act of that kind, even though damage resulted, where there was nothing to show the company had any reason to suppose the act would be committed. Negligence on the part of the company is the basis of its liability, and the mere failure to prevent a single and dangerous act, as above stated, would not prove its existence. The persons on this train were employés, in fact, and were being transported to their homes by the company, which had, during the time of such transportation, full control over their actions. Whether or not they were through with their work is not material.

If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act and liable for the injury resulting therefrom, notwithstanding the act was that of an employé and beyond the scope of his employment and totally disconnected therewith. Knowledge on the part of the defendant, through its agents or servants, that passengers or employés upon its trains were in the habit of throwing out of the windows newspapers, or other light articles, not in their nature dangerous, would not render the company liable on the ground of negligence, although on some one occasion an individual might be injured by such act. The result in that case would be so unexpected, so extraordinary and so unnatural that a failure to prevent the custom could not be said to be negligence. But if a passenger upon a train or an employé of the company upon one of its cars should supply himself with a quantity of stones for the purpose of throwing them off the train as it passed through a city, can it be possible that under such circumstances, if this intended use of the stones came to the knowledge of those who had the conduct of the train, it would not be their duty to prevent the act? And would it be any answer for the company, when charged with negligence in knowingly or negligently permit-

ting such passenger or employé to throw the stones, to say that the person throwing them was a passenger, or, if an employé, that he had completed his work for the day and was being transported to his home on the car of the company, and that the act was without the scope of his employment? Surely not. It is not a question of scope of employment or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is, does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? We think the company does owe such a duty, and if through and in consequence of its neglect of that duty an act is performed by a passenger or employé which is one of a series of the same kind of act and which the company had knowledge of and had acquiesced in, and if the act be in its nature a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable. Any other rule would in our opinion be most disastrous, and would be founded upon no sound principle.

We feel quite clear that, from the evidence in this case, it was for the jury to say whether the custom was sufficiently proved, and whether the act was of a nature from which injury to a person on the street might reasonably be expected, and also whether such acts had theretofore been performed with the knowledge and consent of the agents and servants of the defendant, and whether the company was guilty of an omission of the duty which it owed to the plaintiff as one of the public, lawfully using the street where the track was. We do not say that the jury should be instructed to find that the defendant was guilty of negligence in case they found from the evidence that this custom was known to its officers or agents, but we do say that the custom being known,

whether it was negligence or not for the company to permit it under all the circumstances, was a question to be decided by the jury and not by the court. The company of course is not an insurer of the safety of the public in the highway along or near which its road may run, but it is bound, as we have stated, to use reasonable diligence to see to it that no dangerous acts which may result in injury to persons lawfully on the highway shall be committed by persons who are on its trains, whether as passengers or employés. If it neglect that duty, then there is a liability on its part to respond in damages for the injury resulting from that neglect.

The fact that this custom had existed for some time without any injuries having been received by any one is not a legal bar to the liability. It may be addressed to the jury as an argument upon the question whether the act was in its nature dangerous, and whether under all the circumstances the company was guilty of any negligence in permitting its continuance; but if the character of the act complained of is such that a jury might upon the evidence fairly say that injury to others might reasonably be apprehended, the fact that none such had theretofore occurred is not an answer as matter of law to the charge of negligence in continuously permitting acts of that nature. As against the contention that this act was not in its nature dangerous it might be urged to the jury that the caution given to be careful showed that there might be danger in the performance of the act itself. It would be for the jury to answer the question.

We are not able to see the bearing upon this case of the case of *Walton* v. *New York Central Sleeping Car Co.*, 139 Mass. 556. In that case there was but a single act, that of throwing the bundle from the train by the porter of the parlor car; there was no evidence that any officer of the company on the train had the least reason to suppose the porter intended to do the act or that it had been habitually done before; no evidence of any custom known to the defendant by which at that or any other particular point the porter of the car habitually and frequently threw bundles from the moving train. Acquiescence on the part of the defendant

after knowledge of the custom could not from the one act be imputed to it. Very probably, a single act so performed by the porter without the knowledge or assent of the defendant — performed for his own purposes and not in the scope of his employment, unexpected and wholly disconnected from his duties — would not render the defendant liable for the injuries resulting to a third person from such act. If, however, it had been proven in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care and not hurt anybody, and if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.

The trial court in the case cited, while holding the defendant not responsible, said: "The defendant is not responsible if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders or doing the defendant's work, and not while acting as such servant in the scope of his employment." The important point was, it is to be observed, that the act of Maxwell, although the servant of the defendant, was without its authority, knowledge or acquiescence. In this case, upon the evidence submitted, the jury might be asked to infer knowledge on the part of the defendant of the existence of the custom and acquiescence on its part in such custom, and that therefore the acts of the individuals in throwing the timber were acts which were performed with the authority of the defendant. The act would be performed with the authority of the defendant, if, being aware of the custom, the defendant or its agents permitted such acts and made no effort to prevent their performance and issued no orders forbidding them. If the jury should also find that the act was one of a dangerous nature, from which injury to an individual on the roadside might reasonably be expected, then the jury

might find the defendant guilty of a neglect of duty in permitting its performance.

We do not think the case of *Snow* v. *Fitchburg Railroad*, 136 Mass. 552, can be distinguished from this case by reason of the simple fact that the person injured was a passenger who was at the station and upon the platform where the mail bag was thrown. It may be true the defendant owes a higher duty to its passengers, in the shape of a greater degree of care, than it does to the public generally, but it is a question only of degree. It owes a duty to the public not to injure any one negligently, and the facts in this case make it a question for the jury to say whether it has not been guilty of negligence resulting in plaintiff's injury.

Considerable stress was laid upon the case of *Walker* v. *Hannibal & St. Joseph Railroad*, 121 Missouri, 575, as an authority against the principle which we have above referred to. We have examined that case and regard the facts therein set forth as so materially different that the case cannot be regarded as opposed to the views we have stated. The baggagemaster in gratuitously taking in his car the drills (not properly baggage) which he threw out at the station as he passed through, was held not to have been acting within the scope of his employment, and as there was no proof of knowledge on the part of the railroad authorities, it was held that the railroad company was not responsible for this act of the baggagemaster not done in the scope of his employment and of which they had no notice. It is stated in the opinion that the trainmaster, the superintendent of the defendant and also the general agent were all ignorant that the drills were being carried by the baggageman on the passenger train, and, in speaking of the act and the arrangement under which it was performed, the court said: "The arrangement seems to have been one between plaintiff for the lime company and James, the train baggageman, with reference to something not in the line of his employment, and of which his employer had no knowledge and gave no consent."

Upon the whole, we think it was a question for the jury to say whether the custom was proved; whether, if proved, it

was known to and acquiesced in by those in charge of the train as servants of the company; whether it was a dangerous act, from which injury to a person on the street might reasonably be apprehended, and if so, whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act.

For these reasons we are of the opinion that the judgment should be

Reversed, and the cause remanded to the Court of Appeals of the District of Columbia, with directions to reverse the judgment of the Supreme Court of the District of Columbia and to remand the case to that court with directions to grant a new trial.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA MIDLAND RAILWAY COMPANY.

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

No. 208. Argued March 12, 15, 16, 1897. — Decided November 8, 1897.

Cincinnati, New Orleans & Texas Pacific Railway v. *Interstate Commerce Commission*, 162 U. S. 184, and *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S. 479, adhered to, to the points that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, 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, after having determined what, in reference to the past, were reasonable and just rates, 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.

Competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contempla-

tion of Congress in the passage of the act to regulate commerce. This is no longer an open question in this court.

The conclusion which the court reached in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, and *Wight* v. *United States*, 167 U. S. 512, that in applying the provisions of §§ 3, 4 of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, making it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

The purpose of the second section of that act is to enforce equality between shippers over the same line, and to prohibit 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, and it was held in *Wight* v. *United States*, 167 U. S. 512, that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation — among which is the fact of competition when it affects rates.

The mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraints of the third and fourth sections; but these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such, as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

The conclusions of the court on this branch of the case are: (1) that competition between rival routes is one of the matters which may lawfully be considered in making rates for interstate commerce; and (2) that substantial dissimilarity of circumstances and conditions may justify

Statement of the Case.

common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, in such commerce.

Whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case.

The Circuit Court had jurisdiction to review the finding of the Interstate Commerce Commission on these questions of fact, giving effect to those findings as *prima facie* evidence of the matters therein stated; and this court is not convinced that the courts below erred in their estimate of the evidence, and perceives no error in the principles of law on which they proceeded in its application.

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there was a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint was, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminated in their rates against the former, and gave the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony related, were:

1. That the Alabama Midland Railway and the defendant roads forming lines with it from Baltimore, New York and the East to Troy and Montgomery charged and collected a higher rate of shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer distance point by fifty-two miles.

2. That the Alabama Midland Railway and Georgia Central Railroad and their connections unjustly discriminated against Troy and in favor of Montgomery in charging and collecting $3.22 per ton to Troy on phosphate rock shipped

from the South Carolina and Florida fields and only $3.00 per ton on such shipments to Montgomery, the longer distance point by both of said roads; and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland had to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminated against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is forty-seven cents, and that from Montgomery, the longer distance point, is only forty cents, and that such shipments from Montgomery over the road of the Alabama Midland had to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so called "jurisdiction" of the Southern Railway and Steamship Association to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate was charged than the regular published tariff rate to such seaports, and that Montgomery and such other points were allowed by the rules of said association to ship through to Liverpool via any of these seaports at the lowest through rates on the day of shipment, which might be less than the sum of the regular published rail rate and the ocean rate via the port of shipment; that this reduction was taken from the published tariff rail rate to the port of shipment; that, this privilege being denied to Troy, was an unjust discrimination against that town in favor of Montgomery and such other favored cities, and that it was also a discrimination against shipments which terminate at such seaports in favor of shipments for export.

5. That Troy was unjustly discriminated against in being charged on shipments of cotton via Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and Georgia Central.

6. That the rates on "class" goods from Western and Northwestern points, established by the defendants forming lines from those points to Troy, were relatively unjust and dis-

criminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.

The Commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified, as follows, to wit:

1. On class goods shipped from Louisville, Kentucky; Saint Louis, Missouri, or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Georgia, and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Montgomery, Alabama, to New Orleans, Louisiana, no higher rate of charge than fifty cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore or other Northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the Commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed, and

complainant, the Interstate Commerce Commission, appealed the cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said Circuit Court of the United States for the Middle District of Alabama was in all things duly affirmed; and from this judgment and decree the appellant appealed to this court.

Mr. L. A. Shaver and *Mr. Assistant Attorney General Whitney* for appellant.

Mr. George F. Edmunds, on behalf of the appellant, on the question of the jurisdictional power of the Interstate Commerce Commission to make the order it did in this case, that the charge exacted by the carriers in respect of the particular goods in question should not exceed a certain named sum which the Commission, upon complaint, answers, issues, proofs and hearing, found to be reasonable and just, filed the following brief.

I. It is submitted with respectful confidence that the interstate commerce law is in all its civil aspects a remedial one.

At the time of its passage the railway carriers were the absolute and irresponsible masters of all interstate commerce. The several States, in trying to break up, or at least to mitigate, the unjust tyranny of these great corporations and combinations that held the largest part of the intercourse of the people in their grasp (and which in many instances undertook to control political as well as commercial affairs), found themselves baffled, and practically defeated in their efforts by the national constitutional provision that only Congress could regulate interstate commerce. In this state of affairs, and to redress such enormous grievances, the Interstate Commerce Act was passed for the intended benefit of the whole body of the citizens of the Republic having a common grievance and a common interest in the vast commercial intercourse between all the States. This legislation was, therefore, in the very highest sense, and to the last degree, remedial.

II. Being thus remedial, the statute ought to be construed liberally to the attainment of the ends in view. Instead of being given the narrowest possible application and construction, it should, it is humbly submitted, be applied and construed by the judiciary in the largest latitude fairly consistent with its language. It ought not to be frittered away by the refinements of criticism, or made ineffectual because it does not possess all the inclusive and exclusive qualities of a plea in abatement, and may not be "certain to a certain intent in every particular." It is, perhaps, questionable taste for the bar to cite authority for this proposition, but it may be permitted to refer to a few of the vast number of the authorities on the subject. *Wilkinson* v. *Leland*, 2 Pet. 627; *Silver* v. *Ladd*, 7 Wall. 219; *Beaston* v. *Farmers' Bank*, 12 Pet. 102; *United States* v. *Bank of North Carolina*, 6 Pet. 29; *Bank of United States* v. *Lee*, 13 Pet. 107; Broom's Legal Maxims, 5th Am. ed. (3d London ed.) 80.

III. But the contention on the other side is that, while the Commission has power to decide what shall not be done, it has no power in the very same case to do complete justice by declaring what shall be done by the carriers in the given matter. We may well quote here the language of Broom's Legal Maxims: "Again, in construing an act of Parliament, it is a settled rule of construction that cases out of the letter of the statute, yet within the same mischief or cause of the making, thereafter shall be within the remedy thereby provided; and, accordingly, it is laid down that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common law) four things must be considered: (1st) What was the common law before the making of the act; (2d) What was the mischief for which the common law did not provide; (3d) What remedy has been appointed by the legislature for such mischief; and (4th) The true reason of the remedy. And then the duty of the judges is to put such a construction upon the statute as shall suppress the mischief and advance the remedy — to suppress the subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and

remedy according to the true intent of the makers of the act, *pro bono publico.* In expounding remedial laws, then, the courts will extend the remedy so far as the words will admit." It is submitted that the words of the statute in question do not require the application of the foregoing rules, — being too plain for their application. If they are not, then the rule should be applied.

IV. What, then, is the statute? At the risk of reiteration, I quote the crucial parts of some of the sections bearing on the subject of this brief. Act of February 4, 1887, c. 104, 24 Stat. 379.

"SEC. 1. . . . All charges made for any services rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"SEC. 2. 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, and 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.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue

or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

"SEC. 4. 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 kind of property under substantially similar circumstances and conditions for a shorter than a longer distance over the same line, in the same direction. . . ."

SECS. 6 and 7 control the regulation of through rates, and provide against devices to break up continuous transportation, and for a general control of the Commission over that subject.

SEC. 9 provides that persons claiming to be damaged in respect of the matters embraced in the acts may complain to the Commission.

SEC. 11 establishes the Commission, and secures to it a non-partisan character and a freedom from private interest or bias.

"SEC. 12 [as amended by the act of March 2, 1889, c. 382, 25 Stat. 855]: That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted; and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; . . . and for the purposes of this act the Commission shall have power to require by subpœna the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation. . . ."

"SEC. 13. That any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention to the provisions thereof, may apply to said Commission by petition,

which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. . . .

"SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found. . . .

"SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both. . . .

"SEC. 16. That whenever any common carrier as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, . . . it shall be lawful for the Commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition to the Circuit Court of the United States, sitting in equity, . . . alleging such violation or disobedience, as the case may be; and the court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; . . . and said court shall proceed to hear and determine the matter speedily as a court of equity . . . in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode, and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition. . . ."

These sections, by general, comprehensive and specific language (only short, possibly, of the inclusive and exclusive strictness and fulness required in pleas in abatement at common law), place within the jurisdictional power and duty of the Interstate Commerce Commission the investigation, hearing and determination of all questions of dispute between the public and its component citizens and localities and the carriers. There is no limitation of the clear phrases of these various sections. The duty of the carrier is set forth in all its aspects, both of affirmative duty and of prohibition. The first section requires that "all charges shall be reasonable and just." The second section prohibits special personal favoritism by secret devices. The third section prohibits preferences between persons or localities and kinds of traffic. The fourth section prohibits charging more for a shorter than for a longer distance. The twelfth section provides that the Commission shall have authority to "inquire into the management of the business of all common carriers," and that "the Commission is hereby authorized and required to execute and enforce the

provisions of this act." There is no part of it that the statute does not expressly require the Commission to cause to be completely executed. The method of this execution is pointed out by the prescribed modes of procedure provided for in sections 13, 14, 15 and 16. And all this to be done on due application, under due procedure of notice, evidence and hearing of all the parties. How, then, can it be said by the most hypercritical refiner that the Commission has no jurisdiction to decide, for instance, what is "reasonable and just" as provided in section 1? Has the Commission only the power to repeat the words of the statute, and say to the carrier proved to be guilty of extortion, "You must desist from extortion, and be reasonable and just"? Would not that be a palpable mockery of either administrative or judicial justice?

If the statute had contained only the first and twelfth sections with the procedure sections, could this court doubt the power of the Commission to decide the matter, and require the very conduct on the part of the carrier that the Commission had found to be "reasonable and just?" To hold otherwise would be to ignore and flout the plainest possible use of language, if the statute be within the competence of Congress to pass.

But the rightful power of Congress to enact the law is not disputed. That the legislative department of any government, state or national, has power to regulate the conduct of any full or *quasi* public business, is too obvious for discussion. State legislatures, in respect of their internal commerce and polity, possess, and have always exercised, the power of controlling all such business through agents (by whatever names they may be called), to whom is deputed the execution of the sovereign will according to the principles and rules laid down by the legislative power. The innumerable instances of this need not be cited. Indeed, government could not be, and it never has been, carried on in any other way.

Again: section 2 prohibits the unjust discrimination between persons, *i.e.*, between the traffic that citizens may be engaged in, or between citizens engaged in the same traffic. The Commission is, by the proper methods of procedure, to

"enforce" this provision. Is the power of the Commission exhausted in saying to the discriminating carrier, "You shall not discriminate," and stop there? Must it not say, if it does its duty in enforcing the act and redressing the grievances found to exist, that it will enforce the law by deciding what the nature and degree of the discrimination is, and by requiring that such degree of discrimination shall be effaced altogether by affirmative conduct of equality, or by a charge of no more than the ascertained rightful sum, to the parties aggrieved?

Without referring in detail to the other provisions of the statute above quoted, it is safe to say that the plain purpose and clear, comprehensive language of the act show that the whole and all of the duties and obligations of the carrier to its customers and toward localities, etc., are to be enforced by the Commission; not a part of them, not a half of any of them, but all and every part of all of them. It is like algebra, in which neither side of the equation can possibly be considered or worked without the other. A complaint may be filed before the Commission (as in this case) alleging that the carrier ought not to charge for a described service more than the just and reasonable sum of fifty cents the hundred pounds, while, in fact, it is exacting one dollar the hundred pounds. Suppose the carrier appears and confesses that fifty cents per hundred is a reasonable and just price and that it does exact one dollar, but insists that the Commission has no jurisdiction to require the confessed reasonable charge to be made, and that it only has jurisdiction to require the cessation of the one dollar exaction, thus leaving the carrier to continue to plunder its customers of forty-nine cents per hundred with absolute impunity, as far as the Commission is concerned, until a new complaint shall have been instituted and the forty-nine cent charge again declared to be unreasonable. That this is shocking to all our natural sense of justice no one can dispute. Why, then, should the broad, comprehensive, and specific language of the statute be "cabined, cribbed, confined" to produce such a state of the law? The citation from Broom may be well remembered in this connection.

The statute certainly requires the carrier to refrain from

exacting more than a reasonable price (section 1); to refrain from drawbacks, rebates, etc., and all other unjust discriminations (section 2); to refrain from giving preferences or unequal advantages to persons or localities (section 3); to refrain from exacting more for a short than for a long haul (section 4); to refrain from all devices to break up continuous passage from road to road (section 7). I repeat in this connection that section 12 provides that the Commission shall have authority to "inquire into the management of the business," etc., and to obtain "full and complete information necessary to perform the duties and carry out the objects for which it was created." And I repeat the inquiry, what were the duties and objects for which it was created? The same section answers the question in terms so clear that neither cavil nor sophistry can confuse or obscure them.

V. But it is said that the Commission is not a judicial body, and cannot exercise judicial powers. Granted in the strict sense of the terms; but, in every civilized country, administrative officers have always lawfully exercised many powers, in every department of government, which are in their nature judicial; for every power which involves the exercise of judgment, opinion and decision is of that nature. Such are the powers exercised by the Secretary of the Interior as to many land questions; the Secretary of the Treasury and some of his subordinates, as to customs, etc.; the various Commissions that have existed from time to time for nearly a century to settle land claims; and many others.

That Congress had the power to establish interstate "rates" in the largest sense of the word cannot be doubted. And that it had the power to establish a Commission to do the same thing is, it is submitted, equally clear. It is assumed, for the purpose of this case, that it did neither in the sense to which I am now referring. It adopted a policy short of this, and provided clear descriptions and requirements concerning the duties of the carriers in all the aspects that touch their conduct toward their patrons and toward the localities and sections of the country; and established the Commission to execute and enforce all these provisions — not a part of them,

and not a part of any one of them; not negatively merely, but affirmatively and fully, to the end that real conformity by the carrier to the requirements of the act should be obtained, and as the act declares, obtained speedily, by procedure formal and ceremonious, in which all parties in interest were to be heard; and it provided for a decision of the particular question and the particular grievance thus brought to the attention of the Commission and examined by it; and in case of refusal to obey, the act provided for a suit to be brought in a judicial court of "equity," which court is required "to hear and determine the matter speedily as a court of equity," with all that the phrase implies. The Commission is to inquire into "anything done or omitted to be done" by any common carrier subject to the provisions of the act in contravention to the provisions thereof; and it authorized the Commission to require the carrier to "satisfy the complaint," or answer; and then, after hearing, to require the carrier "to cease and desist from such violation, or to make reparation, or both." How can this be done short of a decision upon the whole matter? To again illustrate, let it be supposed that the sole complaint was that the carrier was exacting double what was just and reasonable for a particular service, and that this, on due notice to both sides, was found to be true. This would be a palpable violation of the act. But the Commission is authorized to require the carrier to cease and desist from doing that very wrong. Does the carrier do so unless and until he reduces his exaction to the true point of justice and reason? To hold otherwise would be, it is submitted, trifling both with grammar and common justice. If the statute had conferred the very same power, and in the very same words, upon a court of equity instead of the Commission, could the power of the court to redress the whole grievance be doubted? But the admitted power of the Commission to command the desistance from a charge of one hundred cents per hundred pounds is no less "judicial" than a requirement not to charge more than the sum found to be reasonable and just. And the two things are precisely the same in principle and legal effect, and are inseparable.

On the subject of "reparation" provided for in section 3, I observe again that this section is to be enforced by the Commission. How is this possibly to be done, otherwise than by commanding action by the 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. No such exercise of the power by the Commission is either "fixing rates" or prejudging a matter, as referred to by Mr. Justice Shiras in the Social Circle case.

VI. The words "lawful order" mean an order 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 of 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 has 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 and is now imposed upon this court.

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 its 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 Mr. 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 the 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 in the act which expressly or by necessary implication confers such power," etc. 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 the 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.

VII. The judiciary of the United States have recently been able, without the special aid of any act of Congress, to preserve the interstate carriers from being despoiled by unlawful interference with their operations. It is to be hoped for the good name of Congress and for the public welfare and contentment that the same judiciary will find that Congress has adequately provided for protecting the people from being despoiled by the carriers, and that it is within the clear competence of the Commission and the courts to make these provisions effectual.

Mr. Edward Baxter for appellees.

Mr. A. A. Wiley filed a brief for appellees and for the Savannah, Florida and Western Railway Company.

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

Several of the assignments of error complain of the action of the Circuit Court of Appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates, to be thereafter charged by the defendant companies, for services performed in the transportation of goods.

Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held,

after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, 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, after having determined what, in reference to the past, were reasonable and just rates, 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. *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway*, 167 U. S. 479.

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendants, common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis and Cincinnati, and from New York, Baltimore and other Northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus and other places and localities and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula and Columbus justifies the giving to

those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended, in the briefs filed on behalf of the Interstate Commission, that the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the Commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case; for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the Commission in its order made due allowance for such dissimilarity.

So, too, in *In re Louisville & Nashville Railroad*, 1 Int. C. C. Rep. 31, 78, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the

element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia* v. *Clyde Steamship Co.*, 5 Int. C. C. Rep. 326, the Commission somewhat modified their holding in the *Louisville and Nashville Railroad Company case*, just cited, by attempting to restrict the competition, that it is allowable to consider, to the cases of competition with water carriers, competition with foreign railroads, competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315; *Missouri Pacific Railway* v. *Texas & Pacific Railway*, 31 Fed. Rep. 862; *Interstate Com. Com.* v. *Atchison, Topeka &c. Railroad*, 50 Fed. Rep. 295; *Same* v. *New Orleans & Texas Pacific Railroad*, 56 Fed. Rep. 925, 943; *Behlmer* v. *Louisville & Nashville Railroad*, 71 Fed. Rep. 835; *Int. Com. Com.* v. *Louisville & Nashville Railroad*, 73 Fed. Rep. 409.

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Railway*, 11 App. Cas. 97; *Phipps* v. *London & North Western Railway*, 2 Q. B. D. 1892, 229.

But the question whether competition as affecting rates is an element for the Commission and the courts to consider in

applying the provisions of the act to regulate commerce, is not an open question in this court.

In *Interstate Com. Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, it was said, approving observations made by Jackson, Circuit Judge, (43 Fed. Rep. 37,) that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibition of the statute, only such as are unjust or unreasonable;" and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the first section of the act to regulate commerce; nor make "an unjust discrimination" against him within the meaning of the second section; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section.

In *Texas & Pacific Railway* v. *Interstate Com. Com.*, 162 U. S. 197, it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the

goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of *Wight* v. *United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit 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; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under

consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation — among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this, that, when circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the Commission.

The language of the proviso is as follows:

"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 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 claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the Commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of *In re Louisville & Nashville Railroad* v. *Interstate Com. Com.*, 1 Int. C. C. Rep. 31, 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid, the carrier is left at liberty to do, without permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar

circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the Circuit Courts: *Interstate Com. Com.* v. *Atchison, Topeka &c. Railroad*, 50 Fed. Rep. 295, 300; *Same* v. *Cincinnati, N. O. and Tex. Pac. Railway*, 56 Fed. Rep. 925, 942; *Behlmer* v. *Louisville & Nashville Railroad*, 71 Fed. Rep. 835, 839; and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do jus-

tice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. *Denaby Main Colliery Company* v. *Manchester &c. Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps* v. *London & North Western Railway*, 1892, 2 Q. B. D. 229; *Cincinnati, N. O. & Tex. Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 184, 194; *Texas and Pacific Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 235.

The Circuit Court, after a consideration of the evidence, expressed its conclusion thus:

"In any aspect of the case it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central railroads, in the matter of the charge upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the interstate commerce act. The conditions are not substantially the same and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the Commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed, and it is so ordered." 69 Fed. Rep. 227.

The Circuit Court of Appeals, in affirming the decree of the Circuit Court, used the following language:

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The Commission finds that no departure from the long and short haul rule of the fourth section of the statute as against Troy as the shorter distance point, and in favor of Montgomery as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question when separately considered, are not unreasonable or unjust. As a matter of business necessity they are the same by each of the railroads that reach Troy. The Commission concludes that, as related to the rates to Montgomery, Columbus and Eufaula, the rates to and from Troy unjustly discriminate against Troy and in the case of the Alabama Midland violate the long and short haul rule.

"The population and volume of business at Montgomery are many times larger than at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable, if need be, of bearing to Mobile on the sea the burden of all the goods of every class that

pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized and intelligently and honestly controlled and regulated by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates, and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actively competing for it, and a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by the Board of Trade. We do not discuss the third and fourth contention of the counsel for the appellant further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business, and 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 rates 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 of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." 41 U. S. App. 453.

The last sentence in this extract is objected to by the Commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the Commission, and afterwards by the Circuit Court and by the Circuit Court of Appeals.

The first contention we encounter, upon this branch of the case, is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.

In the case of *Cincinnati, N. O. and Texas Pac. Railway* v. *Int. Com. Com.*, 162 U. S. 184, the findings of the Commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence and reversed by the Circuit Court of Appeals, and this court, in reference to the argument that the Commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the Commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence and in this court to review their decisions.

So in the case of *Texas & Pacific Railway* v. *Interstate Com. Com.*, 162 U. S. 197, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the Commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that,

in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the Commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the Commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the Commission as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts by making an allowance, in the rates prescribed, for dissimilarity resulting from competition, and it was contended on behalf of the Com-

mission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the *extent* shown, and that the allowance made therefor by the Commission was a *due* allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice Harlan, dissenting.

I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect,

proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centres of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

CHAVES v. UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 4. Argued October 12, 1897. — Decided November 15, 1897.

By the Spanish law in force at the time of the alleged grant of 1788, set up in this case, lots and lands were distributed to those who were intending to settle, and it was provided that, "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them, at their will, as their own property," but confirmation after the four years had elapsed was required in completion of the legal title; and it was further provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence, and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." On the facts in this case it is *Held*, that the granting papers in this record, taken together, do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon, but that the contrary is to be inferred from the testimony in respect of possession; that Armenta's

certificate of 1798 and the correspondence of 1808 conduct to no other result; and that, in the light of all the evidence, the conclusion of the court below was correct.

This was a petition filed by heirs and legal representatives of Francisco Garcia de Noriega and José Antonio Garcia de Noriega, for the confirmation of an alleged grant made by Governor Concha, January 27, 1788, of 9752.57 acres, called the Cañon de San Diego, situated in the county of Bernallilo, New Mexico, and included within a grant of 116,288.89 acres by Governor Chacon, March 6, 1798, alleged in the petition to have been to the "town of the Cañon de San Diego."

The granting papers of 1788 were produced and placed in the archives of the Government by claimants in 1879. As translated by the Government, they read as follows:

"Señor Governor Don Fernando de la Concha:

"We, Francisco Garcia de Noriega, interpreter for the Navajos, and José Antonio Garcia de Noriega, with the most profound respect appear before your Excellency and state, Sir, that a *cañon* which is called San Diego being found vacant, having seen that cultivation may be had and some animals pastured therein, we prostrate ourselves at the royal feet of your Excellency's grandeur solely to ask and pray that you deign in the name of his Majesty to favor us by giving us the said *cañon* for the purposes mentioned, on account of finding ourselves lacking land for planting, and, we deserving that his Majesty should favor us, we ask as a grant the said *cañon;* on account of all which we ask and pray that your Excellency be well pleased to command that what we request be done, that by your so doing we shall receive great benefit and favor, etc.

"Francisco Garcia de Noriega. (Scroll.)
"Jose Antonio Garcia. (Scroll.)

"Santa Fe, *January* 27, 1788.

"I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for, the chief *alcalde* of the Queres, Don Antonio Armenta, placing them in

possession thereof, provided that no prejudice results to the Indians and residents settled in that vicinity, and it having been so done, following this decree he shall place the said taking of possession without prejudice to a third party, in order to copy it in the government book, and to write it out on stamped paper when the same shall reach this province.

"CONCHA. (Scroll.)

"At this Cañon of San Diego on the sixth day of the month of February, of the year one thousand seven hundred and eighty-eight, I, Don Antonio de Armenta, chief *alcalde* and war captain of the jurisdiction of the Queres, by virtue of the authority that is conferred upon me by Señor Don Fernando de la Concha, Knight Commander of Mora in the Order of Santiago, lieutenant colonel of the royal armies, civil and military governor of this province of New Mexico, being at the said cañon, having cited the natives of the *pueblo* of Jemez, who are the adjoining owners to said land, and having designated to them that which was their own they were well suited on account of receiving no injury by the giving of said *cañon*, and also knowing that it is the will of our Sovereign that his lands be peopled by his vassals in whatever surplus there may be, and finding no obstacle whatever that could interfere with it, and exercising the authority that is conferred upon me, I went to said Cañon of San Diego, and no one appearing who had a better right, nor there being any prejudice to a third party who might make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother, José Antonio Garcia de Noriega, being present and understanding it all, I took them by the hand, I conducted them over said lands, they pulled up grass, threw stones to the four cardinal points, and we all said together three times, 'Long live the King, our Lord (whom may God preserve,)' as evidence of true possession, which they received quietly and peaceably without any opposition, their boundaries being the following: On the north side, the waterfall (*salto del agua*); on the south side, the junction of the rivers and also a point of a red table land (*una mesa colo-*

rada,) and lands of said Indians. With respect to the east and west there is nothing more than some very high table lands on both sides of the *cañon*, which (table lands) serve as boundaries. And, there resulting no prejudice whatever, they were satisfied with them (the boundaries); and in order that it may so appear I, said chief *alcalde*, Don Antonio de Armenta, signed it, together with my two attending witnesses, with whom I act for lack of a public or royal notary, of which there is none of any kind in all this government, to all of which I certify.

"The interlineation 'river' is valid.

"ANTONIO DE ARMENTA. (Scroll.)

"(Armenta's scroll.)

"Witness: SALVADOR ANTONIO SANDOVAL. (Scroll.)

"Witness: NICOLAS ORTIZ. (Scroll.)"

There are some differences between petitioners' translations and those of the Government, the principal being in the opening words of the alleged grant, which in Spanish were: "Concedo en nombre del Rey el cultivo y labor de la tierra que solicitan los Supplicantes," etc. These words are translated by petitioners: "I grant in the name of the King, for cultivation and working, the land that the petitioners solicit"; and by the Government: "I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for."

The granting papers of the grant of 1798 were as follows:

"Seal Third. [Seal.] Two Rials.

"For the years one thousand seven hundred and ninety-eight and ninety-nine.

"*To the lieutenant colonel and governor of this province:*

"Francisco and Antonio Garcia, brothers, and interpreters of the Navajo nation, in unison with Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierez, Juan de Aguilar, Blas Nepumuceno Garcia, Bartholomew Montoya, José Montoya, Tomas Montoya, Juan Domingo Martin, José Gonzales, Salvador Lopes, Antonio

Statement of the Case.

Abad Garcia, Miguel Gallego, Marcos Apodaca, José Miguel Duran and José Maria Jaramillo, appear before your Excellency in the most approved manner the law requires and may be necessary, and state that a quantity of vacant and uncultivated land lies in the Cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez; and whereas the settlement thereof would be beneficial to the provinces, and advantageous to our present families and descendants to be settling upon these lands with our property and cultivating the same, we pray your excellency to be pleased to grant this aid and settlement that we petition for to the persons herein mentioned; being pleased at the same time to order, in the name of his Majesty (whom may God preserve), that we may receive from the boundaries beyond the land granted to the Indians of the pueblo, our petition calling for from east to west to the middle arroyo called Los Torreones, and the line running from north to south to the Vallecelo de la Cueva which is in front of the waterfall, and in a transverse line from said middle arroyo to the Rito de la Jara. We also protest that we will not injure with our persons or stock, a few trees which the Indians claim as their own, although they are planted beyond the limits of the lands which belong to them. Therefore we humbly pray your Excellency to be pleased to order our request to be complied with, granting us the vacant land asked for; by doing which we will receive grace, and we swear, in due form, that our petition is not made through malice; and one signed, the others not knowing how.

"José Miguel Garcia.

"*Decree.*

"In view of the foregoing petition made by José Miguel Garcia and other citizens therein mentioned, in regard to settling in the cañon known as San Diego de Jemez, where the interpreters of the Navajo nation were temporarily stationed, I grant to them the aforesaid land in the name of the King, our sovereign, with the expressed condition that it is to be settled by at least twenty citizens; that the lands are to be

distributed in equal parts, and that they are not allowed or authorized, for themselves or their heirs, to sell or dispose of the lands granted to them. It being his Majesty's will, according to his last orders, that the lands should descend from father to son, or his heirs in a direct line; and if any colonist, to suit his own conscience, should desire to remove, under any pretext whatever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place, or persons marrying there, shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself, or expelled or banished by the authorities on account of his bad conduct; that besides the subdivision above mentioned, a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement, if such may be the case (which is likely to occur) — (torn) — order of the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law. CHACON.

"*Possession.*

"In the Cañon de San Diego de los Jemez, on the fourteenth day of the month of March, in the year one thousand seven hundred and ninety-eight, I, Don Antonio Armenta, chief justice of the Pueblo of Jemez, by virtue of the authority conferred upon me by my superior, Don Fernando Chacon, gentleman of the order of Santiago, lieutenant colonel of the royal armies, political and military governor of this province of New Mexico, being at the aforesaid place, and having summoned the natives of said Pueblo of Jemez, to whom having measured the league belonging to them, I found a surplus of two thousand one hundred varas, which they had before arriving at the Cañon de San Diego, all of which they claimed as their own, without having any right to them in any manner; and believing that it is the wish of our sovereign that his land be settled upon by his subjects wherever a surplus may be found, and finding no impediment whatever, and using the authority in me vested, I proceeded to the surplus lands, and finding no one with a better title, and Francisco Garcia, An-

tonio Garcia, Navajo interpreters, Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierrez, Juan de Aguilar, Juan Blas Pumuceno Garcia, Bartolome Montes, Tomas Montoya, José Montoya, Juan Domingo Sangil, Salvador Lopez, José Gonzales, Antonio Abad Garcia, Miguel Gallegos, Marcos Apodaca, José Miguel Duran and José Jaramillo, being present, all interested and well informed in regard to the matter, I took them by the hand, walked them over said lands, they pulled up grass, threw stones towards the four winds, and we all cried at once, three times, Live the King our sovereign (whom may God preserve) in proof of legal possession, which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter; and in order to prevent any other from coming to meddle and create difficulties between the citizens, as well as the Indians, I gave time to understand which were their boundaries, which are: On the north, the Vallecito de la Cueva, on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara; and no injury resulting to any one they were all satisfied, and in order that it may so appear, I, the said chief justice, signed with my two attending witnesses in the absence of a public or royal notary, there being none within the limits of all this government, to which I certify.

"ANTONIO DE ARMENTA.

"Witnesses:

"SALVADOR LOPEZ.

"JOSÉ MIGUEL GARCIA."

In 1879, when the documents of 1788 were produced by claimants and filed in the archives, the following certificate was also brought forward by them and put on file:

"In the Cañon de San Diego de Jemez on the fourteenth day of the month of March, year 1798, before me, Antonio

de Armenta, and there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors, said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these. Friends and brothers, now each of you is about to take the lands, which His Majesty has granted and donated to you; but you are all notified that the lands, which we first and in our first grant, we have been possessing, be all of you aware that I, and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day there being no one absent. The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

"All here set forth I, said chief justice, witness, for all of the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I will make this document in favor of the said two Garcias, I sign the same with those of my attendance in the aforesaid cañon in said day, month and year, to which I certify.

"Anto. de Armenta."

It also appeared that there were among the old archives the following:

"Governor: The interpreter of the Navajos, Antonio Garcia, has presented to me a document executed to him by the former alcalde of this jurisdiction, Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez Cañon, having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others the latter grantees alleging title to all the land; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I enclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all questions which will necessarily result if the latter be not decided by your superiority that the land of the Garcias is included or not in the grant of the last settlers and whether a copy of this grant be taken so that the original, which is the one I enclose, may remain in the archives of the Government confirmed by you, and the same to be done with a copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention. God preserve you many years.

"Ignatio Sanchez Vergara.

"Santa Ana, 1st of December, 1808.

"Lieutenant Colonel José Manrique."

"Advised of your official communication of the first instant and documents you accompany.

"I will state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a

preference. The last settlers cannot deny to the Garcias a better title and so these should always remain on the same grant which they have held hitherto; and if the said new settlers do not coincide you will not permit them recourse for and such which they may possess, they will not have the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication before mentioned. I return to you the documents mentioned that you may deliver them to the party interested. God preserve you many years.

"Santa Fé, 13th of December, 1808.

"To the alcalde of Jemez."

On the 4th day of June, 1859, certain claimants for themselves and in the name of the actual settlers petitioned the Surveyor General of New Mexico, Pelham, for a confirmation of the grant of March 6, 1798, who took action thereon. In the proceedings it appeared from the evidence that a town existed on the grant some sixty years before and was in existence when the United States took possession, and the testimonio of the original granting papers, heretofore given, certified to as correct and genuine by the alcalde, Don Antonio Armenta, with his attending witnesses, on March 16, 1798, in due form, "at the verbal request of the parties," which was then on file in the office of the Surveyor General, was considered and acted on by him. The Surveyor General made his report to Congress, under date June 10, 1859, approving the grant, and stating that "the evidence shows that the town has been in continuous occupation of the claimants, and was in existence when the United States assumed sovereignty over the country." The grant was thereupon confirmed by Congress, June 21, 1860, 12 Stat. 71, c. 167, § 3. The patent for this grant was issued October 21, 1881, to the original twenty grantees and those claiming under or through them.

In 1879, Amado Chaves, for himself and the other heirs of the two Garcias, petitioned the then Surveyor General, Atkinson, for the approval and confirmation of the grant of 1788,

and in the proceedings before him the papers of that date, together with the certificate of Alcalde Armenta of March 14, 1798, were produced and filed, and considered with the correspondence of 1808, and sundry depositions. The Surveyor General approved the grant, March 22, 1880, and transmitted a certified transcript of the papers for the action of Congress, but the grant was not confirmed.

The evidence tended to show that Francisco and Antonio Garcia were two Spanish brothers, who were interpreters for the Navajos; that Francisco was killed in 1807, and that Antonio died in 1835.

The depositions of two witnesses, one of them the great grandson of Francisco Garcia, born in 1827, and the other the grandson of Antonio Garcia, born in 1807, were taken by Surveyor General Atkinson in January, 1880. Both gave the south boundary of the tract sued for as the junction of the San Diego and the Guadalupe Rivers, "and the lands of the Indian pueblo of Jemez." Both testified that the tract was reputed to belong to the heirs of the two Garcias; that Francisco was reputed to have lived thereon; and that Antonio, who survived until 1835, lived there to their knowledge.

In addition to these depositions, petitioners called as a witness another great grandson of Francisco, born in 1850, who testified that his grandmother was born on the tract, and that "she said the land was occupied and cultivated by them," the two Garcias. What particular part of the tract she was born on and the particular place of occupancy and cultivation did not appear.

The evidence on behalf of the Government was to the effect that Antonio Garcia occupied land several hundred varas in extent, running north from the north boundary line of the Indian pueblo, which was subsequently sold by Antonio's grandson to one of the witnesses, who thereupon took up his residence in Antonio's house; that Antonio said that he had "lands in the Indians' league"; "from the Pueblo Indian league up north"; that the ranches were in the cañon and divided into portions of 300 varas each; that heirs of the original grantees or persons claiming under them still held

original allotments north of the junction of the rivers; and that the smaller grant was not generally known.

The survey of May 18, 1880, was as shown in the map on the next page.

The Court of Private Land Claims, two members dissenting, held that the claim under the grant of 1788 had been abandoned, and dismissed the petition.

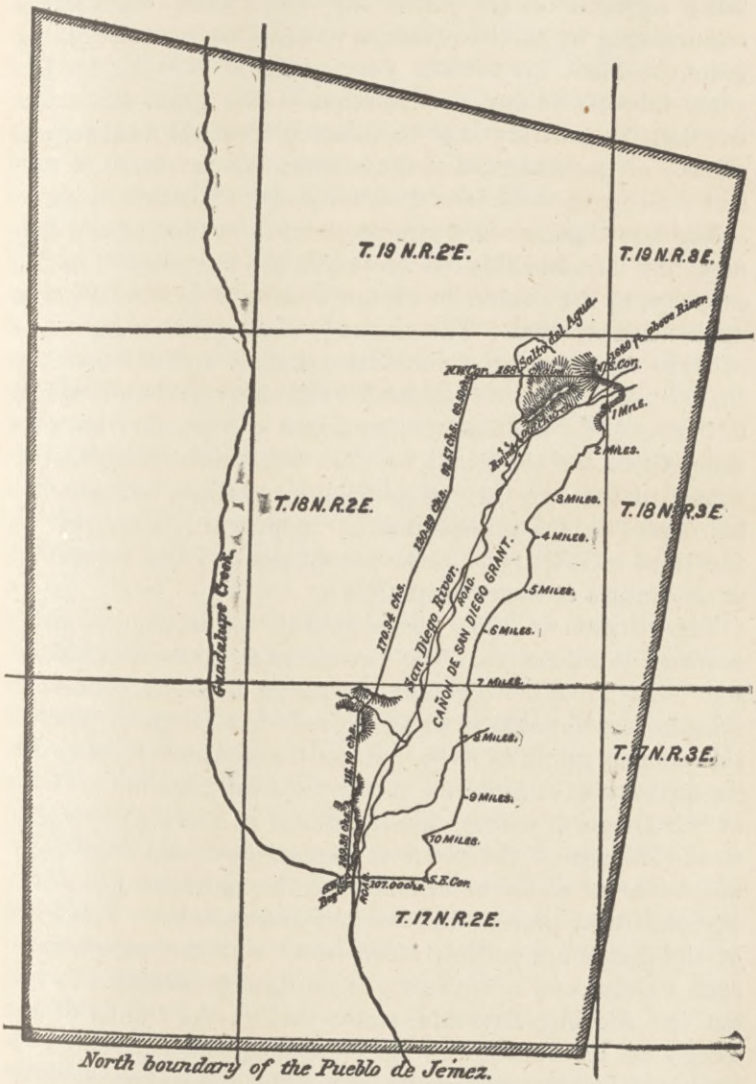
Mr. Henry M. Earle for appellants.

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.

By the Spanish law in force at the time of the alleged grant of 1788, lots and lands were distributed to those who were intending to settle, and it was provided that "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property." But confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title. Laws Indies, Lib. IV, Tit. 2, Law 1; Royal Order of 1754; 2 White's New Recop. 48, 62. This is admitted except that it is said that confirmation was not needed, and was not usually had, until the settler sought to exercise the power of disposition.

It was also provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." Lib. IV, Tit. 12, Law 2; 2 White, 49.



Plat of the Cañon de San Diego Grant, surveyed by Rob't G. Marmon, U. S. Deputy Surveyor, May, 1880. Scale 80 chains — 1 in.

We are of opinion that the granting papers in this record taken together do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon; but that the contrary is to be inferred from the testimony in respect of possession; and that Armenta's certificate of 1798 and the correspondence of 1808 conduct to no other result.

The two Garcias were interpreters to the Indians and they may not unreasonably be supposed to have resided, in that capacity, at the pueblo, or on lands claimed by the Indians as appurtenant thereto. The language of the petition and decree of 1788 was perhaps somewhat peculiar, and it is manifest that Governor Chacon regarded "the cultivation and working of the land" by them as not permanent in character; for when the petition for the grant of 1798 was presented to him on behalf of the two Garcias and eighteen others, he referred in his decree to the interpreters as "temporarily stationed" on the tract solicited, and must be assumed to have been aware of the nature of their occupation.

The petition of 1798 was a petition for settlement, and it nowhere intimates that the two Garcias, petitioners "in unison" with the other eighteen proposing to settle, claimed an independent interest in the Cañon de San Diego by virtue of the alleged grant of 1788, but on the contrary it states that "a quantity of vacant and uncultivated land lies in the Cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez," and that "the settlement thereof would be beneficial to the provinces and advantageous to our present families and descendants." The terms of the decree are entirely inconsistent with the recognition of such a claim, and so is the act of juridical possession. In that act the Alcalde, Armenta, states that in the Cañon de San Diego de los Jemez, having summoned the natives of the pueblo of Jemez, to whom was measured the league belonging to them, he found a surplus of two thousand one hundred varas, which the Indians had, before arriving at the Cañon de San Diego, and were claiming as their own, but to which he

says they had no right in any manner; and believing that it was the wish of the sovereign that his lands be settled by his citizens wherever a surplus was found, finding no impediment, and using the authority in him vested, and finding no one with a better title, and Francisco Garcia and Antonio Garcia, the Navajo interpreters, and the eighteen other petitioners, (naming them,) being present, "all interested and well informed in regard to the matter," he took them over the lands, performing the usual formal acts in proof of legal possession, "which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter"; and he gave them time to understand the boundaries, which were: "On the north, the Vallecito de la Cueva, on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara"; adding: "and no injury resulting to any one they were all satisfied." Of these boundaries the southern was the north boundary of the Indian pueblo, and in making the subdivision Armenta apparently started from that boundary and, after reaching the junction of the Guadalupe and the San Diego, followed up the San Diego, which flowed through the cañon. He made the distance from the north boundary of the pueblo to the south boundary of the cañon 2100 varas, and, therefore, if he subdivided that space, must have allotted at least 3900 varas within the alleged grant of 1788, for he certified that he delivered to "each one of the said settlers three hundred varas," which would be six thousand varas in all for twenty settlers. The government survey shows that distance to have been something short of 3400 varas. If Armenta meant by "the said settlers" the eighteen co-petitioners, and left to the interpreters as contradistinguished from these settlers what they were cultivating between the two boundaries, then 5400 varas were allotted to the eighteen within the grant of 1788.

In any view, allotments were made north of the south

boundary of the grant now claimed, which was entirely embraced by the grant of 1798.

The evidence for the petitioners did not show where the two interpreters were located and what the particular tract was that was reputed to belong to them in fee, but the evidence for the Government tended sufficiently to establish that they did not actually cultivate any part of the grant of 1788 prior to 1798. It must be conceded that wherever the interpreters were, they were together, and it is quite clear from the testimony that Antonio Garcia, who survived until 1835, when one of the witnesses was twenty years old, cultivated and claimed ownership of land not within the boundaries of the grant of 1788, but between the south boundary of that tract and the north boundary of the Indian pueblo; and the presumption is that this was so in respect of Francisco.

It is true that when Armenta gave juridical possession under the grant of 1788, he described the south boundary as "the junction of the rivers and also a point of a red table land and lands of said Indians." But at that time the Indians claimed to the junction of the two rivers, and no attempt was then made by Armenta to determine the boundary of the pueblo, as it would seem would have been the case if the grant had been of land for settlement with the intention of acquiring the legal title.

When the proceedings were had before the Surveyor General in 1879–80, the original papers of 1788 were produced by claimants, and also an independent paper purporting to have been signed by Armenta on the 14th day of March, 1798, at the cañon, stating "there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors"; and that "the said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these. Friends and brothers, now each of you is about to take the lands, which his Majesty has granted and donated to you; but you are all notified that

the lands, which we first and in our first grant, we have been possessing, be all of you aware that I, and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children and our successors." And "all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time"; and that they should be left "in peace concerning the said land which they had been so justly possessing." And to this Armenta bore witness, because "all of the citizens declared that it was not to them any imposition that Messrs. Garcias should enjoy the lands which they were heretofore cultivating."

There is nothing to show and we think the presumption cannot be indulged that this so called certificate was brought to the attention of Governor Chacon, and the alcalde certainly had no authority in himself to make an exception to the grant.

The grant of 1798 was a grant for settlement, and by the allotments contemplated to be made and which were made, so many parcels, of three hundred varas each, specifically situated in whole or in part within the cañon and the alleged grant of 1788, were set off, so that if an exception could have been created by this independent paper, it involved the proposition that after the allotments had been made, eighteen of the twenty allottees assented to be deprived of any right or title to the lands which had just been assigned to them, and would have been repugnant to the grant.

Again, there was no intimation of such an exception in the petition, the decree, or the act of juridical possession, nor any mention of the execution of this paper in that act, nor does it appear that it was placed in the archives with the title papers, and when Armenta certified to the testimonio on the 16th of March, 1798, he did not include nor make any mention of this certificate. Moreover, it was not attested by witnesses, as required in the instance of official documents, in the

absence of a public or royal notary, of which there was "none within the limits of all this government," as Armenta certified in the act of juridical possession. It is impossible to treat this paper as of legal validity as an exception, and to give it the same force and effect as the act of juridical possession or as if it were a direct reconveyance.

But treating the paper as genuine and entitled to consideration as evidence, it amounts to nothing more than the statement of an assent on the part of the eighteen that the Garcias should not be disturbed as to the particular land they were cultivating, which we are satisfied from the evidence was not within the grant of 1788 at all. It furnishes no basis for permitting the Garcias to repudiate the official action of the alcalde in making the allotments to their co-petitioners, they having been present, participating in the proceedings, and parties to the transaction from the beginning.

This brings us to consider the papers of 1808, which consist of a communication of Alcalde Vergara to Governor Manrique and an unsigned note purporting to be the governor's reply thereto. The alcalde states that "the interpreter of the Navajos, Antonio Garcia," has presented to him a document in his favor, executed by the former alcalde, Armenta, under the decree of Governor Concha, "as appears from the grant itself, and the whole of the Jemez cañon having been settled under an order of Don Fernando Chacon in a royal grant made to them, and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others, the latter grantees alleging title to all the lands; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I enclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve of the same, to obviate all questions which will necessarily re-

sult if the latter be not decided by your superiority that the land of the Garcias is included or not in the grant of the last settlers." . . .

It will be perceived that the controversy is asserted to be not whether the Garcias' land included that of the other settlers, but whether the land of the latter embraced that of the Garcias. It is this question which the governor is asked to determine. The "others" are plainly the eighteen settlers, and they are the grantees who are said to be alleging title to all the lands. The reply of the governor stated that the subject did not require his decision, "inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a preference"; and that the last settlers could not deny to the Garcias a better title, and so these "should always remain on the same grant which they have held hitherto." And he added that "if the said new settlers do not coincide," he should not permit them recourse, for "as the documents referred to were sanctioned by former governors of this province," the royal audiencia of Guadalajara alone could annul them.

This correspondence was entirely *ex parte* and without the knowledge of the other settlers, and was in no respect judicial action. The reply signified the individual opinion of the governor, not that the new settlers could be driven from their own holdings, but that they could not claim the land actually occupied by the Garcias. And he expressly declined to adjudicate in the premises because unable to take jurisdiction in respect of documents "sanctioned by former governors." Now what had been sanctioned in 1789 by Governor Chacon was the grant and allotments of that date, and it does not appear that in 1808 the validity of those allotments was questioned. The communication of Vergara related to the land that had been formerly cultivated by the Garcias and to which they were given a preferred right by Armenta at the time of delivering juridical possession in 1798; and Vergara stated that the whole of the cañon had, when he wrote, been settled under the grant of that year.

The Court of Private Land Claims held that Governor

Chacon was justified in regarding the petition to him as in the nature of a request on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified and as an offer of release of all claims to any part of the land by virtue of the grant of 1788; that the act of juridical possession showed that the twenty petitioners, including the Garcias, were placed in possession and each received three hundred varas of land, leaving the remainder to be held in common; that the certificate of Armenta of 1798 was probably signed before the act of juridical possession, and reasonably bore the construction that the petitioners had agreed, in pursuance of an original understanding, that a colony of twenty persons should be formed, of which the two Garcias should be members, to settle in the cañon and that the Garcias should surrender all claim under the grant of 1788, and accept their proportion of the new grant with the new settlers, share and share alike; that the Garcias accepted the agreement of their co-grantees as a guarantee that in any distribution of the land which might be made their allotments should cover the particular portion which they had theretofore been cultivating; that by thereafter accepting their allotments the Garcias became parties to the official action of the alcalde and were bound by it; and that they each accepted three hundred varas as their equal part in compliance with the terms of the grant and of the agreement, and to their entire satisfaction. On the other hand, it might fairly be argued that Armenta in the act of juridical possession in 1798 left to the Garcias all the land which they were actually cultivating south of the south boundary of the grant of 1788, and assigned to the eighteen last settlers 5400 varas north of that boundary and in the grant itself, and that the certificate of 1798 was merely in authentication of an assent to the allotment to the Garcias, as co-settlers with the eighteen, of lands previously possessed by them south of the grant of 1788, and not to an exception of that grant out of the grant of 1798. Although the Garcias, if they should be regarded as prior settlers, did not "leave their former residence and remove themselves to the new place to be settled," they brought

themselves into connection with it and relinquished whatever rights they had outside of the particular land resided on and cultivated. The 2100 varas were surplus lands so far as the Indians were concerned, and vacant in the sense that the Indians had no title to them, yet nevertheless the interpreters may have been in occupation thereon as outlying Indian lands, and upon the surplus being ascertained, may have asserted a superior right to what they were there cultivating, and demanded that that be conceded in the distribution under the new grant. If this were so, it would satisfactorily explain the certificate of Armenta and the contention referred to by Vergara.

We are not dealing with the rights of the Garcias as between them and other claimants, but with the rights of the Garcias as between them and the Government of Spain, and in that regard the question is whether that Government conveyed to others what had already been conveyed to the Garcias. Whether then the Garcias did or did not take three hundred varas each north of the south boundary of the grant of 1788, they would be equally bound by their participation in the grant of 1798, although in the distribution thereunder they were allotted even more than that south of that boundary under the circumstances.

Accepting either construction of the documents and in the light of all the evidence, the conclusion of the court below was correct.

The suggestion that some of the allotments may have been in the Cañon Guadalupe finds no such support in the record as to require consideration.

Affirmed.

ZIA, Pueblo of *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 5. Argued October 12, 1897. — Decided November 15, 1897.

An officer of the Pueblo of Zia and an officer of the Pueblos of Santa Aña and Jemez, in 1766, petitioned the Spanish governor and captain general, setting forth "that they, from their foundation, have considered as their pasture ground, in the vicinity of their said pueblos, a valley commonly called the Holy Ghost Spring, and that in some urgent cases, the same as is known, is used as a pasture ground for the horses of this royal garrison, and the said parties being aware that the said valley has had, in its vicinity, some applicants to acquire the same by grant, which will cause them very great injury, as they have considerable cattle, sheep, goats and horses for the royal service, and not having any other place in which to pasture them, particularly the people of the Pueblo of Zia, the greater part of whose fields are upland, and some of them in the glens of said valley, adjoining their said pueblo," and asking him to "be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos, directing that the boundaries thereof be designated to them, that is, on the east, the pueblos aforesaid, on the west, the summits of the Puerco River, on the north, a place called the Ventana, where some Navajo Apaches reside, and on the south, the lands of the citizen settlers of said Puerco River." On receipt of this petition the captain general ordered an examination to be made, and, upon the coming in of a favorable report, ordered the alcalde to give royal possession of the grant to the petitioners and the boundaries therein set forth. *Held*, that the language used in the documents indicated nothing more than a right to pasture their cattle upon the lands in question; that the grant did not vest the title to the lands in the petitioners, but was a mere license to use them for pasturage, which license, if not revoked by subsequent grants, was revoked by the treaty of Guadalupe Hidalgo, ceding the entire territory to the United States; and that the title to the land was not one "lawfully and regularly derived from the government of Spain," nor "one that if not then complete and perfect at the date of the acquisition of the territory by the United States the claimant had a lawful right to make perfect, had the territory not been acquired by the United States," as provided for in the act of March 3, 1891, c. 539, creating the Court of Private Land Claims.

THIS was a petition by the Pueblos of Zia, Santa Aña and Jemez for the confirmation of what is known as the Ojo del Espiritu Santo grant, containing about 382,849 acres.

The *testimonio*, or official copy of the proceedings, opens

with the following petition to the governor and captain general, presented in 1766, by Felipe Tafoya, as the agent of these pueblos:

"His excellency the governor and captain general:

"I, Felipe Tafoya, lawyer of this town of Santa Fé, appear before your excellency in full legal form, for and in the name of Cristoval, Indian governor of the Pueblo of Zia, and Thomas, chief war captain of said pueblo, who come under appointment from their casique, and of the other inhabitants of their Republic, and, sir, in the name of the aforenamed, and of the community of the Pueblos of Santa Aña and of Jemez, do state that they, from their foundation, have considered as their pasture ground, in the vicinity of their said pueblos, a valley commonly called the Holy Ghost Spring, and that in some urgent cases, the same as is known, is used as a pasture ground for the horses of this royal garrison, and the said parties being aware that the said valley has had, in its vicinity, some applicants to acquire the same by grant, which will cause them very great injury, as they have considerable cattle, sheep, goats and horses for the royal service, and not having any other place in which to pasture them, particularly the people of the Pueblo of Zia, the greater part of whose fields are upland, and some of them in the glens of said valley, adjoining their said pueblo. In consideration of all of which, I ask and pray that your excellency, in the name of His Majesty, (whom may God preserve,) be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos, directing that the boundaries thereof be designated to them, that is, on the east, the pueblos aforesaid, on the west, the summits of the Puerco River, on the north, a place called the Ventana, where some Navajo Apaches reside, and on the south, the lands of the citizen settlers of said Puerco River, and, should your excellency order to be done as I have requested, the said parties, my clients, will receive grace with the justice which I ask, and declare in their name that this is not in dissimulation, and so forth.

"FELIPE TAFOYA."

Upon the receipt of this petition and on June 16, 1766, Velez Cachupin, governor and captain general, made an order commissioning the chief alcalde of said pueblos, Bartolomé Fernandez, "to the end that, having examined the boundaries which they mentioned as of the Holy Ghost Spring, where they state they pasture their stock and horses, he reports to me the leagues the same may embrace from north to south and from east to west, and whether the aforesaid three pueblos have the cattle, sheep, goats and horses proportional to the boundaries asked for their grazing, and also whether or not any citizen or citizens are damaged by said boundaries under any prior valid grant and possession held by them, which the said chief alcalde will perform with all possible veracity."

Fernandez reported that he proceeded to examine the lands and their boundaries, and after establishing the quantity, found that they were "only suitable for pasturing live stock, which is abundant at said pueblos, though the said three republics have no other lands on which to sustain their stock, and it being, as it is true, that none of the aforementioned boundaries will injure any one holding or to hold possession of lands within the same, which proceedings I placed on record," etc.

Upon this report the captain general made the following decree:

"In the town of Santa Fé, on the sixth day of the month of August, one thousand seven hundred and sixty-six, I, Thomas Velez Cachupin, governor general of this kingdom of New Mexico, in view of what is petitioned for by the three Pueblos of Santa Aña, Zia and Jemez, of the Queres nation, and of the report which their chief alcalde, Bartolomé Fernandez, makes, that they have held said lands for their live stock, which at present is abundant, without having any other places in which to pasture them, except those referred to in their petition, together with the small watering places mentioned in said report, declare that I would grant, and I did grant, in the name of His Majesty (God preserve him), the

aforesaid lands for pasturing the stock and horses of the aforesaid three Pueblos of Santa Aña, Zia and Jemez, with the boundaries, from north to south, from the place Ventana to the stone ford of the Puerco River, the boundaries also of the citizens of the place San Fernando of Nuestra Señora de la Luz; and from east to west, from the Pueblo of Zia to the said Puerco River, the eastern edge, the whole of the valley of the Holy Ghost Spring being embraced within the centre and within the boundaries of this grant, with the condition and stipulation: that in case of necessity the horses of this royal garrison of Santa Fé may, and shall be, kept in said valley, the same being a place where they have been accustomed to graze; wherefore the aforementioned three pueblos are to place no obstacle in the way, nor claim damage therefor; and the aforementioned boundaries being for the future considered those of the aforementioned three pueblos, they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, deeming the pasturage to be common. And I direct the chief alcalde, Bartolomé Fernandez, to go and give to the aforementioned three pueblos royal possession of this grant, and the boundaries therein set forth, taking with him the justices and seniors of each one of them, and placing his proceedings on record, following this my granting decree, which he will return to me, in order to furnish to each pueblo the proper testimonio of the whole, and deposit the original in the archives of this government, where it shall remain.

"And I so provided, granted, ordered and signed, acting with two attending witnesses in the absence of notaries, there being none of any kind in this jurisdiction.

"Thomas Velez Cachupin.

"Witness: Carlos Fernandez.

"Witness: Domingo Sabadia."

In compliance with this decree of the governor and captain general, Bartolomé Fernandez, the alcalde, made report to the governor that he proceeded to the aforementioned pueblos,

and, in company with the governors, casiques and other authorities, proceeded to the lands asked for by the natives of the said three republics, and summoning the contiguous land holders, took by the hand the aforesaid governors and the magistrates, " and conducted them over said land; and they shouted 'Long life to the King, our sovereign, whom may God preserve,' and they cast stones, and pulled up grass, in sign of possession, which I gave them, and which they received quietly and peaceably, without any opposition whatever, under the conditions mentioned in the aforesaid grant," etc.

The claim was presented to the surveyor general under the law of July 22, 1854, and through the Secretary of the Interior reported to Congress for confirmation, but no action was ever taken. The petitioners also produced evidence tending to show that since the date of the grant they have been continuously and openly in possession of the property, pasturing their cattle upon it and cultivating certain portions, under a claim of exclusive right thereto by virtue of the grant; that they are now in the open and notorious occupation of the same as the owners in fee, except a portion of it which may be in conflict with a certain grant called the Santissima Trinidad Galvana Ignacio Sanchez Veraga tract, in regard to which they admit they have released the same unto the claimants thereof. The continuity and exclusiveness of this possession were denied by the witnesses produced by the Government.

In defence it was shown by the Government that three subsequent grants were made, one in 1815 to Luis Maria Cabeza de Baca, known also as the Ojo del Espiritu Santo grant; another in 1786, known as the San Isidro grant, and another made 1798, known as the Cañon de San Diego grant, in connection with which parol evidence was admitted to show a conflict between these grants and that of the petitioners to a large, if not to the entire, extent of their grant.

Upon this state of facts the Court of Private Land Claims made a decree rejecting the grant, and dismissing the petition of petitioners upon the ground that the grant was not in fee, but a license to pasture. From this decree the petitioners appealed to this court.

Mr. Henry M. Earle 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.

The main question in this case is whether the language of the documents, which make up the *testimonio*, indicates anything more than the grant of a right to these pueblos to pasture their cattle upon the lands in question — a right somewhat akin to the right of common under the English law, and one which appears to have been frequently granted under the Spanish law. *United States* v. *Huertas*, 8 Pet. 475; *United States* v. *Davenport's Heirs*, 15 How. 1.

The words of the several documents set forth in the *testimonio* certainly favor this interpretation: Thus, in the petition, there is no application for a grant of vacant land for cultivation and pasturage, as is usual in this class of cases, but a statement that the pueblos "have considered as their pasture ground in the vicinity of their pueblos, a valley commonly called the Holy Ghost Spring," (which, it seems, had been used in some cases as the pasture ground for the horses of the royal garrison,) and that some applicants were desirous of acquiring the same by public grant, "which will cause them very great injury, as they have considerable cattle, sheep, goats and horses for the royal service," and have no other place in which to pasture them. There was no claim of a grant of the lands, such as the other applicants were seeking to acquire, but a request to have them *considered as their pasture ground*, and as the pasture ground for the horses of the royal garrison. The prayer bears out this construction of the statement of the petition. It asks, not for a grant of the land, but that his excellency will "be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos," directing a designation of their boundaries, etc.

The order of the captain general upon this petition and the report of the chief alcalde are addressed only to the ascertainment of the boundaries, and to the fact whether there was any other prior grantee in possession, and throw but little light upon the granting act.

The final grant or decree, however, states that the captain general granted the aforesaid lands "for pasturing the stock and horses of the aforesaid three pueblos," designating the boundaries, and with the stipulation that in case of necessity the horses of the royal garrison of Santa Fé might be kept in the valley where they had been accustomed to graze, and decreed that the aforementioned three pueblos "will hold the same, with legitimate title, under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, deeming the pasturage to be common." The alcalde was further directed to give royal possession of the grant which he certifies in the act of possession that he did by taking by the hand the governors and war captains of the pueblos with their magistrates, and conducting them over the land, and making a livery of seizin by shouting "Long life to the King, our sovereign, (whom may God preserve,)" and casting stones and pulling up grass in sign of possession, "which I gave them and which they received quietly and peaceably without any opposition whatever, under the conditions mentioned in the aforesaid grant," and, subsequently, attesting these formalities with witnesses.

There is nothing in any of these instruments to indicate that the pueblos desired, or that the governor intended to grant anything beyond a common, whereon the inhabitants of the pueblos might pasture their stock in conformity with ancient usage. When it is considered that the valley was already used as a pasture ground for the horses of the royal garrison, it is to be inferred that the rights of these pueblos were practically the same as those of the royal garrison, and were not intended to involve a conveyance of a fee of the land. It is true that by the common law of England, livery of seizin was only necessary to be made upon the granting of an estate of freehold, either of inheritance or for life, (2 Bl.

Com. 314;) but, under Spanish law, it seems to have been a feature commonly connected with the delivery of possession of the land, though to what extent is somewhat uncertain.

The granting clause is not in the usual form of a grant of vacant lands to the grantee for cultivation and pasturage upon condition of actual possession for a number of years. Nor are there any words indicating an intention to pass a fee simple, such as found in some of the Spanish grants, *para adquirir légitimo derecho de propiedad y señorio*, "in order to acquire legitimate right of property and dominion." These words, *propiedad y señorio*, carry the idea of complete ownership, and seem to be practically the same as the words "fee simple" under the common law.

Upon the contrary, the grant in question provides that the grantees "shall hold the same with legitimate right" of possession (*para que lo posean con derecho légitimo*) "under this royal grant, so that they be not molested by any Spanish citizen taking their stock thereon, deeming the pasture to be common." It would seem to have been the intention of the governor by these words to vest the pueblos simply with the right to the use of the lands without intending to estop himself, or his successors, from making a subsequent disposition of the same by a grant in fee. This construction is also borne out by the fact that within a few years thereafter a grant was made of the entire tract to other parties. As remarked in the opinion of the court below, "it seems quite unreasonable to suppose that, if this area in controversy had been granted as an estate in fee to the land, the same granting authority would have deliberately granted a portion of the same land to a third party only twelve years after the former grant, repeat a like act in 1815 and afterwards, and that, too, of land situate near the capital, grazed upon by the royal horses of the capital garrison, and the local alcalde directed in every case to report officially whether the land proposed to be granted was unoccupied, or that the grant would be to the injury of third parties. This grant was prayed solely as a pasturage right; it seems to have been granted for that purpose alone, and it appears that the governor afterwards treated it as such, and disposed

of the paramount title to a large part of the land upon the same view."

In the absence of direct testimony it is somewhat difficult to ascertain with precision the laws of Spain with respect to grants of pueblo lands; but in 2 White's New Recopilacion, 254, it is stated by Nicholas Garrido, apparently acting for the Duke of Alagon, in a communication addressed to the governor of Florida, that "the concession of a great extent of land for the rearing and pasture of cattle, constitutes no more than the usufruct of it, for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation upon which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if it were held on rent. Those who have obtained those concessions as recompense for services are in the same class with the others, and can allege no other right, than what is extended to all those who have suffered losses, and faithfully followed the cause of his majesty." From the correspondence, of which this opinion was a part, and which was considered by this court in *United States* v. *Clarke*, 8 Pet. 436, 459, it would seem that there was a recognition by the governor and civil authorities of Florida of a distinction between absolute grants of land and "allotments of land made for raising cattle, which may not have titles of proprietorship," (2 White, 252,) the latter of which did not vest in the grantee the ownership of the lands. Certainly if a grant in these terms were made in a State in which the common law prevails, it would be treated simply as a license to pasture, terminable at the will of either party. Such information as we are able to obtain regarding the law of Spain favors a like interpretation of this grant.

The evidence of possession in this case was perfectly consistent with the grant, which on its face vested the pueblos with such possession, and besides, the testimony was of such a vague and contradictory character as to throw but little light upon the nature of the occupation.

The case of *United States* v. *Huertas*, 8 Pet. 475, relied upon

by the petitioners, seems rather to bear against them. It is said by Chief Justice Marshall, in his brief opinion, that the governor in his decree making the concession states his own knowledge of the facts set forth in the petition, namely, the many and great services rendered to the government in an insurrection. He grants the ten thousand acres with the precise condition to use the same for the purpose of raising cattle, "without having the faculty of alienating the said tract without the knowledge of this government"; but, he adds, that on the 20th of July, 1816, three years after the concession, Governor Coppinger granted a complete title to this land, reciting the decree made by Governor Kindelan, and the boundaries of the land. It was this second grant which evidently fixed the title of the grantee, notwithstanding the limitations of the prior grant.

Upon the whole, we are of opinion that the court below was correct in holding that the grant in question did not vest the title to the land in the petitioners, but was a mere license to use them for pasturage, and that such license, if not revoked by the subsequent grants, was revoked by the treaty of Guadalupe Hidalgo, ceding this entire territory to the United States; *Wallis* v. *Harrison*, 4 M. & W. 538; *Cook* v. *Sterns*, 11 Mass. 533; *Harris* v. *Gillingham*, 6 N. H. 9; *Cowles* v. *Kidder*, 24 N. H. 364, 379; *Blaisdell* v. *Portsmouth, Great Falls &c. Railroad*, 51 N. H. 483; *Coleman* v. *Foster*, 1 Hurl. & Norm. 37; *S. C.* 37 E. L. & E. 489; *Prince* v. *Case*, 10 Connecticut, 375; and that in the language of § 13 of the act of March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims, the title to the land in question was not one "lawfully and regularly derived from the government of Spain," or "one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant had a lawful right to make perfect, had the territory not been acquired by the United States."

The decree of the court below is therefore

Affirmed.

CRESPIN *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 6. Argued October 12, 1897. — Decided November 15, 1897.

The plaintiffs claimed as heirs and legal representatives of the original grantees under a grant alleged to have been made March 24, 1840, by "the prefect or superior political chief of the district of Bernalillo," in the Republic of Mexico. There was no evidence that the grant of the prefect ever received the sanction or approval of the governor, the ayuntamiento, or other superior authority of the Mexican Republic. *Held*, that it was beyond the power of the prefect alone to make the grant in question.

Possession of land so granted after the date of the treaty of Guadalupe Hidalgo, however exclusive and notorious, cannot be regarded as an element going to make up a perfect title.

THIS was a petition by Crespin and about forty others for the confirmation of what is commonly known as the San Antonito grant, situated in Bernalillo County, New Mexico, and alleged to contain 32,000 acres.

Plaintiffs claimed as the heirs and legal representatives of the original grantees, and set forth in their petition that, on March 24, 1840, the Republic of Mexico, through Antonio Sandoval, "the prefect or superior political chief of the district of Bernalillo, thereunto duly authorized by the laws, usages, customs, superior orders and decrees of the said Republic, or of its duly constituted and competent authorities," granted and delivered possession of this tract of land unto the grantees therein named; that the original grant or *expediente* of title remained in the office and formed a part of the archives of the said prefect, and that an official copy or *testimonio* was at the time delivered to the grantees as a complete and final title in fee.

That the petitioners were unable to find the original *expediente*, which, with a large part of the other public archives, was lost, destroyed or stolen, and that the official copy, or *testimonio*, had also been stolen; but that, while the *expediente* was in the archives of the prefecture, a *testimonio*, or

true copy, thereof was made by one Rumaldo Chaves for his own use, and that such copy was, prior to 1846, transferred and delivered by said Chaves, by indorsement thereon, unto Gaspar Atencio, one of the grantees of the original grant, for his uses and purposes, and has ever since remained in his possession.

The petitioners further alleged, upon information and belief, that the grant was finally confirmed and approved by Governor Manuel Armijo and the departmental assembly, and that by virtue thereof an allotment was made in severalty to each of the grantees, and juridical possession given to such grantees by José Trujillo, in accordance with the decree of the prefect and the laws then competent and in force in said territory, and that the grantees since then have been in open and notorious possession of the tract. The remaining allegations of the petition are immaterial.

Upon the trial of the case, plaintiffs offered in evidence a petition addressed to "Señor Prefect Don Antonio Sandoval" by "Juan José Garcia and Gaspar Atencio, residents of the demarkation of Albuquerque," stating that they and their constituents, finding themselves without tillable land by which to subsist, "and there being back of the Sandia Mountain a tract of land called San Antonito, the fertility of which and the increase of whose waters all invite its cultivation, by this means the commendable promotion of agriculture and the progressive benefit of the petitioners will be accomplished," they inform the prefect "that it is fifteen years, a little more or less, since this tract was donated to Cristobal Jaramillo, deceased; yet, moreover, in all this space of time, said land has not been cultivated at all, and if this has been forfeited in accordance with our laws, we humbly beg your honor to be pleased to grant us what we ask, as it is without prejudice to a third party."

In compliance with this petition, the prefect, signing himself simply "Sandoval," made an order, under date of March 21, 1840, that the petition be transmitted to the justice of the peace of Los Ranchos to report in detail the nature of the land and the need of the petitioners.

On the following day, José Trujillo, the justice, filed his report, stating that, after having fully informed himself as to the nature of the lands, "it is fitted for agriculture, very pleasing and very delightful for a life of tranquillity, very favorable to everything for a most comfortable living," and that the petitioners are in need of landed property, with the exception of three persons named, who are known to have land, but do not count upon it, because they are in debt and have it secured by said lands, and that all the others have not such property.

Upon this report Sandoval made the following decree:

"BARELAS, *Mar.* 24, 1840.

"One of the most commendable and beneficial things to a people being the promotion of agriculture, let this petition be transmitted to the justice of the peace of Los Ranchos, in order that with all the customary formalities he give the possession solicited by the parties in interest, without prejudice to a third party, and only for cultivation the lands necessary, leaving free the pastures and watering places, which under no circumstances ought to be interfered with; and after this is done he shall make a full report to this prefecture.

"FRANCISCO SARRACINO, *Secretary.* SANDOVAL."

In compliance with this decree, Trujillo, justice of the peace, reported that he had given juridical possession of the lands to the petitioners and their associates to the number of twenty-seven, who were each given one hundred *varas*, except two of the petitioners, who were given one hundred and fifty, in the usual form of livery of seizin under Spanish grants.

The *testimonio*, or official copy of these papers, was not made by the secretary of the Prefect Sandoval, but by Rumaldo Chaves, the clerk of the justice of the peace Trujillo, and seems to have been made for the personal use of Chaves, and afterwards transferred by indorsement to Gaspar Atencio, who appears, from the document, to have been one of the leading petitioners, and received, according to the allotment, one hundred and fifty *varas*.

Counsel for Appellants.

Plaintiffs next offered in evidence the following *hijuela*, or certificate of allotment, executed April 11, 1840, by José Trujillo, purporting to show an allotment of one hundred *varas* of land at San Antonito to Vicente Samora under the decree of the prefect Sandoval:

"The citizen José Trujillo, justice of the peace of the jurisdiction of los ranchos de Albuquerque, does hereby certify in form of law that one hundred varas of land at San Antonito were donated to Vicente Samora in accordance with and as stated in the general grant made by me, the said justice of the peace, by virtue of the decree of March 24th made by the prefect Don Antonio Sandoval. The foregoing certificate is given at the ranchos this 11th day of April, 1840, I signing it with my two attending witnesses, to which I certify.

"José Trujillo. [rubric.]

"Attending witness:

"Rumaldo Chavez. [rubric.]

"Attending witness:

"Pablo Roman Sisneros. [rubric.]"

Plaintiffs further offered to refer to other cases and documents for the purpose of showing that other grants had been made by prefects, which were recognized and confirmed by the proper Mexican authorities, and, also, that several of such grants had been confirmed by the Congress of the United States.

These documents were all objected to by the Government, and were admitted subject to these objections. Some further explanatory oral testimony was introduced in support of petitioners' claim, but no evidence was offered on behalf of the Government.

Upon this state of facts, the court delivered judgment, dismissing the petition and rejecting the grant, whereupon the plaintiffs appealed to this court.

Mr. Henry M. Earle 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.

The principal question urged upon the attention of the court in this case is whether, under the laws of Mexico, as they existed in 1840, it was within the power of a prefect to make a grant of public lands.

In endeavoring to ascertain what were the laws of Mexico at any particular time, of which we are bound to take judicial notice, *Fremont* v. *United States*, 17 How. 542, 557; *Romero* v. *United States*, 1 Wall. 721, we are somewhat embarrassed by the frequency with which the government was changed — usually by revolutionary violence — between the time the Republic gained its independence in 1821 and the treaty of Guadalupe Hidalgo in 1848, under which the northern provinces of Mexico were ceded to the United States. These changes were sometimes accompanied by decrees annulling the acts of previous governments, cancelling grants, and putting new regulations in force with respect to the disposition of public lands. That these difficulties are of long standing is evident from the comments of Chief Justice Marshall in the case of *Soulard* v. *United States*, 4 Pet. 511, in which the court announced itself as unable to form a satisfactory judgment by reason of its inability to obtain proper information with regard to the laws and principles upon which the transfer of Spanish titles depended, and therefore postponed the final disposition of the case until such information could be obtained.

In view of this and similar difficulties, this court, as early as 1832, in *United States* v. *Arredondo*, 6 Pet. 691, laid down as a general proposition that the grant itself was *prima facie* evidence of its own validity, and that it would be presumed to have been regularly issued until the contrary appeared, or such reasons were offered for doubting its authenticity as were sufficient in law to rebut the legal presumption. To

the same effect are *United States* v. *Clarke*, 8 Pet. 436; and *United States* v. *Percheman*, 7 Pet. 51; *Strother* v. *Lucas*, 12 Pet. 410, 437; *Reynolds* v. *West*, 1 California, 322, 326; *Jones* v. *Garza*, 11 Texas, 186, 207.

The courts of California have carried this principle so far as to hold, though apparently with some fluctuation of opinion, that a grant of a pueblo lot made by an alcalde raises a presumption that the alcalde was a proper qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Reynolds* v. *West*, 1 California, 322; *Cohas* v. *Raisin*, 3 California, 443; *Hart* v. *Burnett*, 15 California, 530; *Payne* v. *Treadwell*, 16 California, 220; *Leese* v. *Clarke*, 18 California, 535; *Donner* v. *Palmer*, 31 California, 500.

In considering their methods of disposing of public lands, this court has had frequent occasion to uphold the validity of grants made by the Governors of the Spanish and Mexican provinces, who appear to have been sometimes also called "Political Chiefs." Indeed under the regulations for the colonization of the Mexican territories of November 21, 1828, the political chiefs were expressly authorized to grant the public lands of their respective territories. Reynolds' Land Laws, 141; *United States* v. *Workman*, 1 Wall. 745, 761; *Hornsby* v. *United States*, 10 Wall. 224, 231; *Vanderslice* v. *Hanks*, 3 California, 27; *Leese* v. *Clarke*, 3 California, 17; *Leese* v. *Clarke*, 18 California, 535, 546; but see *Jones* v. *Garza*, 11 Texas, 186. A similar power seems also to have been vested in the Spanish intendants. Reynolds' Land Laws, 59, 60; *United States* v. *Clarke*, 8 Pet. 436, 452.

Prefects were functionaries well known in the Roman law, and under the empire were clothed with extensive powers, both judicial and administrative. With the decline of the empire they seem to have lost their importance and to have finally disappeared; but, after remaining in abeyance for some hundreds of years after its fall, the office was revived in the eighth year of the French Republic, (1800,) and bestowed upon the heads of the departments into which the country had been divided by the National Assembly in 1790. In the perform-

ance of their duties they were aided by a council of prefecture. The prefect was charged with the administration of local affairs, and was practically the representative of the central government in public matters. The title was carried into several States, whose legislation was framed upon the model of the Code Napoleon, but, until the establishment of the Republic, was apparently unknown in Mexico. It seems to have been recognized, however, prior to 1836, since by the constitutional law or decree of December 29 of that year, defining the powers of the president and governors, there was given to the latter the authority "to appoint the prefects, to approve the appointment of the sub-prefects of the department, to confirm that of the justices of the peace, and to remove any of these officials." Reynolds, 205.

By the law of March 20, 1837, for regulating provisionally the interior governments of the departments, it is provided, by article one, that "the interior government of the departments shall be in charge of the governors, departmental councils, (juntas,) prefects, sub-prefects, common councils, alcaldes and justices of the peace"; that it shall be the duty of the governors to appoint the prefects, etc. The power of the prefects is thus defined: Article 77: "They shall regulate administratively and in conformity with the laws, the distribution of the common lands (tierras comunes), in the towns of the district, provided there is no litigation pending with regard to them, the right being reserved to the parties in interest to apply to the governor, who, without further appeal, shall decide what is most proper, with the concurrence of the departmental council (junta)." Reynolds, 221. This is the only act to which our attention is called which defines their functions.

It is difficult to say exactly what is meant by the power "to regulate administratively" the distribution of the common lands in the towns of the district. But it would not seem to include the power to make grants of public lands generally, though it might have justified in this case the special allotment (*hijuela*) to Vicente Samora, had it been made by the prefect. The power given to the governor to

make grants of public lands, which was expressly given by the regulations of November 21, 1828, (though the constitutional decrees of 1836 and 1837 were silent upon the subject,) taken in connection with the limited powers conferred upon the prefects by the law of March 20, 1837, apparently preclude the idea that the more general power of granting public lands was intended to be conferred upon the latter — in other words, the limited authority conferred upon them by Article 77 repels the inference of more extensive powers which had theretofore been vested in the governors, and in the governors alone.

Plaintiffs' counsel offered to show in this connection that other grants had been made by prefects, which had been recognized and confirmed by the proper Mexican authorities, and that several such grants had been confirmed by the Congress of the United States; but they were not regarded by the court below as sufficient to establish a general custom to recognize grants made by prefects as valid and legal. Indeed, the power given to prefects to regulate administratively the distribution of the common lands would seem to presuppose a prior grant to the pueblo, made by a higher authority, and to have been intended merely to authorize the prefect to make distribution of such common lands among the inhabitants of the pueblo.

The only case we have been able to find in which the power of prefects to make grants of public lands is discussed is that of *Ohm* v. *San Francisco*, 92 California, 437. In that case the complaint alleged that the State of California was, prior to July 13, 1848, a political department of the Republic of Mexico, and was subdivided into pueblos, constituting political municipalities, supplied with such officials as the republic or governor chose to appoint; that such officers could grant and distribute lands of the municipalities; that the pueblo of Yerba Buena, or San Francisco, was one of such municipalities, and was provided with a prefect appointed by the Republic and the governor of California, who was empowered, among other things, to make a grant and distribution of lands to private persons in fee within his district and said municipality. It seems that the grant in this case had been

approved by the governor of the department by virtue of his superior power to grant vacant lots within the boundaries of the Republic, and had been subsequently confirmed by the District Court.

The rarity of the question involved, and the special familiarity of the Supreme Court of California with Spanish and Mexican land grants, will justify a somewhat lengthy transcription from its opinion concerning the power of prefects: "We cannot find," said the court on page 451, "in any of the laws or ordinances of Spain and Mexico to which we have been referred any authority conferred upon prefects to make grants in fee of the pueblo lands. It is not contained in the decree of the Spanish Cortes of January 4, 1813, nor in the plan of Pitic, nor in the Mexican law of colonization of 1824, nor in the regulations of 1828, nor, we think, in the law of March 20, 1837, to which the prefect himself refers as the source of his authority. The clause of this act, cited and relied on by the appellant, is given in the original Spanish and in translation, at page 314, addenda, Dwinelle's Colonial History of San Francisco. In terms, it merely authorizes the prefects in their respective districts to 'regulate executively' the distribution of the *common* lands of the pueblos, provided there are no law suits pending in the courts concerning them, saving a right of appeal to the governor. The law writers do not agree in their construction of this article. Dwinelle thinks it conferred authority to make grants of the pueblo lands for the pueblo. Halleck thinks that it merely conferred a power to regulate the temporary use of the common lands. This court has decided that it did not expressly confer power to grant lands in private ownership. *Hart* v. *Burnett*, 15 Cal. 572. As a matter of history it is known that the prefects very rarely attempted to exercise such power, not more than two or three instances, including this grant to Scherrebeck, appearing in the records of San Francisco, and one of those subsequent to the conquest, by Horace Hawes. It is also well known as a fact and as matter of law that the claim of such power by the prefects has been repudiated by the city from the beginning. The complaint here shows that the validity

of this Scherrebeck grant was denied by the city as early as 1853, and ever since. The Van Ness ordinance passed in 1855, and ratified by the legislature in 1858, practically confirmed all previous grants of pueblo lands made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo, or of the city, but was entirely silent as to grants by prefects. Even the allegations of the complaint do not show that the prefect had power as agent and acting in behalf of the pueblo to alienate its lands in fee. He is said to have authority to make grants and distribution of lands within the pueblo limits, but this power may have been derived from the departmental authorities and exercised independently and against the will of the municipal authorities. And this appears to have been the case with the Scherrebeck claim; the making of the grant was opposed by the alcalde, the only municipal officer who appears to have had anything to do with it, but it was approved by the governor and the superior authorities."

In the case under consideration there was no evidence that the grant of the prefect ever received the sanction or approval of the governor, the *ayuntamiento*, (town council,) or other superior authority of the Mexican Republic; and we do not think the fact that similar grants may have been confirmed by Congress, or received the approval of the Mexican authorities, is decisive in favor of recognizing its validity. In its adjudication of these cases, the Court of Private Land Claims is subject to certain statutory restrictions upon which previous confirmations by Congress of imperfect grants have no proper bearing. *Rio Arriba Co.* v. *United States*, 167 U. S. 298, 308. We are of opinion that it was beyond the power of the prefect to make the grant in question.

Nor do we think that petitioners are entitled to this grant by prescription or adverse possession, since under section thirteen of the act creating the Court of Private Land Claims, the title to the land must have been "lawfully and regularly derived from the government of Spain or Mexico," and one which, if not complete and perfect at the date of the acquisition of the property 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." This would preclude the idea that possession since the date of the treaty, however exclusive and notorious, could be regarded as an element going to make up a perfect title. There was no evidence of more than six or eight years' possession prior to the date of the treaty, and this, under any construction of the Spanish or Mexican laws, would be insufficient to constitute a title as against the sovereign. Indeed, it may be open to doubt whether under the legislation of Mexico public lands are not imprescriptible; but if it be otherwise, it would seem that under the decree of the King of Spain of July 16, 1819, nothing less than a possession of forty years could be deemed or respected as creating title by adverse possession. 2 White's New Recopilacion, 562.

The disposition we have made of this case renders it unnecessary to consider whether the document offered in evidence to establish the plaintiffs' title, which was neither the *expediente*, nor the *testimonio*, or official copy thereof — and was merely an unsworn and unverified copy of the *testimonio* — was admissible at all.

If there be any hardship to the petitioners in the rejection of this grant, they must apply for relief to another department of the Government. We are bound by the language of the act creating the Court of Private Land Claims. Its decree in this case was correct, and it is therefore

Affirmed.

ROFF *v.* BURNEY.

ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

No. 34. Submitted October 15, 1897. — Decided November 29, 1897.

A right of citizenship in an Indian Nation, conferred by an act of its legislature, can be withdrawn by a subsequent act; and this rule applies to citizenship created by marriage with such a citizen.

Whether any rights of property could be taken away by such subsequent act, is not considered or decided.

Statement of the Case.

THIS case comes from the United States Court for the Indian Territory on a certificate as to jurisdiction. The amended complaint filed in that court November 6, 1893, besides stating a cause of action in favor of the plaintiff against the defendant, alleges the following facts bearing on the question of jurisdiction: That the plaintiff is a natural born citizen of the United States of America; has never renounced his allegiance to said government, and has never taken an oath of allegiance to any foreign government of any kind whatever; that he has ever been and is yet a citizen of the United States; that the legislature of the Chickasaw Nation, on October 7, 1876, passed the following act:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H. Bourland: Amanda, Matilda, Gordentia and Run Hannah."

That by this act, which was simply a confirmation of a prior statute, passed in 1857, the parties named therein became adopted citizens of the Chickasaw Nation; that he was duly and legally married to one of the parties named therein, to wit, Matilda Bourland, while she was such adopted citizen; that thereafter, and on October 11, 1883, the legislature of the Chickasaw Nation passed another act, as follows:

"SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That the right of citizenship granted to the following-named children and nephews of W. H. Bourland, Amanda, Matilda, Gordentia and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.

"SEC. 2. Be it further enacted, That the governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation, and that this act take effect from and after its passage."

And that since the passage of the last-named act the Chickasaw government and all the officials thereof have refused to recognize this plaintiff as a member of the Chickasaw tribe, or a citizen of said Chickasaw Nation, and that the courts of that nation have refused to entertain jurisdiction of any controversy between him and any member of the tribe of Chick-

asaw Indians, and still refuse to entertain jurisdiction of such controversies.

Article 7 of the treaty of June 22, 1855, between the United States and the Choctaw and Chickasaw tribes, 11 Stat. 611, 612, is as follows:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw tribe." . . .

Article 38 of the treaty with the same tribes, of date April 28, 1866, 14 Stat. 769, 779, provides:

"Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations, according to his domicil, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

Section 6 of the act creating the United States Court in the Indian Territory, approved March 1, 1889, c. 333, 25 Stat. 783, 784, reads:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more: *Provided*, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only."

This was amended by the act of May 2, 1890, c. 182, 26 Stat. 94, which, in section 30, p. 94, contains this proviso:

"Provided, however, That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties."

And in section 31, p. 96, it was also provided:

"But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

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

Mr. H. C. Potterf and *Mr. W. F. Bowman* for defendant in error.

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

The condition of the Indians and Indian tribes within the limits of the United States is anomalous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations. *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Worcester* v. *Georgia*, 6 Pet. 515; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Cherokee Nation* v. *Kansas Railway Company*, 135 U. S. 641. While the Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the

intercourse of the Indians with one another and with citizens of the United States, and also the courts in which all controversies to which an Indian may be a party shall be submitted, *United States* v. *Rogers*, 4 How. 567; *United States* v. *Kagama*, 118 U. S. 375; *Gon-Shay-Ee*, *Petitioner*, 130 U. S. 343; *Cherokee Nation* v. *Kansas Railway Company*, *supra*, the mere fact that a citizen of the United States has become a member of an Indian tribe by adoption may not necessarily cancel his citizenship. As said by Chief Justice Taney, in *United States* v. *Rogers*, *supra*, p. 573, "whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished." Indeed, by section 43 of the act of May 2, 1890, c. 182, 26 Stat. 99, provision is made for the naturalization of members of the Indian tribes in the Indian Territory, with a proviso "that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong."

Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by an act of the Chickasaw legislature. The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw Nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. The Chickasaw legislature, by the second act, whose meaning is clear though its phraseology may not be beyond criticism, not only repealed the prior act but cancelled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. This act was

not one simply taking effect as of the date of its passage, and then withdrawing rights admitted to have been theretofore legally granted, but was retroactive in its scope, and purported to annul and destroy all that had ever been attempted to be done in respect to the matter. Whether any rights of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded on the mere status created by the prior act fell when that status was destroyed. Plaintiff never took any oath of allegiance to the Chickasaw Nation; never in terms relinquished his full rights as a citizen of the United States. Doubtless, by intermarriage with one who was at the time by legislative act a Chickasaw citizen, he acquired the rights and privileges of a member of that tribe or nation, but when that which was the foundation upon which such acquisition rested was taken away by act of the nation, then all those rights and privileges ceased. The tie which bound him to the nation was his wife's citizenship. That tie the nation destroyed. Its destruction released him. That such was the effect of this legislative act is established by the conduct of the Chickasaw government and all its officials, for they have refused to recognize plaintiff as any longer a member of the Chickasaw Nation, and the courts of that nation have declined to entertain jurisdiction of any suits brought by him against a Chickasaw. The validity of the act withdrawing citizenship from the wife of plaintiff, and the consequent withdrawal from plaintiff of all the rights and privileges of citizenship in the Chickasaw Nation, has been practically determined by the authorities of that nation, and that determination is not subject to correction by any direct appeal from the judgment of the Chickasaw courts. It follows, therefore, that his right as a citizen of the United States to appeal to the Federal courts to take jurisdiction of his claims against one of the Chickasaw Nation must be sustained, for it cannot be that a citizen of the United States residing in the Chickasaw Nation can be wronged without an opportunity of redress in some judicial tribunal. We are of opinion, therefore, that the plea to the jurisdiction was wrongfully

sustained, and the judgment of the United States Court for the Indian Territory will be

Reversed and the case remanded, with instructions to overrule the plea to the jurisdiction.

OGDEN CITY *v.* ARMSTRONG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 127. Argued November 11, 1897. — Decided November 29, 1897.

An examination of the record discloses that none of the complainants, save one, was assessed with a sufficient amount of taxes, to enable him to bring the case here on appeal, and accordingly, under the doctrine of *Russell* v. *Stansell*, 105 U. S. 303, and *Gibson* v. *Shufeldt*, 122 U. S. 27, the appeal is dismissed as to such parties.

No jurisdiction vested in the appellant's city council to make an assessment and levy a tax for the improvements which are the subject of this controversy until the assent of the requisite proportion of the owners of the property to be affected had been obtained, and the action of the city council in regard to that question was not conclusive.

In order to justify a court of equity in restraining the collection of a tax, circumstances must exist bringing the case under some recognized head of equity jurisdiction; and this case seems plainly to be one of equitable jurisdiction, within that doctrine.

When the illegality or fatal defect in a tax does not appear on the face of the record, courts of equity regard the case as coming within their jurisdiction.

When the authorities have jurisdiction to act, the statutory remedy is the taxpayer's exclusive remedy; but when the statute leaves open to judicial inquiry all questions of a jurisdictional character, a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

THE original bill in this case was filed in May, 1892, in the Fourth Judicial District Court of the late Territory of Utah, against Ogden City, a municipal corporation, and its mayor and the members of its common council; and it was thereby sought to restrain the city and its officers from levying assessments upon the real estate of the plaintiffs and others simi-

larly situated, for the purpose of paving a portion of one of the streets of the city.

To this bill a demurrer was filed, which was sustained by the District Court, and a judgment was entered dismissing the bill. On appeal to the Supreme Court of the Territory that judgment was reversed, and the cause remanded to the court below. An answer to the bill was then filed, denying substantially the equities of the bill. Subsequently, on April 9, 1894, a supplemental bill was filed, bringing in additional parties complainant, and alleging that since the filing of the original bill the defendants had passed the ordinance assessing the properties of the plaintiffs, and were about to expose to sale the real estate described in the original and supplemental bills to satisfy the assessments, and threatened to continue to sell said real estate annually for ten years as each instalment of said assessment became due, whereby the plaintiffs had been compelled to pay certain amounts, stated in detail, in order to prevent a sale of their property, and to prevent a cloud upon their titles; and that certain real estate belonging to some of the plaintiffs had been sold by the city to satisfy the illegal assessments. The prayers were for a decree declaring the ordinance and assessments to be void restraining the defendants from proceeding thereunder; that an account be ordered of the amounts paid by plaintiffs under protest; that plaintiffs have judgment for the same; that the sales of real estate be set aside, and for general relief. An answer was filed to the supplemental bill denying specifically all of its allegations, but admitting that the ordinance in question was passed as alleged. It alleged affirmatively that the plaintiffs were estopped to complain as in the supplemental bill alleged; that the same did not state facts sufficient to constitute a supplemental complaint; that the cause of action was barred by the statute of limitations; that there was a misjoinder of parties plaintiff, and that there was a misjoinder of causes of action.

On the 27th day of October, 1894, findings were signed, and judgment entered, giving the plaintiffs the relief prayed for in both the original and the supplemental bill. The decree of

the court below was on appeal affirmed by the Supreme Court of the Territory, from whose decree an appeal was taken and allowed to this court.

The findings of fact were as follows:

1. That the plaintiffs were at the date of the filing of the complaint in this action residents and taxpayers in Ogden City, Weber County, Utah Territory, and brought this action concerning a matter of general interest to all taxpayers in said Ogden City on their own behalf and on the behalf of all others similarly situated.

2. That the defendants, except Ogden City, at the time of the bringing of this action were the mayor and members of the common council of said Ogden City, defendant.

3. That on the 7th day of March, 1892, proceedings were had by the common council of said Ogden City as follows:

"Finance committee recommending immediate creation of three paving districts as follows: District No. 2, Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue.

"Councillor Dee moved to lay on the table for one week. Motion lost.

"Councillor McManis moved to adopt the motion. Carried."

4. That the above were the only proceedings had by said council of Ogden City in regard to the creation of said paving district prior to the publication of the notice hereinbelow mentioned; and upon the same day the following proceedings were had:

"Councillor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts: 'I move that the council adopt the accompanying notice of intention, and that the same be published for twenty days, beginning with to-morrow morning, Tuesday, March 8th.' Said notice was read and Councillor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting 'aye;' Calvert, Cannon, Graves, McManis, Shurtliff and Spencer voting 'nay.' The original motion was then put and carried, Calvert, Cannon, Graves, McManis, Shurtliff and Spencer voting 'aye,' and Dee and Elliott voting 'nay.'"

Statement of the Case.

5. That thereupon, on March 9th, 1892, in the Ogden Daily Standard the following notice of intention mentioned above was published, to wit:

"Notice of intention of the city council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

"The city council of Ogden City, situate in the county of Weber, Territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This district shall be known as paving district No. 2. The boundaries of the district to be affected and benefited are the lines running one hundred and fifty feet back and parallel with the outer lines of each side of the streets on each and every block and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district and to the extent of the benefits to such property by reason of such improvement. The city council will, on March 29, 1892, at 10 A. M., hear objections in writing and from any and all persons interested in said local assessment. By order of the city council:

"T. P. BRYAN, *City Recorder.*"

6. That on March 29, 1892, at 9.55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then the owners of real property within the said paving district No. 2 and with frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one half of the whole

frontage on said Twenty-fifth street within said district, to wit, 2414 feet; that after said hour of 10 A.M. of said day certain persons who had protested to the amount of 302¼ feet withdrew their protests, leaving at all times 2111¾ feet frontage on said Twenty-fifth street in said district still protesting against the said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3960, of which 660 feet belonged at said time and still belong to said Ogden City and were then and are now used for public purposes by the said city, and 125 feet of said frontage were then and are now the property of the said Ogden City, and was public school property, used and owned for public schools.

7. That notwithstanding said protest of said abutting property owned on said Twenty-fifth street in said paving district No. 2, and without giving any other or further notice except as hereinbefore stated, the said city council, on the 4th day of April, 1892, passed the following resolution, to wit:

"*Resolved*, That the city proceed as speedily as possible to the paving of Twenty-fifth street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once and submit the same at the next meeting of the council; that the competition of said work be restricted to *bona fide* residents of Ogden, and that so far as it is possible only Ogden labor be employed in the performance of the work."

8. That on May 2, 1893, said city council of Ogden City passed a resolution instructing the city recorder to advertise for bids for the paving of Twenty-fifth street in said district; which notice was as follows:

"To paving contractors: Bids will be received by the city recorder of Ogden City until 12 o'clock M. May 23, 1892, for the paving of Twenty-fifth street, in Ogden City, from Washington to Wall avenue, according to the specifications of the city engineer of Ogden City, on file in the city recorder's office. Competition is restricted to *bona fide* residents of Ogden City. The city reserves the right to reject any and all bids. Specifications will be furnished on application to the city recorder."

9. That no specifications had been made by the city prior to this time, but afterwards new specifications were made and filed providing for the paving, grading, and curbing of said Twenty-fifth street, and were adopted by the city council; which specifications provided for the paving of said street with asphaltum and the sides of the street with sandstone blocks and curbing the street, and the contract which was awarded for the doing of said work provided that the contractor should keep the said street in repair for two years after the work upon the same was finished.

10. That the plaintiffs in this action were at the date of the filing of the complaint herein, to wit, May 21, 1892, the owners of the real property mentioned in the complaint, but upon the trial of this action it appeared that John Broom and William Chapman were deceased; Samuel Chapman, administrator of the estate of William Chapman, and Hester Broom, administratrix of the estate of John Broom, were substituted as plaintiffs, and said other parties were still the owners of the property mentioned as belonging to them in the complaint in this action.

11. That said plaintiffs had upon filing their complaint obtained a temporary injunction against the said defendants, but afterwards a demurrer to said complaint was sustained by the said court and said complaint ordered dismissed; which ruling was afterwards by the Supreme Court of the Territory of Utah reversed, and the said cause was ordered remanded, with directions to the defendant to answer said complaint.

12. That the said council, in spite of the protest hereinbefore mentioned, proceeded and at the time of the filing of the complaint in this action had upon its passage the ordinance attached as Exhibit B to the complaint in this action, and afterwards, on the 22d day of March, 1893, passed the ordinance which is hereto attached and marked Exhibit A and made a part of these findings.

13. That on the 9th day of April, 1894, the plaintiffs filed a supplemental complaint in this action and asked that Mathias Biel, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks and Ann Horrocks, J. S. Lewis,

Lindsey R. Rogers, Patrick Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, Mary A. Stephens, Elizabeth Stephens and The Ogden Union Depot and Railway Company, a corporation, be made parties to this action; which supplemental complaint was ordered by the court to be filed; that at the time of the filing of the supplemental complaint the said parties (except The Ogden Depot and Railway Company, a corporation) were and still are the owners of real estate fronting on said Twenty-fifth street (and said plaintiff last named was the owner of real estate assessed with said special tax, but not included in said paving district) included in said paving district, and upon the trial of this action D. H. Peery, Jr., and The Realty Company of Kittery, Maine, a corporation, and J. Pingree and Zilpha J. Stephens, Carrie Lewis and George W. Murphy were added as parties plaintiff, and were at the date and still are the owners of real estate in said district fronting on said Twenty-fifth street, the pleadings having been allowed to be amended by the court in accordance with such facts.

14. That said Ogden City, in pursuance of said ordinance of March 22, 1893, was about to expose the real estate described in the original and supplemental complaints to sale to satisfy the illegal assessment imposed by said ordinance, and that the parties plaintiff in this action, after their said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid under protest to said Ogden City, in order to prevent the sale of their property, the following amounts, to wit, J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. and J. S. Lewis, $82.09; Carrie Lewis, $30; Joseph Morely, $36; Patrick Healey, for Patterson and Healey, $30; Joseph Clark, for Patterson and Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl S. Sorenson, $20.40; W. C. Warren, $48;

Geo. M. Kerr, guardian of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway Company, a corporation, $118.80; Geo. W. Murphy, $154.20.

15. That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter levy assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment.

16. That the number of feet frontage in said paving district was 3300, as the same is described in the ordinance, Ex. A; that the difference between the district described in the ordinance and the district described in the notice of intention consisted of 660 feet of the public property of the said Ogden City, and the lots affected by the said assessment and described in said ordinance varied in depth, some being 75 feet deep and others 150 feet deep, and that the property owned by the various parties plaintiff in this action varied greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the property abutting and fronting upon Twenty-fifth street within the said paving district at an arbitrary rate of $12 per front foot without any finding or attempt to find the amount of actual benefits to the property; that the said improvement was made without any general plan and form of public improvement having been adopted by the said Ogden City, and the actual benefits to the property assessed for said improvement were not equal and uniform, nor was said assessment equal and uniform.

Mr. R. H. Whipple for appellant. *Mr. T. D. Johnson* was on his brief.

Mr. E. M. Allison, Jr., for appellees.

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

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal.

Although no motion was made to dismiss the appeal, it was suggested at the argument that, as it was not competent to make up the sum necessary to give this court jurisdiction by uniting the several sums for which each taxpayer was liable, this was such a case, and that therefore we should dismiss the appeal.

Undoubtedly, it is the well-settled rule of this court that, in a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than five thousand dollars is decreed. *Russell* v. *Stansell*, 105 U. S. 303, was a case in its facts much like the present one. There land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged; a bill of complaint was filed by a number of them, praying for an injunction against the collection of the assessment, and from a decree dismissing the bill an appeal was taken to this court. It was held that, while the complainants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, the object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable, and that such distinct and separate interests could not be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.

The same conclusion was reached in *Gibson* v. *Shufeldt*, 122 U. S. 27, where the previous cases were fully discussed.

Opinion of the Court.

An examination of this record discloses that none of the complainants, save one, was assessed with an amount sufficient to have enabled him to bring the case here on appeal, and accordingly, under the doctrine of the cases cited, this appeal must be dismissed as to such parties.

But it appears that the Realty Company of Kittery, a corporation of the State of Maine, a party complainant in the supplemental bill, had been assessed, under the ordinance complained of, for the sum of $748.80, as an instalment for one year, and had been compelled to pay the same, and that the city was threatening to continue said proceedings and to sell the real estate of said company annually for nine years as each instalment for a like sum became due. The liability of that company then, under the ordinance and assessment complained of, amounted to the sum of $7488, and as that company could, had the decree of the court below been adverse to it, have brought the case here on appeal, so, upon the authorities above referred to, it is competent for the defendant city to do the same.

Upon the merits, the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax.

The proceedings were initiated and the tax sought to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late Territory of Utah. The thirteenth section thereof reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements; the estimated cost of such improvements, and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, avenue or alley

to be so improved be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

The bill alleged, the answer admitted, and the trial court found that the notice of intention to pave in district No. 2, and to defray the expenses thereof by levying a local tax on abutting property owners, was published on March 9, 1892, and in which it was stated that the city council would on March 29, 1892, at 10 o'clock A. M., hear objections in writing from any and all persons interested in said local assessment.

The sixth finding of the trial court was as follows:

"That on March 29th, 1892, at 9.55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then owners of real property within the said paving district No. 2, and with a frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-fifth street within said district, to wit, 2414 feet; that after said hour of 10 A.M. of said day certain persons who had protested to the amount of 302½ feet withdrew their protests, leaving at all times 2111¾ feet frontage on said Twenty-fifth street in said district still protesting against said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3960 feet, of which 660 feet belonged at said time and still belongs to said Ogden City, and was then and is now used for public purposes by said city, and 125 feet of said frontage was then and is now the property of the said Ogden City, and was public school property, used and owned for public schools."

It is contended on behalf of the appellant that the city council, on April 4, 1892, determined that less than half of the whole frontage had protested, and that, as the city council was acting judicially in a proceeding duly inaugurated, such

action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the District Court.

So far as this proposition involves questions of facts as to the proportion of frontage covered by the protests, we, of course, accept the finding, on that subject made by the trial court, and approved and adopted by the Supreme Court of the Territory. *Stringfellow* v. *Cain*, 99 U. S. 610; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303.

But the argument seems to be that when once that question of fact was determined by the city council, proceeding under the statute, their determination cannot afterwards be challenged in a collateral proceeding; that while it would not be conclusive in an action by certiorari to set aside the assessment, it is conclusive as against a proceeding by injunction to prevent the collection of the tax. It is said that the jurisdiction of the city council attached when by resolution or ordinance and publication it gave notice of its intention to make the improvement in question.

We agree with the courts below in thinking that no jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the action of the city council in finding the fact of such assent was not conclusive as against those who duly protested. The fact of consent, by the requisite number, in this case to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power.

"Where the power to pave or improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void." (Dillon's Municipal Corporations, vol. 2, sec. 800, 4th edition, where numerous cases

from the different States are cited in support of that proposition.)

In *Zeigler* v. *Hopkins*, 117 U. S. 683, a similar question was thus stated and decided:

"There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the nonpayment of taxes levied to defray the expenses of opening Montgomery Avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the landowner is estopped from showing, by way of defence, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is concluded, (1), by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder; or, (2), by the judgment of the county court confirming the report of the board of public works.

"This precise question was most elaborately considered by the Supreme Court of California in *Mulligan* v. *Smith*, 59 California, 206, and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority."

It is next contended on behalf of the appellant that if the city council wrongfully took jurisdiction, in face of the facts shown in or upon the face of its own proceedings, then the tax was absolutely void on its face, and the plaintiffs must seek their remedy at law; and further, if the city council wrongfully and falsely made its record to show facts sufficient to give it jurisdiction, when such facts never existed, then in order to get into equity plaintiffs must plead all such facts, and that even in such a case certiorari is, under the laws of Utah, a plain and perfect remedy.

It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are legal remedies for all such mere irregulari-

ties and errors as do not go to the foundation of the tax, and parties complaining must be confined to these. As was held by this court in *Dows* v. *Chicago*, 11 Wall. 108: "A suit in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant."

But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void. That there was no plain and adequate remedy by certiorari would seem to be evident. Upon that writ nothing could have been shown by evidence of facts outside of the record. It is true that, in some of the States, provision is made by statute to bring such evidence in, but such is not shown to have been the case here. It is an admitted fact upon the face of the pleadings that the common council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record. The plaintiffs alleged in their bill and the defendants in their answer denied that the finding of the jurisdictional fact by the common council was an untrue finding. Such an issue required evidence *dehors* the record of the proceedings before the council in order to impeach their finding. The record of this case discloses that a large amount of oral evidence was introduced by the complainants, and admitted without objection by the defendants, to show ownership by the protesting parties, and to show that the common council were mistaken in finding that the requisite number had not protested.

Not only, however, was there a want of an adequate remedy in proceeding by a writ of certiorari, but, we think, equitable

jurisdiction was properly invoked to prevent a multiplicity of suits, and also to relieve the plaintiffs from a cloud upon their title.

The finding on this fact of the case was as follows:

"That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter lay assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment."

If a tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and possibly threaten a loss of it to the owner. It is doubtless true that it has been held by this and other courts that if the alleged tax has no semblance of legality, and if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, as disclosed by a mere inspection of the record, such a tax would not constitute a cloud, and that the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, would not attach.

But when the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost, or become unavailable from death of witnesses, or when the deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent.

Dows v. *Chicago*, 11 Wall. 198; *Hannewinkle* v. *Georgetown*, 15 Wall. 547.

Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is also the exclusive remedy. But when the statute, as in this case, leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

Thus in *Emery* v. *Bradford*, 29 California, 75, the Supreme Court of California, while holding that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of public supervisors, and that, if the proceedings are such that the proper officers have jurisdiction to act, their determinations are valid and can only be reviewed in the mode provided by the statute, said: "That where there are acts to be performed of a jurisdictional character essential to the validity of the assessment, it is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of cases."

So in *Wright* v. *Boston*, 9 Cushing, 273, the Supreme Judicial Court of Massachusetts, in holding that objections to a tax for some defect or irregularity in making the assessment must be taken advantage of by appeal, stated the proposition thus: "For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, which does not go to show the whole proceedings a nullity, the owner must take his appeal, if he has one."

In *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516, 525, this court, through Mr. Justice Bradley, said:

"But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be

presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Numerous cases to the same effect may be found cited in Cooley on Taxation, 543.

Again, it is contended on behalf of the appellant, that the defendants cannot recover the taxes paid by them under protest because the Session Laws of Utah, 1890, sec. 1, p. 38, provide that "any party, feeling aggrieved by any such special tax or assessment or proceeding, may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment, to be apportioned by the court as may seem proper, which remedy shall be exclusive."

As respects this contention we agree with the Supreme Court of the Territory, that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the

statute and its remedies for errors and irregularities have no application.

Our conclusion is that the decree of the Supreme Court of the Territory of Utah, so far as it respects the Realty Company of Kittery, is affirmed, and that as to the other appellees the appeal is dismissed.

DENNISON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 84. Argued and submitted November 2, 1897.— Decided November 29, 1897.

To entitle a supervisor of elections to a valid claim against the Government, he must make it appear that the services performed were required by the letter of Rev. Stat. § 2020 and § 2026, or were such as were actually and necessarily performed in the proper execution of the duties therein prescribed, and that his charges therefor are covered by Rev. Stat. § 2031, or, if not fixed in the very words of that section, that by analogy to some other service, he is entitled to make a corresponding charge.

If the services were only performed for his own convenience, or were manifestly unnecessary or useless, even if they be such as he judges proper himself, they cannot be made the basis of a claim against the Government.

It is *held* that the applicant, a chief supervisor, should have been allowed for drawing instructions to supervisors, and, in the absence of proof to the contrary, for the full amount of his claim for auditing claims of and drawing pay rolls of supervisors, and certifying the same to the marshal; and all the other claims, enumerated in the opinion of the court, are disallowed.

The ruling in *Cromwell* v. *Sac County*, 94 U. S. 351, that when a 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, affirmed and applied.

THIS was a petition by the Chief Supervisor for the Northern District of New York for fees and disbursements connected with the general election of 1890, amounting to $16,612.79, of which $2752.60 were disallowed by the Treasury Department; for like fees and disbursements connected with the general

election of 1892, amounting to $18,998.94, of which $2581.75 were disallowed; and also for fees connected with the examination of witnesses to show that certain supervisors, who had been appointed in the city of Troy to attend a Congressional election in 1888 had been deterred from discharging their duties by violence, or threats of violence, by disorderly persons. This account amounted to $624.65, of which $402.65 were disallowed.

The petition alleged that all these accounts had been approved and allowed by the District Court.

Upon a finding of facts, which do not differ materially from those set up in the petition, the Court of Claims directed a judgment in favor of the petitioner for $678.10, whereupon petitioner appealed to this court.

Mr. Richard Randolph McMahon for appellant.

Mr. Attorney General, for appellees, submitted on their brief, on which were *Mr. Assistant Attorney General Pradt*, and *Mr. Felix Brannigan.*

Mr. Justice Brown delivered the opinion of the court.

The duties of Chief Supervisors are prescribed by statute. Rev. Stat. § 2020 and § 2026. Their fees are also fixed by statute. § 2031. To entitle a supervisor to a valid claim against the Government he must make it appear that the services performed were required by the letter of the former sections, or were such as were actually and necessarily performed in the proper execution of the duties therein prescribed. It must also appear that his charges therefor are covered by the latter section, or if they are not fixed in the very words of that section, that, by analogy to some other service, he is entitled to make a corresponding charge. If the services are only performed for his own convenience, or are manifestly unnecessary or useless — even if they be such as he judges proper himself — they cannot be made the basis of a claim against the Government.

The petitioner in this case made a claim for his services in the general elections of 1890 and 1892 in the aggregate sum of $35,611.73, of which but $4265.13 appear to have been for disbursements. Of this very large amount there was disallowed but $5334.35, an amount which was further reduced by the judgment in his favor of $678.10 to $4656.25, which is the amount in dispute here.

If the petitioner be entitled by law to the further sum claimed for what are in the main clerical services, he must receive judgment for them; but as the dates of the approval of his accounts show that his services did not extend over a period of more than six months, he has at least no reason to complain of the illiberality of the Government.

The approval of the District Court goes only to the facts that the services were rendered as stated in the accounts, and that in certain matters of discretion, the discretion was properly exercised. *United States* v. *Jones*, 134 U. S. 483; *United States* v. *Barber*, 140 U. S. 177, 179. Neither of these cases requires the allowance of charges obviously unnecessary.

The items disallowed by the court below will be considered in their order:

1. — Item 4. Drawing instructions to supervisors, relative to their duties, 106 folios at 15 cents a folio, $15.90. As this charge was expressly allowed in *United States* v. *McDermott*, 140 U. S. 151, 154, ¶ 5, and in *United States* v. *Poinier*, 140 U. S. 160, 163, ¶ 3, we do not understand why the item was rejected. Apparently it was an oversight. The Attorney General concedes the allowance in his brief.

2. — Item 5. Making copies of applications from different cities for the appointment as supervisors, to be annexed to the reports made to the judge, 1950 folios at 15 cents a folio, $279.50. Rev. Stat. § 2012 requires that the court, when opened, shall proceed to appoint and commission under the hand of the judge two resident citizens of each election precinct, who shall be of different political parties, etc., as supervisors. Section 2026 seems to contemplate that the judge shall obtain his information as to the competency of the persons receiving these appointments through the Chief Super-

visor, who is charged with the duty of receiving the applications of all persons for appointments to such positions; of presenting such applications to the judge, and furnishing information to him in respect to the appointment of such supervisors. The law does not require or contemplate that the original applications shall be retained by the Chief Supervisor, but rather that they shall be presented to the judge, who may preserve them or not as he sees fit. There is not the slightest necessity for making copies of them. The offices to be filled are purely temporary, and as soon as the election is held and the reports made the supervisors are *functi officio*. The office of the applications is even more temporary than that of the supervisors, since as soon as the appointments are made the applications have served the purpose for which they were intended. To speak of them as the official records of the Chief Supervisor is to dignify them with a title and importance entirely foreign to their real functions. To retain the originals and furnish the judge with copies is only to burden the Government with an utterly useless expense. There is nothing to show that these copies were ordered by the court.

3. — Items 7, 8, 10, 13, 14, 21 and 27 are all of one class, and fall within the same general principle. They are for entering and indexing special letters of instruction to each local supervisor, containing a notice of the supervisor's appointment and general directions with regard to the method of obtaining his commissions or concerning the proper discharge of the duties of his office; some enclosing blank reports to be made of proceedings at the meeting of the boards of registration; others requiring a report of the vote cast; still others notifying the supervisors of the days allowed and the amount due, with special orders requiring them to verify their lists; and similar directions germane to the proper discharge of their functions. The aggregate amount of these items is $1447.65.

We see no reason for entering or indexing these letters of instructions. There was no necessity for making separate memoranda of them — much less copying them or preserving

duplicates. The regular course of business of the office would authorize one to infer that instructions were sent to the local supervisors in each case, and the names in the supervisors' commissions would show to whom these instructions were sent. We held in the case of *United States* v. *McDermott*, 140 U. S. 151, 154, that the Chief Supervisor was entitled to fifteen cents per folio for preparing and furnishing proper instructions to supervisors, and that he was also entitled to the expense of printing copies of such instructions for the use of the local supervisors, but that he was not entitled to a folio charge for each copy so furnished.

It is equally clear that he is not entitled to a charge for entering and indexing them, as they are no proper part of the records of his office. Letters of instructions are not "records" in any sense of the word.

4. — Items 9, 22, 23 and 24 are for entering and indexing special reports of the supervisors of election, either of the proceedings at the meeting of the board of registry or of other matters connected with the registration, election or compensation of the supervisors.

Petitioner is doubtless entitled to a fee of ten cents under Rev. Stat. § 2031, for filing and caring for each of these special reports, which are a proper part of the records of the office, but we think the entering and indexing them were an unnecessary burden upon the Government. These items are, therefore, disallowed.

5. — Items 11 and 25. Entering and indexing reports on presentation of applications for the appointment of supervisors of election, which reports furnished information to the judge in respect to the qualifications of each applicant, $355.95 and $101.10. These reports are made to the judge, and are no part of the records of the Chief Supervisor's office. By section 2031, the charge for "entering and indexing" can only be made where the papers are a part of the records of the office. In view of the temporary character of these appointments, the word "record" should receive a narrow construction, and be limited to such documents and entries as might subserve some useful purpose in the future. The office of

these reports is performed when they are submitted to the judge and the appointments are made. If he deems them of any importance, their custody belongs to the court and not to the supervisor. The copying and entering of them upon his records can be of no possible utility. It belonged to the court to determine for itself what should be done with the originals.

6. — Item 12. Entering and indexing pay rolls of supervisors of election and certifying the same to the marshal, $76.95. It appears to have been the duty of the Chief Supervisor, under the instructions of the Attorney General, to audit and certify the amount due the supervisors, but we see no necessity for preserving copies of them in the records of the supervisor's office. The charge in this case is not for auditing and certifying the amounts, but for *entering*, by which we understand *copying*, and indexing the pay rolls, which we consider an unnecessary burden.

7. — Items 15 and 28 include charges to the amount of $630.60, for drawing oaths of supervisors, two folios. The controller allowed one folio for each oath. The oath contained the statement formerly required by section 1756, that the affiant had never borne arms against the United States, etc., which was repealed by the act of May 13, 1884, 23 Stat. 21, the repealing act providing that in the future every person appointed to any office should take the oath prescribed by section 1757. The oath thus prescribed is less than one folio in length. The case is evidently not one for a liberal construction of the statute. These items are accordingly disallowed.

8. — Item 17. Auditing claims of and drawing pay rolls of supervisors of election for their claims for service, and certifying the same to the marshal for payment, 773 folios, of which the controller disallowed 531 folios, the difference being $81.60. There is no finding in connection with this item as to whether the count of the supervisor or of the controller was correct. Nor is any reason given for the disallowance of the 531 folios. As the account was verified by the oath of the claimant that each and every service charged therein had been necessarily performed, and as the District Court allowed the item, we

think it was incumbent upon the Government to show that the claimant charged for an excessive number of folios. We are therefore of opinion that this item should be allowed.

9. — Item 18. Entering and indexing applications of persons applying to be appointed supervisors of election, etc., $286.95. This was not a charge for *filing* recommendations for appointments or for indexing *appointments*, which charges were allowed in *United States* v. *Poinier*, 140 U. S. 160, but for entering and indexing the applications. As we have already held that the law does not contemplate that these papers shall become the records of the office, the service was evidently wholly unnecessary.

10. — Items 19 and 20. Entering and indexing the oaths of supervisors and special deputy marshals, of which the controller allowed a part and disallowed a larger part, the difference being $671.70. It does not appear why the controller allowed less than one-half of these items; but as we think the whole charge should have been disallowed, it is unnecessary to seek an excuse for disallowing a moiety. It is true that Rev. Stat. § 2027 requires the commissioners, with all due diligence, to forward to the Chief Supervisor all oaths of office administered to any supervisor of election, in order that the same may be properly preserved and filed. They thereby become a part of the records of the Chief Supervisor's office, and he is properly entitled to a fee for filing the same; but it does not, therefore, follow that he is entitled to a separate fee for entering and indexing them. As we observed in *Poinier's case*, page 162, "it does not, however, follow that every paper which the law authorizes to be filed must, therefore, be recorded or copied. To entitle a paper or document to be recorded, it should have some permanent value. Where the original paper is preserved or filed, such for instance as the pleadings, exhibits, depositions or other papers in a common suit at law or equity, no necessity ordinarily exists for its being recorded. As a charge of ten cents for filing these informations was allowed by the department, the exception to this item for recording and indexing is, therefore, sustained." The same remarks are applicable to the charge in this case

The petitioner was entitled to ten cents for filing and caring for every paper to be filed by him; but he does not thereby become entitled to a separate fee for entering and indexing them.

11. — Item 26. Making, entering and indexing records, such as mail lists containing supervisors' names and post office addresses, with columns for checking matter sent out by mail, and also receiving lists, etc. These lists are obviously no part of the record, and the item should be disallowed.

12. — Item 31. Entering and indexing certain depositions and evidence taken in the matter of the claim made that certain supervisors had been unable to discharge the duties of their office by reason of violence and threats of violence, $172.35. For the reasons already stated with reference to the items for entering and indexing oaths, we think that the supervisor was entitled to a charge of ten cents for filing these depositions, but he is not entitled to the large charge of $172.35 for entering and indexing them. This charge is also disallowed.

The underlying vice of the petitioner's theory throughout this whole account consists in the assumption that every paper or document which comes into or issues from his hands, or is prepared by him officially, even though it be for a purely temporary purpose, constitutes an official record, and that it is within his discretion that every such paper shall be entered (copied) in durable books and indexed in a permanent form. This is not the case. Even in courts of justice, which are a permanent feature of every civilized government, the judgment record which the clerk is authorized to enter in a book kept for that purpose, does not include every paper found in the files of the case, nor even the depositions of witnesses, but is confined to the pleadings and proceedings necessary to make up a complete history of the suit. Much more is this the case with the records of the Chief Supervisor, which exist only for a temporary purpose, and after a year or two lose practically their entire value. It is true that the Chief Supervisor is entitled to exercise a certain discretion as to what papers he shall enter upon a permanent book, but to enter a

hundred letters, each of which must be substantially a copy of every other, excepting the address, is so manifestly an abuse of his discretion that no court should tolerate it for a moment. It is not for us to determine what are the records which should be entered and indexed. It is sufficient to say that, for the purposes of this case, we have no difficulty in determining what are not.

The plea of *res judicata*, arising from the fact that the claimant brought an action in 1887 in the Court of Claims to recover for various items of service of the same nature and description as those claimed in this case, and that the court found in his favor and rendered judgment against the United States for the amount claimed, is not well taken. There is no finding of fact in connection with this plea, and we can only judge of what the issue was by reading the opinion of the Court of Claims. 25 C. Cl. 304. From this opinion it appears that the items of the account were not passed upon in detail, but that the court rendered judgment in favor of the claimant upon the ground that the approval of the account by the District Court, under the decision in *United States* v. *Jones*, 134 U. S. 483, threw upon the Government the burden of disproving the correctness of the several items. That the court did not approve the items as charged is evident from its statement that "on the argument it was maintained by the counsel for the government that the claimant had failed to establish the *quantum* of his services and expenditures by competent evidence, and, as to many of the items, such is the opinion of the court."

Further than this, however, the suit under consideration is not for the *same* items as those allowed in the former case, but for *similar* items, and the case falls within our ruling in *Cromwell* v. *Sac County*, 94 U. S. 351, that "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." There was no issue raised and decided in the former case as to the legality of the several items considered separately, but such issue is clearly raised in this case.

Statement of the Case.

While we think the judgment of the Court of Claims was correct with respect to all the items involved in this case, with the exception of two, the aggregate amount of which is $97.50, for its error in respect to those two the judgment will have to be varied by increasing the same from $678.10 to $775.60 and subject to such increase it is, in all other respects,

Affirmed.

UNDERHILL *v.* HERNANDEZ.

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

No. 36. Argued October 22, 25, 1897. — Decided November 29, 1897.

Hernandez was in command of a revolutionary army in Venezuela when an engagement took place with the government forces which resulted in the defeat of the latter, and the occupation of Bolivar by the former. Underhill was living in Bolivar, where he had constructed a waterworks system for the city under a contract with the government, and carried on a machinery repair business. He applied for a passport to leave the city, which was refused by Hernandez with a view to coerce him to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces. Subsequently a passport was given him. The revolutionary government under which Hernandez was acting was recognized by the United States as the legitimate government of Venezuela. Subsequently Underhill sued Hernandez in the Circuit Court for the Second Circuit to recover damages caused by the refusal to grant the passport, for alleged confinement of him to his own house, and for alleged assaults and affronts by Hernandez' soldiers. Judgment being rendered for defendant the case was taken to the Circuit Court of Appeals, where the judgment was affirmed, the court holding "that the acts of the defendant were the acts of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." *Held* that the Circuit Court of Appeals was justified in that conclusion.

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

In the early part of 1892 a revolution was initiated in Venezuela against the administration thereof, which the revo-

lutionists claimed had ceased to be the legitimate government. The principal parties to this conflict were those who recognized Palacio as their head and those who followed the leadership of Crespo. General Hernandez belonged to the anti-administration party, and commanded its forces in the vicinity of Ciudad Bolivar. On the 8th of August, 1892, an engagement took place between the armies of the two parties at Buena Vista, some seven miles from Bolivar, in which the troops under Hernandez prevailed, and on the 13th of August, Hernandez entered Bolivar and assumed command of the city. All of the local officials had in the meantime left, and the vacant positions were filled by General Hernandez, who from that date and during the period of the transactions complained of was the civil and military chief of the city and district. In October the party in revolt had achieved success generally, taking possession of the capital of Venezuela, October 6, and on October 23, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States.

George F. Underhill was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water, and he also carried on a machinery-repair business. Some time after the entry of General Hernandez, Underhill applied to him as the officer in command for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18, when a passport was given and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport; for the alleged confinement of Underhill to his own house; and for certain alleged assaults and affronts by the soldiers of Hernandez' army.

The cause was tried in the Circuit Court of the United States for the Eastern District of New York, and on the conclusion of plaintiff's case, the Circuit Court ruled that upon the facts plaintiff was not entitled to recover, and directed

a verdict for defendant on the ground that "because the acts of defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the Circuit Court of Appeals, and by that court affirmed upon the ground "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." 26 U. S. App. 573. Thereupon the cause was brought to this court on certiorari.

Mr. Walter S. Logan for Underhill. *Mr. Charles M. Demond* was on his brief.

Mr. Frederic R. Coudert, Jr., for Hernandez. *Mr. Joseph Kling* was on his brief.

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

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military

force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *United States* v. *Rice*, 4 Wheat. 246; *Fleming* v. *Page*, 9 How. 603; *Thorington* v. *Smith*, 8 Wall. 1; *Williams* v. *Bruffy*, 96 U. S. 176; *Ford* v. *Surget*, 97 U. S. 594; *Dow* v. *Johnson*, 100 U. S. 158; and other cases.

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. *The Three Friends*, 166 U. S. 1.

In this case, the archives of the State Department show that civil war was flagrant in Venezuela from the spring of 1892; that the revolution was successful; and that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our minister to Venezuela, "accepted by the people, in the possession of the power of the nation and fully established."

That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. *Jones* v. *United States*, 137 U. S. 202; *Mighell* v. *Sultan of Jahore*, (1894) 1 Q. B. 149.

It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs.

We entertain no doubt upon the evidence that Hernandez

was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

The decisions cited on plaintiff's behalf are not in point. Cases respecting arrests by military authority in the absence of the prevalence of war; or the validity of contracts between individuals entered into in aid of insurrection; or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy; and the like, do not involve the questions presented here.

We agree with the Circuit Court of Appeals, that "the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces," and that "it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive;" and we concur in its disposition of the rulings below. The decree of the Circuit Court is

Affirmed.

PRATT *v.* PARIS GAS LIGHT & COKE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No 85. Submitted November 2, 1897.— Decided November 29, 1897.

To constitute an action one arising under the patent-right laws of the United States, the plaintiff must set up some right, title or interest under the patent laws, or, at least, make it appear that some right or privilege under those laws will be defeated by one construction, or sustained by the opposite construction of these laws.

When a state court has jurisdiction both of the parties and the subject matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defence, the defendant claims the invalidity of a certain patent.

This was an action in assumpsit upon the common counts, by the persons constituting the firm of Henry Pratt & Company, to recover of the Paris Gas Light and Coke Company the agreed consideration of $4850 for manufacturing and setting up at its works in the city of Paris, Edgar County, Illinois, an apparatus for the manufacture of water gas, in accordance with certain patents granted to Pratt and Ryan, April 22, 1884, and April 12, 1887, the component parts of said apparatus being set forth in the contract.

Defendants pleaded the general issue, and in addition thereto that the cause of action arose under a written contract, by which the plaintiffs agreed to keep the defendant harmless against any suits which might be brought against it for the infringement of any patents, and if any such were brought, to defend the same at their own expense; further averring that the patents to Pratt and Bryan were void, and an infringement upon certain patents which had been granted to Springer and Lowe; that plaintiffs had not kept defendant harmless from suits for infringement, as provided for in such contract, and had not defended the same at their expense, but that a suit had been begun against defendant by the National Gas Light and Fuel Company in the Circuit Court of the United States for the Southern District of Illinois, for

an infringement of the Springer patent; that defendant requested plaintiffs to defend it, which they had agreed to do, but that they wholly refused to defend it, and said suit is still pending; that defendant was compelled to, and did at once, quit using the apparatus by reason of such suit, and has wholly ceased to use it.

The third plea averred, in substance, that the plaintiffs obtained the contract upon false and fraudulent representations that their patents were not infringements upon any other patents, which representations the plaintiffs knew to be untrue; that plaintiffs further represented that the National Gas Light and Fuel Company had begun a suit against them for an infringement of the Springer patent, and had found that they had no claim, and assured plaintiffs that no suit would be brought against defendant by the Gas Light and Fuel Company, nor by any one else, and that the company had abandoned all claim that plaintiffs' patents were an infringement upon theirs, which representations were false and fraudulent to the knowledge of the plaintiffs, who had before that time been notified by the Gas Light and Fuel Company that suit would be brought against any one who might use the apparatus made by them.

The fourth plea alleged substantially the same representations as the third, and that, while plaintiffs were about to commence the construction of the apparatus, the National Gas Light and Fuel Company notified defendant that the plaintiffs' apparatus was an infringement upon the patents; that defendant thereupon notified plaintiffs that it would not accept such apparatus, and thereupon plaintiffs proposed that, if defendant would permit them to proceed, they would, before asking payment for the same, furnish defendant a good and sufficient bond indemnifying it against all damages that it might suffer by reason of any infringement, and upon defendant's accepting such offer, plaintiffs refused to give such bonds as they had agreed, and still neglect to do so.

To these special pleas a general demurrer was filed by the plaintiffs, which was overruled by the court, and by leave of the court, replications were filed, and upon the issues thus

joined a trial was had, which resulted in a verdict for the defendant. A motion for a new trial being overruled, and judgment entered upon the verdict, the case was taken to the appellate court of Illinois, and from that court to the Supreme Court, which affirmed the judgment of the Circuit Court, whereupon plaintiffs sued out a writ of error from this court.

Mr. John T. Richards for plaintiffs in error.

Mr. George Hunt and *Mr. James R. Ward* for defendant in error.

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

The only Federal question presented by the record in this case turns upon the admissibility of evidence tending to show that the patents issued to the plaintiffs Pratt and Ryan were infringements upon a prior patent issued to Springer. Plaintiffs contend that the state court, by admitting such testimony, thereby assumed jurisdiction of a patent case, in violation of Rev. Stat. § 711, which declares that "the jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States. . . . Fifth. Of all cases arising under the patent-right or copyright laws of the United States."

The action, however, was not brought to test the validity of plaintiff's patents; to recover damage for their infringement, or to enjoin their use by the defendant. The suit was an ordinary action of assumpsit upon the common counts for the price of a machine — a patented machine it is true — but none the less subject to a common law action to recover its value. No mention is made of a patent in the declaration, and the contract having been executed, the action was properly brought upon the common counts, notwithstanding the machine was sold under a written agreement. 2 Greenleaf's Ev. § 104. Defendant in its plea sets up the contract, under

which the plantiffs agreed to save the defendant harmless against any suit which might be brought against it for infringement, and to defend such suits at their own expense; and averred, among other things, that the patents were void and an infringement upon prior patents; that plaintiffs had not kept the defendant harmless against suits, but had refused to defend it against a suit brought by the National Gas Light and Fuel Company, by reason of which the consideration had wholly failed, and defendant had rightfully rescinded the contract. Manifestly if the defendant had no right to use the machine it was of no value to it, and the whole purpose of its purchase was frustrated.

Had the action been in the Circuit Court of the United States defendant would obviously have had the right to show that the plaintiffs' patents were void; and an infringement upon prior patents as an excuse for rescinding the contract. *Hayne* v. *Maltby*, 3 T. R. 438; *Nye* v. *Raymond*, 16 Illinois, 153. Why should it not have the same right in a state court? It is evident that, unless it can prove the invalidity of the plaintiffs' patents, it might be completely at their mercy. It cannot, under our decisions, remove the case to a Federal court, as one arising under the Constitution or laws of the United States, since no claim was made by the plaintiffs in their declaration under such Constitution or laws. *Chappell* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454. It could not file a bill against the National Gaslight and Fuel Company to test the validity of the patents, since the defendant and not the Fuel Company was the offending party. Nor could it have compelled the Fuel Company to sue it for an infringement had that company not chosen to do so. The Fuel Company did, however, elect to bring such suit, which the plaintiffs were promptly notified by the defendant to defend; but they refused to do this, and now claim that defendant is incapacitated from contesting the validity of their patents, which contest they were bound under their contract to make in the suit brought against the defendant by the Fuel Company. It is possible a bill would lie in the

Circuit Court of the United States to rescind the contract, but having the right to rescind without suit, it ought not to be driven to this circuitous remedy.

The action under consideration is not one arising under the patent right laws of the United States in any proper sense of the term. To constitute such a cause the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws. *Starin* v. *New York*, 115 U. S. 248; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473.

The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defences, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of "*cases*" arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading — be it a bill, complaint or declaration — sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.

The jurisdiction of state courts over patent cases is not more exclusive than that of the District Courts over cases of admiralty and maritime jurisdiction. Yet, when vessels have passed into the hands of an assignee or receiver, it has been the constant practice of courts of bankruptcy and equity to respect the liens given by the maritime law, to marshal such liens and direct their payment, precisely as a court of admiralty would have done. *Scott's Case*, 1 Abbott U. S. 336; *In re Kirkland*, 14 Fed. Cases, 677; *In re Peoples' Mail Steamship Co.*, 3 Ben. 226; High on Receivers, § 138.

While the question has never arisen in this court, in the exact form presented in this case, we have repeatedly held that the Federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license, or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts. *Hartell* v. *Tilghman*, 99 U. S. 547; *Wilson* v. *Sanford*, 10 How. 99; *Albright* v. *Teas*, 106 U. S. 613; *Goodyear* v. *Day*, 1 Blatchford, 565; *Blanchard* v. *Sprague*, 1 Cliff. 288; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46; *Wade* v. *Lawder*, 165 U. S. 624. Although in an action for royalties, if the validity and infringement of the patent are controverted, the case is considered as one "touching patent rights," for the purposes of an appeal to this court under Rev. Stat. § 699. *St. Paul Plough Works* v. *Starling*, 127 U. S. 376. In this case the court expressly reserved the question whether the action should be considered as one arising under the patent laws of the United States within the meaning of section 711.

We are referred to but one case directly in point which favors plaintiffs' contention: *Elmer* v. *Pennel*, 40 Maine, 430, in which, in a suit upon a note given for a patent right, proof that the patent was void as an infringement upon a prior one was held not to be admissible without that fact having been determined by a court of competent jurisdiction.

There is, however, an overwhelming weight of authority to the contrary. Beginning with the case of *Bliss* v. *Negus*, 8 Mass. 46, in which, in a similar action upon a note, it was held the defendant might show that the patent had been obtained by fraud and perjury, the Supreme Judicial Court of Massachusetts has held steadily to the doctrine that where the question of the validity of a patent arises collaterally, it will take jurisdiction of it. In *Dickinson* v. *Hall*, 14 Pick. 217, evidence that the patent was void was held to be pertinent to show a total want of consideration for the defendant's note. The principal case, however, is that of *Nash* v. *Lull*, 102 Mass. 60, in which the opinion of the court was delivered by

Mr. Justice Gray, to the effect that any degree of utility or practical value in a patent will support the consideration paid for it; but that if it be wholly void, a note given for it is without consideration, and such issue may be tried in the state court as well as in the Circuit Court of the United States. See, also, to the same effect, *Bierce* v. *Stocking*, 11 Gray, 174; *Lester* v. *Palmer*, 4 Allen, 145.

Like opinions have been pronounced in the courts of New Hampshire, Connecticut, New York, Pennsylvania, Indiana, Wisconsin, Illinois and Missouri; and in all these States the principle seems well established that any defence which goes to the validity of the patent is available in the state courts. In these cases the validity of the patent was attacked upon different grounds, but we perceive no distinction in the principle involved. The patent may be void because the invention was well known before; or because it is useless or immoral; or because it is an infringement upon other prior patents, and it is no objection to the jurisdiction of the state court that the question of validity may involve the examination of conflicting patents, or the testimony of experts. It is the fact of its invalidity, and not the reasons for it, that is material. The cases are so numerous and uniform that a bare reference to them is all that is necessary. *Dunbar* v. *Marden*, 13 N. H. 311; *Rich* v. *Atwater*, 16 Conn. 409; *Sherman* v. *Champlain Transportation Co.*, 31 Vermont, 162; *Clough* v. *Patrick*, 37 Vermont, 421; *Burrall* v. *Jewett*, 2 Paige Ch. 134; *Middlebrook* v. *Broadbent*, 47 N. Y. 443; *Continental Store Service C.* v. *Clark*, 100 N. Y. 365; *Head* v. *Stevens*, 19 Wend. 411; *Harmon* v. *Bird*, 22 Wend. 113; *Cross* v. *Huntly*, 13 Wend. 385; *Saxton* v. *Dodge*, 57 Barb. 84, 115; *Geiger* v. *Cook*, 3 W. & S. 266; *Slemmer's Appeal*, 58 Penn. St. 155, 163; *McClure* v. *Jeffrey*, 8 Indiana, 79; *Nye* v. *Raymond*, 16 Illinois, 153; *Page* v. *Dickerson*, 28 Wisconsin, 694; *Rice* v. *Garnhart*, 34 Wisconsin, 453; *Billings* v. *Ames*, 32 Missouri, 265.

The claim made by the plaintiffs in error, that there was no competent evidence to show that their patents were an infringement upon the prior patents, was not specially assigned as

error, either in the appellate court, or in the Supreme Court of the State, and is not noticed in either of the opinions of those courts. Under these circumstances it cannot be assigned as error here.

The judgment of the Supreme Court of Illinois is, therefore,

Affirmed.

HODGSON *v.* VERMONT.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 26. Argued October 14, 15, 1897. — Decided November 29, 1897.

The State's attorney of Vermont, under the statutes of that State, filed an information in the proper court against H., charging that on a day and at a place named he "did, at divers times, sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." At the same time he filed specifications as follows: "In said case the State's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say," giving the names without the residences. "And the undersigned State's attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute. And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit." This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "when a specification is required, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale,

Statement of the Case.

furnishing or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person, whether named in the specification, or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to a postponement of the trial, for this cause, as the court shall think reasonable." It did not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. *Held*, that this was due process of law, within the meaning of the Fourteenth Amendment to the Constitution.

The words "due process of law" do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The Amendment undoubtedly forbids arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State.

At the June term, 1892, of the county court for the county of Addison, in the State of Vermont, the plaintiff in error was tried and convicted "of one first offence and one second offence," upon an information for selling liquor, filed by the State's attorney. The information was as follows:

"Be it remembered that Frank L. Fish, State's attorney within and for said county, comes here into open court in his own proper person, and upon his oath of office gives said court to understand and be informed, that Edward Hodgson of Orwell, in the county of Addison, and State of Vermont, on the 7th day of June, A.D. 1892, at Orwell, in the county of Addison aforesaid, did, at divers times, sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the said State's attorney, on his oath aforesaid, comes and gives said court further to understand and be informed, that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury, in and for the county of Addison, on the first Tuesday of

December, A.D. 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing and giving away intoxicating liquors, against the law in such case made and provided."

It is stated in the record that the State's attorney "likewise filed specifications in words and figures following:"

"In said case the State's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say:

[Here follow the names of sixty-six persons, whose residence is not given.]

"And the undersigned State's attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute.

"And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit."

This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "*when* a specification shall be *required*, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale, furnishing or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person,

whether named in the specification or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to a postponement of the trial, for this cause, as the court shall think reasonable." Statute of Vermont, 1886, No. 37.

It does not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. These proceedings were based upon c. 169, §§ 3802, 3803, 3859, 3860 of the Revised Laws of Vermont, (Revision of 1880,) as amended by No. 42 of the statutes of 1888, which are as follows:

"SEC. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away, intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the State, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year.

"SEC. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceding section, and the same may be tried upon the complaint of the grand juror of the town, or of the State's attorney, before a justice, or upon the information of the State's attorney, before the county court.

"SEC. 3859. Complaints for any offence against section 3572 (section 3802) shall be substantially in the following form:

"'STATE OF VERMONT, }
——— COUNTY, } ss:

"'To A. B., justice of the peace for the county of ———, comes C. D., grand juror of the town of ———, in said county,

and complains that E. F., of ———, on the ——— day of ———, A.D. ———, at ———, did, at divers times, sell, furnish or give away (as the case may be) intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

"'C. D., *Grand Juror.*'

"SEC. 3860. Under the foregoing complaint every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for each offence."

Before trial the plaintiff in error filed a motion to quash the indictment. This motion was overruled by the court, to which decision the plaintiff in error duly excepted. The case was carried by the plaintiff in error to the Supreme Court of Vermont upon exceptions to the overruling by the county court of his motion to quash, and upon other exceptions taken at the trial, and not material here, as they raise no Federal question. Judgment and sentence were stayed in the county court, to await the result of the hearing in the Supreme Court.

In that court the plaintiff in error filed a motion in arrest of judgment, which he was allowed by the court to do, and the same was taken into consideration and passed upon by the court.

The grounds set forth are in substance: That the information upon which the conviction was had is insufficient and void, and lacking in substance in various particulars specified in the motion; that the respondent was deprived of his right to be informed of the nature and cause of the accusation against him; that he was convicted of two infamous crimes without due process of law, and denied by the State the equal protection of the law; that the statutes of Vermont under which the proceedings were had are in conflict with the provisions of the Constitution of the United States, and especially that provision of the Fourteenth Amendment which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or prop-

erty without due process of law; nor deny to any person the equal protection of the law."

The Supreme Court of Vermont affirmed the judgment of the county court refusing to quash the information, and overruled the motion in arrest, and proceeded to render judgment upon the verdict, and sentenced the plaintiff in error to pay a fine of $30 for the first offence and $70 for the second offence, with costs taxed at $197.36, and to be confined at hard labor in the house of correction at Rutland for the period of sixty days, "with alternative sentence." The alternative sentence is, that in case of failure to pay the fine and costs within twenty-four hours, the respondent be confined in the house of correction for the term of three days for each dollar, in addition to the period for which he is sentenced. Rev. Laws, § 4336.

The court decided, in substance, that the information was sufficient; that it constituted due process of law; that the statute did not infringe the requirements of the Constitution of the United States by depriving the accused of the equal protection of the laws or by subjecting him to cruel and unusual punishment.

The defendant thereupon sued out a writ of error to this court, which was allowed by the Chief Judge of the Supreme Court of the State of Vermont.

Mr. E. J. Phelps for plaintiff in error. *Mr. W. H. Bliss* was on his brief.

Mr. Frank L. Fish and *Mr. Charles A. Prouty* for defendant in error.

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

At a former term of this court, in the case of *O'Neil* v. *Vermont*, 144 U. S. 323, we were asked to hold certain provisions of the laws of the State of Vermont, concerning the importation and sale of intoxicating liquors, void, because they

conflicted with the Constitution of the United States wherein it confers upon Congress exclusive power to regulate interstate commerce and forbids cruel and unusual punishments. But the court was of opinion that the record in that case did not disclose that any Federal question had been raised or decided in the Supreme Court of Vermont, and the writ of error was accordingly dismissed.

In the present case the assignments of error raised no question as to the character of the punishment inflicted upon the accused. Nor do the facts of the present case call upon us to consider the validity of those portions of the Vermont statutes which concern intoxicating liquors as articles of interstate commerce.

But certain Federal questions are sufficiently presented in this record, which have been argued with great ability, and which it is our duty to now consider.

The first contention is that the information under which the plaintiff in error was tried and convicted was defective in such essential particulars as to deprive him of his liberty and property without "due process of law." It is said that the information does not charge any specific offence; that it does not state with any reasonable certainty the time when the offences charged, or any or either of them, occurred; that the name of no person to whom liquor was alleged to have been sold, furnished or given away is stated; that neither the place where the sales are claimed to have taken place, the kind or quantity of intoxicating liquor so disposed of, nor any other circumstance that would tend to identify the transactions referred to, is stated; that such an information does not protect the accused the least against being prosecuted for one crime and convicted of another; that under this information it is and must remain utterly uncertain what particular one of many offences the accused was convicted of; that the record of an acquittal or conviction upon such an information forms no bar to a second prosecution for the same offence.

While we are not relieved from considering these objections by the mere fact that the offences charged arose under a statute, and were proceeded in, in a court of a State, it is

yet obvious that our concern in them can go no further than to inquire whether the plaintiff in error was deprived of the rights and immunities secured to him by the Federal Constitution.

Several of the objections specified merely raise questions of form, and, as such, were conclusively ruled by the state court. But it is insisted that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him.

Conceding that this is a correct statement of the rights of an accused person, and that, if deprived of such rights, he may properly invoke the protection of the Constitution of the United States, our reading of this record has not satisfied us that the plaintiff in error has any just grounds of complaint. We adopt, in this regard, the views and language of the Supreme Court of the State:

"The offence created by the statute is the provision of intoxicating liquors without the authority of law, either by sale, furnishing or giving away. There are no circumstances necessary to be set out to constitute either of these facts an offence. The terms of the statute as clearly import the prohibited offence as any terms can. The offence is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquors sold, nor upon the person to whom the sale, furnishing or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by some one for him. None of these particulars need be set forth to notify the respondent of the offence with which he is charged, and called upon to answer, nor to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offence in the exact and easily understood language of the statute which creates

it. This is sufficient. . . . It is not an ancient crime which has been, from time immemorial, clothed in special terms which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common law crime without defining it, or creates an offence and prescribes no form for an information. In such cases it is well held that the common law requirements in charging it must be met. . . . But it is sufficient to charge a statutory offence in the terms of the statute. . . . The respondent contends that the prescribed form is defective, in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law, when applicable. The specifications ordinarily would, and did in this case, supply the information. . . . It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold should be set forth in the information, both to apprise the respondent of the evidence he has to meet, and to have the record protect him from a second information for the same offence. It is never necessary for the State to disclose what is merely its proof of the commission of the offence charged in the information. If the record does not itself identify the offence or offences for which conviction has been had, on the trial of a subsequent prosecution, such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offence for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor, to the same person, at the same price, at the same place and on the same day. Besides by the common law it has always been held that the prosecutor need not set forth the name of the person, when unknown. It is sufficient to state that his name is unknown. . . . These particulars of the kind, quantity, price, and person to whom sold, are seldom known to the prosecutor until revealed by the witness upon the stand. Without these

particulars the prescribed form answers every essential requirement of the common law in regard to informations or indictments. The prescribed form sets forth in clear language, easily to be understood, 'the cause and nature of the accusation.' . . . By the use of the words 'at divers times' on the day named, it notifies him that he may be called upon to meet more than one offence committed in one of the ways named. The prosecution is never confined to prove the offence on the day specified in the information, if the proof is within the time limited for the prosecution of the offence. The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases, which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet, as much as a respondent in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view, the information, aided by specifications, is good by the rules of the common law; but, whether it be or not, the legislature has an undoubted right to change and mould the forms of procedure so long as it does not deprive the accused of any constitutional right. . . . This class of cases is not exceptional in their manner of trial. They are proceeded with like all other cases. The selection and empanelling of the jury, the rules of evidence, burden of proof, and procedure in the trial, is the same as in all other criminal cases. What has been said in regard to the scope of the information, aided by specifications, to which the respondent was entitled as a matter of right, and which were furnished to him, and in regard to the order and manner of his trial, makes the respondent's trial a trial by 'due process

of law,' or in accordance with 'the law of the land,' within the varying definitions of those general terms as claimed by the respondent's counsel." *State* v. *Hodgson*, 66 Vermont, 134, 150.

It is argued that the defects or insufficiencies of the information cannot be supplied by the specification, because the latter is not required by any statute and is not a matter of right. If this assumption was well founded it would strengthen the criticism urged against the information. But that such assumption is not well founded is shown by the opinion of the Supreme Court of Vermont above quoted, wherein it is held that the accused under these proceedings is entitled to a specification as a matter of right.

The defendant being entitled to a specification as a matter of right, under the decision of the Supreme Court of the State, the question of the validity of the information in the absence of any specification is not presented by this case, and we therefore express no opinion upon it.

It is further claimed that the conviction of the plaintiff and his sentence to infamous punishment was without due process of law, because he was not indicted by a grand jury. Discussion of this contention is unnecessary, because it was the very matter considered in *Hurtado* v. *California*, 110 U. S. 516, where it was ruled that the words "due process of law" in the Fourteenth Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The views expressed in that case have been approved and followed in a number of subsequent cases, of which a few may be cited. *Barbier* v. *Connolly*, 113 U. S. 27; *In re Kemmler*, 136 U. S. 436; *Ex parte Converse*, 137 U. S. 624; *Hallinger* v. *Davis*, 146 U. S. 314.

We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal

Counsel for Parties.

protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by quoting the language of this court in *Ex parte Converse*, 137 U. S. 624: "We repeat, as so often has been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State."

Finding no error therein, the judgment of the Supreme Court of Vermont is

Affirmed.

UNITED STATES *v.* WILSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 296. Submitted October 26, 1897. — Decided November 29, 1897.

When a consul of the United States, in his regular accounts and settlements with the Treasury, charges himself with fees received by him as consul for which he is not obliged to account, and pays the same into the Treasury with each settlement, and retires, and makes his final settlement with the Treasury on the same basis, he cannot, in an action commenced in the Court of Claims three years after his retirement, recover back such payments, but they will be regarded as wholly voluntary payments.

THE case is stated in the opinion.

Mr. Attorney General and *Mr. Felix Brannigan* for appellant.

Mr. John S. Mosby for appellee.

Opinion of the Court.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The Court of Claims in this case gave judgment in favor of the appellee upon these facts: Thomas B. Van Buren, a citizen of the United States, was appointed consul-general of the United States at the port of Yokohama, Japan, and held office from June, 1874, until June, 1885. While at Yokohama, Mr. Van Buren received fees for certifying invoices of merchandise shipped from that port through the United States in bond to foreign countries amounting to the sum of $4115, which fees were paid into the Treasury of the United States under the rules, regulations and requirements of the Departments of State and Treasury, requiring fees to be so accounted for and paid to the United States. There were 1646 of these invoices. Of the merchandise so shipped, that covered by 523 of the invoices was stopped in transit, for consumption in the United States without further consular certificates, and the declarations or invoices and certificates made by the consul were accepted by the customs officers of the United States as sufficient. The fees collected for certifying these 523 invoices amounted to $1307.50. The merchandise described in 478 of the 1646 invoices passed in transit through the United States to foreign countries, and was exported from the United States. The fees collected for certifying these invoices amounted to $1195. With regard to 645 of the 1646 invoices, there was no evidence either that the merchandise described in the invoices was stopped in transit and entered for consumption in the United States, or that it passed in transit through the United States to foreign countries. The fees collected for certifying these invoices amounted to $1612.50. Mr. Van Buren's accounts for the total of all these among other fees were settled at the Treasury Department, and in the settlements he was charged with these as for official fees.

The Court of Claims found that it was not shown that the reason for paying said fees into the Treasury was to avoid controversy with any department of the Government, or that Mr. Van Buren made any demand to have the fees refunded to him, or credited to him before said accounts were finally set-

tled, or that before the final settlement of his accounts at the Treasury Department he made any objection or protest against said fees being charged to him as official fees. The court gave the claimant judgment for the total of the three sums above mentioned, being $4115.

The judgment in this case was mainly based by the court below upon the case of *United States* v. *Mosby*, 133 U. S. 273, and it was there held that the invoices referred to in sections 2853 and 2855, Revised Statutes, either as they stood originally, or as they were amended by the act of June 10, 1880, did not include invoices for the shipment of merchandise in transit through the United States to other countries, and that the law did not require a consul to issue certificates in such cases; that no provision was made for a fee for them in the regulations of 1874, or those of 1881, and that it did not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. The claim of the claimant in regard to such fees was allowed as a proper claim against the Government.

It is stated in the brief of counsel for the Government herein that in the *Mosby case* neither the Court of Claims nor this court was given the benefit of any information as to what transit invoices were, and it is now said that both the courts were mistaken in holding that the invoices in the *Mosby case* were not those referred to in the above-numbered sections of the Revised Statutes; and it is said that it now appears by the evidence before the court that such invoices are the identical invoices described by those sections, and that section 2860, in providing that, "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of sections 2853, 2854 and 2855, and has thereon the certificate of a consul, vice-consul or commercial agent in those sections specified," makes it necessary to have the consular certificate given in this case.

We are not now called upon to question the decision in the *Mosby case*. We think there is another ground upon which to base a reversal of the judgment herein, which is, that the

payments made by Mr. Van Buren of the fees covered by his claim were wholly voluntary, and that the general rule applicable to voluntary payments should be enforced.

The petition in this case was not filed until the 30th of March, 1888, and Mr. Van Buren's term of service expired in June, 1885. From the commencement of that service in 1874 up to the termination of his office and the final settlement of his accounts, no whisper of any claim on his part against the Government was ever heard from Mr. Van Buren. It does not appear that he had the least doubt that the Government was entitled to all the fees paid over by him to it, and in all the various settlements of his accounts with the Treasury Department, and in his correspondence, so far as this record shows, no claim was ever made or hint given on his part that he had the least title to retain these fees or to recover them back if paid to the Government. There is no pretence that he paid the fees into the Treasury to avoid a controversy with any department of the Government, or that he ever made any objection or protest against the fees being charged to him as official fees. The Court of Claims so finds in substance. If a voluntary payment can be made to the Government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the Government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the Government, without claim of any right to retain one penny of it.

In *United States* v. *Lawson*, 101 U. S. 164, the collector received an order in writing from the commissioner of customs, his superior, requiring him to account for all fees received by him as collector. Under that order he paid the fees in controversy into the Treasury, and it was held that

having thus paid them pursuant to a peremptory order of his superior officer, he was not precluded from thereafter recovering them in a suit against the United States.

To the same effect is *United States* v. *Ellsworth*, 101 U. S. 170, where the ruling in the *Lawson case* is followed. In the *Ellsworth case* the court said, after referring to the penalties for non-compliance with the requirements of the law in paying over moneys: "Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

In both of the cases, in addition to the general law upon the subject of moneys received for the use of the United States to be paid into the Treasury, there was a distinct and peremptory order that the moneys in question should be paid, and it was in compliance with such order from a superior officer that the moneys were paid.

In *Swift Company* v. *United States*, 111 U. S. 22, the payments were held to be not voluntary because the purchaser of the stamps from the Government had to take them on the terms which the Government imposed or else go out of business. In that case, however, it appeared that the leading manufacturers of matches, among whom was William H. Swift, (who upon the organization of the claimant corporation in 1870 became one of its large stockholders and treasurer,) had made repeated protests to the officers of the Internal Revenue Bureau against the methods adopted by it in computing commissions for proprietary stamps sold to those who furnished their own dies and designs. It appeared that the rule of the department was one adhered to during the whole time of its existence, and it was announced by the Internal Revenue Commissioner that such ruling would not be altered, and as it was necessary for those in the business to have the stamps in order to continue their business, it was held by this

court that they were not obliged to continuously protest, and that settlements made with the Treasury officials upon the basis of the correctness of the custom of the department in regard to the sale of stamps and commissions thereon did not bar the claimant's right to recover the moneys which the department ought to have paid but did not; that the position of the parties was such as to render these continuous protests unnecessary. Various cases are cited by Mr. Justice Matthews, in delivering the opinion of the court, showing what amounts to an involuntary payment.

In the *Mosby case*, *supra*, it appears that the claimant asserted his right to the moneys and had correspondence with the officers of the department in relation thereto, and only paid the moneys to avoid a contest with his superior officers.

Nothing in any case cited is inconsistent with the view that the payments in this case were wholly voluntary in their nature, and as such cannot be recovered back.

For these reasons, without considering other questions appearing in the record, we think the judgment below should be

Reversed, and the case remanded to the Court of Claims with instructions to dismiss the petition.

HOLTZMAN *v.* DOUGLAS.

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

No. 80. Argued November 1, 1897. — Decided November 29, 1897.

This was an action of ejectment. The plaintiff claimed under one Hall, former owner of the land. The defendants claimed under one Douglas, who bought it at a tax sale in 1865. The defendants set up adverse possession in defence. The court instructed the jury that to defeat the claim of the plaintiffs upon the defence of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession

Opinion of the Court.

by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises; and, on the request of the defendants, that "if the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid for it by him at such sale and received from the corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington, and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangements with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover." *Held*, that the instructions as given were substantially correct, and there was evidence in the case upon which to found the one given at defendants' request.

THE case is stated in the opinion.

Mr. Arthur A. Birney for appellant.

Mr. Job Barnard for appellees. *Mr. Henry E. Davis* and *Mr. James S. Edwards* were on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is an action of ejectment, brought to recover the possession of a lot in the city of Washington, designated as lot No. 8 in square No. 941. The defendants set up adverse possession as a defence. Upon the trial before a jury a verdict was rendered in favor of the defendants, upon which judgment was entered, and an appeal taken to the Court of Appeals of

the District of Columbia, where the judgment was in all things affirmed, 5 D. C. App. 397, and the plaintiff has brought the record here for review.

It appeared on the trial that the record title to the lot had been, at the time of his death, in one David A. Hall, who died December 24, 1870, and the heirs-at-law of Hall, by divers conveyances, conveyed this lot to the plaintiff in fee. The plaintiff proved also that the defendants at the commencement of this action were in possession of the premises through one Richard Rothwell, their tenant, and that they claimed to own the same as heirs-at-law of William Douglas, who died in September, 1865. The defendants, on their part, proved a deed of conveyance to William Douglas of the lot in question from the corporation of the city of Washington, the deed reciting a sale of the property for unpaid taxes assessed on the land in the name of David A. Hall, the deed being dated July 6, 1865, and recorded July 12, 1865, in the proper office. The deed was admitted in evidence to show color of title in the defendants.

The facts upon which the defence of adverse possession arises have been so well summarized in the opinion of the Court of Appeals, which was delivered by Mr. Justice Morris, that we take his statement thereof, as follows:

"It was testified on behalf of the defendants that, some time in the latter part of the same year, 1865, one Richard Rothwell, a stonecutter and builder, who owned and occupied an adjoining lot, deposited upon the rear of the lot in controversy some pontoons which he had purchased from the United States, and which he stored there until he could make some disposition of them; and that he afterwards used a part of this lot for the deposit of stone and marble which he used in his business. He testified that he had deposited three or four wagon loads of marble there as early as the year 1867, and that some of the pontoons remained on the lot four or five years. He also testified that, in the year 1870, he commenced to deposit stone there in large quantities; and that in 1872 he erected a small shed on the lot in which to carry on his work, and which he replaced with a larger structure in or about the year 1882.

Opinion of the Court.

"Some time in the year 1867, Mrs. Douglas, the widow of William Douglas, apparently acting on behalf of his estate or of the estate of their children, had an interview with Rothwell and came to an understanding with him with reference to his continued occupancy of the lot, in pursuance of which understanding he agreed to pay as rent to her annually therefor a sum of money equal to the amount of taxes that should annually be assessed upon it, and he did so pay rent to her until her death in 1887; and after her death he paid the rent to her daughter, a Mrs. Wirt, down to about the time of the institution of this suit. During all this time, that is, from 1867 to 1889, Rothwell continued to occupy the property and paid rent therefor to the Douglases, and the latter paid the taxes annually for all the years from 1868 to 1893, both inclusive, except for the year 1870, during which there was an interregnum in consequence of the establishment about that time of a territorial form of government in the District of Columbia, the assessment of the property having been in the name of William Douglas since the year 1868, inclusive.

"By a stipulation filed in the cause since the argument, in order to supplement some omission in the printed record, it appears that, at the death of William Douglas in 1865, four of his children were adults and two minors; and that Mrs. Douglas, the widow, was appointed guardian to the two latter, and filed in her guardianship accounts for several years the annual receipts for taxes on this lot, paid by her, and was allowed credit for them by the court. It, therefore, appears that, with reference to this lot, she acted not for herself or on her own individual account, but on behalf of the estate that was then in her children.

"There was a proposition on the part of Mrs. Douglas, apparently about the time of Rothwell's attornment to her, to inclose the lot with a fence. But to this Rothwell objected, on the ground that it would interfere with his use of it and with free access to it of his horses and wagons; and the project was abandoned, so that the lot was never actually inclosed, and the only evidences of occupation consisted in such use of the property as has been indicated. The streets

had not been actually laid out in that neighborhood otherwise than by their delineation on the map of the city; and the whole region was an open field with no definite landmarks to indicate to the casual observer the actual location of this lot."

This action was commenced on the 31st of May, 1889, and, as stated in the brief of the counsel for the plaintiff, the vital question for the jury was, were the defendants in adverse possession prior to May 31, 1869. The evidence is uncontradicted that from a period as early as 1867 the defendants, through their tenant, Rothwell, were in possession of the premises, and such possession was continued up to the commencement of this action; but it is claimed that because Rothwell had entered upon the land in 1865, without claiming to own the same or to be entitled to possession, and had deposited the pontoons and marble mentioned in the foregoing statement of facts, that he thereby became a tenant of the plaintiff's predecessors in title, and that he could not change the character of his possession, as being in subordination to them, by any agreement between himself and Mrs. Douglas without giving notice to them that such an agreement had been made.

The doctrine which the plaintiff seeks to set up, we think, is not applicable to the facts of this case. After the purchase at the tax sale, the delivery of the deed and the recording thereof, Mrs. Douglas in 1867 claimed title to the land and demanded possession thereof from Rothwell, and by reason of the understanding then arrived at between herself and Rothwell he became the tenant of Mrs. Douglas as the representative of the heirs-at-law of William Douglas, and such tenancy continued up to the commencement of this action. She went to him under a claim of ownership and of the right to immediate possession of the lot as owner. He then acknowledged her right, became her tenant and paid rent to her. That certainly placed Mrs. Douglas, as the representative of the heirs, in possession of the lot. From that time the facts are sufficient upon which to base a claim of adverse possession. We think it was inaugurated when Rothwell,

under his agreement with Mrs. Douglas, acknowledged her right and paid her rent, and it was immaterial, so far as the heirs are concerned, that Rothwell had before that time entered upon the lot, although under no claim of title and presumably in subordination to the title of plaintiff's predecessors. *Harvey* v. *Tyler*, 2 Wall. 328. If Rothwell were himself asserting a title by adverse possession, while coming into possession in acknowledgment of and under the title of the owners, there might be an opportunity for the application of the doctrine contended for by plaintiff, and in such case Rothwell could not set up title by adverse possession while entering in subordination to the title of the owner, unless he first vacated and then retook possession as a hostile entry, or did some act necessarily evincing an intention to put an end to his tenancy. We are not dealing with Rothwell's rights or title. The defendants did all they were called upon to do in order to take possession and inaugurate an adverse holding, when they came with their tax deed, claimed to own the property described in it and exercised an act of ownership by letting the lot to Rothwell as a tenant at a certain rent. When Rothwell recognized the claim of ownership and remained in possession from that time in subordination to the rights of Mrs. Douglas and the heirs-at-law, their adverse possession, so far as this point is concerned, was sufficiently inaugurated. Mrs. Douglas was no party or privy to the prior entry of Rothwell, and, therefore, whatever the circumstances as proven in this case regarding such prior entry, her rights and those of the heirs cannot be in any way affected thereby. There is no pretence of any fraud or concealment in the case by any one, certainly not by Mrs. Douglas. Neither she nor the heirs were bound, in order to maintain their rights, to give any written or verbal notice to the former owners that they were in possession through Rothwell; nor did the possession of Rothwell, as tenant of the Douglas heirs, fail to commence at the time of this agreement because he did not give notice to the former owners of his recognition of the title and right to the possession as claimed by Mrs. Douglas.

We are also of the opinion that there was evidence to be

submitted to the jury, that the possession of the defendants was in all other respects adverse within the meaning of the law upon the subject for more than twenty years before the commencement of this action. There is no doubt that the entry of defendants by means of the agreement mentioned was under a claim of title on the part of Mrs. Douglas and those whom she represented as the heirs-at-law of William Douglas. There was enough to authorize the jury to find that the possession was notorious and exclusive, continuous, actual, open and adverse. *Ward* v. *Cochran*, 150 U. S. 597.

Payment of the taxes, as described in the above statement of facts, is very important and strong evidence of a claim of title; and the failure of the plaintiffs' predecessors to make any claim to the lot or to pay the taxes themselves, is some evidence of an abandonment of any right in or claim to the property. In *Ewing* v. *Burnet*, 11 Pet. 41, it was held by this court that the payment of taxes on land for twenty-four successive years by the party in possession was powerful evidence of the claim of right to the whole lot upon which the taxes were paid. The same principle is held in *Fletcher* v. *Fuller*, 120 U. S. 534, 552. It is some evidence that the possession was under a claim of right and was adverse.

Although there was no fence around this lot during the period in question, yet it was occupied by the tenant for the purposes of his business, that of marble and stone cutting, and although every foot of the property was not covered by his material, yet it was placed upon the lot in a convenient manner to be used by him in the prosecution of his business, and in a manner which showed that his possession was not in connection with any others, but was exclusive and perfect in himself.

We agree with the court below when, speaking through Mr. Justice Morris, it says that: "Short of an actual inclosure, it is not easy to conceive of a use and occupation more sharply distinctive and adverse than the conversion of the property into a stone yard, with the stone practically scattered all over it, according to the testimony of one or more of the witnesses. Nor should the fact be ignored in this connection that for

upwards of twenty years the record owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendants to discharge the burden which it was incumbent upon themselves to bear, and it might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired."

At the request of the plaintiff, the judge charged the jury that, "to defeat the claim of the plaintiffs in this action upon the defence of adverse possession, the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises." *Ward* v. *Cochran*, 150 U. S. 597.

This charge contains a statement of all the requisites for constituting an adverse possession according to the above-cited case.

And the jury were instructed that the defence of adverse possession was an affirmative one, and that it was incumbent upon the defendants to establish it by a clear preponderance of proof, and if the proof were equally balanced, they must find for the plaintiff.

At the request of the defendants the court gave the following instructions to the jury:

"If the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid by him at such sale and received from the corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington

and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover."

The plaintiffs excepted to the granting of such request and to the charge as given. For the reasons already suggested, we think the exception not well founded. The charge as given was substantially correct, and there was evidence in the case upon which to found it. The first, second and third requests to charge, made by counsel for plaintiffs, involve the questions above discussed, and were properly refused. There are no other questions of sufficient doubt to render their discussion necessary. We are of opinion there is no error in the record, and the judgment must be

Affirmed.

Syllabus.

O'BRIEN *v.* MILLER.

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

No. 40. Argued April 2, 1897. — Decided November 29, 1897.

The Johnson, an American ship, was chartered at Valparaiso to carry a cargo of nitrate of soda, of 1938 tons, from Caleta to Hamburg consigned to a London firm. On the way she sprang a leak, and put into Callao. There 1200 tons of the cargo were transferred to the Leslie, a British bark, and the Johnson was repaired, the master executing a bottomry bond to meet the expenses of the repairs. That bond bound the Johnson, cargo and freight, hypothecated the portion of the cargo transhipped to the bark and further provided that "if during the said voyage an utter loss of the said vessel" [*in the singular*] "by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty shall unavoidably happen," "then and in either of the said cases this obligation shall be void." Both vessels sailed for Hamburg. The Johnson collided at sea with the Thirlmere, a British vessel, and was sunk with a total loss. The bark reached Hamburg safely. The consignees, in order to obtain the cargo, agreed to refer to arbitration by German lawyers the question of its liability for the whole amount of the bond. They decided that it was so liable, and the consignees paid the amount of the bond and received the cargo. The owners of the Johnson libelled the Thirlmere and its owners. The latter were held not to be personally liable, and judgment was rendered only for the value of the Thirlmere. The insurers of the Johnson also paid to its owners the amount of the policies of insurance, and the latter, after receiving the amount of the judgment against the Thirlmere, paid to the insurers their proportionate part of it. This suit was then instituted by the consignors and the consignees of the cargo of the bark to recover from the owners of the Johnson their share of the sum paid on the bottomry bond. *Held*,

(1) That the terms of the bottomry bond included not only the Andrew Johnson and her cargo, but the cargo transhipped on the Leslie;

(2) That the owners of the Johnson, to the extent of the damages paid on account of the collision, were liable to the libellants, as creditors of the ship.

In interpreting a contract the whole contract must be brought into view, and it must be interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them: and this rule is especially applicable to the interpretation of contracts of bottomry and respondentia.

In an action to recover on a bottomry bond from the shipowner for ad-

vances made for his benefit and charged upon the property of the cargo owners by the master, if he questions the power of the master to execute the instrument of hypothecation it is his duty to plead it in defence.

The action of the district judge in refusing to permit the respondent to amend his answer by setting up the plea of laches and *res judicata* was not error.

THE case is stated in the opinion.

Mr. Wilhelmus Mynderse for Miller and others.

Mr. Sydney Chubb for O'Brien.

MR. JUSTICE WHITE delivered the opinion of the court.

By a charter party executed at Valparaiso, Chili, on April 5, 1884, Gibbs & Company, of the place named, chartered the ship Andrew Johnson to carry a cargo of nitrate of soda from Iquique and Caleta "to any safe port in the United Kingdom or on the continent between Havre and Hamburg, both included, as ordered." After loading at the places named, the Andrew Johnson, pursuant to orders, sailed on July 15, 1884, for Hamburg, the cargo on board being consigned to the order of Antony Gibbs & Sons, a firm doing business in London. On the 4th of August following, the vessel, being in distress, put into Callao. Certain necessary repairs, which were advised by a duly appointed board of survey, were made, and, upon the recommendation of the board, 8449 bags, or about 1200 tons, of the nitrate of soda were transhipped to the British bark Mary J. Leslie, to be conveyed, by that vessel, to Hamburg.

To defray the expenses incurred in the port of refuge, the master of the Andrew Johnson executed a bottomry and respondentia bond to the firm of Grace Brothers & Company. This bond not only bound the ship Andrew Johnson and her cargo and freight, but also, in express terms, hypothecated the cargo transhipped to the Mary J. Leslie. Although both cargoes were thus bound, the bond, in its defeasance clause, provided that it should be void "if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils

of the sea or navigation, or any other casualty shall unavoidably happen." A copy of the bond is found in the margin.[1]

The two vessels sailed for Hamburg. The Leslie arrived,

[1] Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship or vessel, called the Andrew Johnson, of Thomaston, Maine, of the measurement of nineteen hundred and thirty-eight tons or thereabouts, now lying in the port of Callao, am held and firmly bound to Messrs. Grace Brothers & Co., carrying on business at Lima and Callao under the firm of Grace Brothers & Company, in the penal sum of thirteen thousand two hundred and seventy-three Peruvian silver soles $\frac{72}{100}$, at forty pence to the sole, equal to two thousand two hundred and twelve pounds 5*s.* 9*d.*, of good and lawful money of Great Britain, to be paid to the said Grace Brothers & Co., or any of them, or to their or any of their order, certain attorney, executors, administrators or assigns, or to such person or persons as they or any of them shall appoint by endorsement thereon in the name of their firm of Grace Brothers & Co. to receive the same.

For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of said vessel and her cargo of nitrate of soda, including about twelve hundred tons of nitrate of soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof, firmly by these presents, sealed with my seal. Dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, the said vessel lately sailed from Caleta Buena, laden with a cargo of nitrate of soda, bound therewith to Hamburg in Germany, and during the prosecution of the said voyage sprang a leak, whereby she took in water at sundry times to such an extent that it was deemed expedient by the said master, for the safety of the vessel and the benefit of all concerned, to bear up for Callao, which was accordingly done, and on arrival at Callao aforesaid the vessel was duly surveyed by competent surveyors and certain repairs were recommended to be done to enable the said vessel to continue the voyage with safety, and also to tranship to another vessel about twelve hundred tons of the cargo laden on board the aforesaid Andrew Johnson in order to enable her to proceed on her voyage with perfect safety.

And whereas all necessary repairs and supplies have been made to the said vessel, and the said portion of cargo transhipped to the Mary J. Leslie to enable her to prosecute her said voyage, and she is now in a seaworthy condition and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his said vessel which he is totally unable to defray and make good, save and except upon the security of the bottom of his said vessel and her cargo and freight, hath been necessitated to

but the Johnson perished at sea as the result of a collision with the British ship Thirlmere. After the arrival of the Leslie at Hamburg, demand was made upon the representa-

raise the sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{72}{100}$ silver, or its equivalent in British sterling, for the payment of the debts incurred as aforesaid, and to enable the said vessel to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit or that of the owners of the said vessel, or in any other way than by bottomry and hypothecation of the said vessel, her boats, apparel, cargo and freight.

And whereas the said Grace Brothers & Co. have, at the request of the above-bounden James H. Killeran, agreed to lend and advance to him the sum of thirteen thousand two hundred and seventy-three soles, $\frac{72}{100}$ silver, or its equivalent, at forty pence as aforesaid, in British sterling, for the purposes aforesaid, upon his executing this present bond or obligation and hypothecation of the said vessel, her boats and apparel and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Brothers & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel Andrew Johnson, her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid and for securing the repayment of the said sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{72}{100}$ silver, or its equivalent in British sterling as aforesaid, the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Brothers & Co., their executors, administrators and assigns.

Now, the condition of this obligation is such, that if the said vessel shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, their or any of their order, attorneys or attorney, executors, administrators or assigns, or unto such person or persons as they or any of them shall appoint by endorsement under their or his hand or hands in the name of their or his firm of Grace Brothers & Co., or otherwise, upon this present obligation the sum of two thousand two hundred and twelve pounds 5*s.* 9*d.* British sterling money, being the principal money of this obligation, and the further sum

tives of Antony Gibbs & Sons, the consignees of the nitrate of soda, which had been shipped on the Leslie, for payment in full of the amount of the bond, and, in order to obtain possession of the cargo, the consignees entered into an agreement by which the question of the liability of the nitrate of soda on the Leslie for the entire amount of the bond was to be determined by arbitration, the arbitrators to be selected by and their decision to be binding upon the respective parties. It is to be inferred that the only question controverted before the arbitrators was whether the use of the words "said vessel" in the defeasance clause of the bond operated to avoid the bond in consequence of the wreck of the Andrew Johnson and the loss of her cargo. The German lawyers who were selected as arbitrators found that the nitrate of soda on board the Leslie was bound for the whole amount of the bond, and that, therefore, the consignees were not entitled to the cargo unless they paid the bond. Their award was as follows:

"We formulate the question which you, in the names of Messrs. Antony Gibbs & Sons and Messrs. Baring Brothers & Co., have submitted to our judgment as follows:

"Whether the portion of the cargo of nitrate of soda of the

---

of three hundred and eighty-seven pounds three shillings of like money for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds 10 per centum, making together the sum of two thousand five hundred and ninety-nine pounds 8*s*. 9*d*. British sterling, and also do and shall on demand well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, or to their or any of their order, attorneys, endorsers, executors, administrators or assigns, all such costs, charges and expenses as they or any of them shall or may have incurred, sustained or be put to in or about the recovery of the aforesaid principal money and premium, or any part thereof, or otherwise howsoever in the premises.

Or if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue.

In testimony whereof, the said James H. Killeran hath, to these presents, and to a duplicate and triplicate thereof, set his hand and seal after careful reading, in the presence of the undersigned witnesses, the day and year first before written.

Andrew Johnson, brought home per Mary J. Leslie, is liable for the whole amount of the bottomry bond, which was signed in Callao, and whether, consequently, the receiver of this portion of the cargo has to pay the whole of the bottomry bond, provided the value of this portion of the cargo is not less than the amount of the bottomry debt?

"This question we must answer in the affirmative, because, according to the law here, ship, freight and cargo of the Andrew Johnson, as well as the portion of the cargo which was transhipped into the Mary J. Leslie, are jointly liable for the whole amount raised on bottomry at Callao, and, therefore, the Andrew Johnson and her cargo having become a total loss, the holder of the bottomry bond can come upon that portion of the cargo which was shipped by the Mary J. Leslie for the whole amount of his claim.

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent or appear to be lent contingent upon the safety of the Andrew Johnson, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason, that if the bottomry bond were interpreted in this manner, the cargo of the Mary J. Leslie would be entirely liberated, after the loss of the Andrew Johnson occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested."

Antony Gibbs & Sons paid the amount of the bond for account of Gibbs & Company, the consignors. Subsequently, the owners of the Andrew Johnson commenced legal proceedings against the Thirlmere to hold that vessel responsible for the collision by which the Johnson and her cargo were lost. The Thirlmere availed herself of the statute of Great Britain

limiting the liability of shipowners, and the result was an award finding the Thirlmere to be wholly at fault, and condemning her to pay the loss caused by the sinking of the Johnson. As their proportion of the ascertained value of the Thirlmere, the owners of the Johnson for ship and freight were allowed the sum of £6557 9*s.* 6*d.*, but from this amount there was deducted about £1500 for certain expenses. In the proceedings in question, the owners of the nitrate of soda which was on the Johnson also recovered their proportion of the value of the Thirlmere. On account of the loss of the Andrew Johnson, the Boston Marine Insurance Company paid to her owner the sum of $30,000 less $2825.49, the amount of a premium note with interest, and out of the sum received by the owner of the Andrew Johnson for the ship and freight from the value of the Thirlmere, the owner of the Andrew Johnson, in April, 1896, remitted to the insurance company as its share thereof the sum of $11,456.05, and to correct some mistake in calculation the sum of $35.60 was also subsequently paid by the shipowner to the insurance company.

The present suit was commenced on July 20, 1887, by a libel *in personam* against the owner of the Andrew Johnson to recover the due proportion of the sum paid on the bond. Those joined as libellants were eleven in number; that is, all the members composing the firm of Gibbs & Company, the consignors of the nitrate of soda, and the members of the firm of Antony Gibbs & Sons, the consignees. The original libel is not in the record. Exceptions to it were filed on the ground that it did not state the nature of the action and that it did not state a cause of action. On June 6, 1888, the district judge overruled the exception to the want of clearness in the averments of the libel, but maintained the exception of no cause of action. Although the learned judge found that the bottomry bond had not been avoided by the loss of the Andrew Johnson and her cargo, and therefore that the payment made at Hamburg was necessary, he yet concluded that as the Andrew Johnson and her cargo had proven a total loss, nothing having been alleged in the libel as to a recovery by reason of such loss, the libellants were precluded from

enforcing their claims *in personam* against the owner of the Johnson in consequence of the provision of the acts of Congress limiting a shipowner's liability for the acts and contracts of the master to the value of the ship and freight. 35 Fed. Rep. 779. As a result, on the 27th of June, 1888, an order was entered sustaining the exception of no cause of action, and directing that, unless the libel were amended, it be dismissed with costs. An amended libel was filed in July, 1888, to which an exception of no cause of action was again sustained, with leave further to amend. On January 4, 1889, the libel was for the second time amended, and this was also excepted to, on the ground of ambiguity, and that it did not state a cause of action. On the 24th of October, 1890, the libel was again amended by averring the loss of the Johnson, the fact that it had occurred by collision with the Thirlmere, the institution of proceedings against the Thirlmere by the owner of the Johnson, and the recovery in those proceedings on the ground that the collision had been caused solely by the fault of the former vessel. In June, 1891, respondent filed exceptions and an answer to this amended libel. The answer, among other things, averred as follows:

"This respondent admits that the owners of the ship Thirlmere, having taken appropriate proceedings under the statutes of the United Kingdom of Great Britain and Ireland, obtained a decree limiting their liability for said collision to a certain sum, which they thereupon paid into the court, and which said sum was distributed between the libellants and the respondent herein, and other parties and their attorneys, in part satisfaction of the damages by each of them sustained by reason of said collision, but this respondent denies that he received the said sum of £6557 9*s.* 6*d.*, and avers that the amount received by him was much less than said sum."

No allusion was made in the pleadings of the respective parties to the fact that the owner of the Andrew Johnson had received the benefit of any insurance upon the vessel.

After the taking of proof the cause was heard on the exceptions and merits on November 23, 1893. At the outset

of the hearing the trial court overruled all the exceptions to the third amended libel but that of no cause of action, and referred this latter exception to the merits. Before the case was finally submitted the respondent moved the court to be allowed to amend his answer so as to plead two additional and distinct defences:

"First, to as much of the libellant's claim as arises out of the limited liability proceedings in the English court as to the Thirlmere, the defence of laches on the part of the libellant in not sooner bringing that matter before the court.

"Also as to the same portion of his claim, the defence *res judicata*, because passed on by the English court."

This request was refused and exceptions to the refusal were noted. The court, on the merits, held that the bottomry bond, at the time of its payment, was a valid obligation; that in view of the fact that the bond embraced not only the cargo on the Johnson, but also the cargo on the Mary J. Leslie, that the words "said vessel" in the defeasance clause must be considered as referring to the cargo on both vessels, and, therefore, the obligations of the bond were not avoided by the loss of the Johnson and her cargo; that the owners of the Johnson having recovered from the Thirlmere, up to the value of the latter vessel, damages for the collision, were not discharged from personal liability under the acts of Congress, inasmuch as the sum recovered from the Thirlmere was greater than the amount sought to be enforced *in personam* against the owner. 59 Fed. Rep. 621. In conformity to the opinion of the court, an interlocutory decree was entered on April 3, 1894, referring the matter to a special commissioner to ascertain and report the amount the libellants were entitled to recover. On April 10, 1894, the respondent again applied to the court for leave to amend his answer by setting up the two additional defences of laches and *res judicata*, and the request was again denied. On June 5, 1894, the report of the commissioner was filed, finding the libellants entitled to the principal sum of $6091.73, and on July 16, 1894, a final decree for that sum with interest and costs was duly entered. By the final decree seven of the libellants, that is to say, those who composed the firm of

Antony Gibbs & Sons, were dismissed on the ground of a want of interest, the court having found that the bond was paid by the consignees for account of the consignors, and they, therefore, were alone interested in the suit. On appeal to the Circuit Court of Appeals, the judgment of the trial court was reversed. The appellate court concluded that the words "said vessel" in the defeasance clause of the bond were free from ambiguity, and left no room for construction, and, therefore, that the loss of the Andrew Johnson with her cargo had operated to avoid the bond according to its tenor, and that the payment made of the amount by the consignees was hence unnecessary, and gave rise to no legal claim against the master or owner of the Johnson. 35 U. S. App. 138. In consequence of the allowance of a writ of certiorari, the cause is here for review.

In the discussion at bar many minor questions have been pressed upon our attention, but the pivotal controversy rests upon the ascertainment of the true meaning of the bottomry bond, and the obligations, if any, which arose from its payment. We forego the present consideration of the more unimportant questions in order to at once approach the fundamental issues in the cause. The libellants assert that from the terms of the bond as a whole, it manifestly results that the cargo of the Leslie was liable despite the loss of the Johnson and her cargo; that hence the consignees of the cargo, on the Leslie, were obligated to pay the bond, and that on their doing so there arose a legal duty on the owner of the Johnson to pay the proper proportion thereof, which obligation, it is claimed, can be enforced despite the loss of the ship, since the owner had recovered and retained the amount awarded against the Thirlmere. On the other hand, the respondent asserts that the words of the bond providing for its avoidance in case of the loss of "said vessel" are free from ambiguity and give no room for construction, and that even if this be not the case in consequence of the loss of the Johnson, the consignors who paid the bond are not entitled, under the limited liability acts, to recover any proportion thereof.

There can be no doubt that, considered in themselves and

alone, there is no ambiguity in the words found in the clause of the contract providing that "if during said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, . . . this obligation shall be void." But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *Boardman* v. *Reed*, 6 Pet. 328; *Canal Co.* v. *Hill*, 15 Wall. 94.

This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and respondentia.

In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity, per Story, J., in *The Virgin*, 8 Pet. 538, 550; and the same learned justice, in the case of *Pope* v. *Nickerson*, 3 Story, 486, said: "A court of admiralty in cases within its civil jurisdiction acts as a court of equity, and construes in-

struments, as a court of equity does, with a large and liberal indulgence."

To quote the language of the judicial committee of the Privy Council in *The Prince George*, 4 Moore P. C. 28: "Bottomry bonds for the benefit of the shipowners and the general advantage of commerce are greatly favored in courts of admiralty, and where there is no suspicion of fraud every fair presumption is to be made to support them."

We reach, then, under the light of these principles, the consideration of the contract, for the purpose of ascertaining its meaning and enforcing the intention of the parties to be derived from all the stipulations therein found. There can be no doubt that the terms of the bond included not only the Andrew Johnson and her cargo, but the cargo transhipped on the Leslie, for the bond says: "For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of the said vessel and her cargo of nitrate of soda, including about 1200 tons of nitrate of soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof."

In the recitals of the bond, where a statement is made of the facts creating the necessity for the loan, the intention of the master to include the cargo transhipped on the Leslie is also unequivocally expressed. Likewise in the recitals which relate to the conditions upon which the lenders have agreed to advance the money required, it is again stated that they have consented so to do upon the master's executing "this present bond or obligation and hypothecation of the said vessel, her boats and apparel, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect to the said cargo, and the said Grace Brothers are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel Andrew Johnson, her boat, tackle, apparel and furniture, together with the cargo

laden on board as aforesaid, and the freight to be earned and become payable as aforesaid, and for securing the repayment of the said sum . . . he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie and the freight to be earned and become payable in respect to the said voyage, unto the said Grace Brothers, their executors, administrators and assigns."

The cargo on the Leslie having been hypothecated along with that on the Johnson, and the bond declaring that it was upon the faith of such hypothecation that the money was advanced, the claim that because of the use of the word "vessel" in the singular, the bond was to be avoided by the loss of the Johnson, despite the arrival of the Leslie, amounts to contending that although both parties declared that the money was lent on the faith of both cargoes, and that without the pledge of both it would not have been advanced, yet that they immediately stipulated that it should be secured upon only one of the objects hypothecated.

Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word "vessel" in the defeasance clause as not applying to both the Johnson and the Leslie. It is conceded that the value of the Johnson and her cargo was enormously in excess of the sum of the bond; this having been the case, to hold that the hypothecation of the cargo on the Leslie was only to be availed of in case of the arrival of the Johnson and her cargo, would be to determine that the cargo on board the Leslie was only to be resorted to by the bondholder, in the event recourse against that cargo should be superfluous. We cannot construe a contract for security so as to render the security available only in case resort to it should become unnecessary. True, it is sought to escape the dilemma resulting from this reasoning by saying that the object which the parties had in view was a resort to the cargo of the Leslie in case the Johnson and her cargo arrived in such a damaged condition as to render it necessary that the cargo

of the Leslie should be called upon for an average contribution. But this explanation only accentuates the dilemma, since it contends that the lenders were to have recourse to the cargo of the Leslie in case the security resulting from the Johnson and her cargo was partially impaired, and not in the event that it was wholly so. But, obviously, if the security of the cargo of the Leslie was contemplated and provided for by the parties, as it manifestly was, the contract should not be held as meaning that the security was to be availed of only in the event that the value thereof was required to pay a part of the debt, and it was not to be resorted to when a greater reason for so doing existed. There are many other conditions of the bond which with equal force refute the attempt to limit the word "vessel," in the defeasance clause, to the Johnson, and which irresistibly make the language of the defeasance clause harmonize with the nature and extent of the security afforded by the bond. Thus, the clause as to the arrival of the vessels made no distinction between the Johnson and the Leslie. It cannot be contended that, if the Leslie had arrived at the port of destination before the Johnson, her cargo could have been discharged without payment of the bond.

The contemporaneous construction of the contract given by the masters of the Johnson and Leslie is shown by the bill of lading which was given by the one and taken by the other for the nitrate of soda which was transhipped on the Leslie. On this bill of lading the following endorsement was placed:

"The 8449 bags of nitrate of soda, as per this bill of lading, are included in and jointly responsible with the nitrate of soda specified in the bottomry and respondentia bond given to Messrs. Grace Brothers & Company as security for the payment of the Amer. ship Andrew Johnson's disbursements in Callao."

We conclude that to give the construction to the bond claimed by the shipowner would not only do violence to the expressed intentions of the parties and their contemporaneous interpretations of its meaning, but would also be adopting, to quote the language of Sir James Colville in *The Great Pacific*, L. R. 2 P. C. 254, "so improbable an hypothesis that the construction is only to be admitted if there is no escape from it."

Opinion of the Court.

We may properly say of the bond under consideration what was said by the Supreme Court of Pennsylvania in *Insurance Company* v. *Duval*, 8 S. & R. 147, in speaking of a form of respondentia bond in use in Philadelphia, which partook of the character of a loan coupled with a contract of insurance:

"Contracts of this kind are so different in different countries, (although they resemble each other in some prominent features,) that when disputes arise they are to be decided by the words of the particular contract in question rather than by any principles of general commercial law. In the present instance, therefore, we must endeavor to ascertain the meaning of the bond, and be governed by it."

In the case just referred to, the loan was upon goods ladened upon a vessel, and it was a condition of the contract that the loan was to be paid within a certain period *after the return of the vessel* to Philadelphia, her home port, or in the event of an utter loss by certain enumerated sea risks, the bond was to be void. On the return voyage, the vessel was condemned and sold at an intermediate port, and the goods on board were sent to Philadelphia in other vessels and delivered to the defendants, and according to an agreement annexed to the respondentia bond were sold by them. In an action brought to recover the difference between the price realized from the sale and the amount of the loan, the defendants contended, among other defences, that the terms of the bond did not make the repayment of the loan dependent upon the return of the goods, but upon the return of the vessel, and that as the vessel did not return, the day of payment had not arrived. The court pointed out the extraordinary consequences which would follow the construction contended for, and held that, even if under a literal interpretation the right to recover did not exist, a resort to the spirit of the contract and the intention of the parties would entitle the lender to judgment, as the goods and not the vessel were the sources from which the defendants expected to derive the means of payment.

Our conclusion being that the bond was not avoided by the loss of the Johnson, and was a valid and subsisting obligation,

at the time of its payment, by the owners of the cargo, on the Leslie, the question which arises is, — can the cargo owners recover by an action *in personam* against the shipowner the due average proportion of the expenses at the port of refuge, incurred for the benefit of the ship and freight? The manifest result of the obligation of the cargo owners to pay the bond before they could obtain delivery of the goods was that they were obliged to discharge the part of the debt which was due by the ship Johnson. This, in effect, gave rise in their behalf to a claim against the ship for a breach of the contract of affreightment or charter party, by virtue of which the property of the owners was received on the Andrew Johnson to be transported to Hamburg, and there delivered to the order of the consignees named in the charter party on payment of the freight therein specified. Had a portion of the cargo not been delivered, or been delivered in a damaged condition by the fault of the master, the right to proceed in admiralty to recover the damage sustained would have been clear. *The Schooner Freeman*, 18 How. 182; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 462. Delivering the cargo charged with a lien for an indebtedness of the shipowner is no different in principle or effect from the non-delivery of a portion or the whole in a damaged condition. It is also analogous in principle to a jettison of a portion of the cargo for the benefit of the ship and the remainder of the cargo, when a clear right to contribution would exist, enforceable in admiralty. *Dupont* v. *Vance*, 19 How. 162, 168. As said in the latter case by Mr. Justice Curtis, delivering the opinion of the court: "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law." And, whilst in the same case, (page 169,) the power of the master to hypothecate or sell a part of the cargo to enable him to prosecute the voyage was declared to exist, the obligation of the shipowner, under the law of the sea, to reimburse the cargo owner for the due proportion of the loss was clearly stated.

The shipowner being liable for his average portion of the

loss, the question is, Was he discharged therefrom by the loss of the Johnson and her cargo, although the owner has recovered and retains the sum awarded as damages against another ship for having brought about the loss? The answer to this question involves a consideration of the proper construction to be given to the act limiting the liability of shipowners.

The original act, approved March 3, 1851, c. 43, 9 Stat. 635, was carried forward into the Revised Statutes as sections 4282 *et seq.*

Section 4283 declares that the liability of the owner of any vessel for various acts and things mentioned "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

Section 4284 describes the liability as "the whole value of the vessel, and her freight for the voyage"; and section 4285 declares that it shall be a sufficient compliance with the law if the owner transfer his *interest in such vessel and freight, for the benefit* of the claimants, to a trustee.

Section 4283 was amended by the act approved June 26, 1884, c. 121, 23 Stat. 53, 57, so as to do away with the restrictions upon the character of debts and liabilities against which the limitation might be asserted. This amendment, however, is not material to the question now considered.

The clear purpose of Congress was to require the shipowner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment as compensation for a failure to restore the property. Manifestly, if the option was afforded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act.

In *The City of Norwich*, 118 U. S. 468, where the obliga-

tion of a shipowner to account for the sum of insurance recovered on the loss of his ship, was fully considered, the fact was declared to be that the provisions of the act of Congress, just referred to, were in conformity with the general maritime law of Europe (502). The text of the Ordonnance de la Marine of 1681, and the opinions of Pardessus and other continental jurisconsuls, were referred to as the sources from which the principles embodied in the act of Congress were derived. The language of Pardessus clearly shows that, under the general maritime law, the obligation of the owner was to surrender a sum awarded as damages for the loss of his ship, and, if he did not, he could not avail himself of the limitation of liability. He says (Droit Commercial, part 3, title 2, ch. 3, sec. 2):

"The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and, if they are lost, it suffices for his discharge to surrender *all claims in respect of the ship and its freight.*"

So, also, Kaltenborn, in a treatise published at Berlin in 1851, as translated and quoted in the dissenting opinion in *The City of Norwich*, *supra*, says:

"The Roman law, which held the owner absolutely liable with all his property, is nowhere put in practice, and was not current as early as the Middle Ages. Indeed, the Consulate of the Sea, ch. 183, 224, 236, the law of Wisby, reasoning from Arts. 13 and 68, that of the Hanse Towns, reasoning from Art. 2, title X, render the owners, as a rule, answerable only to the extent of the ship's value; and the modern maritime laws free the owners, by the *abandon* of the ship and their several shares in the vessel, from all further liability for the ship enterprise, particularly for the acts and contracts of the captain. *In the ship are included all gains arising during the voyage, as well as the insurance.* Should the ship and the freight have perished, it is sufficient for exoneration of the owners *if all claims and causes of action having reference to the vessel and freight are abandoned by them.*"

The same doctrine is clearly recognized in the provisions of

the General German Commercial Code, where, in Art. 778, it is provided as follows:

"Art. 778. In cases of general average, the compensation for sacrifice or damage takes, as against the ship's creditor, the place of that which the compensation is to make good.

"The same rule applies to the indemnity, which in case of loss or damage to the vessel or of nonpayment of freight when goods have been lost or damaged, is due to the shipowner by the party who has caused the damage by his illegal conduct.

"When the compensation or indemnity has been received by the shipowner, he is personally responsible to the ship's creditors to the extent of the amount received in the same manner as to the creditors of a voyage in case of encashment of the freight."

Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of *Sheppard* v. *Taylor*, 5 Pet. 675. That was a case where a vessel had been seized, condemned and sold by the Spanish authorities because of a violation of the trade regulations of the kingdom of Spain. The King of Spain subsequently ordered the proceeds of the vessel and cargo to be repaid to the owners, but this was not done; afterwards the owners, having become insolvent, assigned their claims for the restoration of the proceeds and for indemnity from Spain to their separate creditors, and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship. The officers and seamen having proceeded against the owners of the ship by a libel *in personam* for their wages, and having afterwards, by an amended libel *in personam*, claimed payment out of the money paid to the assignees of the owners under the treaty, it was held that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners.

Mr. Justice Story, delivering the opinion of the court, said (p. 710):

"If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty in a suit *in rem* for the whole compensation due to them. They have by the maritime law an indisputable lien to this extent. This lien is so sacred and indelible that it has, on more than one occasion, been expressively said that it adheres to the last plank of the ship. 1 Peter's Adm. note 186, 195; 2 Dodson's, 13; *The Neptune*, 1 Hagg. Adm. 227, 239.

"And, in our opinion, there is no difference between the case of a restitution in specie of the ship itself and a restitution in value. The lien reattaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them."

Nor does the ruling in *The City of Norwich*, *supra*, that the proceeds of an insurance policy need not be surrendered, by the shipowner, conflict with the decision in *Sheppard* v. *Taylor*. The decision as to insurance was placed on the ground that the insurance was a distinct and collateral contract which the shipowner was at liberty to make or not. On such question there was division of opinion among the writers on maritime law and in the various maritime codes. But as shown by the full review of the authorities, found in the opinion of the court, and in the dissent in *The City of Norwich*, all the maritime writers and codes accord in the conclusion that a surrender, under the right to limit liability, must be made of a sum received by the owner, as the direct result of the loss of the ship, and which is the legal equivalent and substitute for the ship.

We conclude that the owner who retains the sum of the damages which have been awarded him for the loss of his ship and freight has not surrendered "the amount or value" (sec.

4283) of his interest in the ship; that he has not given up the "whole value of the vessel" (sec. 4284); that he has not transferred "his interest in such vessel and freight" (sec. 4285). It follows that the shipowner, therefore, in the case before us, to the extent of the damages paid on account of the collision, was liable to the creditors of the ship, and the libellants, as such creditors, were entitled to collect their claim, it being less in amount than the sum of such proceeds.

The remaining questions are free from difficulty. It was urged below and is pressed at bar that the amended libels disclosed no cause of action, because it was not specifically alleged that the master of the Johnson communicated with the cargo owners before consenting to the bond.

It was said in *The Julia Blake*, 107 U. S. 418, 425, "it is now the settled law of the English courts that a master cannot bottomry a ship without communication with owner, if communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable." A particular review of the doctrine laid down by the English courts was however rendered unnecessary in the case of the *Julia Blake*, as the circumstances in that case clearly established that the hypothecation of the cargo was unwarranted, irrespective of the failure to communicate with the owner of the cargo. In the case of *Glascott* v. *Lang*, 2 Phillips' Ch. 310, decided in 1847, Lord Chancellor Cottenham declared that no authority existed to support the claim that a bottomry bond executed upon a vessel might be avoided because the captain, though having opportunity to do so, failed to communicate with the owners before giving the bond. In *The Karnak*, L. R. 2 Ad. & Ec. 289, Sir Robert Phillimore thus referred to the subject:

"I think it will be found upon examination of the foreign maritime law that the bottomry bond, under the various titles of *contrat à la grosse aventure*, *hypotheca*, *bodmer*, or *cambio maritimo*, was always considered as binding the cargo, and that the necessity of a special communication, if possible, of the master with the owner of the cargo, according to the doc-

trine of recent cases, however just in principle, is peculiar to the English law."

The rule declared to be settled in Great Britain by the cases of *The Bonaparte*, 8 Moore P. C. 459; *The Hamburg*, B. & Lush. 253, 273; *S. C.* 2 Moore P. C. (N. S.) 289, 320; *Australasian Steam Navigation Company* v. *Morse*, L. R. 4 P. C. 222, was, in 1877, thus stated by the Privy Council in *Kleinwort* v. *Cassa Marittima*, 2 App. Cas. 157:

"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavor to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. . . . If according to the circumstances in which he is placed it be reasonable that he should — if it be rational to expect that he may — obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

As in the case of the *Julia Blake*, however, we find it unnecessary to determine in the case now before us whether the rule laid down by the courts of Great Britain is the doctrine of this court. Under that rule, it is only where, *under all the circumstances of the case*, communication with the owners of the cargo was feasible, that a failure to attempt to communicate will avoid the bond. Now, in the case at bar, the pleadings do not aver nor does the evidence establish whether communication was had by the master with the owners of the cargo before the execution of the bond, nor that such communication was feasible or might reasonably have been had. While it may be inferred from the averment in the libel that the libellants assented to the bond, "believing that the said bond was properly and necessarily issued," that such assent was given subsequent to the execution of the bond, the language used does not imply that the master had not communicated with the cargo owners before making the hypothecation. As

the bond does not import to the contrary, the master must be presumed to have lawfully executed it. The necessity for the hypothecation and that the course pursued was for the best interests of the cargo owners is established by the evidence. Under such circumstances, we think the duty was upon the party who questioned the power of the master to have executed the instrument of hypothecation to plead it as a matter of defence. *The Virgin*, 8 Pet. 538, 550. Particularly is this the case when, as here, the recovery sought from the shipowner is for advances made for *his benefit*, which were charged upon the property of the cargo owners by the representative as well of the shipowner as the owners of the cargo. Whether, under the circumstances, an estoppel might not arise, need not be determined.

But one matter remains to be considered, and that is as to the action of the District Judge in refusing, on the hearing and subsequently, to permit the respondent to amend his answer by setting up the plea of laches and of *res judicata* as respects the allegation for the first time made in the third amended libel of the receipt by the owner of the Andrew Johnson of partial compensation from the owners of the ship Thirlmere for the loss of the Andrew Johnson and her freight. The third amended libel was filed October 28, 1890, and the exceptions and answer thereto were filed June 22, 1891. The trial took place on November 22, 1893. It appears from the papers used in support of the motion filed after the trial of the case that the claim made in the admiralty proceedings in England, that the cargo owners should be credited from the ship's share of the moneys paid into court by the owners of the Thirlmere with the ship's proportion of the bottomry bond, was rejected, because of a supposed want of jurisdiction. Indeed, the proctor for the respondent, in an affidavit filed in support of the renewed application for leave to amend the answer, stated as a reason for not setting forth the defences in question in the answer to the amended libel that he "was then of the opinion that his client was entitled to judgment on the defences then set up" and that he "was then advised that the presentation and rejection by the English admiralty court of the libellants'

claim, founded on their payment of the bottomry bond, did not, according to the law of England, amount to an adjudication thereon, for the reason that the said English court of admiralty was without jurisdiction thereof."

It is also clearly inferable from the statements in the affidavit we have referred to that when the answer to the third amended libel was filed the proctor for the respondent knew of the transaction with the insurance company. Even, therefore, if the fact was, as claimed, that the respondent would have been entitled to receive from his underwriters one half of whatever decree the libellants might be entitled to recover, had the same been secured with reasonable diligence, and that respondent had lost said recourse by reason of the bar of the statute of limitations, still there is no pretence that the respondent was misled into believing that the libellants had abandoned their claim against him, and the fact was that they promptly brought suit in this country to recover against the shipowner. Without considering the averment in the last amendment to the libel, by which the recovery by the owner of the Johnson from the Thirlmere was alleged, the first libel informed the respondent that the claim arising from the bond was pressed against him. If between the time of the filing of the first libel (July 20, 1887) and the time of the hearing (November 22, 1893) a claim against an insurance company in favor of the respondent was lost by laches, such loss was the result of his own conduct.

Under all the circumstances, particularly as the rejection of the claim in the courts of Great Britain was not upon the merits, we are of opinion that the trial court did not abuse its discretion in refusing leave to amend the answer.

The decree of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed, and it is so ordered.

HARRISON *v.* PEREA.

PEREA *v.* HARRISON.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Nos. 113, 497. Argued November 10, 11, 1897. — Decided November 29, 1897.

When the defendant's answer in a chancery suit sets up matters which are impertinent, and he also files a cross bill making allegations of the same nature, a demurrer to the cross bill on that ground should be sustained.

The findings of fact in an appeal from the Supreme Court of a Territory are conclusive upon this court, whose jurisdiction on such appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment.

It being found that the defendant converted the entire assets which are the subject of this controversy, there was no error in charging him with interest on the amount so converted, without regard to whether he did or did not make profits.

The solicitor was properly allowed a fee from the fund.

An item in the decree below which was not appealed from by the complainant is not before this court for consideration.

A clerical error in the decree of the court below caused by the omission of the name of one of the distributees, can be corrected, on application, by the court below after the case is sent down.

The costs in this court must be paid by Harrison personally.

THE bill in the first above entitled suit was filed in a District Court of the Territory of New Mexico, in chancery, by Pedro Perea, as sole surviving administrator of the estate of José L. Perea, Second, deceased, and as one of his heirs-at-law, against the defendant, George W. Harrison, individually and as administrator of the estate of his wife, Guadalupe Perea de Harrison, and also against the other heirs-at-law of José L. Perea, Second. It was brought to compel an accounting by the defendant George W. Harrison, individually and as administrator of the estate of his wife, for the property and assets of the estate of José L. Perea, Second, which had come into his hands.

The bill in substance alleged the following facts: José

Statement of the Case.

Perea, Second, a resident of New Mexico, died in that Territory on the 27th of August, 1887, being about the age of eight years. He left him surviving his mother, Guadalupe Perea, who was then a widow, and his half brothers and sisters as his heirs-at-law. On the 23d of July, 1884, his mother had been appointed his guardian and had taken possession of his property. In September, 1885, she married the defendant George W. Harrison. She continued guardian of her son up to his death, in August, 1887. In September, 1887, the complainant was appointed administrator and the mother was appointed administratrix of the estate of the minor. They both gave bonds and took the requisite oaths. On the 6th of March, 1888, the mother made what she termed a final report of her guardianship to the probate court, which showed a balance of over seventeen thousand dollars in her hands belonging to the estate of the minor. Under the influence of her husband she claimed, from the time of her son's death down to her own decease, to hold the property as guardian and not as administratrix, and while acting under that influence she refused to permit the complainant, after his appointment as administrator, to assist in the administration of the estate, or to have possession or control over any of its assets. Objections were made by the complainant to the report filed by the mother in March, 1888, called the guardian's final account, and these objections were sustained by the probate court. An appeal from that order was taken by the mother, but no further proceedings were had therein, and the same was practically abandoned. The mother died October 20, 1889. Her husband then unlawfully took possession of the property of the minor in her hands at the time of her death, and subsequently and on the 6th of January, 1890, he took out letters of administration on her estate, she dying intestate. He then claimed to hold the estate of the minor by reason of being administrator of his wife's estate. He took possession of the minor's estate individually, with full knowledge of its trust character, placed it to his own credit in bank, mingled it with his own funds, and claimed the right to retain possession and control thereof, and refused the demand to pay over the estate to him, which

the complainant made in his capacity as sole surviving administrator of the estate of the minor. It was also alleged that the mother of the deceased minor, acting under the influence and by the direction of her husband, and the defendant Harrison himself, individually, did by their actions cause great damage to the estate of the minor, and relief was demanded against the defendant Harrison as administrator of his wife's estate, and individually for an accounting in relation to the estate of the minor, of which he was in possession, and for a recovery of the amount found to be in his possession.

The defendant Harrison demurred to the bill, his demurrer was overruled, and he then answered both individually and as administrator of the estate of his deceased wife. In that answer the defendant denied many of the material allegations contained in the bill. He alleged that he and the defendant Grover William Harrison, who was minor child of himself and his deceased wife, Guadalupe Perea de Harrison, had succeeded to all the interest and rights of his said wife in and to the property of the estate of José L. Perea, Second, and for that reason the complainant was not entitled to a decree for anything upon the accounting. The answer also alleged that the complainant was a son and also one of three administrators of the estate of the late José L. Perea, Senior, (two of complainant's brothers being the other administrators,) and that those administrators had failed to account for a large sum of money which was due from the estate of José L. Perea, the elder, to José L. Perea, Second, in his lifetime, and afterwards to his estate; and it was alleged that large amounts of property had come into the hands of such administrators of the estate of the deceased father, José L. Perea, Senior, of which no account had been made, and that the *pro rata* share of the minor, José L. Perea, Second, in these assets so unaccounted for would amount to thirty thousand dollars.

The complainant excepted to so much of the answer as contained the above allegations relating to the estate of the elder Perea and the action of the administrators with regard thereto, upon the ground of impertinence.

The defendant, by leave of court, also filed a cross bill, in

which in very great detail he set forth the condition of the estate of the elder Perea and the action of the administrators thereof. Among other things it was alleged that the elder Perea in 1842 married his first wife and they lived together until 1877, when she died; that he had by her six daughters and six sons, and that he brought into the marriage community a large amount of property, real and personal, amounting to a hundred thousand dollars, acquired by him by inheritance, bequest and other means, and in addition personal property of the value of about three hundred thousand dollars, and that at the time of his marriage his wife owned in her own right and brought into the marriage community real property situate in the Territory of New Mexico of the value of thirty thousand dollars and personal property of the value of thirty thousand dollars; that this property of the husband and wife became upon their marriage property of the marriage community, and so continued to remain the property of the parties, to which large accretions and additions were made by the industry and labor of the husband and wife, so that at the time of the death of the wife in 1877 the full value of the united property was three hundred thousand dollars of realty and five hundred thousand dollars of personalty, and that all of this property, except the amount brought into the marriage community, was gain and increase of that property and belonged in equal parts to the husband and wife.

It was further alleged that in 1883 the elder Perea died, and that his estate had not been properly administered; that property belonging to the estate had not been inventoried as such; that the conduct of the administrators had been wasteful, the estate had not been properly taken care of, and that the administrators had expended large amounts of the community property in the purchase of real property, so that such property had been unlawfully converted into worthless real property. It was also alleged that a pretended settlement had been made before the probate judge in New Mexico, and the administrators had made an accounting before the court, and had obtained their discharge and the cancellation of their bonds by that court; that this settlement before and discharge

by the probate court was a fraudulent one and fraudulently obtained, and that the decree should be set aside. It was also alleged that the defendant Harrison and his wife had before her death commenced a suit against the complainant and the other defendants who were administrators of the estate of the elder Perea, asking for an accounting in regard to the identical matters and things set up in this cross bill; and that such suit was still pending and undetermined at the time of the commencement of this suit by the complainant herein.

Various other matters in relation to the management of the estate of the elder Perea were set forth in the cross bill at very great length, and relief was demanded in accordance with what was alleged to be his rights by such complainant. This relief was of all varieties, including an investigation into accounts and matters relating to community property arising out of the marriage of the elder Perea in 1842, and an inquiry as to what was such property and its proper increase; also injunctions, accountings, decrees for conveyance, for distribution, for removal of the administrators; for the annulling of the pretended and fraudulent decree discharging the administrators and finally settling their accounts, and for the appointment of a receiver of the estate of the elder Perea.

To this cross bill the complainant herein demurred upon several grounds, the substance being that it was multifarious in that it was brought in regard to matters having no connection with the subject-matter of the original bill, and not proper to be investigated in this suit.

The exceptions to the answer and the demurrer to the cross bill were argued at the same time, and, after hearing counsel, the court allowed the exceptions and struck out the matter excepted to, and it also sustained complainant's demurrer to the cross bill.

The case then being at issue was duly referred to a master, before whom both parties appeared and introduced their proofs, after which the master made his report. Upon that report and the evidence taken before the master, the case was brought to a hearing, and the court found in substance that the allegations set forth in complainant's bill were true. The

court also found that José L. Perea, Senior, died about the 21st day of April, 1883, and left his widow, Guadalupe Perea, (who afterwards married the defendant George W. Harrison,) and the other defendants in this suit, with the exception of George W. and Grover William Harrison, his heirs-at-law. José Perea, Second, was the son of the elder Perea by his second wife, Guadalupe Perea. After the death of the elder Perea, his widow married, as heretofore stated, the defendant George W. Harrison, and by him she had issue, Grover William Harrison, one of the defendants herein. With these exceptions all of the defendants were children of the elder Perea by a former wife. Pedro, Mariano and Jesus M. Perea were appointed administrators of the estate of their deceased father.

The court also found that the defendant George W. Harrison, not only upon the death of his wife had control, but that immediately after their marriage he took control and charge of the assets of the deceased minor, and at the time of the entry of the decree herein he still retained and had possession of all the moneys belonging to that estate, and that they were subject to his individual control.

At the time of the death of the minor he owed no debts and there were no charges against his estate except his funeral expenses and the expenses of his last illness and certain claims for his maintenance by his guardian. The defendant George W. Harrison, in the name of his wife and in her lifetime, made sundry reports to the probate court as to the condition of the estate, some of which contained false entries to her advantage, and together they obstructed the distribution of the estate among the heirs.

The court also found that George W. Harrison, the defendant, wilfully obstructed the distribution of the assets of the estate of the minor, and by his misconduct rendered it necessary that the complainant should obtain possession of the assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the defendant Harrison.

The amount found due from the defendant to the com-

plainant was stated in the decree to be, with interest up to the date of the entry of the decree, June 19, 1893, the sum of $31,545.32, of which the defendant Harrison was entitled as administrator of the estate of his late wife, Guadalupe Perea de Harrison, to thirteen twenty-sixths, and to three twenty-sixths in addition by reason of the purchase of the interests of some of the heirs of the estate of José L. Perea, Second, and to one twenty-sixth more, as guardian of Grover William Harrison, one of the defendants, being a total of seventeen twenty-sixths; and the other heirs were each decreed entitled to one twenty-sixth of such balance; and it was provided in the decree that the defendant Harrison might, instead of turning over to the complainant, the administrator of José Perea, Second, the full sum found due, retain the amount found due him from the estate, which was stated to be the sum of $16,227.19. The defendant George W. Harrison was also charged with the payment of the costs of the suit individually, including the sum of one thousand dollars allowed the special master.

From the final decree thus entered the defendant George W. Harrison appealed to the Supreme Court of the Territory of New Mexico, which court, with some modifications, affirmed the judgment of the court below. Those modifications consisted in charging interest upon the full amount of the sum found due by the decree of the court below, from the time of the entry of that decree up to the 26th of August, 1895, which amounted to the sum of $4324.45, and the defendant was charged in the decree of the last named date with the full sum of $35,869.77. The fee for the solicitor of complainant was reduced from $5000 to $3586.97, being ten per cent upon the amount found in the hands of the defendant Harrison. The complainant, as administrator, was decreed to be entitled to the statutory commission upon the last named sum found by the court to be due from the defendant Harrison, which commission amounted to $1943.48. The court also reduced the compensation of the special master from $1000 to $500. The court also modified the decree against Harrison for the payment of costs individually, by directing "that the

said solicitor's fee, the said commission for said administrator, the said special master's fee, and all of the costs of this case in this court and in the court below, should be paid out of said fund, and that of the remainder the said defendant George W. Harrison may retain in his possession seventeen twenty-sixth parts thereof, and that he shall pay over to said Pedro Perea, as administrator of José L. Perea, deceased, the remaining nine twenty-sixths, to be distributed to the heirs at law of said José Leandro Perea, Second," as directed by the court. From the judgment of affirmance as modified the defendant George W. Harrison has appealed to this court. The complainant also took a cross appeal from the judgment.

Mr. William B. Childers for Harrison.

Mr. Neill B. Field for Perea.

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

The question first arising in this case is in regard to the correctness of the decisions of the courts below in allowing complainant's exceptions to portions of the answer of the defendant Harrison and in sustaining the demurrer to defendant's cross bill. The decision of the two matters rests in this case upon essentially the same foundation. If the allegations of the defendant's answer to the original bill are impertinent, it would follow that in this case the cross bill would be multifarious, and that the demurrer on that ground should be sustained. The allegations in the two pleadings are of the same nature, only in the cross bill they are very greatly extended and set forth in almost infinite detail.

Impertinence is described by Lord Chief Baron Gilbert to be: "Where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question." 1 Daniell's Chancery Pl. & Pr., (5th Am. ed.) marginal paging, 349. It is also said that impertinence is the introduction of any matters in a bill, answer or other pleading

in the suit which are not properly before the court for decision at any particular stage of the suit. *Wood* v. *Mann*, 1 Sumner, 578. "The best test to ascertain whether matter be impertinent is to try whether the subject of the allegation be put in issue in the matter in dispute between the parties." All matter not material to the suit is regarded as impertinent. *Woods* v. *Morrell*, 1 Johns. Ch. 103; 1 Daniell, *supra*, 349, note.

As to multifariousness, it was said in *Shields* v. *Thomas*, 18 How. 253, 259: "There is, perhaps, no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application, than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features. Thus Daniell, in his work on Chancery Practice, vol. 1, p. 384, quoting from Lord Cottenham, says: 'It is impossible, upon the authorities, to lay down any rule or abstract proposition, as to what constitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various, and the court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule.'" Continuing his opinion, the learned justice in the above case said: "Justice Story, in his compilation upon equity pleading, defines multifariousness in a bill to mean 'the improperly joining in one bill distinct and independent matters, and thereby confounding them.' . . . Justice Story closes his review of the authorities upon this defect in a bill with the following remark: 'The conclusion to which a close survey of the authorities will conduct us, seems to be, that there is not any positive inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer.'"

Upon consideration of the various cases, we think that in

allowing the exceptions to the answer and in sustaining the demurrer to the cross bill, the courts below committed no error. The facts which the defendant Harrison endeavored to set up in his answer and cross bill were not relevant to the matters properly in issue in this suit. Neither the convenience of the parties nor their rights in regard to the matters set forth in the original bill would be aided by entering upon an inquiry relating to the matters set up in the answer and cross bill. It is clear that an investigation and accounting, such as is asked for in the cross bill, would take a long time, probably many years, to finish, involving as it would an inquiry into the amount of the community property of the elder Perea and his wife in 1842, and what should be found to be the actual increase springing from the same; also an inquiry into the transactions of the administrators of the estate of the elder Perea and into their liability on account of the same, together with the taking of evidence upon the subject of the fraudulent character of the decree of the probate court discharging the administrators of that estate. It would in addition include an inquiry into the question whether the administrators, if the decree were set aside, had been guilty of such conduct in the care and management of the estate coming into their hands as would make them liable for any loss sustained by the estate in consequence of such action. In fine, it is seen that the character of the investigation demanded by the cross bill and of the relief sought thereby is extensive enough to call for an almost interminable amount of research and labor. These considerations are not of the slightest moment when weighed against the legal rights of the parties interested in the question; and their right to have such investigation made and adequate and proper relief granted is not a matter of discretion or of favor. If they have not slept upon their rights and if they come into court at the proper time and in a proper action, the court will enter upon the necessary investigation and grant such relief as they may be entitled to. On the other hand, these considerations are most material and vital upon the question of the necessity or propriety of such an investigation in this suit which was

brought for a different purpose, and which would be necessarily greatly delayed in its termination if such an inquiry should be now entered upon.

Let us look for a moment at the simple character of this suit. It is brought to recover as administrator the assets of the estate of the minor already mentioned, the possession of which the defendant Harrison does not deny. He shows no right to them as against the complainant, because the facts he sets up in his answer form no defence. Nor do the same facts when set forth in the cross bill constitute a cause of action against this complainant, proper to be proved and defended against in this suit, as against the demand of the complainant herein. It is plain that the complainant, as the surviving administrator of the estate of the deceased minor, was entitled to the immediate possession of all the assets of such estate. Upon the death of the minor the guardianship of the mother ceased, and as she was thereupon appointed administratrix, her continuing to hold the assets of the estate from the time of such appointment was as administratrix and not as guardian. The counsel for Harrison says in his brief that he is disposed to concede this proposition. It is plainly true. Her right or duty to account, as guardian, did not affect the title to the property upon the death of the ward. That title became vested in the administrator and administratrix upon their appointment. 1 Williams on Executors, (6th Am. ed.) 696. The plaintiff herein, as coadministrator, had the same legal title to the assets that she had. The advantage of possession was with her. But on the death of the administratrix the complainant remained the sole surviving administrator, and in him was vested the exclusive title and the right to the immediate possession of the assets of the estate of the deceased minor. Instead of obtaining that possession he finds all the assets in the hands of the defendant Harrison, who refuses to give them up. Their amount is not really in controversy. The defendant shows no right or title whatever to them. It is no answer to the demand that the defendant should pay over the sum which is in substance acknowledged to be in his possession, to say that the

minor's estate may be increased after an accounting shall be had and judgment obtained and the money paid over in the matter of the estate of the elder Perea. The claim upon that estate, so far as the defendant Harrison is concerned, either individually or as administrator of his deceased wife, is altogether too remote and too disconnected from the issues properly joined in the original suit herein to make it necessary, on his demand, to turn aside from their decision until that claim shall be hereafter and in this suit determined. It would be entering upon an investigation into matters connected with a different estate, an inquiry into which would involve innumerable questions which would have no bearing upon the decision as to the right of defendant to retain these particular funds now in his individual possession and treated by him as his own.

It must also be borne in mind that the defendant Harrison has an action pending against the complainant herein and the other and surviving administrator of the estate of the elder Perea, together with his other heirs-at-law, in regard to these very matters which are set up in his cross bill herein. Indeed, this cross bill contains nothing material beyond the allegations which are contained in the complaint in his first suit. The allegations in that suit are reintroduced in the cross bill word for word, and the relief prayed for in the cross bill is the same. From all the facts thus appearing in complainant's original bill, in the answer and the cross bill of the defendant Harrison, it is plain that the matters set up in the answer and in the cross bill in regard to which the defendant seeks investigation in this suit are not proper subjects of inquiry herein, because not connected with the issues sought to be decided in the original bill, and it would result in great and unnecessary delay in the decision of this suit to reverse this judgment and direct an investigation into matters which are foreign to its merits. We are of opinion the court below committed no error in allowing complainant's exceptions to the answer and in sustaining his demurrer to the cross bill.

The decision thus arrived at includes the main question in the case. There are some few other matters to be reviewed.

Our further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a Territory those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Stringfellow* v. *Cain*, 99 U. S. 610; *Neslin* v. *Wells*, 104 U. S. 428; *Eilers* v. *Boatman*, 111 U. S. 356; *Idaho and Oregon Land Company* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Company* v. *Salt Lake Machine Company*, 151 U. S. 447, 450; *Haws* v. *Victoria Copper Mining Company*, 160 U. S. 303; *Gildersleeve* v. *New Mexico Mining Company*, 161 U. S. 573; *Bear Lake and River Water Works and Irrigation Company* v. *Garland*, 164 U. S. 1, 18.

Objection is made to that portion of the decree which holds the defendant Harrison liable as an individual for the repayment of the amount of the assets of the estate found in his possession. The findings of fact amply justify this action of the court. It is found that immediately upon the intermarriage of the defendant Harrison with the widowed mother of the minor he took entire charge and control of her affairs, including the assets of the minor's estate; that he reduced them to money, mingled the same with his own funds, deposited them in bank to his individual credit and at the time of the final decree he retained the same subject to his individual control. The court also found that he made reports in the lifetime of his wife, and in her name to the probate court, which contained false entries to the advantage of his wife, and that together they obstructed the distribution of the estate among the heirs; that upon the death of his wife on the 20th of October, 1889, he was in possession of these assets with full knowledge of their trust character, and after her death he refused to pay over on demand, to the complainant as the sole surviving administrator of the estate of the minor, the assets pertaining to that estate. These facts show a persistent, deliberate and successful attempt to secure and retain the assets of this estate and to convert them to his own use

individually. The facts found show that he was guilty of such conversion. Cases are cited by defendant's counsel where payments wrongfully made by an administrator to a third person could not be recovered directly from such third person at the suit of a creditor of the estate, the estate itself not being insolvent. Those cases and the one at bar have no resemblance to each other. This is a case where the whole assets of the estate have been wrongfully and knowingly taken and converted to the individual use of this defendant, and the action is brought to recover the same by the sole surviving administrator of the estate. Nor is it a question of following the specific property which was taken by the defendant. The finding is that he reduced the assets and property of the estate to money and mingled the same with his own funds, and has kept control of them ever since. The question of identification has nothing to do with the case. It is a bald case of the conversion of the whole estate of the minor, and his liability to pay it back is plain and clear.

Nor did the court below err to the prejudice of the defendant in the matter of charging him with interest at six per cent on the amount of the assets converted by him. The interest is charged by reason of his conversion of the whole assets of the estate. It is not a mere mingling of the funds with his own, while recognizing his liability to repay them and having them at the same time ready to respond when demanded. It is a wholesale conversion of the entire assets. The facts found make the inference perfectly clear that such conversion was intended from the time of his marriage with the mother of the minor. His false entries in the reports are very strong evidence in that direction.

Neither is it a question of what profits (if any) have been made by an individual who has mingled trust funds with his own and used them for his personal benefit, although never denying his liability to account. In such cases it is sometimes proper to inquire what profits have been made in order to charge the trustee with their amount, if greater than the usual rate of interest. This is not such a question. The defendant has, without the least right or title, taken moneys

belonging to the estate of a deceased minor, and converted them substantially to his own use, while denying the right of the administrator of such estate to the possession thereof. He is properly charged, at least, with the usual interest without investigation into the question of what profits he may have made.

That portion of the decree which authorizes the complainant as administrator to retain his statutory commissions upon the full fund found due from the defendant is objected to, and the claim is made that he is not entitled to commission on any other sum than that which he actually receives and pays out. The decree determines the amount due from the defendant to the complainant as administrator. Strictly speaking, the complainant was entitled to a decree for the payment of that full sum by the defendant, after which he would be paid the distributive share legally coming to him. If that course had been followed and such a decree given, the complainant would have been entitled to his statutory fees, as administrator, upon the amount thus paid in; but by the favor of the court, the defendant Harrison was permitted, instead of making this formal payment, to retain in his possession the seventeen twenty-sixths of the estate which the court decided he would be entitled to receive from the administrator, upon his making distribution of such estate to the parties entitled to it. The court in pursuance of this course did not relieve the estate from the payment of the full amount of the commissions of complainant as administrator which he would have been entitled to, had the amount which the defendant retained been actually and physically paid over into his hands. As to this, the defendant has no good ground of complaint.

The defendant also objects to the allowance of the solicitor's fee which is charged against the fund. We think no error arises from this action of the court below. By the exertions of the solicitor the fund was recovered, and it was properly made to bear some portion of the expense of its administration. The amount was within the judicial discretion of the court, and in fixing that amount the trial court could proceed upon its own knowledge of the value of the solicitor's services.

Trustees v. *Greenough*, 105 U. S. 527; *Fowler* v. *Equitable Trust Co.*, 141 U. S. 411, 415.

These are substantially all the questions which arise upon the appeal of the defendant Harrison.

Upon the cross appeal of the complainant he seeks to modify the judgment of the Supreme Court in regard to the parties to the distribution, as he claims that the fund should be distributed, one half to the administrator of the deceased mother of the minor and the other half among his twelve half brothers and sisters, (children of the minor's father,) to the exclusion of the minor's half brother, Grover William Harrison, (the son of his mother by her husband Harrison,) who by the judgment of the court is permitted to share in such distribution. As the trial court made that decree and the complainant did not appeal from it, and the Supreme Court has simply affirmed that provision, the complainant's appeal from the latter decree does not, in our opinion, bring up this question for review. All that the complainant could claim in the Supreme Court was the affirmance of the judgment as given in the court below, because, as he had not appealed from it, he could not be heard to ask for its modification or reversal. When the Supreme Court affirmed that provision of the decree the complainant's appeal from that court would not bring the propriety of the provision for distribution before us.

Upon his cross appeal the complainant also asks for a modification of the decree with regard to the rate of interest charged against defendant, claiming it ought to be 12 instead of 6 per cent. We cannot interfere with the rate charged in the original decree, because the complainant has not appealed therefrom, and we do not think we ought to interfere with the rate of 6 per cent charged by the Supreme Court upon the total amount of the original decree from the time it was entered. It was to a certain extent discretionary with the latter court, and we think we are not called upon to alter and increase the rate charged by that court.

Although the complainant herein did not appeal from the original decree entered by the trial court, yet upon defendant Harrison's appeal therefrom the Supreme Court modified the

decree in some particulars, and specially in regard to costs, charging them upon the fund instead of against the defendant Harrison individually, as was the decree below. This was a modification of the judgment against the interest of and unfavorable to the complainant herein, as it reduced the amount of the fund for distribution. This question can be reviewed upon the complainant's cross appeal. We are of opinion that there was no proper ground for the modification of the decree as to costs made by the trial court.

The defendant Harrison, by the finding of the court, has wilfully obstructed the distribution of the assets of this estate, and by his misconduct has rendered it necessary that the complainant should obtain possession of them by the institution of this suit, and the necessity for commencing it arose entirely out of his wrongful conduct. This is the finding as approved by the Supreme Court of the Territory. The other findings, showing the false accounts, the wrongful conversion of these moneys, and the wrongful and persistent refusal to pay them over, on demand made by the administrator, altogether make out a gross case against the defendant, and leave no reasonable foundation for permitting him, as the Supreme Court does, to defend this action entirely at the expense of the fund and with no personal responsibility for costs. We see no plausible ground for this privilege.

A clerical error seems to have been made in the distribution by the Supreme Court. One twenty-sixth part of the estate is undisposed of by the judgment. It provides for the payment of seventeen twenty-sixths to defendant Harrison, and distributes the remaining nine twenty-sixths, one ninth to each of *eight* named distributees. One name has been accidentally omitted. This can be corrected on application by the court below.

The provision making all the costs payable out of the fund cannot stand, and the decree should charge defendant Harrison with costs personally as in the original decree entered by the trial court, with the exception that the amount of the fee of the special master is retained at $500. All the costs in this court must be paid by the defendant Harri-

son personally. The decree of the Supreme Court of New Mexico is therefore

Reversed on the cross appeal of Perea, and the cause remanded with instructions to enter judgment in conformity with this opinion, with liberty to change the distribution upon application if it shall appear proper.

KARRICK *v.* HANNAMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 12. Argued October 27, 28, 1896. — Decided November 29, 1897.

A partner who, within the term stipulated in the articles of partnership for its continuance, undertakes, of his own will, and without the consent of his copartner, to dissolve the partnership, takes exclusive possession of its property and business, profitably carries on the business with the property for his own benefit, and excludes his copartner from any participation in the business or the profits, is liable (whether the partnership should or should not be considered as having been dissolved by his acts) to account to the copartner for his share of the property and of the profits of the partnership, according to the partnership agreement.

This was a suit brought April 17, 1890, in the third judicial district court of the Territory of Utah, by Hannaman against Karrick for the dissolution of a partnership, formed February 3, 1886, by an agreement in writing, by which they agreed to become partners in a mercantile and laundry business for the term of five years from that date, with a capital stock of $25,000, of which the plaintiff was to furnish $5000, and the defendant $20,000; the defendant lent the plaintiff the sum of $5000 for five years, for which the plaintiff gave a promissory note, payable at the end of that time, and secured by mortgage upon his interest in the partnership property; the plaintiff was to give his entire time and attention to the partnership business, and the defendant was to devote to it only such time as he should see fit; the plaintiff to have the control and management of the business generally and entirely, except as the defendant might designate, and such matters to be subject to mutual agreement; one half of the

net profits of the business to go to the defendant in repayment of $15,000 of the capital stock furnished by him, and the other half to be allowed to remain in the business, except that each partner might draw out not exceeding $125 a month for personal expenses; the profits and losses to be shared equally, and neither party to have any other salary or compensation for services; and the title and interest of the partners in the partnership property to be proportionate to their respective contributions to the capital.

The complaint alleged the following facts: The parties carried on business in conformity with the agreement until February 1, 1888, when the defendant took exclusive possession of all the partnership business, stock, books and accounts, and of the premises where the business was carried on, and ever afterwards prevented the plaintiff from participating in any manner in the business or deriving any benefits therefrom. The plaintiff until that date performed his part of the agreement, and was ever after ready and willing to perform it, and so informed the defendant. From that date, the defendant wrongfully, and in fraud of the plaintiff's rights, carried on and controlled the partnership business for his own exclusive benefit, and applied to his own use from the proceeds and profits of the same large sums of money, exceeding the proportion to which he was entitled. On January 1, 1890, the defendant, without the plaintiff's knowledge or assent, sold and delivered to the Bast-Marshall Mercantile Company all the assets and property of the partnership. The complaint prayed for a dissolution of the partnership, the appointment of a receiver, an injunction against interfering with the property, its application to the payment of the partnership debts and a division of the remainder between the partners, the setting aside and cancellation of any transfer or assignment to the Bast-Marshall Mercantile Company, and an account.

The defendant Karrick, in his answer, admitted the partnership, and his own taking possession on February 1, 1888; but denied the other allegations of the complaint; and alleged that the plaintiff mismanaged the business in various particulars specified, and that when the defendant took possession

the partnership was insolvent and heavily in debt, and the plaintiff was owing to it a large sum of money, and was insolvent, and the partnership was then dissolved by mutual consent.

The Bast-Marshall Mercantile Company was originally made a defendant, and filed a separate answer. But the plaintiff afterwards dismissed his suit as against that company; the case was referred, by consent of the remaining parties, to a referee to report his findings of fact and conclusions of law to the court; and at the hearing before the referee much evidence was introduced by either party in support of his allegations and denials.

On October 5, 1891, the referee made his report, in which he set forth all the evidence; and by which he found that the facts were as alleged in the complaint, and were not as alleged in the answer of Karrick; and stated an account, resulting as follows:

Unadjusted and undivided profits January 1, 1890, including $2616.25 then uncollected by defendant	$22,858 18	
Profits realized after January 1, 1890	99 90	
Wrongfully disbursed by defendant after that date	379 50	
	23,337 58	
Unavoidable losses after January 1, 1890	2,005 12	
Net profits	21,332 46	
Of which, plaintiff is entitled to one half	10,666 23	
Capital put by plaintiff into the business	5,208 89	
	15,875 12	
Due from plaintiff to defendant on note mentioned in partnership agreement, without interest	5,000 00	
Principal sum due to plaintiff	10,875 12	
Interest at eight per cent yearly from January 1, 1890, to October 5, 1891, on $8258.87, the difference between $10,875.12 and $2616.25 uncollected January 1, 1890	1,165 41	
Total amount due to plaintiff	$12,040 53	

Statement of the Case.

From the findings of fact the referee concluded, as matter of law, that the partnership was not dissolved; but that it expired February 3, 1891, according to the terms of the agreement; that the profits and losses of the partnership business should be divided equally between the parties, after crediting each with his advances to and investments in the partnership; and that the sum of $12,040.53 was therefore owing to the plaintiff. The court confirmed the referee's findings of fact and conclusions of law, and entered a decree accordingly.

The defendant appealed to the Supreme Court of the Territory, which adopted the findings of fact in the district court, and held that, for the reasons stated in its opinion, (the material part of which upon this point is copied in the margin,[1]) the defendant could not dissolve the partnership,

---

[1] "Where the partnership is merely at will, the right of one partner to terminate it must be conceded; but where by agreement it is to continue for a time stipulated, the party seeking a dissolution before the expiration of the time ought in justice at least be required to act in good faith, and at a reasonable time, and in a reasonable manner. In the case of a partnership for a stipulated time of duration, where the business has been established, is becoming profitable, and has good future prospects, to allow one of the partners *sua sponte* to expel the other and dissolve the partnership, with a view to appropriate the business to himself, would be to adopt a doctrine at once inequitable, and unsupported by either reason or justice. There seems to be no good reason why a person should be allowed to commit a breach of his contract in such case, while in all other cases of flagrant violation, not within the partnership, he would be compelled to specifically perform, if it was within his power to do so. Why should a partner be thus allowed to ruin the business of the firm from mere caprice, or of his own volition, without cause, and in violation of his agreement, and sacrifice the entire object of the partnership? That such a violation may entitle the injured partner to damages is no answer, for damages, in many cases, must necessarily prove to be utterly inadequate to compensate for the destruction of a profitable and growing business; and, besides, this mode of redress is usually slow and unsatisfactory, and is not a remedy that will or can do complete justice between the parties. Where there is such a breach between the parties as to render continuance impossible, or when dissension has dispelled the hopes, prospects and advantages which induced its formation, or if for any just cause the partnership ought to be dissolved before the expiration of the term, then a court of equity is competent to grant relief. But it would scarcely seem to come within the principles of justice to permit one partner to expel another from a profitable business

without reasonable cause, and without the plaintiff's consent, before the expiration of the term stipulated in the partnership articles; and therefore that the partnership had not

---

for some real or fancied wrong or mismanagement, and then continue the business himself, and profit by his own wrong, responsible only in damages.

"Mr. Justice Story, in his Commentaries on the Law of Partnership, § 275, speaking of the power of one partner to dissolve the partnership where the time of duration is stipulated, says: 'In cases where the partnership is by the agreement to endure for a limited period of time, the question whether it may within the period be dissolved by the mere act or will of one of the partners, without the consent of all the others, does not seem to be absolutely and definitely settled in our jurisprudence, although it would not seem, upon principle, to admit of any real doubt or difficulty. Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner at his mere pleasure to violate his engagement, and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation.' In *Gerard* v. *Gateau*, 84 Illinois, 121, Mr. Justice Scott, delivering the opinion of the court, said: 'A party who is the author of the ill feeling between himself and partners ought not to be permitted to make the relation he has induced, the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other has been guilty of no wrongful act or omission of duty. The results flowing from a premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise.' So in *Henn* v. *Walsh*, 2 Edw. Ch. 129, the vice chancellor said: 'A partnership agreement, like any other, is binding upon the parties; and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause. Mere dissatisfaction by one partner will not justify him in filing a bill for a dissolution where, by the express agreement, it is to continue for a definite term; and this court will not interfere to dissolve the contract upon such ground.'

"The views thus expressed have the apparent support of most elementary writers, and seem to be in conformity with the doctrine prevailing in England. The contrary doctrine, if not indefensible, is founded on reasons exceedingly artificial. It is based on the ground that one partner has the right to found his claim, real or otherwise, to immediate safety and indemnity, on an obvious injury to the interests and rights of another, which is alike inequitable and unjust; and we think it is not supported by the

been dissolved by the acts of the defendant; but that, as each partner was permitted by those articles to draw out of the partnership $125 a month for personal expenses, the defendant should have been allowed the sum of $3000 as personal expenses for the two years during which he conducted the business of the firm; and that the judgment should be modified by deducting one half of this sum, and, so modified, be affirmed for the sum of $10,540.53. 9 Utah, 236. The defendant appealed to this court.

Mr. J. M. Wilson for appellant. *Mr. J. G. Sutherland*, *Mr. A. Howat* and *Mr. C. W. Bennett* were on his brief.

Mr. Joseph L. Rawlins for appellee. *Mr. Parley L. Williams* was on his brief.

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

Much of the argument for the appellant was devoted to a discussion of conflicting evidence, which is not open to examination by this court, its authority upon appeal from the Supreme Court of a Territory being limited to the question whether the facts found by that court support its judgment. *Haws* v. *Victoria Co.*, 160 U. S. 303; *Harrison* v. *Perea*, *ante*, 311.

The principal question of law discussed in the opinion of the Supreme Court of the Territory, and at the argument in this court, was whether a partnership, which by the copartnership articles is to continue for a specified time, can be dissolved by one partner at his own will without the assent of the other before the expiration of that time.

It is universally conceded that a contract of partnership, containing no stipulation as to the time during which it shall

---

weight of authority. Story on Partnership, §§ 275, 276; Story Eq. Jur. § 673; Lindley on Partnership, [bk. 4, c. 1, (5th ed.)] p. 575, § 2; *Ferrero* v. *Buhlmeyer*, 34 How. Pract. 33; *Pearpoint* v. *Graham*, 4 Wash. C. C. 232; *Peacock* v. *Peacock*, 16 Ves. 49; *Cash* v. *Earnshaw*, 66 Illinois, 402; *Van Kuren* v. *Trenton Co.*, 13 N. J. Eq. 302."

continue in force, does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, but may be dissolved by either partner at his own will at any time. *Peacock* v. *Peacock*, 16 Ves. 49; *Crawshay* v. *Maule*, 1 Swanst. 495; *Neilson* v. *Mossend Iron Co.*, 11 App. Cas. 298; 3 Kent Com. 53; Story on Partnership, § 269.

Upon the question how far the status or relation of a partnership, which by the partnership agreement is to continue for a certain number of years, can be determined by one partner without the consent of the other before the expiration of that time, there has been some difference of opinion.

The principal reasons and authorities in favor of the position that a contract of partnership for a definite time cannot be dissolved at the mere will of one partner are stated or referred to in the opinion of the Supreme Court of the Territory in this case, reported in 9 Utah, 236.

Those which support the opposite view may be summed up as follows: A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartner. *Meehan* v. *Valentine*, 145 U. S. 611. Every partnership creates a personal relation between the partners, rests upon their mutual consent, and exists between them only. Without their agreement or approval, no third person can become a member of the partnership, either by act of a single partner, or by operation of law; and the death or bankruptcy of a partner dissolves the partnership. 3 Kent Com. 25, 55, 58; *Wilkins* v. *Davis*, 2 Lowell, 511. So an absolute assignment by one partner of all his interest in the partnership to a stranger dissolves the partnership, although it does not make the assignee a tenant in common with the other partners in the partnership property. *Bank* v. *Carrolton Railroad*, 11 Wall. 624, 628; *Marquand* v. *New York Manuf. Co.*, 17 Johns. 525, 528, 535. No partnership can efficiently or beneficially

carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. *Skinner* v. *Dayton*, 19 Johns. 513, 538; 3 Kent Com. 54, 55, 62; *Cape Sable Co.'s Case*, 3 Bland, 606, 674; *Monroe* v. *Conner*, 15 Maine, 178, 180; *Mason* v. *Connell*, 1 Whart. 381, 388; *Slemmer's Appeal*, 58 Penn. St. 168, 176; *Blake* v. *Dorgan*, 1 Greene (Iowa), 537, 540; *Solomon* v. *Kirkwood*, 55 Mich. 256, 259, 260. According to the authorities just cited, the only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one for a specified term, is this: In the former case, the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case, such a dissolution before the expiration of the time stipulated is a breach of the agreement, and as such to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership.

A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, because, upon familiar principles, a partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement. *Marble Co.* v. *Ripley*, 10 Wall. 339, 358. But, generally speaking, neither will it interfere at the suit of the other partner to prevent the dissolution, because, while it may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed, it will seldom, if ever, specifically compel subsequent performance of the contract by either party, the contract of partnership being of an essentially personal character. Batten on Specific Per-

formance, 165–167; Lindley on Partnership, bk. 3, c. 10, § 4; Pomeroy on Specific Performance, § 290; *Scott* v. *Rayment*, L. R. 7 Eq. 112; *Satterthwait* v. *Marshall*, 4 Del. Ch. 337, 354; *Reed* v. *Vidal*, 5 Rich. Eq. 289; *Somerby* v. *Buntin*, 118 Mass. 279, 287. Especially where, by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement cannot be specifically enforced against the plaintiff, and will not be enforced against the defendant. *Stocker* v. *Wedderburn*, 3 K. & J. 393, 404; *Buck* v. *Smith*, 29 Michigan, 165.

In the somewhat analogous case of a contract of hiring and service, it is well settled that a court of equity cannot compel the performance of the service, although it may in some cases enforce a negative stipulation not to serve any third person within the time agreed. *Dietrichsen* v. *Cabburn*, 2 Phil. Ch. 52, 59, and cases cited; *Lumley* v. *Wagner*, 1 D. M. & G. 604; *Wolverhampton & Walsall Railway* v. *London & Northwestern Railway*, L. R. 16 Eq. 433, 440; *Whitwood Chemical Co.* v. *Hardman*, (1891) 2 Ch. 416; *Davis* v. *Foreman*, (1894) 3 Ch. 654; 13 Law Quarterly Review, 306; *Tobey* v. *Bristol*, 3 Story, 800, 824.

We are not prepared, therefore, to assent to the opinion of the court below that a partnership for a definite time cannot be dissolved by one partner at his own will, and without the consent of his copartner, within that time; and consequently that the partnership between these parties was not dissolved on February 1, 1888, when the defendant assumed exclusive possession and control of the business and property of the partnership, and excluded the plaintiff from any participation therein. But it is unnecessary to express an opinion upon this point, because, however it might be decided, it would not affect the conclusion in favor of the plaintiff in the present case.

Even if the partnership should be considered as having been actually dissolved at that date, yet the dissolution did not put an end to the plaintiff's right to his share in the property and the profits of the partnership. In a case in which both parties,

in their pleadings, assumed the partnership to have been dissolved, this court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner and his consequent exclusion from the business did not authorize his copartner, "of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property," or exempt him from responsibility to account to the excluded partner. *Ambler* v. *Whipple*, 20 Wall. 546, 555, 557. And in a later case, the court, speaking by Mr. Justice Woods, said: "However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership." *Pearce* v. *Ham*, 113 U. S. 585, 593.

A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Bagley* v. *Smith*, 10 N. Y. 489; *Dennis* v. *Maxfield*, 10 Allen, 138. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Ambler* v. *Whipple*, and *Pearce* v. *Ham*, above cited; *Hartman* v. *Woehr*, 3 C. E. Green (18 N. J. Eq.), 383; *Freeman* v. *Freeman*, 136 Mass. 260; *Holmes* v. *Gilman*, 138 N. Y. 369; 3 Kent Com. 64.

In the case at bar, by the terms of the agreement in writing, dated February 3, 1886, under which the partnership was formed, it was to continue for five years, that is to say, until February 3, 1891; the plaintiff was to contribute $5000, and the defendant $20,000, to the capital; the defendant lent the plaintiff the sum of $5000, for which the plaintiff gave his promissory note, payable at the end of the five years; the plaintiff was to have the general management of the business; each

partner might draw out not exceeding $125 a month for personal expenses; the profits and losses were to be shared equally, and neither partner was to have any other compensation for services; and their title in the partnership property was to be in proportion to their contributions to the capital.

By the facts found by the courts of the Territory, it appears that the business was carried on, according to the agreement, for two years, or until February 1, 1888; that the defendant then took exclusive possession of the property and the business of the partnership, and thenceforth carried on the business profitably and for his own benefit, and excluded the plaintiff from any participation in the business or the profits, although the plaintiff was, as he informed the defendant, ready and willing to perform his part of the partnership agreement; and the defendant on January 1, 1890, a year before the expiration of the term agreed on, and without the plaintiff's knowledge or assent, sold out and delivered to a stranger all the property of the partnership.

The judgment of the court of first instance charged the defendant with the amount of capital paid by the plaintiff into the partnership, deducting, however, the whole amount of the plaintiff's promissory note payable to the defendant at the end of the term of five years; and further charged the defendant with half of the net profits of the business during the two years that he carried it on after ousting the plaintiff and before selling out to a stranger, and with half of the wrongful disbursements of the defendant afterwards. The Supreme Court of the Territory, affirming the judgment in other respects, held that, as by the agreement of partnership each partner was permitted to draw out a certain sum monthly for personal expenses, the defendant was entitled to such an allowance monthly for the two years during which he conducted the business, and the same should be deducted from the profits to be accounted for, and the judgment in favor of the plaintiff reduced accordingly. The court made no such allowance to the plaintiff. And, in accordance with the partnership articles, neither partner was allowed any compensation for his services other than his half of the profits.

Syllabus.

It does not appear to have been suggested by the defendant in either of the courts of the Territory, and could not successfully be contended, that in estimating the damages or the profits which the plaintiff was entitled to recover, any deduction should be made by reason of his not having performed during those two years the services, as manager of the business, which he had agreed by the partnership articles to perform. No finding as to the value of such services was made or requested; and the defendant himself, not only refused to let the plaintiff, as he offered to do, perform them during those two years, but, in his answer and at the hearing before the referee, insisted that the plaintiff's services as manager were of no benefit to the partnership.

The result is that, whether the partnership should or should not be considered to have been dissolved when the defendant ousted the plaintiff and assumed the exclusive possession and control of the property and business of the partnership, the defendant has shown no ground for reversing or modifying the final decree of the Supreme Court of the Territory.

Decree affirmed.

WARNER *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 82. Argued November 1, 2, 1897. — Decided November 29, 1897.

This was an action to recover for the death of plaintiff's testator, caused by a train striking him while crossing the track of defendant's road. The results of the evidence at the trial are condensed in the statement of the case, below, which cannot well be abridged. Upon them the court below ordered a verdict and judgment in defendant's favor. *Held*, that the peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury;

Statement of the Case.

but that apart from any question which might have arisen from the proof as an entirety, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, Milwaukee &c. Railway* v. *Lowell*, 151 U. S. 209, it is obvious there was no room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent.

The rule of the defendant company that "when one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary," is a proper one, and applies to this case.

The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveller upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence.

A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determining the matter is for the jury.

This action was begun in the Supreme Court of the District of Columbia to recover damages for the killing of the plaintiff's intestate on June 22, 1893, at a suburban station of the city of Washington, located on the line of the defendant's road, known as University station.

It appeared from the evidence that at the station referred to the company operated a double track road, the tracks running substantially from north to south, the southerly direction leading to Washington and the northerly direction leading away from that city. The two tracks being side by side, one consequently lay to the west and the other to the east. The distance between the rails of each track was four feet eight

and a half inches, while the distance between the east and west tracks, respectively, was seven feet five inches.

At the place in question the station building was on the outer side of the west track, and contained a waiting room, a ticket office and the other conveniences of a passenger station. Fronting the station building and beside the track was the necessary platform to enable passengers to enter or descend from any train which might there stop. In the space between the east and west track there was no platform or other facility for passengers either to enter or leave the train, but on the other side of the east track there was a platform which was uncovered, but which was manifestly constructed for the purpose of facilitating the entry into or departure from any train which might stop at that point on the east track. These east and west platforms were connected by a plank crossing, which came opposite the centre of the station building.

There was a road crossing adjoining the station, and the travel was such as seems to have necessitated the use of crossing gates and the employment by the railroad company of a gate watchman. On the east side of the track there was also a settlement known as Brookland, and several of the witnesses who testified at the trial lived in the immediate vicinity of the station in question.

Whilst, as we have said, the substantial direction of the two tracks was north and south, nevertheless the proof showed that in the southward direction of the tracks, that is, towards Washington, the tracks were not perfectly straight, but were somewhat curved. As to the foregoing facts, there seems from the bill of exceptions to have been no conflict of proof.

There was proof tending to show that on the morning of the accident, at about twenty minutes past seven o'clock, the deceased alighted at University station from a local train bound to Washington. One of the stopping points of such train on the way to University station was a small station known as Forest Glen. After attending to some business in the neighborhood of University station, Collis returned to that station at about half-past eight o'clock on the same morning. He was then seen engaged in conversation with several persons

in or about the station building, which we have already described. There was a local train bound out from Washington, that is, going north, which was scheduled to stop at Forest Glen, and which was due to arrive at University station at *nine* minutes past nine o'clock, whilst there was an express train bound to Washington scheduled to pass the same station at *eleven* minutes past nine. The proof tended to show that the local train arrived at University station a few minutes late, and that either as it was stopping at the east platform or after it had actually stopped there Collis, who had in his possession a return-trip ticket from University station to Forest Glen, hurriedly went from under the arch of the station building in the direction of the local train. There was conflict in the proof as to whether, when Collis started, the local train had actually stopped on the east track or was slowing down. There was also conflict in the evidence as to where Collis was when he started to the local train. The engineer of the express train testified "that after he got by the whistling post he saw Mr. Collis standing on the platform, but did not think that Collis would go over," and that it was not until Collis started across that he gave the danger signals; whereas another witness for the defence testified that Collis was sitting behind the arch of the station building when the local train arrived, and as it did so he went around the station building "to cross the track and get on his train," and "started straight across, did not stop at all and did not look in either direction." There was conflict also in the proof as to whether, in crossing towards the train, Collis went on the crosswalk connecting the two platforms, or diagonally upon the track away from the board walk and bearing towards the local train. Some of the witnesses testified that as he started toward the local train, not being opposite a platform by which to enter a coach, he obliquely directed his course towards the south as though to reach the platform and steps of a car on the local train, whilst other testimony tended to show that as he came out from under the arch and around the building he pursued a course directly across the track towards the local train.

Statement of the Case.

The testimony moreover established that whilst Collis was making the movement towards the local train, in one or the other of the modes above described, the express came down the west track, past the station, running by the standing or stopping local train at the rate of between forty and forty-five miles an hour, and that by the train so moving Collis was struck and killed. The proof further tended to show that there was a clear view of the track going north from the station for a considerable distance, and that there was a whistling post for the station located fifteen or sixteen hundred feet beyond the station. There was no proof, however, showing that a view of the rapidly moving express train was possible from under the archway of the station from which some of the proof tended to show Collis came on his way towards the local train.

There was conflict in the testimony as to whether the express train whistled at the whistling post. Some of the witnesses testified that the only signal given as the train approached the station was the danger signal which was sounded when the engine was only fifty or sixty feet from the point where Collis was killed; while others testified that a long blast for the station was sounded at the whistling post. There was no proof tending to show that any notice or warning, by sign or otherwise, was given, of the danger which might be incurred if a passenger attempted to cross the west track in order to board a train on the east track, nor was there any proof offered tending to show that any warning or notice was given, either by the ticket agent, gate watchman or the employés of the local train, to passengers actually in waiting at the station, of the fact that the express train was due under its schedule, and, if on time, would pass the station without stopping, and almost simultaneously with the arrival of the local train.

It was proven that a book of rules issued by the company to its employés contained the following:

"No. 441. When one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to

run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary."

While the engineer of the express train testified that coming down towards University station he saw the local train and did not know whether it was moving or had stopped entirely, or was going to stop or not, he also admitted that he knew of the existence of Rule 441, but that "it was impossible to carry out the rule and make schedule time, and that the rule never was carried out."

At the close of the evidence for both parties the defendant requested a peremptory instruction in his favor, which the court gave, and by reason thereof the jury returned a verdict in favor of the defendant. From the judgment thereupon entered an appeal was taken to the Court of Appeals of the District of Columbia, where the judgment was affirmed. The case was then brought into this court by writ of error.

Mr. Rodolphe Claughton for plaintiff in error.

Mr. G. E. Hamilton for defendant in error. *Mr. M. J. Colbert* was on his brief.

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

The peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury. Indeed, apart from any question which may have arisen from the proof as an entirety, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, Mil-*

waukee &c. Railway v. *Lowell*, 151 U. S. 209, it is obvious there was no room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent. In the *Lowell case*, as in this, it was shown that a rule of the company, applicable where double tracks were operated, prohibited any train, either passenger or freight, from attempting to run past a passenger train standing at a station for the purpose of receiving or discharging passengers, until the passenger train at the station had moved on, or signal was given by the conductor of the standing train for the other train to come ahead. Speaking of such a rule, and after declaring that it could not be seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule, the court said (page 217): "In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening this accident would probably not have occurred."

The cogency of this language applies with equal force to the state of facts disclosed in this record, where the station in which was the waiting room was so situated, and the trains of the company so operated, that passengers obliged to board a train which was to arrive and depart on the east track could not do so without crossing the west track, over which a train bound in an opposite direction was momentarily to arrive. If the stopping of a train at a station to put off a passenger, as held in the *Lowell case*, may, under certain circumstances, justify the passenger in presuming that it is safe for him to alight from the train away from a platform, and does not impose upon him in so doing the same degree of care and caution as would be imposed on him if he were not a passenger, it follows, necessarily, that the same rule would apply to one waiting at a station to take a train and who approaches the train he is to take when it arrives at the station.

The learned court below, in affirming the judgment of the trial court, principally rested its conclusion on the ruling in *Elliott* v. *Chicago, Milwaukee & St. Paul Railway*, 150 U. S.

245, and the authorities in that case referred to. But there the question for determination was the negligence of one not a passenger.

The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveller upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the Court of Appeals of New York in *Terry* v. *Jewett*, 78 N. Y. 338, 344:

"There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

And in the case before the court it was held to be a question for the jury, under all the circumstances, whether the plaintiff was chargeable with contributory negligence.

The doctrine of the *Terry case* was approved in *Brassell* v. *New York Central &c. Railroad*, 84 N. Y. 246, and is sup-

ported by the following authorities: *Atchison &c. Railroad* v. *Shean*, 18 Colorado, 368; *Phil. Wil. & Balt. Railroad* v. *Anderson*, 72 Maryland, 519, 530; *Balt. & Ohio Railroad* v. *State*, 60 Maryland, 449, 463, 465; *Pennsylvania Railroad* v. *White*, 88 Penn. St. 327, 333, 334; *Jewett* v. *Klein*, 27 N. J. Eq. 550; *Wheelock* v. *Boston & Albany Railroad*, 105 Mass. 203.

To concede the rule, and, in a given case, to take a passenger beyond its protection by holding that one who goes in proper time to a station for the purpose of taking a train over the road and has a ticket for travel thereon, is not to be considered as a passenger until he has manifested by some outward act his intention to board a train and become a passenger, is to admit the rule on the one hand and on the other to deny it. It is also clear that to say that one who goes to a station to take a train must exercise the same circumspection and care as a traveller on the highway or a trespasser, unless by some implication the corporation has invited the person to deport himself as a passenger, and that such implication must be determined as matter of law by the court and not of fact by the jury, is, in effect, under the form of a qualification, to destroy the rule.

The situation of the tracks, the location of the station building and the waiting room, the coming of the local train and its stopping to receive passengers in a position which required the latter to cross a track in order to reach the train, involved necessarily a condition of things, which under one view of the testimony constituted an implied invitation to the passenger to follow the only course which he could have followed in order to take the train, that is, to cross the track to the waiting train. Whilst it is true, as was said in *Terry* v. *Jewett*, *supra*, that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and caution.

The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care. The doctrine finds a very clear expression in a passage in the opinion in the *Terry case*, already referred to, where it was said (p. 342):

"It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Grand Trunk Railway* v. *Ives*, 144 U. S. 408, 417; *Baltimore & Ohio Railroad* v. *Griffith*, 159 U. S. 603, 611; *Texas & Pacific Railway* v. *Gentry*, 163 U. S. 353, 368. A like doctrine was thus expressed by the Supreme Court of Pennsylvania in *Pennsylvania Railroad Co.* v. *White*, 88 Penn. St. 327, 333, a case in many respects analogous to the present one:

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury."

We think the case presented by the record is not one where the facts inferable from the evidence were such that all reasonable men would, of necessity, draw the same conclusion from them, and the question of negligence was not, therefore, one of law for the court.

Statement of the Case.

It is, therefore, ordered that the judgment be

Reversed, and the case remanded, with directions to grant a new trial, and for further proceedings in conformity to law.

Mr. Justice Brewer is of the opinion that the deceased was guilty of contributory negligence.

ST. ANTHONY FALLS WATER POWER COMPANY *v.* ST. PAUL WATER COMMISSIONERS.

MINNEAPOLIS MILL COMPANY *v.* SAME.

Nos. 23, 24. Argued October 13, 14, 1897. — Decided November 29, 1897.

The rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the State in which the land is situated, whether it be one of the original States or a State admitted after the adoption of the Constitution.

The Mississippi is a navigable river at all the points referred to in the records in these cases.

The grants made to the plaintiffs in error by the acts of February 26, 1856, and February 27, 1856, of the legislature of the Territory of Minnesota, to maintain dams and sluices in the Mississippi River, etc., etc., were subject at all times to the paramount right of the public to divert a portion of the waters for public uses, and to the rights in regard to navigation and commerce existing in the General Government, under the Constitution of the United States; and under those grants the plaintiffs in error took no contract rights which have been impaired in any degree by the acts of the legislature of Minnesota respecting the public waterworks of the city of St. Paul.

These actions were brought in a District Court of the State of Minnesota, by the respective plaintiffs in error against the defendant in error for the purpose of recovering damages for injury to their alleged rights as riparian owners and otherwise, at St. Anthony Falls on the Mississippi River, and also for a perpetual injunction enjoining the defendant in error from diverting the waters above so as to prevent them from flow-

ing in their natural course in the Mississippi River and down to the water power of the plaintiffs in error respectively.

The plaintiff in error, the St. Anthony Falls Water Power Company, was incorporated by an act of the Territory of Minnesota, approved on the 26th day of February, 1856, c. 137, p. 215. The first eight sections of the act relate to the incorporation of the company and to its internal affairs. The ninth section reads as follows:

"SEC. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of Saint Anthony, in the Mississippi River, to maintain the present dams and sluices, and construct and maintain dams, canals and water sluices, erect mills, buildings or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner or to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of Saint Anthony, with side dams, sluices and all other improvements in the Mississippi River, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted: *Provided, however*, That said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract Islands, or between them on the falls through any dam or dams they may erect, on the west side of Nicollet or Hennepin Islands, and the passage through the pond, above said dam, shall, when needed, be twenty feet wide: *Provided*, That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights of property of any other person or persons whatever."

The Minneapolis Mill Company was also incorporated by an act of the legislature of the Territory of Minnesota, approved February 27, 1856, c. 145, p. 236, the ninth, eleventh and twelfth sections of which read as follows:

"SEC. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and

below the Falls of St. Anthony in the Mississippi River, to maintain the present dams and sluices, and to construct dams, canals and water sluices, erect mills, buildings or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner and to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices and all other improvements in the Mississippi River which may be necessary for the full employment of the powers therein granted."

"SEC. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporators: *Provided*, That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever.

"SEC. 12. *Provided further*, That nothing contained in the act entitled an act to incorporate the St. Anthony Falls Water Power Company shall be so construed as to allow the said St. Anthony Falls Water Power Company to maintain or construct dams or sluices extending beyond the centre of the channel of the Mississippi River from the western bank of Hennepin Island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the ninth section of said act to the space between the western bank of said island and the centre of said river: *Provided*, The said dam shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi River, and that any future legislature may amend or modify this act or the act to which this section is amendatory: *And provided further*, That the Minneapolis Mill Company shall be restricted in its operations to the centre of the main channel of the Mississippi River and to the property belonging to said company."

By the second section of the act of Congress, approved February 26, 1857, 11 Stat. 166, c. 60, authorizing the people

of the Territory of Minnesota to form a State constitution, etc., it was enacted: "That the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll, therefor."

Section two, article two, of the constitution of Minnesota has the same provision for the jurisdiction of the State over the Mississippi and other rivers and waters bordering on the State as is provided for in section two of the above act of Congress.

The complaints in the two cases are substantially similar, the two companies owning on different sides of the Mississippi River at about the same point, and the complaint in the case of the Minneapolis Mill Company contained the following among other allegations: It alleged the incorporation of the plaintiff in error, under the acts above mentioned, and also the incorporation of the defendant pursuant to an act of the legislature of the State of Minnesota, approved February 10, 1881, which has been amended by various acts supplemental thereto.

Plaintiff further alleged that pursuant to the provisions of its charter it acquired large tracts of land bordering upon the Mississippi River, and on the southwesterly bank thereof, lying within the present limits of the city of Minneapolis and county of Hennepin, and that by reason of the fall in said river at that point, which amounts to some seventy feet in the course of a thousand feet, there was created a natural water power of great extent and value; that the plaintiff, pursuant to the provisions of its charter and in accordance with the natural right inherent in the ownership of lands abutting upon the waters of said river, constructed dams and water sluices at great expense, for the purpose of making the water power

available for manufacturing and other purposes to which the same was adapted, and by meeting those erected by the other company, and that by the erection of these dams on the opposite side of the river the plaintiff had made available the water power of the river to the extent of about fifty feet fall, leaving still unoccupied a further fall of about twenty feet; that in pursuance of its charter and in accordance with its rights as riparian owner, plaintiff in error had made contracts with different parties for the construction of mills and manufacturing establishments in convenient proximity to its water power, and for a valuable consideration had furnished and was furnishing water power to these different establishments which have use for the power, and that the same is of great value to the plaintiff; that it has reserved to itself large rents and income by leasing to other parties the right to use certain portions of the water.

And the plaintiff alleged that by reason of its ownership of the land bordering upon the river it had acquired and still owned all the riparian rights incident to the ownership of lands bordering upon the Mississippi River, which was stated to be a natural water course, in which there naturally flowed a large quantity of water derived from the river and also from numerous tributaries above, and that by reason of its riparian rights the plaintiff was entitled to have and require the natural flow of the waters of the river in the channels, both east and west in said river, adjacent to the lands at said falls without diminution or diversion of such natural flow by any person whatever.

It was further averred that one of the tributaries of the Mississippi River is a natural water course and stream known as Rice Creek, which drains waters from a large extent of territory within the State, and which are gathered together and have a natural flow or outlet through said creek into the Mississippi River, eight or ten miles above the water power of the plaintiff; that Rice Creek, in its natural course, flows through a small lake in the county of Anoka, designated as Baldwin Lake, and from thence to its connection with the Mississippi River; that the amount of water flowing in that

creek and lake varies with the different seasons of the year, the ordinary amount being about thirty million gallons per day.

It is then further alleged that the defendant, acting under the provisions of the act of the legislature above mentioned, approved February 10, 1881, authorizing the city of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating a board of water commissioners had acquired title to a portion of the land bordering upon Baldwin Lake, and had erected thereon pumping works and machinery for the diversion of the waters of the lake into a certain other lake situated in the county of Ramsey, which other lake had a natural outlet through streams flowing into the Mississippi River below the water power of plaintiff, and that the defendant had for the greater part of the time during the two years before the commencement of this action, by means of its works on Baldwin Lake, withdrawn from that lake a quantity of water to the amount of ten million gallons per day, and that the quantity thus pumped from that lake was diverted by the defendant into a lake known as Pleasant Lake, and from thence it had been drawn by the waterworks of the defendant into the city of St. Paul, and distributed over that city and used for domestic purposes and for furnishing water for steam engines and other manufacturing purposes, and for the propulsion of elevators and other machinery, and that the waters thus used had been entirely diverted from Rice Creek and from that part of the Mississippi River above the water power of plaintiff, and no part thereof had been returned to the Mississippi River above the water power of plaintiff so as in any way or manner to be made useful to plaintiff.

The plaintiff further alleged that the defendant, although assuming to act in accordance with its charter, had not acquired the right to divert the waters naturally flowing in Rice Creek and through Baldwin Lake from their natural course, nor had defendant made compensation to plaintiff and other parties beneficially interested in the use of said water, nor had defendant made any provision for computing the

Statement of the Case.

amount of compensation due plaintiff for damages caused by diverting and withdrawing the waters of the river from their natural course; that by reason of this diversion of water the income and profits arising from the maintenance of the water power were diminishing, (to an amount stated in the complaint,) and that the damages sustained by the plaintiff by reason of the diversion amounted to the sum of $1500.

Judgment was demanded that the plaintiff should recover its damages already sustained in the sum of $1500, and that the defendant should be perpetually enjoined from interfering with or diverting the waters which would otherwise naturally flow into Lake Baldwin, so as to prevent them from flowing in the natural course to said Rice Creek and Mississippi River to the water power of said plaintiff.

The answer of the defendant averred that the defendant existed as a corporation and executive department of the city of St. Paul, of the State of Minnesota, under and by virtue of the acts referred to in the complaint, as approved February 10, 1881, and amended January 25, 1883, and March 4, 1885, and that the defendant, under these acts and under the charter of the city of St. Paul, exercised all of the authority of the city of St. Paul with respect to acquiring lands and franchises for and the construction of waterworks for the purpose of supplying the city of St. Paul and its inhabitants with pure water for all public purposes.

The defendant also averred that by virtue of the authority granted by the acts of the legislature, above referred to, and by the charter granted to the city of St. Paul, the defendant had secured the right of way from the city of St. Paul to said Baldwin Lake, and by the use of mains, ditches and pumps it had drawn and was drawing from that lake and was bringing to the city of St. Paul water for the use of the city and its inhabitants, and that the defendant and the city of St. Paul are the owners in fee simple of a large tract of real estate bordering on Lake Baldwin, upon which lands it had erected buildings and placed therein pumps, etc., for the purpose of drawing water from that lake for the purpose of supplying the city of St. Paul with water.

Other averments were made not material to be here mentioned.

The defendant claimed the right to take the water from Baldwin Lake and conduct the same to the city of St. Paul for the use of said city and its inhabitants, (without making any compensation or payment therefor to the plaintiff,) by reason of the legislative authority above mentioned.

A similar answer was put in by the defendant in the case of the St. Anthony Falls Water Power Company.

Replies to these answers were put in by the plaintiffs in error taking issue on the matters of fact therein alleged.

Upon these pleadings the two actions came on for trial in the state court and were tried together. Evidence was given upon the part of the plaintiffs tending to support the allegations of the complaints, and after the plaintiffs had rested, the defendant moved that the actions should be dismissed on the ground that there was no liability on the part of the defendant to either of the plaintiffs, because the Mississippi River was a navigable river, its beds and its waters being owned by the State of Minnesota, and that the board of water commissioners, defendant herein, was a part of the city government of the city of St. Paul, authorized by the legislature to draw water from any of the lakes of the State for the purpose of supplying water to the city of St. Paul; that the defendant acted as agent of the State and in the name of the State, supplying the citizens of the State with water owned by the State, which the State had a right to use for that purpose, and that such right was paramount to the rights of any riparian owners; also on the ground that nothing but a reasonable use had been shown by the defendant as riparian owner of land on Lake Baldwin; also that plaintiff's dams are a purpresture, and that plaintiffs can have no right to the use of water obtained in that way; also that their riparian rights do not extend to the use of water on land not owned by them, or, as against the defendant, to power obtained which requires the flowage of land other than their own.

The motion to dismiss was granted in each case, to which the plaintiff in each case duly excepted.

Opinion of the Court.

A motion for a new trial was made before the trial court upon a case and exceptions, and the motion, after hearing counsel, was denied. The plaintiffs then appealed to the Supreme Court of the State from the order of the District Court denying plaintiffs' motion for a new trial and from the whole thereof. The Supreme Court affirmed the order and directed that the defendant should have judgment accordingly. Upon the affirmance of the judgments by the Supreme Court the plaintiffs obtained a writ of error in each case from this court, and the records are now before us for review.

Mr. Rome G. Brown for plaintiffs in error. *Mr. Charles S. Albert* was on his brief.

Mr. James E. Markham and *Mr. Herman W. Phillips* for defendants in error.

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

It is claimed upon the part of the plaintiffs in error that by the decision of the court below they have been deprived of their property without due process of law. They urge that they have certain rights as riparian owners of land near St. Anthony Falls, bordering upon the Mississippi River, to the use of all the water as it would naturally flow past their land, and that this right is property; that its existence and extent are to be determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a state court, and that being property it cannot be taken away or impaired either by other private owners or by the State, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights, it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the state tribunal, the question is now open for review by this court.

If wrong in their above claim the plaintiffs in error then urge that if it be assumed that the State originally had the power to make a diversion of some portion of the water in the Mississippi River for the purpose of supplying the city of St. Paul with water, yet that through the action of the territorial legislature in 1856, in granting these plaintiffs in error their charters, with the powers and rights therein named, the Territory gave and released to plaintiffs in error the right to use all of the water naturally flowing in the river past their lands for the purpose of power free from the right of any subsequent territorial or state legislature to divert the waters in the manner complained of herein without making compensation.

These charters are claimed by the plaintiffs in error to be contracts, the obligations of which no subsequent legislature could impair, and it is argued that the act of 1881 and the subsequent acts amendatory thereof, granting to the defendant in error a right to use water for the purposes therein named, do impair the obligations of these contracts, and therefore are absolutely void.

They also urge that, even if their riparian rights are to be governed by the general rules of law laid down by the highest court of Minnesota, it will be found that the former decisions of that court upon that subject have fixed in plaintiffs the property rights which they here claim, and that this court should not be bound by the last decision of the state court upon the question, as evidenced by the judgment under review, because it is wholly inconsistent and at war with all the prior decisions of the state court, and ought not to be followed.

These contentions on the part of the plaintiffs in error are now to be examined.

(1) In regard to the first proposition, we are of opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original States and those which were subsequently admitted

to the Union under the provisions of the Federal Constitution. The provisions of the act of Congress, already cited, (act of February 26, 1857, c. 60, § 2, 11 Stat. 166,) making the Mississippi River a common highway for the inhabitants of the State and all other citizens of the United States, do not impair the title and jurisdiction of the State over the navigable waters within her boundaries more than rights of that nature are limited with regard to the original States. This has been uniformly held, and is so stated in many of the cases hereinafter cited where similar language has been used in the acts admitting States into the Union.

Preliminarily, it may be said that the Mississippi River at the point in question is a navigable stream. In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream. One witness for the plaintiffs in error said that in its natural state the river at this point was not navigable at ordinary stages of the water for half a mile below St. Anthony Falls, and in its natural state it was not navigable immediately above the falls, but that it was navigable in its natural state above Nicollet Island. He also stated that when he said the Mississippi River was not navigable at these falls, he meant that it was not navigable for boats; that boats could not go up and down in its natural condition; that it was always used for logs with chutes that are artificially prepared. It was navigable below the rapids and navigable above the rapids, and that the dam made it so. It was navigable above the rapids for the purpose of running shallow boats and for floating logs. What is said hereafter in regard to the river is based upon the really unquestionable fact that it is a navigable river at all points referred to in these records.

In *Martin* v. *Waddell*, 16 Pet. 367, it was held that, when the American Revolution was concluded, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. The action was ejectment for 100 acres of land

covered with water in Raritan Bay in the township of Perth Amboy, in the State of New Jersey. The claim of the plaintiff was founded upon the charters of Charles II to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America, the land in controversy being within the boundaries of the charters and in the territory which now forms the State of New Jersey. Those letters patent, as construed by this court, conveyed to the Duke of York all the prerogatives and powers of government residing at the time of their execution in the King of Great Britain, and passed from the jurisdiction of Great Britain to the people of each State after the Revolution. Although the question in that case arose in regard to lands covered with water in Raritan Bay, yet the principles upon which the case was decided have been stated to apply to the rights of the States in regard to all navigable waters within their jurisdiction.

In *Pollard* v. *Hagan*, 3 How. 212, the question arose in regard to the rights of the State of Alabama in the shores of navigable waters and the soils under them within her limits. The sixth section of the act of Congress, passed on the 2d of March, 1819, 3 Stat. 492, c. 47, for the admission of the State of Alabama into the Union, provided: "That all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost or toll therefor, imposed by said State." It was held that the Government of the United States did not by reason of that enactment possess any more power over the navigable waters of Alabama than it possessed over the navigable waters of other States under the provisions of the Constitution, and that Alabama had as much power over those navigable waters as the original States possessed over the navigable waters within their respective limits. It was also held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the States respectively, and the new States had the same rights, sovereignty and jurisdiction over the subject as the original States.

In *Goodtitle* v. *Kibbe*, 9 How. 471, the decision of this court in *Pollard* v. *Hagan*, *supra*, was referred to and affirmed, and it was said that, by the admission of the State of Alabama into the Union, that State became invested with the sovereignty and dominion over the shores of the navigable rivers between high and low water mark, and that after such admission Congress could make no grant of land thus situated.

In *Barney* v. *Keokuk*, 94 U. S. 324, it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the States within which the lands were included. Mr. Justice Bradley, in stating the opinion of the court in that case, said (at page 338): "And since this court in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view *depended, as most cases must depend, on the local laws of the States in which the lands were situated.* In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

It was also said by the same learned justice in speaking of the English idea of navigable waters being necessarily tide waters: "It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States them-

selves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard's Lessee* v. *Hagan*, 3 How. 212, and *Goodtitle* v. *Kibbe*, 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters."

In *St. Louis* v. *Myers*, 113 U. S. 566, this court held that the act of March 6, 1820, 3 Stat. 545, admitting the State of Missouri into the Union, left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The act of Congress providing for the admission of Missouri into the Union, act of March 6, 1820, c. 22, 3 Stat. 545, and which declares that the Mississippi River shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law."

In *Packer* v. *Bird*, 137 U. S. 661, it was held, that as the highest court of California had decided that the Sacramento River being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court would accept that decision as expressing the law of the State. That case asserted the right of each State to determine the extent of the title and of the rights of the riparian owners in waters within the territory of the State. It was also stated that the Federal courts must construe grants of the General Government without reference to the rules of construction adopted by the States for grants by them, but that whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams, would be determined by the States in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. It was further said that: "As an incident of such ownership the right of the riparian owner, where the waters are above the influence of

the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

In *Hardin* v. *Jordan*, 140 U. S. 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the State in which the lands lie, and that it depends upon the law of each State to what extent the prerogative of the State to lands under water shall extend. In the opinion, after stating that the title to the shore and lands under water is in the State and is regarded as incidental to its sovereignty, it is said: "Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas (of land) so reclaimed are occupied by cities and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce and subjecting the lands to the necessities and uses of commerce" (citing cases). Continuing, the court said: "This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends upon the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised."

Mr. Justice Brewer, in his dissenting opinion (p. 402) in the above cited case, which was concurred in by Mr. Justice Gray and Mr. Justice Brown, agreed: "That the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnish the best and the final authority." And the dissent was based upon the theory that although the right of the State to determine this matter was not questioned in the prevailing opinion, there was, nevertheless, error committed by the majority of the court in refusing to follow a decision of the state court on the very question then under review, and in following instead thereof previous decisions of the state court inconsistent therewith.

In *St. Louis* v. *Rutz*, 138 U. S. 226, 242, cited in the dissenting opinion above referred to, it was said by Mr. Justice Blatchford, in delivering the opinion of the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois."

In *Kaukauna Water Power Company* v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, Mr. Justice Brown, in delivering the opinion of the court, said at page 271: "It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the centre or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels (citing cases). In *City of Janesville* v. *Carpenter*, 77 Wisconsin, 288, 300, it is said of the riparian owner: 'He may construct docks, landing places, piers and wharves out to the navigable waters, if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless he injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his pri-

vate property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use.' With respect to such rights, we have held that the law of the State, as declared by its Supreme Court, is controlling as a rule of property."

In *Shively* v. *Bowlby*, 152 U. S. 1, it was again said that the new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions. It was also remarked that, upon the question, how far the title of the owner of the land extends bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The suit was in the nature of a bill in equity brought to quiet title to lands below high-water mark in the city of Astoria, the question involving the rights in navigable waters as between the State and others. The opinion at page 57 states as follows: "By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court above referred to, the law of Oregon governs the case." The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the States to decide as to the character and extent of the riparian rights of owners upon navigable waters within such States.

It is true that in these various cases the exact point in controversy in this case in regard to the rights of the State as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as be-

tween the United States or the State and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the right of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review.

(2) It is claimed, however, by the plaintiffs in error that this judgment is the only case in the State where the ruling made therein has been adopted, and that this particular judgment is at war with and opposed to every other ruling upon the subject heretofore made by the Supreme Court of that State; and they contend that upon the authority of *Hardin* v. *Jordan*, *supra*, this court should disregard the judgment of the state court in this case and follow the previous decisions of that court on this subject. As to the case of *Hardin* v. *Jordan*, it may be said that it went as far as this court ought to go in refusing to follow the latest decision of the highest court of a State in regard to a matter upon which the judgment of that court is regarded as conclusive. It will be observed, however, that the decision in *Hardin* v. *Jordan*, in refusing to follow the ruling of the Supreme Court of Illinois, in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509, was placed upon the asserted fact that such ruling of the Supreme Court of Illinois was not necessary to the decision of the case, and that, being opposed to the entire course of the previous decisions of that State, it should be disregarded. It is not so here. The ruling of the state court was necessary to the decision of this case and stands as the latest, if not the only, exposition

of the views of that court upon the question involved. We ought, therefore, to follow that case.

However, with regard to the decisions of the state court upon this subject, cited by counsel for the plaintiffs in error, we think there is not one of them which is inconsistent with the decision of that court in the cases now under review. The question did not arise in any of them upon the right of the State as against plaintiffs in error, or any one in like situation, to divert a portion of the flow of the water in the Mississippi River to any public purpose so long as it did not interfere with the navigation of the river.

The cases of *Schurmeier* v. *St. Paul & Pacific Railway*, 10 Minnesota, 82; *Brisbine* v. *St. Paul & Sioux City Railroad*, 23 Minnesota, 114; *Morrill* v. *St. Anthony Falls Water Power Co.*, 26 Minnesota, 223; *Minnesota* v. *Minneapolis Mill Co.*, 26 Minnesota, 229; *Union Depot &c.* v. *Brunswick*, 31 Minnesota, 297; *Hanford* v. *St. Paul & Duluth Railroad*, 43 Minnesota, 104; and *St. Anthony Falls Water Power Co.* v. *Minneapolis*, 41 Minnesota, 270, are cited to sustain the contention of the plaintiffs in error.

An examination of these cases shows that the question did not arise and was not decided in any of them. Some of the cases relate to the question as to what was the proper boundary, high or low water mark, of lands mentioned therein, and in others the question arose as to the riparian right of owners of lands adjoining the Mississippi River to build piers or docks out to the navigable portion of the stream, or to fill up and build upon a portion of the river out to its navigable part; or it was a question of the right of a riparian proprietor to compensation from a railway company seeking to condemn for the purposes of its railway a certain portion of land owned by him between the centre of a street and the centre of the channel of the river. In none of the cases was there involved the right of the State to divert for public purposes a portion of the flow of a river, while not in the slightest degree or in any way affecting the navigability of the stream.

In *Union Depot &c.* v. *Brunswick* and in *Brisbine* v. *St. Paul &c. Company*, *supra*, substantially the same questions

arose, and in the latter case, in speaking of some of the riparian rights of an owner upon the banks of a navigable stream, the court said:

"What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi River, we regard as fully and correctly settled by the Federal Supreme Court. *Dutton* v. *Strong*, 1 Black, 23; *Railroad Company* v. *Schurmeier*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497. According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves and piers, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belong to him as riparian owner of the abutting premises were valuable property rights, of which he could not be divested without consent, except by due process of law, and, if for public purposes, upon just compensation. *Yates* v. *Milwaukee*, 10 Wall. 497."

In *Union Depot Street Railway* v. *Brunswick and others*, 31 Minnesota, 297, it was held to be the settled law of Minnesota that a riparian owner upon a navigable stream has the fee to low-water mark; and that in addition he owns as an incident to his ownership certain riparian rights, among which are the right to enjoy free communication between his abutting premises and the navigable channel of the stream, to build and maintain suitable piers, landings or wharves on and in front of his land, and to extend the same therefrom into the stream to the point of navigability even beyond low-water mark, and to this extent exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights

the court held to be property, and that they were not to be taken by the State without paying just compensation therefor. The rights which were held subordinate only to the paramount public right of navigation were those mentioned by the court, and not a word was said as to the right of flowage, which was not involved and was not alluded to.

In *Morrill* v. *St. Anthony Falls Water Power Company*, *supra*, the Supreme Court of Minnesota held that the riparian owner of lands upon a navigable stream may use the water flowing past his land for any purpose, so long as he does not impede navigation, in the absence of any counterclaim by the State or the United States. It will be seen that this case does not refer to the right to receive the full amount of the natural flowage from above, but only to the right to use that which does flow, in the absence of any counterclaim by the State or the United States.

The same general statement of the rights of riparian owners is made in *Hanford* v. *St. Paul & Duluth Railroad*, *supra*. That case treats of the rights of a riparian owner in the bed of the stream above low-water mark as subject to the right of the public to use the same for the purposes of navigation, and adds that "restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. . . . Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers and wharves into the water and up to the point of navigability for his own private use and benefit (citing cases). . . . And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed." It is also said in the course of the opinion: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right."

All this was said in regard to the case then under discussion, which related to the right of a riparian proprietor to reclaim the submerged land to the point of navigability, and to alienate the same so that the alienee might have the rights of the riparian owner, although having no interest in the original riparian estate. The question here involved was neither decided nor considered.

In *Schurmeier* v. *St. Paul & Pacific Railroad Company*, 10 Minnesota, 82, which was affirmed in 7 Wall. 272, it was held that the grantee from the United States had his line bounded by the river, at least to low-water mark, and when after the grant was made to him he platted it into blocks as part of the town of St. Paul that he still retained in the land over which the streets and landing were laid the fee, subject only to the use of the public for the purposes designated, and that the railroad company, having no legal authority to use the streets or landing for railroad tracks, and such use being a special injury to the plaintiff, he was entitled to an injunction. In that case Mr. Chief Justice Wilson, in the state court, was of the opinion that the riparian proprietor went to the middle of the river; that that was the rule at common law, and, in his opinion, there was no reason to doubt that the common law prevailed in Minnesota as to that question; but while so holding, as his individual opinion, he said that other authorities regarded the boundary line of the riparian proprietor to be low-water mark, and even on that assumption the place in dispute was within the title of the riparian proprietor.

The state court subsequently decided that the title of a riparian owner on a navigable stream went only to low-water mark.

St. Anthony Falls Water Power Company v. *City of Minneapolis*, *supra*, does not decide the point contended for by the plaintiffs in error. It was a contest between private parties as to the effect of a certain deed in reserving rights to the grantor and as to the extent of the right of flowage contained in the deed. The question here under discussion was not even remotely affected.

We have looked in vain among all the cases in the state court, cited by counsel for the plaintiffs in error, for any decision upon this question. Whatever may be the rights of the plaintiffs in error under their charters or as the riparian owners of land to build and maintain their dams to the centre of the stream, there is no decision cited which holds that they are entitled to the use of all the water which would naturally flow past their lands and over their dams so constructed, nor has the state court decided that the only right of the State, to which this alleged right of the plaintiffs in error is subject or subordinate in any way, is limited to the right of the State to control or use the bed of the stream and the waters therein for purposes of navigation only. That limitation has never been placed upon the State with reference to the point here in question. The state Supreme Court in deciding this particular case was not therefore announcing a rule which was at all inconsistent with or opposed to any of its former decisions; and as the extent of the riparian rights in this case was a subject committed to the jurisdiction of the State of Minnesota, we are bound, so far as this question is concerned, to follow the decision of the highest court of that State as announced in this case.

(3) If wrong in their above contentions, the plaintiffs in error then assert that their charters granted in 1856, and set forth so far as material in the foregoing statement of facts, gave and guaranteed to them the right to use and develop the water power of St. Anthony Falls, and authorized them to build such structures in and upon the river as were necessary to develop that power, and that when these provisions of their charters were accepted and acted upon, they became contract obligations between the State of Minnesota and the plaintiffs, and that the statute above mentioned, authorizing the defendant to divert some portion of the natural flow of the water without compensation to the plaintiffs, was a violation of the Federal Constitution, as impairing the obligation of the contracts contained in the charters referred to.

We think this contention cannot be maintained. We are of opinion that the true construction of these territorial

charters does not give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies, under which they were licensed to build their dams out into the river for the purpose of utilizing the power, and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the State as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the General Government under the Constitution of the United States. See also upon this subject, *Watuppa &c. Co.* v. *Fall River*, 147 Mass. 548; *City of Auburn* v. *Union Waterpower Co.*, 38 Atlantic Rep. 561, Supreme Court of Maine, Oct. —, 1897. There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the State as above mentioned. The claim made by the companies seems to us most extravagant. The State or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters assumes the power of a territorial or state legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character, (which, under the decision of this court in *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, is at least doubtful,) it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not to be thus construed. The sections of the acts which are material upon this point simply authorize the companies to maintain their dams and sluices,

and permit them to construct and maintain other dams, etc., for the purpose of manufacturing, or for improving any water power owned or possessed by the companies, in such manner or to such extent as shall be authorized by the directors. But there is no language in the acts providing that the companies shall thereafter and always have the right to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. They may have acquired by these acts the right to build dams, etc., and the right to use such water as in fact and from time to time should flow down to their dam, but there is nothing in the language of the charters showing or implying that it was the intention of the State to grant to these parties the rights now claimed by them. It is difficult to believe that a legislature would ever grant to individuals or companies rights of that nature, even if it be assumed it had the power. It was proper and in accordance with a wise public policy to grant a privilege to these companies to build dams, etc., as stated in the charters, and to permit them, by virtue of the dams and sluices, to use the water that in fact and from time to time might come down the river, but it cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the State for any public purpose, without compensating the plaintiffs for that diversion.

In *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 80, this court held, that by the law of Pennsylvania the Delaware River was a public navigable river, held by its joint sovereigns (the States bordering thereon) in trust for the public; that riparian owners in that State had no title to the river, or any right to divert its waters, unless by license from the States; that such license was revocable and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly, or by a corporation created for that purpose; and that the proviso to the provincial acts of Pennsylvania and New Jersey of 1771 did not operate as a grant of the usufruct of the waters of the river to Adam

Hoops and his assigns, but only as a license or toleration of his dam. It appeared in this case that the plaintiffs in error, being plaintiffs below, were the owners of certain mills in Pennsylvania opposite the city of Trenton in New Jersey; that the mills were supplied with water from the Delaware River by means of a dam extending from the Pennsylvania shore to an island lying near and parallel to it and extending along the rapids to the head of tidewater. The plaintiffs claimed that by virtue of a proviso in the acts of the provincial legislatures of Pennsylvania and New Jersey, their predecessors had become entitled to the free and uninterrupted enjoyment of the river Delaware for the use of their mills, and that, notwithstanding, the defendants had erected a dam in the river above plaintiffs' mills and had dug a canal and diverted the water to their great injury. A demurrer was interposed, upon which the court below gave judgment for the defendants, and this court was asked to review and reverse that judgment. It was held that the proviso was nothing more than a license to keep the dam up, which could at any time be revoked.

A careful consideration of the acts in question persuades us that they are not to be construed as plaintiffs claim, and that under them the plaintiffs took no contract rights which have been impaired in any degree by the subsequent acts under which defendants claim the rights set up in their respective answers.

These views lead us to the opinion that the judgments of the Supreme Court of Minnesota in these cases are right, and they are, therefore,

Affirmed.

UNITED STATES *v.* CROSTHWAITE.

APPEAL FROM THE COURT OF CLAIMS.

No. 77. Submitted November 1, 1897. — Decided November 29, 1897.

Attorneys and counsellors specially employed to render legal services for the United States cannot, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by Rev. Stat. § 365; and if he fails or refuses to give such certificate, Congress alone can provide for compensation.

One who receives a commission as special assistant to a District Attorney for particular cases, or for a single term of court, or for a limited time, is not an Assistant District Attorney within the meaning of Rev. Stat. § 365, and therefore the certificate of the Attorney General prescribed therein is a prerequisite to the allowance of compensation.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Pradt for appellants.

Mr. John C. Chaney and *Mr. John R. Garrison* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an appeal from a judgment against the Government in the Court of Claims for the sum of three hundred dollars, which was found to be the value of certain services rendered by the appellee, as a special assistant to the attorney of the United States for the District of Idaho, at a called term of the Circuit Court.

The facts found by the Court of Claims, and upon which the appellee's claim for compensation depends, may be thus summarized:

On the 22d of June, 1892, the appellee, an examiner in the Department of Justice, received from the Attorney General an order directing him to discontinue the investigations then being made by him in Utah, and proceed at once to Idaho for

the purpose of conferring with the author of a certain confidential communication which had been received by the Department of Justice. The order also directed him to examine the offices and accounts of the United States Attorney, the United States Marshal, the clerk of the United States court and the United States Commissioners, investigate the manner in which business was conducted by those officers, inform himself as to the character and qualifications of the various officials and report to the Department the results of his examination.

While thus engaged in Idaho the plaintiff received by telegraph, August 9, 1892, an order from the Acting Attorney General of the United States, directing him to "report to and assist the United States Attorney at a special term to be called by Judge Beatty at Cœur d'Alene City, Idaho."

On the 13th of August, 1892, he was appointed by the Acting Attorney General "a special assistant to the attorney of the United States for the District of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Cœur d'Alene for August 3d, 1892." The order of appointment stated: "Your compensation will be determined by the Attorney General upon completion of your service. Execute the customary oath of office and forward the same to this department without delay."

It should be stated that on the 14th day of August, 1892, while at Boise City, and after his above appointment had been made, but before receiving notice thereof, the appellee mailed to the Attorney General an official communication in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said: "I will proceed to Wallace tomorrow for the purpose of preparing the cases for trial, and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly. In order that no question may be raised by the defence as to my status, and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as

a special assistant to the United States Attorney, without compensation, for these cases."

The plaintiff took the required oath of office and performed the duties assigned to him. He appeared on behalf of the United States before the United States Commissioner at Wallace, Idaho, for the purpose of having him "discharge" a large number of rioters who had been held to appear before that officer, examined witnesses before the grand jury, rendered daily service at the trial of the cases "and generally rendered the professional assistance of an Assistant District Attorney from the 23d of August, 1892, to the 28th of September, 1892." He performed also his duties as Examiner of the Department of Justice.

At the time of rendering service as special assistant to the District Attorney he was receiving in his capacity as an examiner in the Department of Justice a salary of $2500 per annum. He was also reimbursed for his travelling expenses during the time he acted as special assistant to the District Attorney.

Upon the conclusion of his services as above stated, the appellee, although he had suggested that his appointment should be without compensation, sent to the Attorney General a statement of his services, as special assistant to the District Attorney, saying: "I send this statement to you, considering that it is necessary, if it shall be determined that I shall be compensated for the services performed as ass't U. S. att'y. I have left the amount to be inserted at the Department in accordance with your action thereon." But the Attorney General expressed his surprise that the appellee should claim special compensation and refused to fix any compensation for his services, saying, in a communication to the plaintiff: "As an examiner of this department you receive $2500 a year and expenses, and what you have been doing is clearly within the line of your duty in the premises."

The question as to the employment of special counsel on behalf of the United States has frequently been the subject of legislation by Congress.

By the second section of the act of August 2, 1861, entitled

"An act concerning the Attorney General and the attorneys and marshals of the several districts," 12 Stat. 285, c. 37, it was provided "that the Attorney General be, and he is hereby, empowered, whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counsellors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant counsel the amount of compensation."

This section was repealed by the act of March 3, 1869, making appropriations for the Legislative, Executive and Judicial expenses of the Government for the fiscal year ending June 30, 1870, c. 121, 15 Stat. 283, 294. But by the act of April 10, 1869, entitled "An act concerning the Attorney General," the above act of March 3, 1869, was itself repealed, so far as it repealed the second section of the act of August 2, 1861, and that section was declared to be in full force; and it was made the duty of the Attorney General to report "at the commencement of the next session of Congress, and to each succeeding session, the names of all the persons employed for the purposes aforesaid, and where and upon what business employed, with the compensation paid to each." 16 Stat. 46, c. 25.

Next came the act of June 22, 1870, establishing the Department of Justice, 16 Stat. 162, 164, c. 150, the sixteenth and seventeenth sections of which were preserved and reproduced in the following sections of the Revised Statutes:

"Sec. 363. The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

"Sec. 364. Whenever the head of a Department or Bureau gives the Attorney General due notice that the interests of the United States require the service of counsel upon the

examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney General shall provide for such service.

"SEC. 365. No compensation shall hereafter be allowed to any person, beside the respective District Attorneys and Assistant District Attorneys, for services as an attorney or counsellor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the District Attorneys.

"SEC. 366. Every attorney or counsellor who is specially retained under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney General, or to some one of the District Attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the District Attorneys, and shall be subject to all the liabilities imposed upon them by law."

The object of these statutory provisions is manifest. While giving the Attorney General full power to employ counsel for the United States to assist those upon whom regularly devolved the duty of representing the Government in the courts without special compensation, Congress intended to restrict the exercise of that power to the extent indicated in section 365. It was left to that officer to determine whether the public interests required the employment of special counsel. But that the discretion given to him might not be abused, and that unnecessary expense might be avoided, it was declared (§ 365) that, except in the cases of the respective District Attorneys and Assistant District Attorneys, no compensation should be allowed to any person, as an attorney or counsellor for the United States, unless specially authorized by law, and then *only* on the certificate of the Attorney General that such services were actually rendered, and that the same could

not have been performed by the Attorney General, or by the Solicitor General, or by the officers of the Department of Justice, or by the District Attorneys. The giving of such a certificate was thus made a condition of the right of the court to give judgment, as upon contract, against the Government for any amount whatever as compensation for legal services rendered in its behalf by counsel specially employed or retained by the Attorney General to assist those whose duty it is to represent the United States in its legal business. Attorneys and counsellors specially employed to render legal services for the United States cannot, therefore, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by section 365 of the Revised Statutes. In accepting such employment they take the risk of that officer giving such a certificate as ought to be given. If he fails or refuses to give the required certificate, Congress alone can provide for compensation. The courts cannot disregard the express command of the statute forbidding compensation to be allowed for legal services rendered by special counsel when the claim therefor is not accompanied by the prescribed certificate of the Attorney General.

This construction of the statute necessarily requires a reversal, with direction to render judgment for the United States, unless it be held that the plaintiff, while acting under his commission as "a special assistant to the attorney of the United States" during a single term of the Circuit Court of the United States for the District of Idaho and mainly for a particular class of cases, was an Assistant District Attorney within the meaning of the words in section 365, "beside the respective District Attorneys and Assistant District Attorneys;" for, in the cases of the officers last named, no formal certificate is required from the Attorney General. But we cannot so interpret the statute. The Assistant District Attorneys referred to in that section are those who are regular Assistant District Attorneys, serving the Government at fixed salaries, and employed not for special cases or particular legal business, nor for a specified term of court, but generally and regularly for all the business of the Government that may arise in the courts

of the district in which they serve. This interpretation finds support in many appropriation acts. In the Sundry Civil Appropriation Act of October 2, 1888, c. 1069, 25 Stat. 505, 545, the distinction is made between "regular Assistants to United States District Attorneys, who are appointed by the Attorney General at a fixed annual compensation," and "assistants to United States District Attorneys in special cases." This distinction has been made in subsequent appropriation and deficiency acts. 25 Stat.; October 19, 1888, c. 1210, pp. 565, 585; March 2, 1889, c. 411, pp. 939, 977: 26 Stat.; August 30, 1890, c. 837, pp. 371, 409; September 30, 1890, c. 1126, pp. 504, 528, 548; March 3, 1891, c. 540, pp. 862, 892; March 3, 1891, c. 542, pp. 948, 986: 27 Stat.; July 28, 1892, c. 311, pp. 282, 311; August 5, 1892, c. 380, pp. 349, 386; March 3, 1893, c. 208, pp. 572, 609; March 3, 1893, c. 210, pp. 646, 661, 668: 28 Stat.; April 21, 1894, c. 61, pp. 58, 61; August 18, 1894, c. 301, pp. 372, 416; March 2, 1895, c. 189, pp. 910, 957: 29 Stat.; c. 33, pp. 17, 26; June 8, 1896, c. 373, pp. 267, 297, 310, 313; June 11, 1896, c. 420, pp. 413, 450.

We are of opinion that the better construction of section 365 is that one who receives a commission as special assistant to the District Attorney for particular cases, or for a single term of the court, or for a limited time, is not an Assistant District Attorney within the meaning of that section; and therefore the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation. Any other construction of the statute would defeat the object of its passage, which was to protect the Treasury from the expense incident to the employment of special counsel, where the Government did not have the assurance of the head of the Department of Justice, in the form of a certificate, that the services to be rendered were actually rendered and could not be performed, either by himself or by the Solicitor General, or by some officer of that Department, or by the proper District Attorney. In this view it was error to have rendered judgment against the Government.

Reversed, with directions to dismiss the action.

Counsel for Parties.

WILLIAMS *v.* UNITED STATES.

WILLIAMS *v.* UNITED STATES.

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

Nos. 266, 267. Argued October 27, 1897. — Decided November 29, 1897.

The illegal acts described in subdivisions 1 and 2 of Rev. Stat. § 3169, for the alleged violation of which the plaintiff in error was prosecuted, refer to offences committed by officers or agents acting under authority of revenue laws.

The Chinese Exclusion Acts have no reference to the subject of revenue, but are designed to exclude persons of a particular race from the United States, and an officer employed in their execution has no connection with the Government revenue system.

When an indictment properly charges an offence under laws of the United States, that is sufficient to sustain it, although the prosecuting representative of the United States may have supposed that the offence charged was covered by a different statute.

The transactions referred to in the two indictments were of the same class of crimes or offences, and there was no error in consolidating them at the trial.

The affidavit and the bank book referred to in the opinion of the court, were not admissible in evidence against the accused, as, on the face of the transactions, there was no necessary connection between them and the charges against him.

The estimate placed upon the character of a government employé by the community cannot be shown by proof only of the estimate in which he is held by his coemployés.

It was highly improper for the prosecuting officer to say in open court in the presence of the jury, under circumstances described in the opinion of the court, that while Mr. Williams was investigating the Chinese female cases, there were more females sent back to China than were ever sent back, before or after.

THE case is stated in the opinion.

Mr. George D. Collins for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

Opinion of the Court.

Mr. Justice Harlan delivered the opinion of the court.

By an indictment returned in the District Court of the United States for the Northern District of California, it was charged that the plaintiff, an officer of the Department of the Treasury, duly appointed and acting under the authority of the laws of the United States, and designated as Chinese inspector at the port of San Francisco, and by virtue of his office being authorized, directed and required to aid and assist the collector of customs of that port in the enforcement of the various laws and regulations relating to the coming of Chinese persons and persons of Chinese descent from foreign ports to the United States, "did then and there, as such officer, wilfully, knowingly, corruptly and feloniously, for the sake of gain and contrary to the duty of his said office and by color thereof, ask, demand, receive, extort and take of one Wong Sam, a Chinese person, a certain sum of money, to wit, one hundred dollars, which said sum of money was not due to him, the said Richard S. Williams," and which he was not, "by virtue of his said office, entitled to ask, demand, receive or take" — that is to say, that "on the thirty-first day of August, in the year of our Lord one thousand eight hundred and ninety-five, there arrived at the port of San Francisco aforesaid from a foreign port or place, to wit, the port of Hong Kong, in the Empire of China, a male person of Chinese descent, to wit, one Wong Lin Choy, who claimed to the collector of customs that he was entitled to land, be and remain within the United States, on the ground that he was a native born of said United States; that thereafter such proceedings were had and taken before said collector of customs in accordance with law that the said Wong Lin Choy was by said collector of customs adjudged to be entitled to and permitted to land at said port as a native born of said United States of Chinese descent, and to be and remain in the said United States; that thereafter . . . on the eighteenth day of September, 1895, . . . the said Richard S. Williams corruptly and extorsively, for the sake of gain and contrary to the duty of his said office and under color thereof,

did extort, receive and take of said Wong Sam, who was then and there interested in the application or claim of said Wong Lin Choy as aforesaid, a sum of money, to wit, the sum of one hundred dollars as aforesaid, the said Richard S. Williams, under color of his said office, having previously, to wit, on the thirty-first day of August, 1895, at said city and county, State and district aforesaid, feloniously and corruptly obtained and exacted a promise from said Wong Sam for the payment thereof by him, to him the said Richard S. Williams, by then and there falsely and corruptly representing to the said Wong Sam that without the payment thereof to him, the said Richard S. Williams, the said Wong Lin Choy would not be permitted to land at said port, be or remain within the United States, but would be returned to said foreign port from whence he came, against the peace and dignity of the United States of America," etc.

A second count — describing the official character and duties of Williams as in the first count — charged that he wilfully and corruptly, and under color of his office did "take and receive of one Wong Sam, who was then and there interested in the claim of one Wong Lin Choy to be permitted to land at the port of San Francisco aforesaid, a sum of money, to wit, one hundred dollars, as and for a fee, compensation and reward to him, the said Richard S. Williams, for the services of him, the said Richard S. Williams, under color of his said office, in the matter of the application of said Wong Lin Choy, who then and there claimed to the collector of customs of said port to be entitled to land at said port of San Francisco from a foreign port, to wit, the port of Hong Kong, in the Empire of China, and to be and remain in the United States under the claim that he was a native, born in the said United States, which said application was then and there pending and under investigation before said collector of customs as aforesaid, whereas in truth and in fact no fee, compensation or reward was then or at any other time due or owing from the said Wong Sam or any other person to the said Richard S. Williams for such service or any services of him, the said Richard S. Williams, in connection with said matter or at all, nor was he, the said

Richard S. Williams, entitled to the same by law, against the peace and dignity of the United States of America," etc.

A second indictment containing two counts was returned in the same court against the plaintiff in error, describing his official character and duties, and charging him in one count with having wilfully, knowingly, corruptly and feloniously, and in the second, with having wilfully and corruptly, under color of his office, taken from one Chan Ying, a Chinese person, the sum of eighty-five dollars, in consideration of his being permitted to come into and remain within the United States.

The record states that on the margin of each indictment was an indorsement in these words: "Sec. 3169, Rev. Stat. sub. 1 & 2, and sec. 23, act of Feb'y 8, 1875, vol. 1, 2d ed. Supp. Rev. Stat." This indorsement, it is contended, indicates the statutes under which the prosecutions were intended to be instituted.

A demurrer to each indictment having been overruled, the accused was duly arraigned in each case, and pleaded not guilty. The two cases were then, on motion of the Government, consolidated and tried together. The result was a verdict of guilty in each case. Judgment on the verdicts having been asked, the accused interposed a motion in arrest of judgment on the second count of each indictment, and also a motion for a new trial in each case. The first motion was sustained, and the second one having been overruled, the defendant was sentenced in each case to pay a fine of $5000, to be imprisoned for three years to date from September 22, 1896, and to be further imprisoned until the fine imposed on him was paid or until he should be otherwise discharged by due process of law.

The first question to be examined is whether these prosecutions are authorized by any existing statute of the United States. It was assumed by the learned judge who presided at the trial that the indictments were founded upon section 3169 of the Revised Statutes and section 23 of the act of February 8, 1875, c. 36, entitled "An act to amend existing customs and internal revenue laws, and for other purposes." 18 Stat. 307, 312.

Section 3169 of the Revised Statutes is part of Chapter I of Title XXXV, "Internal Revenue," and was brought forward from the act of July 20, 1868, c. 186, § 98, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." 15 Stat. 125, 165. By that section, which is given in full in the margin,[1] it is declared that "every officer

---

[1] § 3169. Every officer or agent appointed and acting under the authority of any revenue law of the United States —

First. Who is guilty of any extortion or wilful oppression under color of law; or

Second. Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward, except as by law prescribed, for the performance of any duty; or

Third. Who wilfully neglects to perform any of the duties enjoined on him by law; or

Fourth. Who conspires or colludes with any other person to defraud the United States; or

Fifth. Who makes opportunity for any person to defraud the United States; or

Sixth. Who does or omits to do any act with intent to enable any other person to defraud the United States; or

Seventh. Who negligently or designedly permits any violation of the law by any other person; or

Eighth. Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate or return; or

Ninth. Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue; or

Tenth. Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court.

or agent appointed and acting under the authority of any revenue law of the United States, first, who is guilty of any extortion or wilful oppression under color of law, or, second, who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward, except as by law prescribed, for the performance of any duty, . . . shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court."

Section 23 of the above act of February 8, 1875, provides: "All acts and parts of acts imposing fines, penalties or other punishment for offences committed by an internal revenue officer or other officer of the Department of the Treasury of the United States, or under any bureau thereof, shall be, and are hereby, applied to all persons whomsoever, employed, appointed or acting under the authority of any internal revenue or customs law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money."

We are of opinion that these prosecutions cannot be sustained under the above statutes. The words "extortion or wilful oppression under color of law," and the knowingly demanding "other or greater sums than are authorized by law," or the receiving "any fee, compensation or reward, except as by law prescribed, for the performance of any duty" —illegal acts described in subdivisions one and two of section 3169 of the Revised Statutes — refer to offences committed by officers or agents "appointed and acting under the authority of any *revenue* law of the United States." The accused, in his capacity of Chinese inspector, did not act under any law that could properly be regarded as a revenue law. He was ap-

pointed pursuant to acts of Congress appropriating money to be used by the Treasury Department "to prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully within the United States." 26 Stat.: August 30, 1890, c. 837, pp. 371, 387; March 3, 1891, c. 542, pp. 948, 968; 27 Stat.: March 3, 1893, c. 208, pp. 572, 589; 28 Stat.: March 12, 1894, c. 37, p. 41; August 18, 1894, c. 301, pp. 372, 390; January 25, 1895, c. 43, pp. 636, 637; March 2, 1895, c. 187, pp. 843, 846; March 2, 1895, c. 189, pp. 910, 932; 29 Stat.: June 11, 1896, c. 420, pp. 413, 431. The Chinese Exclusion Acts have no reference to the subject of revenue, but are designed to exclude persons of a particular race from the territory of the United States. Clearly, Chinese inspectors, proceeding under the acts providing for their appointment, have no connection with the revenue system of the Government, although the execution of the acts referred to is committed to the Treasury Department.

Nor can the prosecutions be sustained under the twenty-third section of the act of February 8, 1875. That section does nothing more than subject persons employed, appointed or acting under the authority "of any internal revenue or customs law, or any revenue provision of any law of the United States," to the same fines, penalties or other punishment for offences committed by an internal revenue officer or other officer of the Treasury, or under any bureau thereof. The words, "internal revenue or customs law," do not include the statutes providing for the exclusion of Chinese persons from this country.

But there is a statute under which, in our judgment, a Chinese inspector, guilty of extortion under color of his office, can be prosecuted and subjected to fine and imprisonment. It is section 5481 of the Revised Statutes, providing that, "Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than one year, except those officers or agents of the United States other-

wise differently and specially provided for in subsequent sections of this chapter."

It is said that these indictments were not returned under that statute, and that the above indorsement on the margin of each indictment shows that the District Attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offence under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offence charged was covered by a different statute.

That the first count of each indictment makes a case of extortion under color of office, within the meaning of section 5481, is too clear to admit of dispute. The court below, therefore, while erroneously adjudging that the prosecutions were embraced by section 3169 of the Revised Statutes and the above act of February 8th, 1875, did not err in overruling the demurrer to the first count of the respective indictments. We say nothing as to the second count in either indictment, because judgment on that count was arrested, and that action of the court is not subject to review on this writ of error. *United States* v. *Sanges*, 144 U. S. 310.

It is proper also to observe that there was error in the judgment as to the fine and imprisonment imposed upon the accused. Section 5481 of the Revised Statutes provides that the fine should not exceed $500, nor the imprisonment more than one year. If this were the only error complained of, the result would not be an entire failure of the prosecutions, for it would only be necessary for the court below to enter a new judgment, imposing such fine or imprisonment, or both, as the statute permitted.

But other errors are assigned relating to the conduct of the trial. They must be examined, because if any of them affect the substantial rights of the accused, a new trial must be the result in each case.

It is assigned for error that the District Court consolidated the two cases, and tried them at the same time and by the same jury. This objection is without merit. By section 1024 of the Revised Statutes it is provided: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." The accused having been charged with different acts or transactions "of the same class of crimes or offences," it is scarcely necessary to say that the transactions referred to in the indictments, being of the same class of crimes, could properly, that is, consistently with the essential principles of criminal law, be joined in one indictment against a single defendant without embarrassing him or confounding him in his defence. *Pointer* v. *United States*, 151 U. S. 396, 400. The plaintiff in error cites *McElroy* v. *United States*, 164 U. S. 76, as sustaining his objection to the consolidation. This is a misapprehension. The inquiry in that case was "whether counts against five defendants can be coupled with a count against part of them, or offences charged to have been committed by all at one time can be joined with another and distinct offence committed by part of them at a different time." It was held that the statute did not authorize that to be done. The Chief Justice, speaking for the court, said: "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." Here, the indictments were against the same person, the offences charged were of the same kind, were

provable by the same kind of evidence, and could be tried together without embarrassing the accused in making his defence.

If the offences could be joined in one indictment, it would follow, under the statute, that separate indictments could, in the discretion of the court, be consolidated and tried at the same time and before the same jury. Nothing in the record shows that the consolidation of these cases worked or could have worked any prejudice to the defendant.

At the trial below the Government read in evidence, over the objections of the accused, his affidavit filed in a divorce suit brought against him by Isabella M. Williams in the Supreme Court of San Francisco. That affidavit, made June 1, 1896, was as follows: "I have read the affidavit of plaintiff in reply on her motion for alimony, etc., and in reply thereto I desire to say it is untrue that prior to the time I entered the employment of the United States Government I was without means and had had no money for quite a time before, or that I had to borrow money to pay my living expenses. On the contrary, when I entered the employment of the United States Government, on or about the 28th day of September, 1893, I was worth more money then than I am at the present time, being worth about $5000, and since then having inherited some property; that the $3000 referred to in said affidavit was not acquired by me during the time I was in the employment of the United States Government, as set forth in said affidavit, but is a portion of the $5000 heretofore referred to. The statement in said affidavit that I have in my possession or had in my possession, in addition to the said sum of $3000 aforesaid, the sum of $5000 instead of $4000, is false and untrue; that, to my knowledge, plaintiff was not in the habit of carrying said sum of $5000 in the bosom of her dress. On the contrary, there was on deposit in the Hibernia Savings and Loan Society in her name, belonging to me, the sum of about $4000, which was a part of the $5000 possessed by me at the time I entered the employment of the United States Government. The $3000 in bank referred to is a portion of said sum so deposited in the name of plaintiff in the Hibernia

Savings and Loan Society. In answer to the statement contained on page 2 of said affidavit, to the effect that plaintiff paid for the piano therein referred to and the bill therefor was made out in her name, I simply desire to annex the bill for said piano to this affidavit, showing the bill to be made out in the name of R. S. Williams. The property at Nos. 420 and 422 Scott street, mentioned on page 2 of said affidavit, was acquired by my stepfather, Henry Monsferran, now deceased. He was a foreigner, unaccustomed to speaking the English language, and the details of the purchase were made by me, but the money that paid for said property was solely and exclusively the money of the said Henry Monsferran. The deed to the property was taken in his name. It is untrue that at the time plaintiff left our residence on the 29th day of April, 1896, she left said sum of $5000 in greenbacks. On the contrary, as above stated, there was no such sum, and the money referred to by her as having been drawn from the Hibernia Savings and Loan Society is $3000, so deposited in the savings bank. It is untrue, as stated in said affidavit, that I avoided the service of the summons and complaint in this action, or that by reason thereof plaintiff incurred an expenditure of $11.25."

It is stated in the bill of exceptions that, independently of that affidavit, there was no evidence whatever before the court relative to the matters therein referred to except certain bank books offered and read in evidence over the objections of the accused.

The bill of exceptions states that at the trial the prosecution offered in evidence a book of the deposit of moneys in the San Francisco Savings Union, a banking corporation of the State of California, which book and deposits were in the name of the defendant; also a book of the deposit of moneys in the Hibernia Savings and Loan Society, a banking corporation of the State of California, which latter book and deposits were in the name of Isabella M. Williams. The deposits in the San Francisco Savings Union, as evidenced by the book first mentioned, were as follows: October 29, 1893, $350; November 18, 1895, $400; December 17, 1895, $550, making a total

of $1300. The deposits in the Hibernia Savings and Loan Society, as evidenced by the bank book in the name of Mrs. Williams, were as follows: September 10, 1895, $300; September 24, 1895, $150; October 8, 1895, $800; October 23, 1895, $700; December 2, 1895, $1000, making a total of $3450.

It is stated in the bill of exceptions that these bank books and affidavit were the only evidence before the court relative to such deposits, and that there was no evidence indicating the existence of any privity or relation between the defendant and Mrs. Williams at the time the above deposits were made by her or at any other time, except as indicated in the above affidavit.

It may be also observed that when the affidavit and bank accounts were offered in evidence, no suggestion was made that the prosecution would at some stage of the trial show that the sums alleged to have been received by the accused under color of his office were part of any sum referred to in the affidavit and bank books.

The defendant duly excepted to the action of the court in allowing the affidavit and bank books to be read in evidence.

The manner in which the trial court dealt with this evidence appears from the following extracts from its instructions to the jury:

"There has been some testimony in support of the allegations of these indictments respecting the pecuniary condition of the defendant, and also testimony as to the extent of his compensation by the Government for services. This evidence was admitted in compliance with a well-known rule which establishes the relevance of evidence of this character where the charge is such as that alleged in these indictments. If the salary of the defendant, during the time alleged in the indictments and before then, was four or five dollars per day, and if the testimony shows to your satisfaction that he has deposited in bank or there was deposited to his credit in bank in the neighborhood of $4750 from September 10 to December 17, 1895, alleged in the indictments, then such testimony may be considered by you with a view of ascertaining how or by what means the defendant obtained that amount of

money at a time when his compensation by the Government, as is claimed by the prosecution, was not to exceed about $150 per month. Where did he get such large sums of money? From what source other than the source named in the indictments did he acquire this money? Has he furnished evidence explaining to your satisfaction the possession of these sums of money? These are all questions which you will consider, and if any explanation made by the defendant as to how he came by this money seems incredible, irrational and unsatisfactory you are at liberty to reject it and to act upon the other testimony in the case. If, after doing all this, you feel to a moral certainty and beyond a reasonable doubt that he took the money, as alleged in the indictments, then your verdict should be guilty. In reference to the testimony which has been introduced in the case showing the pecuniary condition of the defendant, that if testimony explaining how, when and by what means the defendant acquired possession of the sums of money shown to have been deposited in the San Francisco Savings Union and Hibernia bank could have been offered by defendant, and he failed to produce such testimony, then such failure may very properly be taken into consideration by the jury in determining the defendant's guilt or innocence. Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion may be considered, although this attitude of the case alone would not be entitled to much weight, because the burden of proof lies on the prosecution to make out the whole case by sufficient evidence; but when proof of inculpating circumstances had been produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charges. Therefore, if in this case the defendant could have produced testimony explaining his several deposits in the San Francisco Savings Union and the

Hibernia bank during the months of September, October, November and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make would have been, if made, adverse and prejudicial to the defence."

After referring to some authorities announcing the general rule that a party in omitting to produce evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for the presumption that such evidence, if adduced, would operate to his prejudice, and after referring to the affidavit made by Williams in the divorce suit, the court proceeded in its instructions: "It is the duty of the jury to ascertain from said affidavit and from the other testimony in the case what portions of the same are true. The jury is then at liberty to believe one part of it and to disbelieve the other part. Such affidavit was introduced upon the theory that it constituted an admission on the part of the defendant as to his ownership of certain funds referred to therein. The defence then insisted, as they had a right to, that the entire affidavit should be read. The whole of it is now before you, and it is for you to determine, from all of the circumstances of this case, the situation of the defendant, and all of the evidence that has been introduced, as to what portion of said affidavit, if any, is true. You are at liberty to believe or reject such portions of it as you think may be worthy of belief or disbelief. In this respect I call your attention to the deposits as they were made. . . . These deposits were made, as you will observe, at different times. In September he appears to have deposited the sum of $450; in October he deposited $1650; in November he deposited $1100, and in December, up to the 17th, he deposited $1550, making a total, as I said, of $4750; nine deposits in three months and seventeen days. Does the defendant's affidavit satisfactorily explain or account for the receipt of these sums of money?"

We are of opinion that the affidavit and the bank books were not admissible in evidence against the accused. There

was nothing before the jury in respect of the matters referred to in the affidavit except the affidavit itself, and nothing relating to the deposits except that disclosed by the affidavit and the bank books. Taking the case to be as presented by the bill of exceptions, the utmost the evidence tended to show was that the accused had in his possession at different times certain sums that were deposited by him in bank to his credit or to the credit of his wife. It is to be observed that no sum so deposited corresponded in amount with the sums which he was charged with having extorted under color of his office as Chinese inspector. Upon the face of the transactions referred to there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly five thousand dollars, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time $100, and at another $85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, *therefore*, he must be guilty of extorting the two sums in question. The present case does not come within the rule of evidence referred to by the learned court. The jury may have been unable to say from the evidence where the defendant obtained the moneys deposited in bank and specified in the bank book, aggregating $4750 between certain dates. But that did not justify the conclusion that he had, under color of his office as Chinese inspector, extorted one hundred dollars upon one occasion and eighty-

five dollars upon another occasion. The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offence imputed to him. In our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject.

Another assignment of error relates to the admission, against the objection of the defendant, of certain evidence as to character. A witness called by the prosecution was permitted to testify that the defendant's reputation "in the custom house" was bad, although he had distinctly stated, upon preliminary examination, that he did not know the general reputation of the accused "outside of the custom house." This was error. Assuming (although the record is silent on the subject) that the accused introduced evidence of his general reputation for integrity, it is clear that evidence, on behalf of the prosecution, that among the limited number of people employed in a particular public building his character was bad, was inadmissible. The prosecution should have been restricted to such proof touching the character of the accused as indicated his general reputation in the community in which he resided, as distinguished from his reputation among a few persons in a particular building. The estimate placed upon his character by the community generally could not be shown by proof only as to the estimate placed upon him by persons in the custom house.

Another assignment of error deserves to be noticed. One of the witnesses for the defence was the collector of customs for the port of San Francisco. He was asked to whom, upon his return from Washington, was assigned the investigation of female cases. The court having inquired as to the purpose of this testimony, the attorney for the accused said: "It has been sworn to by Mr. Tobin that Mr. Williams asked for certain cases to be assigned to him and show the result. We propose to show by Mr. Wise that on his return from Wash-

ington he assigned to Williams the investigation of Chinese female cases, and while Mr. Williams was acting in that behalf there were more females sent back to China than ever were sent back before or after." The representative of the Government objected to this evidence as irrelevant, saying, in open court, and presumably in the hearing of the jury, "no doubt, every Chinese woman who did not pay Williams was sent back." The attorney for the accused objected to the prosecutor making any such statement before the jury. The court overruled the objection, and the defendant excepted. The objection should have been sustained. The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offences charged.

For the several errors committed at the trial, to which we have referred, the judgment is reversed in each case, with directions to grant a new trial.

MR. JUSTICE BREWER did not hear the argument in this case and did not participate in the decision.

MR. JUSTICE BROWN concurred in the result.

NOBLES *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 376. Argued November 9, 10, 1897. — Decided November 29, 1897.

This court follows the construction given by the Supreme Court of the State of Georgia to the statutes of that State called in question in this case.

If, after a regular conviction and sentence in that State, a suggestion of a then existing insanity is made, it is not necessary, in order to constitute "due process of law," that the question so presented should be tried by a jury.

THE case is stated in the opinion.

Opinion of the Court.

Mr. Marion W. Harris for plaintiff in error. *Mr. W. C. Glenn* and *Mr. D. W. Rountree* were on his brief.

Mr. J. M. Terrell for defendant in error.

Mr. Justice White delivered the opinion of the court.

In July, 1895, Elizabeth Nobles was tried in the Superior Court of Twiggs County, Georgia, upon an indictment for murder, and was found guilty and sentenced to death. The bill of exceptions in the record now before us recites that "the said sentence of death having been regularly and legally suspended and superseded by the order of the court the case came on again to be heard before the court on the 23d day of June," the object of the hearing being, as stated, "for the purpose of passing sentence of death by the court upon the said Elizabeth Nobles in said stated case;" that is to say, in consequence of the order which had suspended the sentence of death previously imposed in July, 1895. On the date of the appearance for resentence, June 23, 1896, W. W. Baughn, the present plaintiff in error, appeared on behalf of the convict and presented a motion or petition. The paper recited that the said Elizabeth Nobles should not be sentenced —

"First, because, as petitioner avers, the said Elizabeth Nobles is now insane.

"Second, because the said Elizabeth Nobles being now insane, it is contrary to the policy of the law and is illegal that the sentence of death should be imposed upon her by the court.

"And petitioner further says that under article 14 of the amendments to the Constitution of the United States, it is provided as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Petitioner says that due process of law means law in its regular course of administration through courts of justice, and that by the Fourteenth Amendment above quoted, whilst the States have power to deal with crime within their borders, no State can deprive any person of equal and impartial justice

under the law, and that law in its regular course of administration through courts of justice, is due process, and unless the same take place through courts of justice, the constitutional requirement above quoted is nullified.

"Petitioner, therefore, specially sets up and claims the right of due process of law through its regular administration through courts of justice, under and by virtue of the constitutional guarantee under the Fourteenth Amendment to the Constitution of the United States above quoted.

"Petitioner says that it is essential to due process of law within the meaning of the above requirement that a jury be empanelled on the issue now tendered by this petition, and that trial take place before a judge of the Superior Court of the State of Georgia, according to the due and regular form of proceedings in our courts. Whenever an issue of fact is made in a Superior Court in the State of Georgia the trial of the questions thereby raised is a function of the Superior Court of the county having jurisdiction, and that the trial of the question raised by this petition is a function of the Superior Court of Twiggs County, in which said court the said Mrs. Nobles was convicted of murder.

"Petitioner further says that the proceedings contemplated under section 4666 of the Code of Georgia are not due process of law for these reasons, to wit."

The grounds alleged were eight in number, and in substance charged that the method of inquiry provided by the Georgia statutes for ascertaining whether one who had been convicted of crime was insane at the time of the inquiry was not due process of law under the Constitution of the United States, because the investigation which the law authorized was not judicial in character. The detailed enumeration of why the remedy provided by the statute was asserted in the petition not to be judicial as well as the prayer of the petition are set out in the margin.[1]

[1] "1st. Because the same does not take place in any court of this State.

"2d. Because no rules of evidence or method of procedure are prescribed in such inquisition, and no proper method for the drawing, sum-

The court refused to grant the petition, and resentenced the prisoner to the death penalty. Thereupon the petition was again presented, and upon its being again refused, exceptions were noted. The case, on the exceptions reserved, as just stated, was taken to the Supreme Court of the State of Georgia, where the action of the lower court was affirmed, and to this judgment of the Supreme Court of the State of Georgia this writ of error is prosecuted. There is no question

---

moning and empanelling a jury, and for the subpœnaing and examination of witnesses is provided.

"3d. Because no judge or presiding officer is charged with the function of ruling in or out evidence which may be tendered on said issue.

"4th. Because no judge or presiding officer is provided in said proceeding whose duty it is to instruct the jury on the law involved in the questions raised and to make rulings on evidence which may be tendered for or against the person said to be insane.

"5th. Because there is no method of moving for a new trial or of correcting any errors which may take place in said proceeding.

"6th. Because said proceeding is one not known to the common law in ascertaining the facts involved according to the settled principles of the law of the land.

"7th. Because the Supreme Court of the State of Georgia has held that the said proceeding is in no sense a judicial proceeding, but is a mere inquisition from which there is no appeal.

"8th. Because no manner of review whatever is permissible from the findings of said inquisition.

"9th. Because the proceedings before said inquisition do not take place before a court in the due course of the administration of justice. And petitioner says that the inquisition provided for a denial by the State of such due process of law as is guaranteed by the Constitution of the United States, and petitioner especially claims the privilege and right, under the United States Constitution, to have due process of law for the ascertainment of the truth of the issue now here tendered to the court.

"Petitioner further says that by the settled principles of the common law the ascertainment of the fact of sanity or insanity at any stage of the proceedings in the course of a legal investigation was a function of the trial court; that is, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or after conviction and before execution, or before or after judgment, and that the settled and orderly course of procedure was the summoning of a jury and a trial of this issue under the forms of law, by introduction of evidence under the rulings of the judge of the said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict. And petitioner says that each

raised that the statutes of Georgia do not afford adequate means for trying by court and jury any question made as to the insanity of the accused at the time of the commission of a crime.

The statute law of Georgia directly applicable to and involved in this controversy is as follows:

Georgia Code (1882), 4666; Code (1895), 1047, 1049. *Become insane after conviction:* "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the Ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found, by the inquisition of such jury, that such convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution, to the presiding judge of the district, who shall cause the same to be entered on the minutes of the Superior Court of the county where the conviction was had. And, at any time thereafter, when it shall appear to the said presiding judge, either by inquisition or otherwise, that the said convict is of sound mind, the said judge shall issue a new warrant, directing the sheriff to do exe-

---

and all and every one of these proceedings named, and also the right to the court's process for the compelling the attendance of the witnesses to testify upon said issue, as well as such other proceedings and process and rights as are usually incident to trials before the Superior Courts of the State, are essential to due process of law within the meaning of the Constitution of the United States, and petitioner now here claims the right to such proceedings under and by virtue of the Fourteenth Amendment to the Constitution of the United States.

"Wherefore, petitioner, now in behalf of the said Elizabeth Nobles, whom petitioner avers is mentally incapacitated because of her present insanity to take any legal steps in her own behalf, the premises considered, prays the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and empanelled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; and that petitioner have the right to the court's process to compel the attendance of witnesses and to such other processes as may be right and necessary, and that said sentence be postponed and suspended till the final adjudication of the question raised by this petition."

cution of the said sentence on the said convict, at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant, and other proceedings in the case to be entered on the minutes of the said Superior Court."

The provisions of this section are a reproduction in the Code of prior legislation (Georgia Acts of 1855–6, p. 36; 1859, p. 50):

Georgia Code (1882), 4666 *a*; Code (1895), 1048. *Lunatics, how disposed of:* "When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of section 4666 of the code, it shall be the duty of the judge to certify the fact, and the said convict shall be received into the lunatic asylum, there to be safely and securely kept, and treated as other adjudged insane persons."

The provisions of this section are a reproduction in the Code of an act passed in 1874. (Georgia Acts of 1874, p. 30.)

The above sections, as existing in the Georgia Code of 1882, were cited by the Supreme Court of Georgia as controlling, and the brief for the plaintiff in error also states this to be the case. We have given the corresponding sections in the Code of 1895, although such sections as reproduced in the latter Code are in three sections and are somewhat altered in phraseology, but not so as to be material to the issue before us.

In the argument at bar the contention was that these sections of the Georgia law afforded an opportunity to investigate the question of the insanity of a person convicted of crime only when the suggestion of insanity was made after conviction and sentence, and, therefore, that the statutes furnished no means of testing the question of insanity arising after conviction and before sentence, and this fact, it was asserted, amounted to a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. The construction of the statutes upon which this proposition was predicated is as follows: Although the text of section 4666 *a*, which provides for an investigation into the question

of insanity, when "any person shall, after conviction of a capital crime, become insane," is conceded to be broad enough to cover all cases arising between conviction and sentence, yet, the words "after conviction" it is urged should be construed as applying only to insanity arising after conviction and sentence, because section 4666 provides only for an investigation "after the convict shall have been sentenced." That is to say, the construction contended for, instead of treating the two sections of the code as in *pari materia*, and construing them together so as to give effect to both, restricts and limits the natural and obvious meaning of the later statute by incorporating into it the provisions of the earlier one. If the contention that the words "after sentence" in the earlier statute only apply to cases where insanity is suggested after sentence, and not to those where it is claimed to have arisen between conviction and sentence, then the provision in the subsequent section, extending the remedy to cases arising "after conviction," cured the omission, if any there was, in the first statute. Instead, then, of construing the earlier as controlling the later statute, the elementary rule of interpretation would require that the later be considered as amplifying and providing for the thing omitted in the prior statute. While these conclusions are obvious, we are nevertheless relieved from the necessity of so deciding, since the opinion of the Supreme Court of the State in the case before us expressly holds that "the provisions of the code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty." We follow the interpretation given by the Supreme Court of the State of Georgia to the statutes of that State.

Indeed, the question which arises on the record does not require a consideration of what would be due process of law under the Fourteenth Amendment where insanity was suggested between verdict and sentence, or even at the time of sentence. This results from the fact that the suggestion of insanity relied on was made, not at the time of sentence, but long after the sentence had been imposed. As stated, the bill

of exceptions recites that the accused had been sentenced to death at the term of court where the verdict of guilty was found, that is, in July, 1895, and that when called into court again, in June, 1896, it was for a resentence upon the verdict, because of the previous sentence "having been regularly and legally superseded by the order of the court." In the opinion of the Supreme Court of Georgia in this case it finds this fact and holds that under the Georgia statutes the proceeding had in June, 1896, although called a resentence, was in legal effect but a fixing of a new date for the execution of the previous sentence, the date fixed in the prior sentence having expired. In other words, the Supreme Court of Georgia holds that the prior sentence remained in force, and that the subsequent action of the court was but a mere fixing of the date for its execution. We take notice of the finding of fact, *Egan* v. *Hart*, 165 U. S. 188, and follow the legal conclusions of the court, and are bound by them, since they involve but a construction by the court of last resort of the State of Georgia of the statutes of that State regulating the effect of a resentence in case the date fixed in a former sentence has lapsed.

From these considerations it follows that the only question which we are called upon to determine is whether, after a regular conviction and sentence, a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and *quasi* judicial process is created for the purpose of investigating the suggestion. Without analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the

will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial. Nor is this so extreme a possibility that it should not be supposed, since in the argument at bar it was admitted that the sentence first imposed was suspended because the record was taken to the Supreme Court of Georgia, where the question of the existence of insanity was either directly or indirectly adversely decided.

Blackstone, it is urged, supports the proposition that at common law there was an imperative duty, on the suggestion of the insanity of a convict, to try the issue by judge and jury. The text to which reference is made is as follows (4 Bl. Com. 24, 25):

"Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he lose his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution."

And 1 Hale P. C. 34, 35, is referred to as being to the same effect. But nothing in these citations is pertinent to the issue under consideration. It is agreed that at common law an insane person was not to suffer punishment. The question here is, what, after conviction and sentence, was the method by which the existence of insanity in the convict was to be ascertained when a suggestion of such insanity was made. In speaking on this subject, Blackstone says (Book 4, p. 395):

"Another cause of regular reprieve is, if the defendant becomes *non compos* between the judgment and the award of execution: for regularly, as was formerly observed, though a man be *compos* when he commits a capital crime, yet if he

becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for '*furiosus solo furore punitur*,' and the law knows not that he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is, therefore, an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him: and if he appears to be insane, the judge, in his discretion, may, and ought to, reprieve him."

In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best. In *Laros* v. *Commonwealth*, 84 Penn. St. 200, where a suggestion of insanity was made after verdict, the court said (p. 210):

"The last three assignments of error raise a single question upon the power of the court to inquire by inspection and *per testes* into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defence to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation.

"The rights of the prisoner as an offender on trial for an offence are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of

justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."

In *Bonds* v. *Tennessee* (1827), Martin & Yerger, 142, the accused was convicted of the crime of murder, and upon being led to the bar and asked by the court if he had anything to say why sentence of death should not be pronounced against him, though his counsel alleged that he was at the time a lunatic, and that sentence could not be passed upon him, and offered to plead his lunacy in bar of the sentence, and further demanded of the court that a jury be called to try the issue of fact arising upon the plea. But the court, upon the inspection of the prisoner and upon consideration of the case — because nothing was shown to render it probable that the defendant was a lunatic, or to make that matter doubtful — refused to allow the prisoner his plea aforesaid, and denied him the privilege of a jury to try the question of his sanity or insanity, and passed upon the accused the sentence of death. In support of his claim that the right to have a jury try the plea of insanity was absolute, and that it was not a matter of choice or discretion with the court to deny the application, counsel for the accused relied upon a statement made in 1 Chitty Cr. Law, 761, to wit, that "The judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane, or merely counterfeits; and, if they find the former, he is bound to reprieve him till the ensuing session." But the reviewing court said: "The meaning of this passage, giving it a reasonable construction, must be that, if upon the question made, the judge is not satisfied, or has doubts, he may call in to his assistance the aid of a jury, and submit the matter to them. The law on this point is more fully stated in 1 Hawk. P. C. p. 3, in the notes, where it is said: 'Every person of the age of discretion is presumed of sane memory, until the contrary appears, which may be, either by the inspection of the court (1 Hale, 33; Tr. per pais 14; O. B. 1783, No. 4); by evidence given to the jury, who are charged to try the indictment, (3 Bac. Abr. 81; 1 Hale, 33, 35, 36; O. B. 1784, No. 283,) or,

being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded, returnable *instanter* in the nature of an inquest of office. (Fost. 46; Kel. 13; 1 Lev. 61; 1 Sid. 72; 4 Comm. Appen. sec. 3.) And this method, in cases of importance, doubt or difficulty, the court will, in prudence and discretion, adopt. (1 Hale, 35.)' From this it appears that inspection by the court is one of the legal modes of trying the fact of insanity, and nothing appears in the record of this case to show that the discretion of the court, in adopting the mode pursued, was erroneously exercised. This court, therefore, is of opinion that there is no error in the matter of the first bill of exceptions." (In making the foregoing quotation we have corrected what seem to be typographical errors in the extract from the marginal note to section 4, chapter 1, book first of Hawkins' Treatise, conforming it to the note as found in the sixth edition, by Leach.)

It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was, therefore, a subject within the control of the State of Georgia. Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the Fourteenth Amendment, a State is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best.

Affirmed.

Statement of the Case.

THE VICTORY & THE PLYMOTHIAN.

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

Nos. 66, 67. Argued October 28, 29, 1897. — Decided November 29, 1897.

On the facts, which are detailed in the Statement of the Case, below, respecting the navigation and the conduct of the Victory and the Plymothian just previous to the collision which caused the injuries and damage herein complained of, *Held;*

(1) That as a general rule, vessels approaching each other in narrow channels, or where their courses diverge as much as one and one half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel;

(2) That the Victory was grossly in fault, and that the collision was the direct consequence of her disregard of that rule of the road, and of her reckless navigation;

(3) That the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment; the burden of proof being upon each vessel to establish fault on the part of the other;

(4) That as the damage was occasioned by collision and was within the exceptions in the bills of lading, it rested upon the underwriters to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her, if sued alone;

(5) That the Plymothian was on her proper course, that she was not bound to anticipate the conduct of the Victory, and that she took all proper precautions as soon as chargeable with notice of risk of collision.

On the twelfth day of November, 1891, the steamers Victory and Plymothian came into collision in the Elizabeth River between Lambert's Point and Craney Island Light. The Plymothian, laden with a cargo of cotton, was outward bound. The Victory was inward bound in ballast. The Plymothian and her cargo were seriously damaged. The Victory was also damaged about the bows.

On the fourteenth of November, the master of the Victory filed a libel against the Plymothian in the District Court for the Eastern District of Virginia; and on November 27 a libel

Statement of the Case.

was filed in that court by the underwriters of the Plymothian's cargo against the Victory and the Plymothian, seeking to hold them both liable for damage thereto. The Port of Plymouth Steamship Company, owner of the Plymothian, filed a petition in said District Court on the third of December, praying for a limitation of its liability for damages growing out of the collision, and giving notice of its intention to contest its liability for any part thereof. A similar petition was filed the same day by MacIntyre and others, owners of the Victory. The value of the owners' interest in the Plymothian and her pending freight was fixed at $45,221, less $5000 salvage, or $40,221; the value of the interest of the owners of the Victory at the sum of $67,500; each gave bond. The damages to the Victory were proven at $14,363.80; to the Plymothian, at $41,684.12; and to the cargo, at $71,427.97.

The cause was heard upon pleadings and evidence, and the District Court held the Victory solely in fault for the collision, and decreed a recovery by the owners of the Plymothian and the underwriters of her cargo, *pro rata*, to the extent of the bond filed by the owners of the Victory in their limitation proceeding. 63 Fed. Rep. 631. The underwriters of the cargo and the owners of the Victory severally appealed from the decree of the District Court to the Circuit Court of Appeals for the Fourth Circuit. That court concurred with the District Court so far as concerned the faults found against the Victory, but held that the Plymothian was also in fault to a slight degree, and modified the decree of the District Court by awarding the whole of the Victory's bond to the cargo, and that any amount remaining unsatisfied should be paid by the owner of the Plymothian. 25 U. S. App. 271.

The owners of the Victory and the owner of the Plymothian thereupon severally petitioned for a writ of certiorari from this court under section six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826; and the writ was accordingly issued.

The facts as stated in substance by the District Court and the Circuit Court of Appeals were as follows:

The Victory was a British steamer of 1774 tons net tonnage, 338 feet in length, 38½ feet in breadth, inward bound in ballast,

drawing seventeen feet aft and thirteen feet forward. Her officers and crew numbered thirty-one all told.

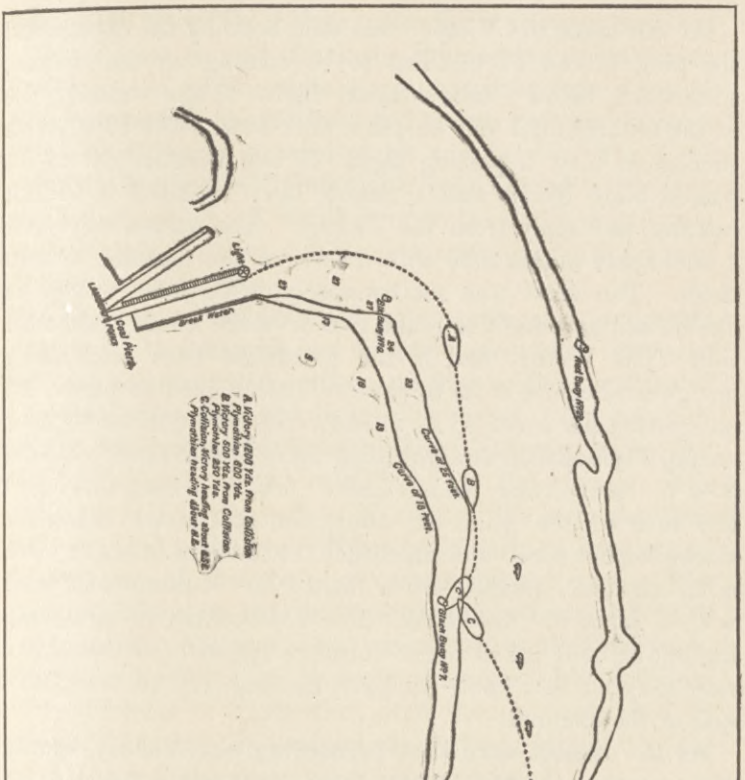
The Plymothian was a British steamer of 1016 tons net register, 260 feet long, laden with a cargo consisting of 3682 compressed bales of cotton. Her officers and crew numbered twenty-one all told. She was outward bound from Galveston to Liverpool, having come in through Hampton Roads to take in coal at Lambert's Point. Her draft was fourteen or sixteen feet. Both vessels were in charge of pilots, and their masters were on their bridges respectively, each acting as lookout, and seeing that the orders of the pilots were executed. Neither ship had a special lookout forward of the bridge on her bows. The collision occurred in a straight stretch of the channel of the Elizabeth River between Craney Island Light House and the turn in the channel at the buoys opposite Lambert's Point. There were two of these buoys, a red one, No. 22, known as the Merrimac Buoy, on the west side, and a black one, No. 9, on the east side. The distance from buoy No. 9 to Craney Island Light House was 1967 yards on the chart, or about a mile and one eighth.

The place of collision was at black buoy No. 7 at the easterly edge of the eighteen-foot curve of the channel, 1200 yards south of the Craney Island Light House and 767 yards north of the black buoy No. 9. The channel is 250 yards wide at Craney Island and 450 yards wide at buoy No. 9.

The diagram of the channel on page 413 sufficiently indicates the situation.

The Plymothian had been taking coal at Lambert's Point pier, a short distance from buoy No. 9. She left the pier at four P.M., heading out off the buoy, the course from the pier to the turning point down the channel being northwesterly at an angle of forty-five degrees. The usual departing signal was given as she moved from the pier. Proceeding outward to round buoy No. 9, with the helm slightly a-port, the engines were at half speed until the buoy was close aboard on the starboard bow. The engines were then put at full speed and the helm hard-a-port, and, rounding the buoy, she set her course down the easterly side of the channel.

Statement of the Case.



At this time, the Victory was seen both by the captain and the pilot of the Plymothian to be coming up the channel, southward, below Craney Island Light, to the westerly side of the mid-channel and on their port bow. The Plymothian thereupon blew a passing signal of one whistle, just as she passed buoy No. 9, and a minute later repeated it without hearing any reply from the Victory. The vessels were over a mile apart at this time with a bend of the channel between them. The wind was southwesterly, with force enough to enable sailing vessels to make two or three knots against the tide. The Victory had in the meantime been maintaining her general course so as to pass well clear, port to port. She had ported her helm, so as to show her port quarter to those on the Plymothian, straightening up to the channel course of S. ½ W. from Craney Island Light. She had been moving at the rate of ten miles an hour, but at Craney Island she slackened her speed and proceeded at the rate of six or seven miles an hour, assisted by a flood tide running southward with a force of two knots. The Plymothian in straightening out at buoy 9 had begun to move against the tide at the rate of about four knots an hour, keeping well to the eastern side of the channel.

As the vessels were thus proceeding, the Victory, shortly after passing Craney Island Light, apparently directed her course towards the easterly side of the channel, as if under a starboard helm. The pilot of the Plymothian blew a single blast on his whistle, and, receiving two in reply, immediately reversed his engines, sending them full speed astern; blew a danger signal of three blasts, and put the helm hard-a-port. The Victory somewhat later also blew a danger signal, and then, or shortly afterwards, reversed her engines three lengths away from buoy No. 7, but not in time to stop her headway, due to high speed and the force of the flood tide. The Victory claimed that she gave two two-blast signals, and there is a conflict of evidence as to her position when the first of them was sounded. The Plymothian heard but one such signal, just preceding the danger blasts.

The Plymothian came practically to a standstill before the

Counsel for Parties.

collision, with buoy No. 7 close under her starboard bow, but the Victory came on and struck the Plymothian's port side at the bridge, at an angle variously estimated at from 45 to 60 degrees, penetrating about fifteen inches into the ship, through her three steel decks, stringer plates and beams. The force of the blow threw the Plymothian's head around to the starboard, so that buoy No. 7, which prior to the collision had been under her starboard bow, was seen to come around in front of her stem to her port bow.

The Plymothian rapidly filled with water, and to prevent her sinking in the channel her engines were put at full speed ahead until she grounded on the mud flats to the eastward of the channel, where she sank in shallow water. She was subsequently raised, repaired temporarily at Newport News, and finally in England, on the completion of the voyage. The Victory was able to proceed to Norfolk. She was also temporarily repaired at Newport News and finally in England.

Of the cargo of 3682 bales of cotton shipped on the Plymothian at Galveston, 1671 bales were shipped under bills of lading, containing the provisions, among others, that the vessel should not be liable for loss or damage occasioned by collisions or other accidents of navigation, even though occasioned by negligence, and that the contract should be governed "by the law of the flag of the vessel carrying the goods."

The other 2011 bales were shipped from interior points under bills of lading given by the inland carrier to the shipper. On reaching Galveston this cotton was delivered to the Plymothian, which issued bills of lading or receipts to the inland carrier, containing the negligence and flag clauses. The bills of lading given by the inland carriers had the negligence, but not the flag clause.

Mr. J. Parker Kirlin and *Mr. Floyd Hughes* for the Plymothian.

Mr. Robert M. Hughes for the Victory.

Mr. Wilhelmus Mynderse for the Canton Insurance Company.

Opinion of the Court.

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

The District Court and the Circuit Court of Appeals concurred in finding the Victory grossly in fault, and we see no reason for arriving at any other conclusion. In our opinion the collision was the direct consequence of the Victory's disregard of the rule of the road and her reckless navigation.

In any aspect of the case, the rule of the road was to keep to the right.

By rule eighteen of the regulations prescribed by the act of April 29, 1864, carried forward in section 4233 of the Revised Statutes, "if two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

The first rule of the supervising inspectors is to the same effect.[1]

---

[1] "Rule I. — When steamers are approaching each other 'head and head' or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course and thereupon shall give as a signal of his intention one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other; but if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left or on the starboard side of each other.

"Note. — In the night, steamers will be considered meeting head and head so long as both the colored lights on each are in view of the other.

"Second situation. — Here the green light only will be visible to each, the screens preventing the red light from being seen. They are therefore passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle."

"Rule II. — When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting head and head or nearly so, and the signals by whistles shall be given and answered promptly as in that case specified."

And this was proven to be the usage in the navigation of the Elizabeth River, and known to the master of the Victory.

These vessels were approaching each other in such directions and with such bearings as required them to keep to the right. The distance between Craney Island Light and buoy No. 9 was about a mile and one eighth. When the Plymothian was at buoy No. 9 the Victory was somewhat to the north of or near Craney Island. As the Plymothian straightened down the channel, opposite buoy 9, she was near the eastern side and heading straight down the channel course N. ¼ or ½ E. She was obliged to swing, on leaving the pier, to round the buoy, but had steadied down as she passed it. The evidence thoroughly established that she was never on the westerly side of the channel. We think the District Judge was amply justified in finding as he did that the Plymothian had not, "in coming out from Lambert's pier, gone over to the west of the channel near to red buoy No. 22; and had not, after doing so, recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect."

The Victory when in the neighborhood of Craney Island was either in mid-channel or to the westward of it, and on the Plymothian's port bow. The Victory's witnesses admitted starboarding twice for different schooners and hard-starboarding just before the collision; but both of the lower courts, in accordance with the great weight of evidence, found that the Victory was not prevented by other vessels in the channel, either from going on the westerly side or from stay-

"Rule III. — If when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

ing there, while the testimony of the Victory's pilot indicated that his object in heading over for the easterly side of the channel was to cut off some of the distance into port by passing close to buoys Nos. 7 and 9.

Moreover, as immediately after straightening down the Plymothian ported a little and then hard-ported, even if the Victory had been heading at a gradual angle across the channel all the way from Craney Island, the vessels would have been approaching each other from an oblique direction, which would have brought the inspectors' second rule into play, that vessels so situated "shall pass to the right of each other as if head and head, or nearly so."

The starboard-hand rule had no application. Although when the Plymothian started from the pier her starboard side must necessarily have been down stream as she turned, the vessels were never starboard to starboard after she had rounded buoy 9 and straightened down the channel and the Victory had passed Craney Island and straightened up S. ½ W. Indeed the rule applicable when two vessels "are crossing so as to involve risk of collision," that "the vessel which has the other on her own starboard side shall keep out of the way," is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. It has often been held as a general rule of navigation that vessels approaching each other in narrow channels, or where their courses diverge as much as one and one half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel. *New York & Baltimore Transportation Co.* v. *Philadelphia & Savannah Steam Navigation Co.*, 22 How. 461; *Union Steamship Co.* v. *New York Steamship Co.*, 24 How. 307; *The Vanderbilt*, 6 Wall. 225; *The Johnson*, 9 Wall. 146; *The John L. Hasbrouck*, 93 U. S. 405; *The Berkshire*, 33 U. S. App. 531, 540.

It is interesting to note that *Union Steamship Co.* v. *New York Steamship Co.* was a case of collision in the channel of the Elizabeth River, where the steamship Jamestown, outward bound, took the eastern side of the channel, rounding

Lambert's Point near the buoy, and proceeded on her course north one fourth east. She was struck by the Pennsylvania, coming up, by reason of the Pennsylvania putting her helm to starboard instead of keeping her proper course, or porting when it became known that the Jamestown was approaching; and it was held that the Pennsylvania was solely to blame.

The principle was embodied in Article 21 of the International Regulations adopted by the act of March 3, 1885, c. 354, 23 Stat. 438, providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel, which lies on the starboard side of such ship," which is Article 25 of the Regulations adopted August 19, 1890, c. 802, 26 Stat. 320, and put in operation, after some postponements and amendments, in 1897, 29 Stat. 885, 893; and of the act of June 7, 1897, 30 Stat. 96, c. 4.

In *The Pekin*, (1897) App. Cas. 532, Articles 21 and 22 of these regulations were considered. Article 21 is given above and Article 22 reads as follows: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

That was an appeal from the decision of the Supreme Court for China and Japan, sitting in Admiralty, in which the steamship Normandie was alone held to blame for a collision which took place between her and the steamship Pekin in the river Whangpoo on April 3, 1896. The case was thus stated by Sir Francis Jeune, delivering judgment in the Privy Council: "At Pootung Point the Whangpoo makes a sharp bend towards the south, returning indeed on its course at something more than a right angle, and to the eastward of that point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside, and the southern the outside channel. The westernmost of these buoys is known as the Old Dock buoy. The Pekin was proceeding up the inside channel, along the line of buoys, that is to say on the starboard side of that channel, and the Normandie was coming down the river to the southward of mid-channel. It

is clear that when near the Old Dock buoy the Pekin ported, and that at or about the same time the Normandie starboarded. The Normandie afterwards endeavored to port, but her helm failed to act owing to what is termed the 'Chow Chow' water, which is, it would appear, a well-known area of eddies or whirlpools off Pootung Point. The result was that a collision occurred well to the north of the river, and somewhat to the eastwards of Pootung Point, the stem of the Normandie striking the port bow of the Pekin.

"The evidence is not clear as to the whistles given by the two vessels. The learned Chief Justice of the Supreme Court has found that 'at the same time two blasts of the Normandie's whistle were blown as a signal to the Pekin, those on board the Pekin simultaneously blew one blast of her whistle.' Those on the Pekin dispute the double blast of the Normandie; but their Lordships think that, accepting as they do the above finding as correct, it may well be that one of the two whistles of the Normandie coincided with the one whistle of the Pekin, and so those on the Pekin heard only one whistle from the Normandie, and believed that only one was given."

The appeal raised the question of the conduct of both vessels. The Normandie was held manifestly in fault. As to the conduct of the Pekin two charges were insisted on by counsel, and after setting them forth, the opinion thus proceeded: "The first of these charges raises the question, were those two vessels crossing vessels within the meaning of art. 22? and also the further question whether the Pekin kept her course? The effect of art. 22 has been made clear by several authorities. The cases of *The Velocity*, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519, and *The Oceano*, 3 P. D. 60, have explained and illustrated the distinction which exists in the effect of this rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to in art. 22 is 'crossing so as to involve risk of collision,' and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as

to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow, the curves of the river bank. But vessels may, no doubt, be crossing vessels within art. 22 in a river. It depends on their presumable courses. If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.

"Their Lordships have restated these propositions because they appear to them decisive of this part of the present case. They are advised by their assessors, and it appears to them clear, that, having regard to the features of the locality at the time the Pekin ported her helm, that is to say when she was near the Old Dock buoy, the vessels were not crossing vessels within the meaning of art. 22. It was reasonable for those on the Pekin, as, without fault on their part, they did not hear the double blast of the Normandie before they took action with their helm, to assume that the Normandie would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision."

We ought to add that, in the case before us, even if the steamers had been so far on the starboard of each other as to justify the pilots in considering that they were not meeting "head and head," or nearly so, there was no pretence of an agreement to go starboard to starboard under Inspectors' Rule I; nor was this a case for the application of Rule III.

Testing the Victory's conduct by settled rules, she was

plainly in fault for not keeping to the right, and in attempting to cross the Plymothian's course, and her speed renders her conduct still more blameworthy. It does not seem to be controverted that at the time of leaving the light-house her speed was five and one half knots through the water, and there was a tide force of two knots, which would make seven and one half knots over the ground. The Circuit Court of Appeals found that from Craney Island up her speed through the water was six or seven miles an hour, with a two-mile tide assisting her, which would make her speed over the bottom eight or nine miles. Certainly she must be held to have known that she was approaching the Plymothian so as to involve the risk of collision, and should have slackened her speed under rule twenty-one, and have stopped and reversed sooner than she did, when she was informed by sight and hearing that her effort to crowd the Plymothian off her rightful course must be unsuccessful.

If she could not port and keep on her own side, she should have reversed at least as early as when her second two-blast signal was blown and not assented to by the Plymothian, yet it was the Plymothian that immediately reversed on hearing that signal and blew three danger signals, while the Victory did not blow her danger signals until after that, and manifestly did not reverse as early as the Plymothian. At the collision the Plymothian's headway had been stopped, but the Victory had such headway on, that she threw the Plymothian's bows around to starboard, while her own bows cut through the Plymothian's three decks and stringer plates a distance of at least fifteen inches, and were damaged as far back as three feet.

None of the excuses the Victory set up for being on the wrong side of the channel tended to palliate her guilt. The only time at which the Plymothian could have been on the Victory's starboard bow was when the Victory was below Craney Island, and she was bound to govern herself by the bearings of the vessels as they were after she straightened up the channel course from the Craney Island south, and then the vessels were port to port. The Victory met a few steam-

ers, but her captain and pilot admitted that they did not force the Victory out of her course, and they were passed near Craney Island, or the light-house, or far below the place of collision. So there were two or three schooners in the channel, but both the courts below found that they did not prevent the Victory from doing her duty by porting and keeping to the right, and her presence near them at all was attributable to her having left the western side of the channel.

We need not elaborate in view of the concurrence of the courts below, and have gone so far into the evidence on this branch of the case because it illustrates the point on which those courts were at variance.

As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409: "Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

"Collision" was an exception in all the bills of lading, and, laying out of view the "negligence" and "flag" clauses, as the damage was occasioned by collision and within the exception, it rested upon the underwriters in this case to defeat the operation of the exception, by proof of such negligence on the part of the Plymothian as would justify a decree against her if sued alone. *Clark* v. *Barnwell*, 12 How. 272, 280; *Transportation Co.* v. *Downer*, 11 Wall. 129; *The City of Hartford and the Unit*, 97 U. S. 323, 325; *The Ludvig Holberg*, 157 U. S. 60.

Apparently it is a hardship for the underwriters on the Plymothian's cargo to be compelled to bear a portion of their own loss, but if the Plymothian was free from fault, this is

merely the result of the Limitation of Liability Acts, the value of the Victory not being sufficient to pay the entire damages sustained.

The Circuit Court of Appeals and the District Court arrived at different conclusions in respect of the Plymothian's entire freedom from fault. The District Court held that the Plymothian was without blame, while the Circuit Court of Appeals was of opinion that she was not wholly blameless, because she kept her course "without taking any precaution whatever until too late, and when the pending collision became inevitable." Whether she may not have been slightly in fault may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. But, after all, the question is, as pointed out by Mr. Justice McLean in *Williamson* v. *Barrett*, 13 How. 101, whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her.

Were the position and course and signals of the Victory such that the Plymothian was bound to change her course or to stop and reverse sooner than she did?

The Plymothian in passing the buoy straightened down the channel course on the easterly side. The only change she made after straightening down was by porting her helm, which put her closer to the easterly edge of the channel at the time of the collision. She left her pier at four o'clock P.M., under half speed until she rounded the buoy, when the engines were put full speed ahead, 767 yards from the point of collision. The full speed of the Plymothian was seven knots. The tide was running against her with a force of two knots. She had her engines at full speed against the tide perhaps five minutes, and both the courts below found her speed over the ground was about four miles an hour. The Victory blew two double-blast signals and a three-blast signal before the collision.

The evidence of her crew was that the two-blast signals were sounded within a half a minute or a minute of each other, when the steamer was half way between Craney Island and buoy No. 7, and that the three blasts followed a minute or so later. The Plymothian heard only one two-blast signal and the three-blast signal, at that time, as appeared from disinterested evidence on both sides. None of these independent witnesses heard two double-blasts and a three-blast signal from the Victory in short succession. All of them, who saw or heard the first two blasts, testified that that signal was blown when the Victory was to the north of or about Craney Island. And, in her petition for limitation of liability, the Victory claimed to have blown that signal "soon after passing Craney Island Light," and placed the Plymothian at that time as "apparently starting down the river from opposite Lambert's Point." But if she blew two blasts twice, where her captain and pilot said she did, they were blown close together. The Plymothian's evidence showed that she heard but one, and if the Victory blew two blasts twice within such a short interval as she claims, it would seem that one of them overlapped the whistle from the Plymothian, or it may be that the last two blasts were overlapped by the Plymothian's danger signal.

The evidence largely preponderates that only one signal of two blasts and the signal of three blasts could be heard in the neighborhood of the Plymothian at the time the Victory claims she repeated the two-blast signal and followed it up with three; and we think that the conclusion is sustained by the weight of evidence that the Victory's first two-blast signal was blown before she passed Craney Island, when the vessels were so far apart that the Plymothian would not have been bound to stop if she had heard or seen that signal, and as there were at least two river steamboats between the vessels at the time, her pilot might well have supposed that the Victory's two blasts were intended for one of them rather than for him. However, the Plymothian did not see or hear that signal and cannot be held in fault as contributing to the collision because she failed to see or hear what would not have

been followed by any change of course; and if there were two two-blast signals within a half a minute, then it is fair to conclude on the evidence that one of them was overlapped by the whistle of the Plymothian. The Plymothian acted immediately and effectively on hearing the two-blast signal she did hear and succeeded in stopping her headway, and this when the risk of collision first appeared, which was when the Victory last starboarded. The course of the Victory was, we have said, along mid-channel or to the west of it, and did not involve a risk of collision until she made a change to port under a starboard helm, just before sounding the two-blast signal heard by the Plymothian. Her witnesses admit that they were starting straight up the channel after passing Craney Island Light, heading S. ½ W. The channel course below Craney Island, as shown by the chart, was S. by E., and in heading S. ½ W. her helm must have been ported, and the vessels were port to port. The testimony of the Plymothian's officers and crew was to the effect that the Victory was on their port bow all the way up from below Craney Island to the point where she changed her course just before blowing a two-blast signal, and they are corroborated by independent and disinterested witnesses. The Victory's witnesses testified to starboarding for two or three schooners, who were near the point of collision, and this would account for her sheer to port, as observed on the Plymothian, when she took her precautions for safety. Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger. *The Servia*, 149 U. S. 144; *The City of New York*, 147 U. S. 72; *Belden* v. *Chase*, 150 U. S. 674.

The rule applicable to them was that each should keep to her own starboard side of the channel. So long as the vessels were port to port, the Plymothian, proceeding at moderate speed, was not bound to stop and reverse on the chance that the other vessel might depart from the rules of navigation.

Opinion of the Court.

Nor would the Plymothian necessarily have been bound to stop and reverse at once if she had heard a two-blast signal from the Victory at the time when the Victory claims to have blown it. That was, the Victory says, half way between buoy No. 7 and Craney Island, which would be six hundred yards from the buoy, while the Plymothian was three hundred yards above the buoy, which would make the distance between the vessels nine hundred yards or a half a mile, as the district judge found. The Plymothian was entitled to rely on her repeated single blast to correct the error of the Victory until it was made apparent by a further cross signal or from a change of heading that she was persisting in her wrongful course.

The case of *The Stephanotis and The Horton*, cited to us from the Shipping Gazette and Lloyd's List, of July 26, 1894, was similar in its main features to the one before us. The collision occurred on the river Tyne. On the part of the Stephanotis it appeared that she was bound up on the north side of the channel, at a moderate speed, in a snow storm, when the Horton was observed about two hundred and fifty yards off, also on the north side of the river, in such a position as to make it impracticable for the Stephanotis to pass up between the Horton and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the Horton, which was seen to be approaching as if under a port helm. The Stephanotis came ahead, helm a-starboard, her engines going full speed ahead, as the only means of avoiding a collision. The case for the Horton was that she was keeping to the south of mid-channel, going down the river at the rate of about four knots. The Stephanotis was seen coming up the river half a mile away, bearing right ahead. The Stephanotis thereupon blew one blast, and the Horton responded with one blast, and then ported and steadied her helm. When the vessels were in a position to clear port to port, the Stephanotis blew two short blasts, and the Horton, after replying with one short blast, again slightly ported her helm. The Stephanotis, however, blew two more blasts, and

as she was then seen to be under a starboard helm, the Horton's whistle was blown a short blast, and her engines were set full speed astern, but the Stephanotis struck the Horton, doing her great damage.

The Master of the Rolls, Lord Esher, said:

"The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the Stephanotis to have ported after the Horton blew one blast, and that the master of the Horton might reasonably have expected that he would do so. When the master or pilot of the Horton heard the first two whistles which were the beginning of the other man's starboarding, and when at that moment starboarding could have but little effect, he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm to port, or to have ceased starboarding, and then they would have gone clear. But he persisted in starboarding. Then comes the question, ought the pilot or captain of the Horton to have stopped or reversed, or stopped even, at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the Horton, but must have been for some other reason, and that the master and pilot of the Horton might reasonably have supposed that when, if anybody had looked, they must have seen the Horton, and must have known that the Horton was porting — they had a right to suppose that the Stephanotis would stop starboarding immediately, and would have ported her helm. If so it was not unreasonable and unseamanlike, I think, for the Horton to keep on as she did. By the time that two ship's lengths were passed over by the two vessels approaching each other — that is, the time of the second blast — the collision was inevitable. It seems to me that the judgment of the President, and the advice of his Trinity Masters, was too severe. It was requir-

ing men to do what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the Stephanotis ought to be held solely to blame."

Similar views were expressed by Judge Brown of the Southern District of New York in *The Florence*, 68 Fed. Rep. 940.

In respect of both these vessels, the captain was acting as lookout on the bridge, but there was no lookout stationed on the bows. Can it be said that the absence of such a lookout on the Plymothian contributed to the injury? Her captain, pilot and third officer were all on the bridge and the view was clear and unobstructed. Would a lookout on the bows have heard or seen more than they did? The bearing of this inquiry is, of course, on the failure of the Plymothian to detect the first alleged two-blast signal blown by the Victory. We have already indicated that the evidence is to our minds satisfactory that that two-blast signal was blown when the Victory was below Craney Island Light House. If so, the vessels were a mile and one eighth apart and the Victory was on the Plymothian's port bow. The Plymothian blew three single-blast signals after that time, and neither of them was dissented from by the Victory until the last one, and the proper manœuvres to avoid the risk then created were promptly taken. But, if it were assumed that the first two-blast signal was blown when the Victory was half way between Craney Island and buoy No. 7, the vessels were still half a mile apart, with room to correct the proposed erroneous course. And if the Victory blew her second two-blast signal inside of a half minute after the first, as her witnesses testified, and the Plymothian upon hearing one of the two immediately acted on it, the failure to hear the other cannot be considered a fault under the circumstances.

We are of opinion that the Plymothian was on her proper course; that she was not bound to anticipate the conduct of the Victory; and that she took all proper precautions as soon as chargeable with notice of risk of collision. The result is that we agree with the District Court in the conclusion that

the Victory was wholly to blame and that the Plymothian was free from fault.

Decree of the Circuit Court of Appeals reversed, the costs of that court to be equally divided between the owners of the Victory and the underwriters; decree of the District Court affirmed; costs in this court for preparing and printing the record to be paid by the owners of the Victory, all other costs in this court to be divided equally between the owners of the Victory and the underwriters.

MUSE *v.* ARLINGTON HOTEL COMPANY.

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

No. 59. Argued October 26, 27, 1897. — Decided December 6, 1897.

A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision.

The same rule being applicable in respect of the validity or construction of a treaty, some right, title, privilege or immunity, dependent on the treaty, must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted.

In respect of the plaintiff's case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution, or the validity or construction of the treaty, and this court is without jurisdiction to review the action of that court.

MOTION to dismiss or affirm.

Margaret A. Muse and others filed their original complaint in ejectment against the Arlington Hotel Company, July 25, 1894, in the Circuit Court of the United States for the Eastern District of Arkansas, to which defendant demurred. Pending the demurrer, plaintiffs filed an amended complaint, in which they averred that defendant was "a corporation organized

under the laws of the State of Arkansas and doing business at the city of Hot Springs in that State"; and that plaintiffs, except "Alice F. South, who is a citizen and resident of Coahuila, Mexico," were all citizens and residents of the United States, some of Louisiana, some of Texas, some of Mississippi, and one of Illinois.

That they are the only heirs at law of Don Juan Filhiol, who died intestate, a citizen of Louisiana, in 1821; and that they are the owners in fee simple of a league of land described in the complaint.

Plaintiffs alleged that Filhiol was born in France in 1740; that he left that country in 1763, going to San Domingo, and thence to Philadelphia in 1779, and finally arrived in New Orleans in May of that year, where he joined the volunteers in the war between Spain and England; that in 1783 he was appointed by the King of Spain captain of the army and commandant of the militia and assigned to duty at the post of Ouachita in Louisiana, under instructions from Don Estevan Miro, the governor general of that province.

That, on December 12, 1787, Filhiol memorialized the governor of Louisiana and West Florida for a grant of land, whereon the governor ordered a survey of the land applied for, and that before February 22, 1788, Don Carlos Trudeau, the then surveyor general of Louisiana, made a survey in accordance with the law as it then existed, and made a report thereof, with figurative plan, and procès verbal in due form, in and by which the land was described; that the survey, figurative plan and procès verbal have been lost or destroyed, and plaintiffs could not produce them, but they alleged that on February 22, 1788, Miro, as governor, made and delivered to Filhiol a grant for a certain league of land, the description of which was set forth in the complaint; that the grant was made while Filhiol was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his position as commandant; and that Miro, as governor, was by the Spanish colonial laws vested with power to make grants of land and to convey by such grants the absolute fee simple to the lands granted.

Plaintiffs further averred that the land granted by Miro to Filhiol consisted of a certain one square league with the hot springs at the city of Hot Springs as its centre, the description, metes and bounds of which league were more accurately described in the survey, figurative plan and procès verbal; and, setting forth a translation of the grant, plaintiffs stated that after the delivery of the grant to Filhiol, December 6, 1788, Trudeau, who was then public and private surveyor of Louisiana, made and delivered to Filhiol a certificate of measurement of the land, a translation of which was also given; that the making and delivery of this certificate was a delivery of the judicial possession of the land, and had the force and effect of segregating it from the public domain, and that the grant vested full and complete title in the grantee.

It was further alleged that Filhiol sold and conveyed the land, November 25, 1803, to his son in law, Bourgeat, passing the deed before the military and civil commandant of Ouachita, the deed being witnessed by two witnesses, who signed the act in the presence of two others, and a copy of which was set out; that the deed was immediately reported to the proper office of Louisiana and was afterwards duly recorded; that Bourgeat retroceded the same lands to Filhiol by deed passed before the judge of the parish of Pointe Coupee, July 17, 1806; that this deed (a copy of which was given) was duly filed and recorded; and that Filhiol never thereafter parted with his title to the land. And plaintiffs alleged that when these deeds were made, the Spanish colonial law forbade any public officer having authority to receive acknowledgments and pass deeds for the conveyance of lands, to pass such deeds or receive acknowledgments thereof, unless they knew that the vendor had title to the lands proposed to be sold.

Plaintiffs also averred that in 1819, Filhiol leased the Hot Springs to one Dr. Wilson for five years; that shortly thereafter, in 1821, Filhiol died; and that ever since his death, plaintiffs had always urged their title to the property, and employed agents and attorneys to do so for them, and that during a large part of this time they had been embarrassed by the want of the original grant, which had been mislaid;

that often and repeated searches were made by plaintiffs for it but without success, but that lately, in 1883, the grant had been found.

The complaint continued: "Said plaintiffs state that they claim title to said league of land so granted by said Estevan Miro, as governor of said province, to the said Juan Filhiol, as the heirs at law of said Juan Filhiol, and they state that they will rely upon the following written evidences of their title for the maintenance of this action:

"First. On the grant made by Don Estevan Miro, as governor of the province of Louisiana, on February 22d, 1788, to Don Juan Filhiol, a translation of which grant is filed herewith, marked 'Exhibit A,' and made part hereof.

"Second. On the certificate of measurement or survey made by Carlos Trudeau, surveyor of the province of Louisiana, on December 6, 1788, and delivered by him on that date to Don Juan Filhiol, a translation of which, marked 'Exhibit B,' is filed herewith and made part hereof.

"Third. On the deed of said land made by Don Juan Filhiol to Narcisso Bourgeat on November 25, 1803, a translation of which is herewith filed, marked 'Exhibit C,' and made part hereof.

"Fourth. On the deed or retrocession of said land made by Narcisso Bourgeat to Don Juan Filhiol on the 17th of July, 1806, a translation of which deed of retrocession is herewith filed, marked 'Exhibit D,' and made part hereof.

"Fifth. On the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803.

"Sixth. On the Fifth Amendment to the Constitution of the United States."

And plaintiffs then alleged that defendant was in the unlawful possession of part of the land, "which portion is included in the Hot Springs Mountain reservation, in the city of Hot Springs, county of Garland, State of Arkansas, the boundary lines of which reservation were established by the Hot Springs Commission by public surveys in pursuance of the laws of the United States;" and this was followed by a

particular description of the land so alleged to be unlawfully possessed.

Plaintiffs charged that defendant had been in such unlawful possession since the third day of March, 1892, during all of which time plaintiffs had title to and the right of possession of said land; and alleged that by reason of such wrongful possession they had been damaged in the sum of twenty thousand dollars; and prayed judgment for possession and damages. To this amended complaint defendant demurred, and also filed an answer and exceptions.

The Circuit Court sustained the demurrer and exceptions, and entered judgment dismissing the complaint with costs, whereupon this writ of error was sued out directly to that court.

The Circuit Court, Williams, J., held, 68 Fed. Rep. 637, that the alleged granting papers were ineffectual to perfect title, because there was no showing that the acts required by law to be performed, to wit, the making of an actual survey on the ground; the certification and approval of the same; and the delivery of possession, had ever been performed; that the claim was barred under the act of Congress of May 26, 1824, c. 173, 4 Stat. 52, entitled an act "enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," and by the act of Congress known as the Hot Springs Act of June 11, 1870, c. 126, 16 Stat. 149; that the claim, if originally valid, must be considered as having been abandoned; and that plaintiffs were estopped from claiming title to the land under the facts disclosed.

Mr. John G. Carlisle for plaintiffs in error. *Mr. Logan Carlisle* was on his brief.

Mr. G. B. Rose for defendant in error. *Mr. U. M. Rose* was on his brief.

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

Writs of error may be sued out directly from this court to the Circuit Courts in cases, among others, in which the construction or application of the Constitution of the United States is involved; or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891, c. 517, § 5, 26 Stat. 826. If this case does not fall within one or both of these classes, this writ of error cannot be maintained.

As ruled in *Ansbro* v. *United States*, 159 U. S. 695, 697, "a case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision." *Green* v. *Cornell*, 163 U. S. 75, 78.

The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted. *Borgmeyer* v. *Idler*, 159 U. S. 408.

The general doctrine has been frequently announced in cases involving the jurisdiction of this court under the twenty-fifth section of the Judiciary Act of September 24, 1789; section 709 of the Revised Statutes; and acts relating to the revision of judgments of the Supreme Court and Court of Appeals of the District of Columbia and the Supreme Courts of the Territories, as well as in cases involving the jurisdiction of the Circuit Courts. *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, and cases cited; *United States* v. *Lynch*, 137 U. S. 280; *South Carolina* v. *Seymour*, 153 U. S. 353; *New Orleans* v. *Benjamin*, 153 U. S. 411; *Linford* v. *Ellison*, 155 U. S. 503; *Durham* v. *Seymour*, 161 U. S. 235; *Hanford* v. *Davies*, 163 U. S. 273; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648.

The amended complaint stated that plaintiffs would "rely

upon the following written evidences of their title for the maintenance of this action," and enumerated, among them, "the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803," 8 Stat. 200; and "the Fifth Amendment to the Constitution of the United States;" but nowhere was any right, title, privilege or immunity asserted to be derived from either Constitution or treaty. There was nothing to indicate in what way, if any, the cause of action was claimed to arise from either.

The Fifth Amendment prohibits the deprivation of property without due process of law, and the taking of private property for public use without compensation. The treaty of cession, Public Treaties, 332, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. But neither amendment nor treaty gave what was not already possessed.

The jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and not on the ground that the case arose "under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority." Act of August 13, 1888, c. 866, § 1; 25 Stat. 433. And it is settled that in order to give the Circuit Court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

If this case had been taken to the Circuit Court of Appeals, the decision of that court would have been final under the sixth section of the statute, and it might well be concluded that therefore the writ of error would not lie under the fifth section.

In respect of plaintiffs' case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution or the validity or construction of the treaty.

The ground, among other grounds, in defeat of plaintiffs' action, that the claim was barred by the act of June 11, 1870,

was indeed sustained, but that was as matter of construction, and the constitutionality of the act if held to apply to the claim, rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the Circuit Court was invoked upon it. In this court it was contended for plaintiffs in error that the act was an enabling act authorizing suits to be brought against the United States, which otherwise could not have been maintained; that the limitation operated on the jurisdiction and not on the right; and that to bar title if suit were not brought within ninety days was so unreasonable that the intention to do so could not be imputed to Congress. These forcible suggestions would undoubtedly have been accorded due weight by the Circuit Court of Appeals, but we are unable to deal with them on this writ.

The Circuit Court also held that plaintiffs' title failed because of non-compliance with the Spanish law. It was not pretended that the treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the Circuit Court to determine into what category the alleged grant fell. In doing so, the construction of the treaty was not drawn in question in any manner.

Writ of error dismissed.

Mr. Justice Harlan and Mr. Justice White dissented.

THE RESOLUTE, DOWSETT, Libellant.

THE RESOLUTE, WILSON, Libellant.

APPEALS FROM THE DISTRICT COURT OF THE DISTRICT OF OREGON.

Nos. 135, 136. Submitted November 12, 1897. — Decided December 6, 1897.

A District Court of the United States has jurisdiction of a libel of a vessel for seamen's wages, which accrued while the vessel was in the custody of a receiver appointed by a state court upon the foreclosure of a mort-

Statement of the Case.

gage upon the property of a railroad company, owner of the vessel, the vessel having been sold and passed into the purchaser's hands, and the receiver discharged when the warrant of arrest was served.

The remedy against the decree of the District Court was an appeal to the Circuit Court of Appeals.

No. 135 was an appeal from the District Court for the District of Oregon, awarding to the libellant, George Dowsett, the sum of $825.50 due to him individually, and the further sum of $358.02 due to him as the assignee of one Tellefson, for wages as seamen upon the tug Resolute. The tug was engaged in the business of towing vessels and barges on and over the bar between Yaquina Bay and the Pacific Ocean, and the waters tributary thereto, within the District of Oregon.

The libel, which was filed on April 26, 1894, was in the ordinary form of a libel for seamen's wages, except that it alleged that the vessel was at that time in the hands of a receiver of a Circuit Court for the State of Oregon. Upon application being made for a warrant for arrest, it was refused upon the ground that the tug was within the custody of a receiver of a state court. Subsequently, and on February 25, 1895, upon affidavit that the receiver had been discharged and the property sold, the order denying the warrant of arrest and directing that the libel remain in abeyance until the tug should be discharged from the custody of the state court, was vacated, and a warrant of arrest ordered to issue. The tug having been released upon bond given, the libel was thereupon amended by alleging that while the said services were being rendered the steam tug was in charge of a receiver appointed by the Circuit Court of the State of Oregon, and that she had since been sold to parties having notice of libellant's claim and had been discharged from such receivership. Exceptions were thereupon filed to the libel upon the ground that it showed that when the services were rendered, the steam tug was in charge of, and operated by, a receiver of the Oregon and Pacific Railroad Company, a corporation, the owner of said steam tug; and that no maritime or other lien had arisen by reason of such employment, or by the rendition of such services; and also that the court had no juris-

Opinion of the Court.

diction in the premises. Upon a hearing before the court, these exceptions were overruled and leave given to answer the amended libel.

Claimants having elected not to answer the libel, their default was entered, and a final decree awarded in favor of the libellant in the amount claimed by him; whereupon the claimants prayed an appeal to this court; and the District Court certified that "the only question arising upon said appeal is the question as to whether or not, under the facts stated in the amended libel and the exceptions thereto, this court acquired or had jurisdiction to pronounce the said decree." A motion was made to dismiss the appeal for want of jurisdiction.

Mr. L. B. Cox, *Mr. W. W. Cotton*, *Mr. Thomas O'Day* and *Mr. C. F. Lord* for the motion to dismiss; and for the respondents.

Mr. William T. Muir and *Mr. John W. Whalley* opposing, and for the claimants.

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

The sole question presented by the record in this case is whether the court was correct in assuming jurisdiction of a libel for seamen's wages, which accrued while the vessel was in the custody of a receiver, appointed by a state court, upon the foreclosure of a mortgage upon the property of the Oregon and Pacific Railroad Company, owner of the tug.

Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit *in rem* for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits.

The contention of libellant is that, as a maritime lien is the sole foundation of a proceeding *in rem*, such facts must be averred as to show that a lien arose in the particular case; or, at least, that if the libel shows that a lien could not have existed, it should be dismissed for want of jurisdiction. The averment relied upon in this libel is that the vessel was at the time the services were rendered in the hands of a receiver appointed by a state court. This fact, however, is not absolutely inconsistent with a lien *in rem* for seamen's wages. *Paxson* v. *Cunningham*, 63 Fed. Rep. 132. It may have been expressly bargained for by the receiver, it may be implied from the peculiar circumstances under which the services were rendered, or it might be held to have arisen from the peremptory language of the statute, Rev. Stat. § 4535, that "no seaman shall, by any agreement other than is provided by this title, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled, and every stipulation in any agreement inconsistent with any provison of this title . . . shall be wholly inoperative." *Prima facie*, the rendition of mariner's services imports a lien, and the mere fact that the vessel is navigated by a receiver does not necessarily negative such lien, although there may be facts in the particular case to show that the above statute does not apply, or that credit was expressly given to the owner, to the charterer or to some third person. In fact, the question of lien or no lien is not one of jurisdiction, but of merits.

It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law; but if the existence of such a lien were a question of jurisdiction, then nearly every question arising upon the merits could be made one of jurisdiction. Thus, supplies furnished to a vessel import a lien only when they are sold upon her credit; and the defence ordinarily made to such claims is that they were sold upon the personal credit of the owner or charterer; but certainly it could not be claimed that this was a question of jurisdiction. The existence of a lien for collision depends upon the question of fault or no

fault, but it never was heard of that it thereby became a question of jurisdiction. Salvage services, too, ordinarily import a lien of the very highest rank; but it has sometimes been held that, if such services are rendered by seamen in the employ of a wrecking tug, or by a municipal fire department, no lien arises, for the reason that the men are originally employed for the very purpose of rescuing property from perils of the sea, or loss by fire. In the case under consideration a portion of the libellant's claim arises by assignment from Tellefson, and the authorities are almost equally divided upon the question whether such assignment carries the lien of the assignor to his assignee. Obviously these are not jurisdictional questions.

In determining the question of a lien in the case under consideration much may depend upon the manner in which the vessels were sold by the receiver. Were they sold in bulk, and merely as a part of the entire property of the insolvent corporation, upon the foreclosure of the mortgage, or was each vessel sold separately, and subject to the liens for mariner's wages which accrued before and while they were in the possession of the receiver? Did the order direct these vessels to be sold free of maritime liens, or subject to them, or was it silent in this particular? Were the lienholders upon these vessels paid from the purchase money, according to their relative rank, as they would have been had the sale been conducted by a court of admiralty? If they were, that would amount to very strong, if not conclusive, evidence against the subsequent endeavor to enforce the liens in a court of admiralty. We cannot assume that the court would authorize its receiver to run these vessels without making some provision for a preferential payment of their current expenses. *Meyer* v. *Western Car Co.*, 102 U. S. 1; *Kneeland* v. *American Loan Co.*, 136 U. S. 89. None of these were questions which went to the jurisdiction of the court to entertain the libels, but were such as would properly arise, either upon the exception to the libels, or upon an answer putting the facts in issue.

Had the vessel, at the time the warrant of arrest was served, been in the actual custody of the receiver, a different question

would have been presented; but the facts of this case show that she had been sold, and had passed into the hands of her purchaser, and that the receiver had been discharged.

The case of *Ex parte Gordon*, 104 U. S. 515, goes even farther than is necessary to support the action of the District Court in assuming jurisdiction of this case. In that case a writ of prohibition was sought to restrain the District Court for the District of Maryland from proceeding against a vessel to recover damages for loss of life in a collision. It was held that, as the case was one of a maritime tort, of which the District Court unquestionably had jurisdiction, it was for that court to decide whether the vessel was liable for pecuniary damages resulting from the loss of life. "Having jurisdiction," said the Chief Justice, "in respect to the collision, it would seem necessarily to follow that the court had jurisdiction to hear and decide what liability the vessel had incurred thereby." The question was held not to be jurisdictional, but one properly arising upon the merits. See also *The Charkieh*, 8 Q. B. 197; *Schunk* v. *Moline &c. Co.*, 147 U. S. 500; *Smith* v. *McKay*, 161 U. S. 355.

So, too, in *In re Fassett*, 142 U. S. 479, the owner of the yacht Conqueror filed a libel for possession, against her and the collector for the port of New York, claiming delivery of the vessel to him and damages against the collector, who had seized her as a dutiable import. The collector applied to this court for a writ of prohibition, alleging that the District Court had no jurisdiction of the suit. We held that the subject-matter of the libel was a marine tort; that the question whether the vessel was liable to duty was properly justiciable in the District Court, and that that court had jurisdiction. Said Mr. Justice Blatchford, in delivering the opinion of the court, p. 484: "The District Court has jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition; and for this court to decide in the first instance, and in this proceeding, the question whether the yacht is an article imported from a foreign country, and subject to duty under the customs-revenue laws, would be to decide that question as a matter of original jurisdiction,

and not of appellate jurisdiction, while as a question of original jurisdiction, it is duly pending before the District Court of the United States on pleadings which put that very question in issue." See also *In re Cooper*, 143 U. S. 472.

No. 136 is also a libel for wages, and involves precisely the same questions as are involved in the case of Dowsett, and will be disposed of in the same way. Claimants have mistaken their remedy in these cases, and should have appealed to the Circuit Court of Appeals.

The decrees of the District Court, in so far as they assume jurisdiction of these cases, are therefore

Affirmed.

THE WILLIAM M. HOAG.

THE THREE SISTERS.

APPEALS FROM THE DISTRICT COURT OF THE DISTRICT OF OREGON.

Nos. 137, 138. Submitted November 12, 1897.— Decided December 6, 1897.

These cases are affirmed as to the jurisdiction of the District Court on the authority of *The Resolute*, *ante*, 437.

The case is stated in the opinion.

Mr. William T. Muir and *Mr. John W. Whalley* for appellants.

Mr. L. B. Cox, *Mr. W. W. Cotton*, *Mr. Thomas O'Day* and *Mr. C. F. Lord* for respondents.

Mr. Justice Brown delivered the opinion of the court.

These cases differ from those already disposed of *ante*, 437, only in the fact that the libels contain claims by the masters of those vessels, with an averment that during the time they were employed there was an officer known as the purser; that the agents of the receiver and the purser collected and received all

the earnings from the vessels from both passengers and freight, and paid over such earnings in the ordinary course of business to the receiver; that none of the earnings of the vessels passed through the hands of the masters, and that their sole duties consisted in navigating the steamers upon routes selected by the receiver within the State of Oregon, and that all the supplies and materials were purchased by the said receiver through other agents and servants. This allegation is evidently designed to raise the question whether the ancient doctrine enforced upon the court of admiralty by prohibition from Westminster Hall, that the master has no lien for his wages, and which was declared to be the law by this court in the case of *The Orleans*, 11 Pet. 175, has any application to modern methods, where a purser or other agent is employed by the owner to collect the freights and pay the bills of the vessel, the practice formerly being for the master to receive all the freight, pay the crew and buy the supplies. The denial of the lien of the master was based upon the theory that he had a lien upon the freight for his wages, and having the freight in his own hands was presumed to pay himself. The argument is made that, the reason for the rule having ceased to exist, the rule itself, which denied the master a lien upon the vessel, has become obsolete.

A lien was also claimed and admitted on behalf of the masters under a local statute of Oregon; but it was also insisted in defence thereto that the masters had not proceeded within the time allowed by law for the enforcement of such claim.

The latter question, at least, if not the former, did not affect the jurisdiction of the court, but went to the merits alone.

The decrees of the court below in these cases are also, in respect to jurisdiction,

Affirmed.

STEWART v. BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 97. Argued November 8, 1897. — Decided December 6, 1897.

The Supreme Court of the District of Columbia has jurisdiction of an action, sounding in tort, brought by the administrator of a deceased person against the Baltimore and Ohio Railroad Company, to recover damages for the benefit of the widow of the deceased by reason of his being killed by a collision which took place while he was travelling on that railroad in the State of Maryland.

The purpose of the several statutes passed in the States in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is in its nature a tort, and where such a statute simply takes away a common law obstacle to a recovery for the tort, an action for that tort can be maintained in any State in which that common law obstacle has been removed, when the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced.

While, under the Maryland statute authorizing the survival of the right of action, the State is the proper plaintiff and the jury trying the cause is to apportion the damages recovered, and under the act of Congress in force in the District of Columbia, the proper plaintiff is the personal representative of the deceased, and the damages recovered are distributed by law, these differences are not sufficient to render the statutes of Maryland inconsistent with the act of Congress, or the public policy of the District of Columbia.

On October 22, 1894, plaintiff in error as plaintiff filed in the Supreme Court of the District of Columbia an amended declaration containing two counts. The first alleged that John Andrew Casey, plaintiff's intestate, was killed through the negligence of the defendant company, in the State of Maryland; that said intestate left surviving no parent or child but only his wife, Alice Triplett Casey, for whose benefit this action was brought. The second count set forth in addition to the matters disclosed in the first a statute of the State of Maryland in respect to recovery in such cases. A demurrer

to this declaration was sustained and judgment entered for defendant. This was affirmed by the Court of Appeals of the District of Columbia, and from such judgment of affirmance plaintiff has brought the case here on error.

The statute in force in the District of Columbia, act of February 17, 1885, c. 126, 23 Stat. 307, provides for recovery in case the act causing death is done within the limits of the District of Columbia; that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured;" that the recovery shall not exceed $10,000; that the action shall be brought in the name of the personal representative of the deceased, and within one year after his death, and that the damages recovered shall not be appropriated to the payment of the debts of the deceased, but enure to the benefit of his or her family and be distributed according to the provisions of the statute of distributions. The Maryland statute, which is copied in the declaration, Rev. Code Maryland, 1878, p. 724, provides in the first section that whenever the death of a person shall be caused by the wrongful act, negligence, etc., of another, "the person who would have been liable if death had not ensued, shall be liable to an action for damages." Sections 2 and 3 are as follows:

"SEC. 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the abovementioned parties, in such shares as the jury by their verdict shall find and direct: *Provided*, That not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced

within twelve calendar months after the death of the deceased person.

"SEC. 3. In every such action, the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

Mr. Edwin Sutherland for plaintiff in error.

Mr. George E. Hamilton for defendant in error. *Mr. Michael J. Colbert* was on his brief.

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

The Court of Appeals was of opinion that the action could not be maintained under the statute of the District of Columbia, because that authorizes recovery only in case the injury causing death is done within the limits of the District, nor under the Maryland statute because of the peculiar form of remedy prescribed therein, citing in support of the latter contention *Pollard* v. *Bailey*, 20 Wall. 520. A statute of Alabama made stockholders of a bank individually liable for its debts, and according to the construction given to it by the Supreme Court of the State the remedy provided was a suit in equity, whereas in that case a single creditor had sued one of the stockholders in an action at law; and in denying the right to maintain such action this court observed, page 526:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement. . . . The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced

by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

To like effect was cited *Fourth National Bank* v. *Franklyn*, 120 U. S. 747. The Court of Appeals was of opinion that the statute in Maryland not only created a statutory liability but prescribed a particular remedy, and that no action could be maintained, either in Maryland or elsewhere, unless that special remedy was pursued.

Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the Court of Appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the States, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick* v. *Railroad Company*, 103 U. S. 11. It may well be that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained " where the statute of the State in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the State in which

the right of action is sought to be enforced." *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 605; see also *Dennick* v. *Railroad Company*, 103 U. S. 11; *Huntington* v. *Attrill*, 146 U. S. 657; *Northern Pacific Railroad* v. *Babcock*, 154 U. S. 190.

What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the State; in this District the personal representative of the deceased. But neither the State in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 5 Cranch, 303; *M'Nutt* v. *Bland*, 2 How. 9; *State of Maryland, for use of Markley*, v. *Baldwin*, 112 U. S. 490. See, also, *Gaither* v. *Farmers' & Mechanics' Bank of Georgetown*, 1 Pet. 37, 42, in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: "This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit." It is true those were actions on contract, and this is an action for a tort,

but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party.

Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland. The judgment will be

Reversed, and the case remanded for a trial upon the merits.

THOMPSON *v.* MAXWELL LAND GRANT AND RAILWAY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 91. Argued November 2, 3, 1897. — Decided December 6, 1897.

That which has been decided on one appeal or writ of error, cannot be reëxamined on a second appeal or writ of error, brought in the same suit.

Whenever a case comes from the highest court of a State for review, and, by statute or settled practice in that State, the opinion of the court is a part of the record, this court may examine such opinion for the purpose of ascertaining the grounds of the judgment.

Although the judgment and the mandate in a given case in this court express its decision, it may examine the opinion for the purpose of determining what matters were considered, upon what grounds the judgment was entered, and what has become settled, for the future disposition of the case.

In the former decision of this case, 95 U. S. 391, the decree was reversed on the ground that the bill, as it stood, was technically a bill of review; but it was further decided that certain matters then in issue were sufficiently and effectually determined by the proofs already in, and the reversal did not throw open the case for additional proofs upon such matters.

An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age; and a decree made in a suit in which an infant is a party, by consent of counsel, without fraud or collusion, is binding upon the infant and cannot be set aside by rehearing, appeal or review.

A compromise made in a pending suit which appears to the court to be for the benefit of an infant, party to the suit, will be confirmed without reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud.

The facts in this case are as follows: In 1841 the Republic of Mexico made a grant to Charles Beaubien and Guadalupe Miranda of a large tract of land, generally known of late as the Maxwell Land Grant; so known because Lucien B. Maxwell, having acquired title from Beaubien and Miranda or their heirs, was, or at least claimed to be, for many years the sole owner. In September, 1859, the heirs of Charles Bent, namely, Alfred Bent and his two sisters, Teresina Scheurick

and Estefana Hicklin, brought a suit in the District Court for the county of Taos in the Territory of New Mexico, against Beaubien, Miranda and Maxwell, claiming that under a parol contract their father, Charles Bent, was interested with Beaubien and Miranda in the ownership of the grant, and praying that such interest be established and decreed, and that it be also set off to them by partition. In June, 1865, upon the pleadings and proofs the court decreed to them an undivided fourth part of the grant, and appointed commissioners to make partition, giving specific directions for their guidance. Nothing was done under this decree. Soon thereafter negotiations were entered into between plaintiffs and Maxwell for a compromise of the litigation on the basis of Maxwell paying them a money consideration to relinquish their claim. It was agreed by the three plaintiffs that Alfred Bent and Aloys Scheurick, the husband of one of the sisters, should act in the matter as their agents to sell to Maxwell for the best price they could obtain, but never less than $21,000, or what Beaubien's heirs received. This compromise was advised and approved by their counsel. A conference was had in September or October, 1865, at Maxwell's residence, at which Alfred Bent demanded $21,000 and Maxwell offered $18,000. Alfred Bent returned from that conference to Taos, where the family resided, without having effected a definite agreement as to the price. The plaintiffs, however, considered the sale as good as made, but Alfred Bent advised his co-plaintiffs that they could get a few thousands more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs should receive. The plaintiffs expected to close the bargain in a few days, were ready to make the deeds as soon as the matter was settled, and the deeds were in fact written out by Scheurick, the husband of one of the plaintiffs. Before the compromise was consummated and on December 15, 1865, Alfred Bent died, leaving surviving him his widow, Guadalupe Bent, and three infant children, Charles, Julian and Alberto Silas, aged respectively six, four and one years. On April 12 his widow was appointed administratrix of his estate and qualified. Just before his death Alfred Bent made a will, by

which he gave and bequeathed to his wife, "for the maintenance of her and my three children, Charles, Julian and Silas Bent, all of my real and personal property." But this will was not presented until March, 1867, when it was approved and admitted to probate. Beaubien, one of the original grantees, had left six children surviving. Maxwell married one of them, and between April 4, 1864, and January 1, 1870, purchased the interests of the other five for a consideration of not more than $3500 each. On April 9, 1866, the death of Alfred Bent was suggested, and his minor children and heirs, Charles, Julian and Alberto Silas, were by order of the court substituted as complainants in place of their father. On April 12, the mother of these minors, Guadalupe Bent, was by the court appointed guardian *ad litem* and commissioner in chancery for such minors, with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate described in the suit to Lucien B. Maxwell. A settlement with Maxwell was concluded by Aloys Scheurick, acting for his wife, his wife's sister and her husband, and the widow as guardian *ad litem* for the minor children of Alfred, which was acceptable to all the parties, by which Maxwell was to pay the sum of $18,000 for the conveyance of the interest of the Bent heirs. This compromise was advised by their leading counsel. In May the two sisters, by separate deeds, conveyed their interests to Maxwell, and during the same month Guadalupe Bent, as guardian *ad litem* and reciting the order of April 12, also executed to Maxwell a conveyance of the interest of the minors. Each of these conveyances purported to be for the sum of $6000. At the next term of the court, about four months after the execution and delivery of these deeds, and on September 10, 1866, a further order or decree was entered, which read as follows:

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas since the

time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities to the same:

"It is therefore hereby ordered, adjudged and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and, by the mutual consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*, that is, to the said Aloys Scheurick and Teresina Bent, his wife, one third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the — Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

"And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged and decreed, that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian, *ad litem*, for Charles Bent, Julian Bent and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim and demand of, in and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, adjudged

Counsel for Parties.

and decreed, that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

In April, 1870, Maxwell, claiming to have the full title to the entire grant, conveyed all except a few acres to the Maxwell Land Grant and Railway Company. In August of that year Maxwell and the Maxwell Company filed a bill in the District Court against the appellants Guadalupe Thompson and her husband, (the former being the widow of Alfred Bent, who had since intermarried with George W. Thompson,) and the three minor children of Alfred Bent, which, after reciting in a general way the history of the grant and the proceedings in the former suit, alleged that it was doubtful whether the order and decree of September, 1866, fully expressed the agreements of the parties, or fully cancelled and discharged all claims that the infant heirs of Alfred Bent had in the land, and prayed that the defendants be adjudged to have no interest in or title to the premises, equitably or otherwise, and that the plaintiffs' title be quieted. Subsequently the bill was amended, and thereafter, the defendants having answered and proofs having been taken, a decree was entered sustaining the prayer of the bill and quieting the title of the plaintiffs in the premises. This decree was affirmed on appeal by the Supreme Court of the Territory, but on further appeal to this court was reversed, 95 U. S. 391, and the case remanded to the territorial courts for further proceedings. Subsequent proceedings having been had therein a new decree was entered by the District Court in favor of the plaintiffs, which on appeal to the Supreme Court of the Territory was affirmed, and from such decree of affirmance this appeal has been taken.

Mr. John G. Carlisle for appellants. *Mr. S. D. Rouse*, *Mr. James O'Hara*, *Mr. Caldwell Yeaman*, *Mr. E. T. Wells*, *Mr. R. T. McNeal*, *Mr. John G. Taylor* and *Mr. Logan Carlisle* were with him on the briefs.

Mr. Frank Springer and *Mr. A. B. Browne* for appellees. *Mr. A. T. Britton* was with them on the brief.

Opinion of the Court.

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

It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be reëxamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Supervisors* v. *Kennicott*, 94 U. S. 498, and cases cited in the opinion; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Northern Pacific Railroad* v. *Ellis*, 144 U. S. 458; *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339, 343.

Whenever a case comes from the highest court of a State for review, and by statute or settled practice in that State the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment. *N. O. Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Kreiger* v. *Shelby Railroad*, 125 U. S. 39; *Egan* v. *Hart*, 165 U. S. 188. We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered and what has become settled for further disposition of the case.

We, therefore, turn to the former opinion and the mandate to see what was presented and decided. The ground upon which the reversal was ordered was that the bill as presented, especially after the amendment, was technically a bill of review, and as such could not be maintained for three reasons: First, because the decree sought to be reviewed was a consent decree; secondly, because the bill was filed on behalf of an assignee of the original defendant; and, thirdly, because it sought a modification of the decree upon a matter of fact not appearing upon the record, without alleging any newly discovered evidence unknown to the parties before that decree. The opinion by Mr. Justice Bradley gives a full history of the litigation, the substance of the allegations in the bill of com-

plaint, and points out why, especially after the amendment, it must be regarded as a bill of review. The amendment put into the prayer these words: "That for the aforesaid errors of law, apparent on the face of the said decree of 10th September, 1866, the same may be reviewed and reversed in the points herein complained of." But after demonstrating that the bill as it stood must be deemed a bill of review, and not sustainable, the opinion proceeds:

"Nevertheless, the general purpose which it evidently had in view — the quieting of the title to the land in question — is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. And if, instead of seeking to reverse the decree of September, 1866, (which, for like reasons of public policy, as applicable to the security of judgments that have passed into *rem adjudicatam*, is not allowable,) the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view."

And then, after quoting from Lord Redesdale, it adds:

"The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf. But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

"Our conclusion is, that the present decree must be reversed

with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

The mandate contained an order in the language of the last paragraph.

Although the former decree was reversed on the ground that the bill as it stood was technically a bill of review and could not, under the circumstances, be maintained, obviously the decision went beyond the determination of this matter. The case was not remanded with instructions to dismiss the bill as one not maintainable. It was decided that there were allegations in the bill which, if certain matters were stricken out, would make it properly one to more effectually carry into execution the consent decree of September, 1866, to establish beyond further controversy the settlement then made, and to quiet the title of the plaintiffs. It was also perceived and decided that the proofs already taken made out a case which justified such relief, and that while the proofs did not establish one of the principal facts set forth in the original bill, to wit, that the settlement was simply carrying into effect a compromise concluded with Alfred Bent, the father of the minors, during his lifetime, they did establish that such settlement made by the mother and guardian was advantageous to the infants, and was so considered and accepted by the court in their behalf. Not only was there no dismissal of the bill, but beyond that, the case was not opened for new proofs in respect to matters distinctly put in issue by the pleadings as they stood, and in respect to which it was determined that the proofs already in were sufficient. The plaintiffs were authorized to amend their bill, as they should be advised, but obviously this contemplated such amendments as would make the bill one of the character and scope indicated in the opinion. The defendants were given leave to

answer any new matter that should be introduced into the bill, thus impliedly excluding the right to make new answer to those matters which should not be changed. And further, while it was ordered that the proofs already taken should stand as proofs upon any future hearing, no leave was given to take further testimony upon the matters already in issue, but simply to make additional proofs upon any new matter that might be put in issue by the amended pleadings. Language could not be clearer to show that this court decided that certain matters then in issue were sufficiently and effectually determined by the proofs already in, and did not throw open the case for additional proofs upon such matters. To now consider the case as reopened in its entirety and to inquire whether each and all of the matters in issue are or are not established by the proofs, including those taken subsequently to the prior decision, would be to practically treat the case as entirely new, and ignore that which was considered and determined on the former hearing.

In the light of that decision it is not difficult to reach a conclusion upon the record as it now stands. When the case went back to the trial court the plaintiffs added no new matter to their bill. They made ten amendments, nine of which consisted simply in striking out certain paragraphs and sentences, and the tenth in transposing the position in the bill of one paragraph. There was, therefore, nothing new to which the defendants were called upon, or permitted by the decision, to make answer. The parts of the bill stricken out were such as tended to make it, according to the opinion of this court, technically a bill of review, and left it strictly such a bill as was approved of in that opinion. The defendants filed answers to the amended bill. These answers contained new matter. This new matter was substantially that the consent decree of September, 1866, was not made at the request or with the consent of the solicitor of the defendants or any of them, nor did the minors or any one having authority to represent them ever authorize any solicitor to consent to any decree for the transfer or surrender of their rights; that the pretended agreement and proceedings were fraudulent as

to the minors, and involved an unjust, erroneous and illegal sacrifice of their just and valid rights; that their interest in the grant alleged to have been sold, released or surrendered for the sum of $6000 was at that time worth not less than $100,000, and is now worth a much greater sum, and that the alleged settlement and compromise was not in any way beneficial or advantageous to the minors, or necessary for their support or maintenance. The record now brought before us contains none of the proofs taken and offered on the hearing, but only the findings of fact made by the court. This is in accordance with the procedure prescribed by statute for the review in this court of cases heard and determined in the territorial courts. It does appear, however, that after the return to the trial court of the mandate in this case, and on April 7, 1882, the children of Alfred Bent commenced an independent suit against the Maxwell Land Grant Company and all other parties supposed to have any interest in the grant, to establish their title to a one twelfth part of the estate; that issues were made up in that case and proofs taken, and that by consent of counsel the proofs taken in that case were used as proofs in this. The findings of fact in the two cases are substantially similar. In that a decree was entered dismissing the bill, and it is now pending in this court, the next case on its docket, and submitted and argued with this. It may well be considered within the scope of the prior decision that as no new matter was introduced into the plaintiffs' bill the defendants were not warranted in setting up any new defences, and that upon the issues as they stood after the amendments to the bill, striking out portions thereof and the proofs then taken, the only thing which the trial court ought to have done was to have entered a decree thereon quieting the plaintiffs' title in accordance with the views expressed by this court.

But passing that, and considering the case in the light of the issues as they stand upon the amended pleadings and the findings of fact made by the lower court, we are clearly of opinion that its decree in favor of the plaintiffs must be sustained. These findings show that in the lifetime of Alfred

Bent the counsel of himself and his two sisters advised them to settle with Maxwell rather than take the award of the commissioners; that on a conference between Alfred Bent, acting for himself and his sisters, and Maxwell, the former demanded $21,000 as the consideration of such settlement, and that Maxwell offered $18,000, a difference of $3000, or only $1000 for each of the three parties plaintiff; that while no definite agreement was then completed the Bents considered the sale as good as made, prepared deeds for carrying such settlement into effect, and only waited on the advice of Alfred Bent that by delaying a few days they might get more money, he insisting that they should receive as much as the Beaubien heirs obtained. The findings also show that the amount which was finally accepted was larger proportionately than that which the Beaubien heirs received for their interests; so that while it may be technically true that no settlement was accomplished during the lifetime of Alfred Bent, it does appear that negotiations had proceeded so far that the Bent heirs considered one accomplished, and prepared to carry it into effect. Scheurick and Hicklin, the husbands of Alfred Bent's two sisters, as well as the four husbands of the Beaubien heirs, who during these years sold and conveyed their interests to Maxwell for less sums proportionally than the Bent heirs received, were intelligent men, ranked among the best citizens of the community, and were considered men of wealth and influence, so the case is not one of an advantage taken of ignorance and inexperience. It further appears that the compromise as finally made was advised by the leading counsel for the Bent heirs; that the sisters, who were adults, with their husbands, executed deeds for the same amount, and have never since questioned the propriety and validity of the settlement. The findings also show that "at and about the year 1866, and for several years thereafter, there was no demand for or sales of undivided interests in lands of the quantity, character and location of those in question, such as to create any ascertainable market value thereof;" that the opinions of the witnesses examined in the present suit varied from two and one half cents to one dollar and twenty-five cents per acre, and that it

is impossible to satisfactorily ascertain or fix what was the value per acre of the grant at that time, the "value being largely speculative for the future." The court further expressly finds that the mother and guardian *ad litem* knew the character and scope of the instrument she was signing; knew that it was a settlement of the claims in favor of her children; was satisfied with the sum paid, and "that no fraud, imposition or error has been shown to have entered into said transaction, or to have brought about said compromise decree."

That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said:

"Although the court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit. In the same manner, an order for maintenance, though usually made after an inquiry, if made without would be equally binding." (In support of these propositions many authorities are cited in a note.) . . . "An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion or error."

In *Walsh* v. *Walsh*, 116 Mass. 377, a decree had been entered as follows: "And the plaintiff and the defendants, . . . Thomas Keyes, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree: And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered, and adjudged, and decreed," etc. On

a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said:

"An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, 3 Madd. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooke* v. *Mostyn*, 33 Beav. 457, and 2 De G., J. & S. 373.

"If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Prac. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review. *Webb* v. *Webb*, 3 Swanst. 658; *Harrison* v. *Rumsey*, 2 Ves. Sen. 488; *Bradish* v. *Gee*, Ambl. 229; *S. C.* 1 Keny. 73; *Downing* v. *Cage*, 1 Eq. Cas. Ab. 165; *Toder* v. *Sansam*, 1 Bro. P. C. (2d ed.) 468; *French* v. *Shotwell*, 5 Johns. Ch. 555."

Ordinarily indeed a court before entering a consent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisability of the settlement was a sound exercise of his discretion. It is

true the findings show that this decree of September, 1866, was not made by the personal procurement, knowledge or consent of said Scheurick or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter. They also show that there is no pleading, order or proceeding of record disclosing whether or not any inquiry was made by the court; but it does appear that the parties plaintiff, including the infants, were represented by counsel; that the guardian *ad litem* as well as the other adult plaintiffs fully understood the settlement and assented to it; and it is not strange that, having executed conveyances, they left to counsel such further action as should be deemed necessary to perfect the transfer of title. Further, in April prior to this decree, not only was the suit revived in the name of the infant heirs of Alfred Bent, but, on motion of the solicitors for plaintiffs, their mother was appointed guardian *ad litem* and commissioner in chancery, with full power to execute deeds and carry into execution all sales or transfers of their interest in the real estate described to the defendant Maxwell. The court was, therefore, early advised of the fact of a proposed settlement. The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree, providing for a settlement whose terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.

Again, the copy of the order directing the appointment of the mother as guardian *ad litem* and giving her authority to make the conveyance was incorporated into the deed which she knowingly executed, so that any inspection of the deed would have disclosed the fact that proceedings were being taken in court looking to the accomplishment of this compromise and settlement. There was no concealment or secrecy in the matter. In this connection we are referred to this paragraph in the opinion of the Supreme Court of the Territory, filed in the companion case to which we have heretofore referred:

"We do not enter into a discussion at large of the testi-

mony by which it is claimed that the decree of September, 1866, is successfully impeached upon the ground of fraud, and while we are not prepared, in view of the testimony submitted since the decision in *Thompson* v. *Maxwell*, 95 U. S. 400, to say that 'the proofs show a case which, in our own judgment, support the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants and were so considered and accepted by the court in their behalf,' we do hold that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion, and that no fraud, imposition or error has been shown to have entered into said transaction or to have brought about said compromise decree."

It will be seen from this that while the Supreme Court of the Territory, under the new proofs presented, was unable to express itself as strongly as this court had done, it did consider that the judgment of the chancellor in considering and accepting the terms of settlement was a fair and reasonable exercise of his discretion. In other words, that court seems to have been of the opinion that under the later testimony it could not be said that the settlement was in fact advantageous to the infants, but at the same time found that the chancellor not only made inquiry and considered the question of advantage, but also exercised fair and reasonable discretion in approving the settlement; and that, certainly, is all that is necessary to uphold a decree of a court. It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than com-

promised their claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal, shall be held as binding upon them as similar action taken by adults.

Again, it is said that it appears from the findings that the guardian *ad litem* was a Mexican woman, and, at the time of the execution of the deed, ignorant of the English language, unfamiliar with business or her duties as guardian, without knowledge of the boundaries or extent of the grant or of the character and value thereof; that Maxwell represented to Scheurick that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red River, whereas it did so extend over 200,000 acres; that Scheurick and the guardian *ad litem* believed and were influenced by said representations; that Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, a resolute and determined man, of large wealth and great influence throughout the county of Taos and Territory of New Mexico; that he made threats that unless the Bent heirs accepted $18,000 for their claims they would never get anything, and that such threats were communicated to the guardian *ad litem*, and that these matters influenced her in making the settlement and conveyance. But it also appears that it was not definitely known at the time where was the boundary line between Colorado and New Mexico; that the guardian *ad litem* acted in concert with the adult plaintiffs who were dealing with their own interests on the same terms, and that she was willing to make the same settlement they did. And when we take into consideration the character, the ability and standing of the husbands of the other adult plaintiffs, the fact that their interests were alike, that they all acted together, that the settlement which was finally made was so nearly that which the father of these minors had proposed in his lifetime, the fact that no fraud, imposition or

error entered into the transaction or brought about the settlement, it is going too far to hold that the mere weakness and ignorance of the guardian *ad litem*, whose interests were looked after by her brother in law and counsel, or the strength and vigor of the opposing party, are sufficient to invalidate a decree otherwise not open to objection.

Again, it is urged that the whole of the consideration had not been paid by Maxwell at the time of the commencement of this suit. The findings are that, as to the payment, the testimony is conflicting. It seems that Maxwell gave notes for the amount to each of the three plaintiffs. The guardian *ad litem* testified that the note she received had been paid — so testifying because her second husband, Thompson, to whom she was married about thirteen months after the death of Alfred Bent, and to whom, at the time of the marriage, she delivered the note with everything else she had, told her it had been paid. Other witnesses testified that only a portion of it had been paid, and the court found that the weight of the evidence was that at the beginning of the suit a considerable sum was still unpaid, but how much could not be ascertained. Maxwell was at all times a man of ample financial responsibility. No part of the proceeds of the note was paid directly to the minors or their mother, but Thompson, her second husband, supported, maintained and educated the minors during their minority with the funds of his wife and himself the same as his own children, keeping no separate account. The sum and substance of all this is, that each of the three separate plaintiffs took notes for the money Maxwell was to pay in settlement. Whether these notes drew interest or not is not disclosed, but Maxwell was a man of large financial ability, from whom the notes could have been collected at any time if the parties desired, and if either of them permitted the note to remain uncollected it must be assumed that it was for some good reason, possibly for the sake of the interest which the note drew. There is no finding that the note to the guardian *ad litem* had not long since been paid, but simply that it had not been fully paid at the time this suit was commenced, to wit, in 1870. If what was paid was not paid to

the guardian *ad litem* it was because she had turned the note, as well as all other papers she had, over to her second husband. Whatever may be said as to the carelessness or the irregularity of these proceedings it cannot be doubted that substantially the proceeds of the note went to the benefit of the children, for they were supported and educated by the second husband the same as his own children. In this connection also it is well to notice the fact that, according to the inventory filed by the widow of Alfred Bent as administratrix, outside of the real estate and the note received from Maxwell, the total assets of the estate were $1408. The claims admitted and allowed in the probate court amounted to $2423; and while certain witnesses familiar with his affairs testified that he had both real and personal property other than that in the inventory, both in New Mexico and Colorado, it does not appear what amount, if any, there was of such property. It would seem from this that the interests of the minors required the settlement of this claim against Maxwell, in order to secure funds for their maintenance and education, for the whole personal estate of their father, as shown by the inventory, was not sufficient to pay the claims allowed.

These are all the matters which are called to our attention as tending to impugn the validity of this consent decree, and even if we were at liberty under the terms of the prior decision to consider all these new matters we are of opinion that there is not enough in them, singly or together, to justify us in disturbing the settlement which was made and the decree which was entered.

In determining the validity of this transaction it must be remembered that the petition filed in the original case brought by Alfred Bent and his sisters disclosed that the interest which their father claimed in the grant arose out of a parol agreement, and so it is not strange that after a decree had been rendered in their favor their counsel advised a settlement and the receipt of money rather than take the chances of further review in an appellate court; that Alfred Bent, the father of these minors, with his sisters, entered upon negotiations looking to a settlement of their claims, and that although there

was a difference of $3000 between what was demanded and what Maxwell offered, they considered the question as settled, and prepared deeds for the purpose of making conveyances of their interests, and that the delay in fully consummating this settlement was owing to the hope of getting a little more money; that only the accidental death of Alfred Bent prevented the consummation of that settlement, a settlement by adults, and one which would never have afforded any excuse for further litigation, as is shown by the acceptance on the part of the two sisters of the settlement in their favor; that while the guardian *ad litem* was an ignorant and inexperienced woman, her interests were looked after by her brother in law, who was a capable business man, and by counsel learned in the law; and, while there may have been some irregularities in the proceedings, yet it is affirmatively found that there was no fraud, imposition or error in the transaction or the decree. Surely under those circumstances the decree ought not to be disturbed.

But there is another aspect in which the equities of this case may fairly be considered. The will of Alfred Bent gave the entire estate to his widow — gave it, it is true, for the maintenance of herself and her children, but nevertheless passed the title to her; and though the will had not been probated at the time of this settlement, it was soon thereafter, and, of course, became operative as and from the date of his death, so that at the time of the settlement the title to this property was in her. The owner by his will gave this property to his widow, and by such will trusted to her to make such disposition of it as she should deem best, relying upon her to use the proceeds for her own maintenance and that of her children. He had a right to make such a disposition of the property and entrust it absolutely to her, and that in respect to this property it was not an unwise disposition is evident, for although he must have known of her inexperience in matters of business, he also knew that her interests were identical with those of his sisters, and that their common interests would be cared for by those competent to look after such affairs. If the settlement made by the sisters, as adults,

is beyond challenge, should not that made by the widow, also an adult, be upheld, and for the same reasons? The question, under those circumstances, would be not whether she was guilty of any wrongful use of the funds which she received, but whether she as the holder of the title was fraudulently led into the settlement. It is, of course, not necessary to rest this case upon such suggestions, but they are certainly worthy of consideration in determining its equities.

In conclusion, it may not be inappropriate to call attention to some things which are matters of public history, and which are referred to at some length in the *Maxwell Land Grant Case*, 121 U. S. 325. The Mexican colonization law limited the amount of a grant to a single individual to eleven square leagues, and it was claimed that all grants like this in which outboundaries were named were to be taken as simply grants of eleven square leagues per individual, to be laid off within such outboundaries. As there were in this case two grantees, Beaubien and Miranda, it was according to the claim a grant by the Mexican authorities of only twenty-two square leagues, or 97,424 $\frac{8}{10}$ acres. While this, with other grants, was on June 21, 1860, confirmed by act of Congress, c. 167, 12 Stat. 71, claim was still made that the confirmation was operative only for the twenty-two square leagues. Some of the Secretaries of the Interior of the United States refused to issue patents in such cases for any more than eleven square leagues per individual grantee, and not until the case of *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, decided in 1876, was it settled that such an act of confirmation was equivalent to a grant *de novo*, and included all the lands within the outboundaries. Indeed, in the opinion in the *Maxwell Land Grant Case*, *supra*, decided in 1887, it is intimated that the *Tameling case* was not conclusive upon the question, because that was an action in ejectment in which the legal title shown by the patent prevailed, and not until the case then being considered, in which was a direct attack by the United States upon a patent, could it be held that there was a final adjudication of the question. So that while the owners of the land grant were claiming as against the Government the whole

area within the outboundaries it was still an unsettled question whether they would finally succeed in obtaining more than the twenty-two square leagues. Was it not a wise settlement for parties, whose claim to an interest in what might be found to be less than 100,000 acres rested simply on a parol agreement therefor, to obtain for that interest a sum which was more than half what the best government land could be purchased for? We think it can be well said, in the language of the Supreme Court of Mew Mexico, "that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion."

We see no error in this record, and the decree is

Affirmed.

Mr. Justice Shiras and Mr. Justice White dissented.

Bent *v.* Miranda. Appeal from the Supreme Court of the Territory of New Mexico. No. 91. Argued with No. 90 and by the same counsel. Mr. Justice Brewer: This is a case, the companion of that just decided, as has been indicated in the opinion in that case, and the same considerations compel an affirmance of the decree herein.

Mr. Justice Shiras and Mr. Justice White dissented.

HYER *v.* RICHMOND TRACTION COMPANY.

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

No. 379. Submitted October 18, 1897. — Decided December 6, 1897.

Hyer and Shield were engaged separately, each on behalf of himself and his associates, in seeking from the city government of Richmond a concession for a street railway with collateral lines. Hyer's organization was to be called the Richmond Conduit Company, and Shield's the Richmond Traction Company. Hyer made a deposit of money in a bank in Richmond to aid in his projects. Hyer and Shield then contracted in writing as follows, each being fully authorized thereto by his associates: "We

Statement of the Case.

hereby bind ourselves, in our own behalf and for our associates, mutually to coöperate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise. The deposit already made with the State Bank of Richmond, by Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system." A full statement of the action of the two companies was made to the Richmond authorities. Hyer fully performed his agreements. He was unable to go to Richmond when the matter was settled, and Shield secured the concession for himself and his associates, and refused to permit Hyer and his associates to participate in it. By bill in equity, amended bill and supplemental bill, Hyer sought to be declared owner of one half interest in the Traction Company's franchise, property and stock, and for a decree securing the possession and enjoyment thereof. *Held*, that, without deciding whether the contract sued on was, under the facts and circumstances disclosed, void as against public policy, the case presented was not one which called for the interposition of a court of equity; but that the plaintiff's remedy was by an action at law.

On October 30, 1895, appellant, as plaintiff, filed his bill against the defendants in the Circuit Court of the United States for the Eastern District of Virginia. After some changes, he, on April 18, 1896, filed an amended and supplemental bill. The sufficiency of this was challenged by demurrer. The demurrer was sustained, and on August 22 a decree was entered dismissing the bill. From that decree the plaintiff appealed to the Court of Appeals, which court, on May 14, 1897, ordered that the decree of the Circuit Court be affirmed, without prejudice. Whereupon the case was removed to this court by certiorari.

It appears from the allegations in the amended and supplemental bill that the plaintiff, whose attention had been for some time devoted to the matter of street railways in the city of Richmond, Virginia, succeeded in obtaining from the city council a franchise for the construction and operation of a

Statement of the Case.

street railway on Broad street, in that city. An ordinance, passed on June 17, granted the franchise to the plaintiff and his associates under the name and style of the Richmond Conduit Company. The terms of this ordinance differed in some respects from those of the one prepared by the plaintiff, who declined to accept it or to proceed under it in the form in which it had passed the council. But upon an open conference with the committee on streets of the city council plaintiff was assured that changes would be made rendering the franchise acceptable to him, provided he would deposit in one of the banks of the city of Richmond the sum of ten thousand dollars, upon certain conditions embodied in a paper, prepared by the city attorney. On July 17 he caused the deposit to be made, and gave satisfactory guarantees of the good faith of himself and associates, and of their purpose to construct the railway, which guarantees, as he was assured, would secure the modification of the grant in accordance with his suggestions. While in Richmond, and conferring with the various committees of the city council with regard to this franchise, he became aware that certain other parties were seeking to secure a grant of a like franchise to them, under the name and style of the Richmond Traction Company, and that the defendant, P. B. Shield, was apparently the head of this movement, but he had not been successful in obtaining the passage of any ordinance by the city council. In the early part of August, 1895, the plaintiff went to the city of New York, to make arrangements for constructing the railway as soon as the amendments had been made to the ordinance. While there he was in the banking house of Stewart & Co., who had been advising with him with a view of aiding him financially in the prosecution of his enterprise, and there ascertained that the defendant Shield was also in conference with the said firm of Stewart & Co., seeking aid in the prosecution of his Richmond Traction Company scheme. Stewart & Co. advised the consolidation of the two interests, to wit, the interest of plaintiff and his associates in the Conduit Company with that of Shield and his associates in the Traction Company. After some conferences a contract was entered into between plaintiff and Shield, which took the

form of a joint letter to the banker, of which the following is a copy:

"NEW YORK, *August 9th*, 1895.

"S. H. G. Stewart, Esq., 40 Wall street, city.

"DEAR SIR: We, the undersigned, L. H. Hyer, of Washington, D.C., and Phil. B. Shield, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to coöperate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER.

"(Signed) PHIL. B. SHIELD.

Plaintiff was authorized to act for himself and associates, and the defendant Shield represented that he had a power of

attorney from all parties interested in the traction company scheme, and he did actually represent them.

It was agreed between the parties to this contract that a full statement and explanation of the action of the two companies should be made to the city authorities of Richmond, and in fact it was so made. Plaintiff fully performed all the promises and covenants entered into in said contract in behalf of himself and his associates, but being detained by a serious illness was unable to proceed immediately to Richmond, and trusted to the defendant Shield and his associates to carry out other terms of the contract and secure the franchise for the mutual benefit of both interests. Disregarding this contract, Shield and his associates secured the passage of an ordinance granting the franchise to them, and wholly ignoring plaintiff and his associates. The first section of this ordinance provides: "That the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, Everett Waddey, Reuben Sherreffs, Philip B. Shield, Charles T. Child and W. F. Jenkins, be, and the same is hereby, permitted to construct and operate a street railway within the limits of the city, along the following routes, under and subject to the conditions and provisions hereinafter set forth: A double track in Broad street," etc. Subsequent sections cast various obligations upon the company in respect to the construction and operation of the railway, the use by other companies of the tracks, and the payment of a certain per cent of the gross receipts into the treasury of the city. The last section is as follows:

"Fourteenth. Said Richmond Traction Company, and all such persons as now compose said company, or who may hereafter unite with them, are, in virtue of the authority vested in the common council of Richmond, pursuant to the act of the General Assembly of Virginia, passed March 20, 1860, entitled 'An act to authorize the common council of Richmond to authorize persons to construct railroads in the streets of said city,' declared to be a corporation, and are vested with all the rights and privileges conferred, or intended to be conferred, by said act on persons or companies authorized by said council of the city of Richmond to construct railroads in the streets of said

city, and are likewise bound by all the restrictions of said act."

All the parties named in the first section of this ordinance were duly notified of the claims of plaintiff and his associates, under the contract of August 9: notwithstanding which they ignored plaintiff and his associates, and proceeded to organize a corporation, taking all the stock to themselves, paying nothing therefor, but receiving certificates purporting to be of fully paid stock. Plaintiff, after alleging that he is the holder of all the interests represented by himself and his associates, prayed that he be decreed the owner of one-half interest in the Traction Company's franchise, property and stock, and specifically for certain orders to secure to him the possession and enjoyment of such interest.

Mr. Robert Stiles and *Mr. Addison L. Holladay* for Hyer.

Mr. W. W. Henry, *Mr. Edmund Randolph Williams*, *Mr. S. D. Schmucker* and *Mr. George Whitelock* for the Richmond Traction Company.

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

Two questions arise in this case: First, whether the contract sued on is, under the facts and circumstances disclosed in the bill, void as against public policy; and, if not, whether the case presented is one which calls for the interposition of a court of equity, or should be determined in a court of law.

In respect to the first question, it will be borne in mind that upon a demurrer, whatever the facts in the case may really be, we must take them to be as stated in the bill. So, in determining the question of the validity of this contract it must be assumed that there was no concealment; that everything was open and public; and nothing withheld from the knowledge of the city council, or any parties interested in the matter. The case thus presented is: Two parties apply separately to a city council for a franchise to construct a street railway. The banker from whom each of the parties is seeking

financial assistance advises them to unite and make a single application. They do so, and thereafter the city council, aware of both interests, of the two applications, of the advice to consolidate and the party by whom it is given, and of all the terms of the consolidation, grants the franchise to only one of the parties. Was the agreement to unite in one application against public policy and void?

In the view we have taken of the second of these questions it is unnecessary to definitely determine the answer which should be given to the first, though it may not be inappropriate to observe that the vice which is so frequently detected in contracts and agreements of a similar nature lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source. It would scarcely be doubted that two or more parties may properly unite in a partnership or corporation and thus unitedly make, in the name of the partnership or corporation, a single application for a grant or franchise; and, if they may so unite before any application, it is not easy to see why they may not so unite after having once made separate applications, providing all the facts and circumstances are fully disclosed and the public and the public authorities act upon full knowledge; and if they may sometimes so unite, an agreement for uniting is not necessarily void. As said by the New York Court of Appeals in *Atcheson* v. *Mallon*, 43 N. Y. 147, 151: "A joint proposal, the result of honest coöperation though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. The risk as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

See also *Smith* v. *Greenlee*, 2 Dev. (Law,) 126; *Phippen* v. *Stickney*, 3 Met. 384; Greenwood on Public Policy, p. 190, Rule 177.

It may be noticed that there is nothing in the agreement, reduced to writing, or as interpreted by the facts stated, which tends to show any thought or purpose of using corrupt or improper influences to secure the action of the city council. So that, upon the record as it stands, the question is, narrowly, whether any agreement to unite between parties who have applied, or contemplate application, for a franchise is under all circumstances necessarily void as against public policy.

The case is also easily distinguishable from those of contracts merely to abstain from bidding. An agreement not to bid tends to diminish the number of bidders, and thus *prima facie* to lessen the probable profitableness of the sale or contract. Yet, even in cases of public sales, the rule laid down by this court is that agreements to unite in a bidding are not necessarily void. Some other element than the mere fact of union must exist before the agreement is to be condemned. *Kearney* v. *Taylor*, 15 How. 494. In that case, at a public sale a portion of a farm was purchased by a company, organized pending the sale and making the purchase with the view of laying out and establishing a town thereon. After discussing the question of competition, and the reasons which had led courts to frequently denounce such combinations for the purpose of bidding, the opinion adds, (p. 520):

"These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders.

"We must, therefore, look beyond the mere fact of an as-

sociation of persons formed for the purpose of bidding at this sale, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it; and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld — otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice.

"Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each."

The observations thus made show that every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement to unite in a bid, must see that the agreement is such as really destroys the value of competitive bidding; and these observations, it must be noticed, were made in respect to a case in which a public sale had been ordered. The sale was, therefore, something which must take place, and the question of making a sale was not discretionary with the sheriff or other officer charged with the duty of making the sale. But here the city of Richmond was not bound to grant any franchise. It was free to determine whether it would grant or not, and, if it did, what form of street transportation should be adopted, and might also well consider the character, the financial ability and the situation of the various applicants in determining to whom it would be best for the public interests to grant such a franchise.

Where the grantor or vendor has not determined the question of grant or sale, and it is still a matter of discretion whether the grant or sale shall be made, it would seem that there were less cogent reasons for denouncing a combination or agreement of parties with a view of making a proposal. *Morrison* v. *Darling*, 47 Vermont, 67, 72. In that case it appeared that two parties each contemplated purchasing property belonging to a third. One of the two promised the other a certain sum if he would not interfere with him in

obtaining the property and would assist him in making the purchase. It was held that the agreement was valid. The court, after referring to the rule pertaining to the cases of public sales, said: "But in this case the owner of the share of the estate was under no obligation to sell to any one; and there was no stipulation to resort to any illegal or improper means to mislead the owner, or to induce a sale by any fraud or artifice. We do not think such a contract can be held void as against public policy."

But, as observed, every case must depend upon its own circumstances, and it may be that when the facts in this case are disclosed by the testimony they will be found to differ materially from those stated in the bill. Inasmuch as we are of the opinion that, even if the contract be valid, the plaintiff's remedy is in a court of law rather than in a court of equity, it is not wise to attempt to definitely determine whether, under the circumstances stated, this contract was or was not void as against public policy, for such determination might prove to be, in the final result, the mere answer to a moot question. It will be more satisfactory to pass upon the question when the surrounding facts are fully developed by testimony.

We pass, therefore, to the second question, which is: Assuming this contract to be valid, was the plaintiff's remedy in equity or at law? According to the allegations, the city council was aware of the two parties, of their agreement to unite in one application, of all the facts surrounding the agreement and proposed union, and with such knowledge it granted this public franchise to one party alone. In the exercise of its judgment in respect to the public interests, the city council determined that it was better that the defendants should have this franchise than that the united parties should have it. In the face of this determination by the authorities having special charge of the public interests, and ignorant as we must be of the reasons which controlled the city council in making this award to the one singly rather than to the two jointly, it would be improper for a court of equity to compel a consolidation of those interests. For reasons which must be held to be

sufficient and controlling, the city council deemed it not wise to grant this franchise to the two, but gave it to the one. Shall the courts overrule this determination, and entrust the franchise to the two rather than to the one? They have no general supervision over the judgment and action of public authorities. The city holds its grantee responsible for the proper discharge of the duties imposed by its grant of the franchise. It may well have determined that it did not desire the plaintiff to have any interest in it, or anything to do with the management of the street railway, and that the best interests of the city would be subserved by committing it, primarily at least, to the defendants alone. Shall the courts say that such determination was erroneous, or may be overruled simply because of a private contract between the two parties? It must be remembered that according to the allegations the city council knew of the union of interests, and yet declined to recognize such union. It may be said that by authorizing these defendants to incorporate, it put it in their power to let the plaintiff and his associates or any one else into the enterprise. Of course, the city council knew that the franchise when granted could be alienated by the grantees, and yet notwithstanding this possible alienation the fact remains that the city council determined that the primary parties to receive the franchise — the ones upon whom the burden of the contract should be laid — were the defendants alone, and not in conjunction with the plaintiff or his associates.

It is obvious that if two interests, which it may be believed are now not in harmony, if not decidedly antagonistic, are let into equal control of a franchise, such as this, the public interests may suffer. Harmony in management is no inconsiderable factor in securing the best possible results, and if the parties in interest are of two minds as to how the railway shall be managed, what improvements shall be made, and, in general, what shall be done in connection therewith, it is not difficult to perceive that their antagonism may prevent that efficiency which will tend to make the street railway of the greatest advantage to the public.

This conclusion, while not interfering with the right of the

plaintiff to maintain his action at law for the damages resulting from the defendants' breach of contract, at the same time preserves the city's control over the franchise, and upholds its determination as to the party or parties to whom it is willing to entrust such franchise.

But beyond these relations of the public to the enterprise, courts are not often wont to compel parties to unite interests and work together. And here it may be well to notice that the contract was not one in terms for a partnership in the management of the railway, but only one for a division of the profits. The parties stipulated to coöperate in securing the franchise and to divide equally the profits, but left the question of control and management unsettled. The application, it is true, was to be in the name of the Richmond Traction Company, but who should compose that company was, according to the last clause of the contract, to be subsequently determined. It may, however, be conceded that there is an implication of joint ownership as well as of joint interest in the management, and in the profits arising therefrom, and thus it may be said that the contract was really one for a partnership. It is seldom that a court of equity will decree that a partnership which has been agreed upon shall be carried into effect. More frequently it is called upon to release parties from partnership agreements on the ground that their antagonism prevents the fulfilment of the purposes of the partnership, and it would seem like a contradiction to force antagonistic parties to form a partnership when it is one of the recognized rules of equity that such antagonism is ground for dissolving a partnership already existing. It is true that the ordinance contemplates the formation of a corporation, and courts will sometimes decree the specific performance of a contract for the transfer of stock. But the ordinance was passed after the contract, and, as we have seen, the most that can be said of the contract is that it contemplated the creation of a partnership. The fact that thereafter the city council deemed it best to provide by ordinance that the grantees of the franchise should incorporate does not change the scope of the contract. It is precisely the same that it would have been

if the council had granted the franchise to Shield personally, and authorized him as an individual to construct and operate the railway. How then can it be said that this contract is to be deemed one for the transfer of shares of stock in a corporation? No corporation then existed. The Richmond Traction Company, in whose name the application was to be made, was not then a corporation and became one only on the passage of the ordinance. There was no certainty that one would ever be formed; there was no agreement that one should be formed, and the rights of the parties must be determined by the facts as they were at the time of the contract and the terms which entered into it. But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of the agreement to sell, but in cases where the stock has no recognized market value, is not purchasable in the market, or has a value which is not settled, but is contingent upon the future workings of the corporation, equity will sometimes decree specific performance of a contract of purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims, can adequate compensation be secured. At the same time the present value of the franchise, and therefore of the stock of the corporation owning the franchise, is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the population adjacent to the line, and, therefore, the number of people likely to avail themselves of its advantages, the cost of construction and of operation, are all well-known facts, and upon such known facts it is not

impossible for a jury to form a fair estimate of the value of the franchise, and, therefore, of the damage which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it.

The authorities generally support these views. In Pomeroy's Specific Performance of Contracts, § 290, the author, citing several cases, says: "It is well settled, as a general rule, that an agreement to enter into a partnership which would be literally performed by executing the partnership articles, or to carry on a partnership already established, will not be specifically enforced."

In *Hill* v. *Palmer*, 56 Wisconsin, 123, 129, the court observes:

"It is also well settled that the wrongful refusal by a party to a contract of copartnership to permit the firm to commence business, or, as it is sometimes termed, to *launch* the partnership business, is ground for an action at law by the injured partner to recover damages of the partner whose wrongful act has defeated the purposes for which the copartnership was formed. The cases which so hold, both in England and this country, are very numerous. Indeed, the authorities seem to be quite uniform in so holding. The following are a few of the cases referred to: *Venning* v. *Leckie*, 13 East Term R. 7; *Gale* v. *Leckie*, 2 Stark. 107; *Manning* v. *Wadsworth*, 4 Md. 59; *Glover* v. *Tuck*, 24 Wend. 153; *Bagley* v. *Smith*, 10 N. Y. 489; *Terrill* v. *Richards*, 1 Nott & McC. 20; *Ellison* v. *Chapman*, 7 Blackf. 224; *Williams* v. *Henshaw*, 11 Pick. 79; *Addams* v. *Totten*, 39 Pa. St. 447; *Vance* v. *Blair*, 18 Ohio, 532; 1 Story's Eq. Jur. sec. 665; Collyer on Part. sec. 245; 2 Lindley on part. (4th ed.) 1025, and cases cited in notes."

Powell v. *Maguire*, 43 California, 11, disclosed, like the case at bar, an agreement in respect to a franchise to be obtained from the legislature for the mutual benefit of plaintiff and defendant. The franchise in that case was for maintaining a steam ferry, and it appeared that the defendant, after obtaining the franchise in his own name, constructed a ferryboat at his own expense, and operated it between the points named in the charter. The suit was one to obtain

specific performance of the agreement, and it was held that it could not be maintained, the court saying, on page 19:

"Upon these facts it is obvious that if the plaintiff's rights rested solely on a verbal agreement, to the effect that he and the defendant would establish and maintain the ferry at their joint expense, and for their joint benefit, without reference to the franchise, the plaintiff's only remedy would be an action at law for a breach of contract. He would have no right to participate in the profits of an enterprise to which he had contributed nothing, and could claim no interest in a boat constructed by the defendant, at his own expense, and for his own use, nor in the earnings thereof. In such cases it is well settled that, when the partnership was never launched, and when one of the copartners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launching the enterprise."

In that case, also, it was held that the contract was against public policy, the facts in respect to the contract not having been disclosed to the legislature at the time the franchise was granted. In respect to this it was said (p. 21):

"When the legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise. . . . But if several persons desiring to obtain a franchise from the legislature, in which they are all to be mutually interested, see fit to ask it in the name of one only, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; and if he repudiates the contract on obtaining the franchise a court of equity will grant no relief. It may be that, if the legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the courts could be appealed to, to enforce such secret ante-

cedent agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretences."

These authorities might be multiplied, but they are sufficient to show the general rule controlling actions of this kind. For these reasons and upon these authorities we are of the opinion that the suit for specific performance cannot be maintained.

The decree of the Circuit Court was one dismissing the bill absolutely. In view of the doubt which rests as to the validity of the contract we think it should have been a dismissal without prejudice, and the order will be, therefore, that the case be remanded to the Circuit Court with directions to modify the decree so as to make it one dismissing the bill without prejudice to an action at law.

Mr. Justice Harlan, concurring.

I am of opinion that the object as well as the effect of the contract set out in the bill was to diminish competition in reference to the obtaining of a public franchise. For that reason it was detrimental to the public interests, and one in respect of which a court of equity ought not to give any aid to either party. In addition to this view, it appears upon the face of the ordinance in question that the city council of Richmond named the persons by whom that franchise was to be exercised; and a court of equity ought not to force another party into connection with those whom the city council thus designated. Aside from these considerations, I am of opinion that if the plaintiff has any remedy at all, he has an adequate one at law. Upon this last ground I acquiesce in the judgment of the majority of the court in this case.

Mr. Justice Brown, with whom concurred Mr. Justice Peckham, dissenting.

Mr. Justice Peckham and myself are unable to concur in that part of the opinion of the court which holds that the

complainant is not entitled to relief in equity. Neither the agreement between Hyer and Shield of August 9, 1895, nor the negotiations of these parties with the common council of the city of Richmond, contemplated or implied a partnership between them. Not only is it a fact of which we may take notice that street railways are universally constructed and operated by corporations, but it was one of the stipulations of the agreement of August 9, 1895, that "the application and franchise to be presented to the common council of the city of Richmond" should "be that of the Richmond Traction Company for the building of an overhead trolley or cable railway system." The franchise of June 17, 1895, was granted by an ordinance of this council to Hyer and his associates under the corporate name of the "Richmond Conduit Railway Company," while the rival competing scheme of Shield was applied for under the name and style of the "Richmond Traction Company." Not only must the common council have understood that it was contracting with a corporation, but there is nothing to show that it placed any special reliance upon the personal qualities of Shield or his associates. Indeed, the facts set forth in the bill in this connection show conclusively there could have been no such reliance.

While the entire stock of the Richmond Traction Company may have been taken in their names, there was nothing to prevent that stock from being transferred at any time to other parties; nor could the city have had any personal claim against Shield or his associates. The transaction was with the corporation, and with the corporation alone, and in a legal point of view it was a matter of entire indifference to the city who became the owners of the stock. The entire stock of the company might have been transferred to other parties the day after the charter was granted without any violation of its provisions. In fact, the common council is alleged to have understood that the interests of the two companies had been consolidated, and granted the charter to the Traction Company, with knowledge that Hyer and his associates were to participate equally in the enterprise.

Under such circumstances, we think it clear that the court

should have entertained a bill for the specific performance of this contract, and not have relegated the parties to the doubtful and unsatisfactory remedy of an action at law. We understand the rule to be, as stated by Cook on Stock and Stockholders, section 338, that "if the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance, and compel the vendor to deliver the stock."

This principle is particularly applicable to a case of this kind, where the corporation was but recently formed, the railroad yet unconstructed, and its shares of uncertain value — if indeed they had any market value at all. To require the complainant, under these circumstances, to bring a personal action for a breach of contract against Shield, who is alleged to be hopelessly insolvent and wholly unable to respond in damages, is to offer him the shadow and deny him the substance of relief.

DOUGLAS *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 10. Argued October 12, 13, 1897. — Decided November 29, 1897.

By the constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this act by proper penalties. All lottery privileges or charters heretofore granted are revoked." *Held*,

(1) That the provision when applied to a previously existing lottery grant in the State of Kentucky was not inconsistent with the contract clause of the Constitution of the United States;

(2) That a lottery grant is not, in any sense, a contract within the meaning of the Constitution, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the faith of or by agreement with the grantee, can be exercised after the revocation of the grant and the forbidding of the lottery, if its exercise involves a continuance of such lottery;

(3) That all rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the State to the extent just indicated; nevertheless, rights acquired under a lottery grant, consistently with existing law, and which may be exercised and enjoyed without conducting a lottery forbidden by the State are, of course, not affected, and could not be affected, by the revocation of such grant;

(4) That this court when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment.

THE case is stated in the opinion.

Mr. D. W. Sanders and *Mr. John G. Carlisle* for plaintiff in error. *Mr. Aaron Kohn* was on their brief.

Mr. W. S. Taylor, Attorney General of the State of Kentucky, for defendant in error. *Mr. William Goebel* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By section 226 of the constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

By joint resolution of the General Assembly passed January 30, 1892, the Attorney General of that Commonwealth

was directed, in execution of this constitutional provision, to immediately institute and prosecute such legal proceedings as might be necessary to suppress or revoke all lotteries or lottery franchises, privileges or charters operated in Kentucky.

In conformity with that resolution the present action was instituted in the Louisville Law and Equity Court. The petition charged that the defendants were exercising in the city of Louisville, Kentucky, and elsewhere, without lawful warrant, the right, privilege and franchise to operate a lottery. The relief asked was a judgment preventing the exercise by the defendants of such lottery franchise.

The defendant Douglas in his answer set out numerous acts of legislation under the authority of which he claimed the right to conduct the lottery in question. He insisted that the statutory and constitutional provisions invoked in support of the action were repugnant to the clause of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of contracts.

The defence was sustained by the court of original jurisdiction, which overruled a demurrer to the answer; and the Commonwealth having declined to plead further, its petition was dismissed. That judgment was reversed by the Court of Appeals of Kentucky, and the validity of the above constitutional provision relating to lotteries, and as applied to the defendant's claim of a lottery privilege, was adjudged not to be repugnant to the Constitution of the United States.

The case is here upon writ of error sued out by Douglas, who claims that by the final judgment of the highest court of Kentucky he has been denied a right and immunity secured to him by the Constitution of the United States.

It appears that under authority conferred by various legislative enactments which need not be specially set forth, the Mayor and Board of Councilmen of the city of Frankfort, a municipal corporation of Kentucky, made, December 31, 1875, a written agreement with one E. S. Stewart, whereby that city sold, conveyed and assigned to him a scheme of lottery composed of 30,900 classes which it had devised, not more than two of which were to be drawn on each day, Sundays ex-

cepted, until the whole number should have been fully drawn; Stewart to have the right to control and operate such scheme in accordance with the provisions of the acts under which the city proceeded. The agreement provided that, in consideration of the above sale, assignment and transfer, Stewart should pay to the city of Frankfort various sums of money at stated times. As required by the agreement, and in conformity with the acts of Assembly, he executed to the Commonwealth a bond in the penal sum of one hundred thousand dollars, conditioned for a faithful compliance with the provisions of those acts, and for the payment of all sums stipulated to be paid to the city of Frankfort, as well as all prizes drawn in any class under said lottery scheme.

By an act approved March 22, 1890, the General Assembly of Kentucky repealed the charter of the Frankfort lottery. Acts, Ky. 1889–90, c. 391, vol. 1, pp. 42, 43. But Stewart had died before the passage of that act, and by contract with his wife, as sole legatee and devisee of his estate, Douglas acquired the right to operate the lottery scheme that had been acquired by Stewart.

It is stated in the answer — and as this case was determined upon demurrer to the answer, it must be assumed in the present action to be true — that Stewart and Douglas fully complied with all the provisions of the above contract, paid all instalments due the city of Frankfort as the same became payable, fully performed every condition of his contract and bond, and was ready and willing to carry out the same according to the terms, stipulations and covenants thereof.

The answer further averred that on the 11th day of September, 1878, the Court of Appeals of Kentucky, in the case of *Webb* v. *The Commonwealth of Kentucky* — brought to enjoin the exercise of the privileges of a lottery grant — adjudged that the sale of a lottery franchise, under the authority of the State, vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract, which could not be repealed by the legislature of the State, and held section 6 of article 21, chapter 28, of the Revised Statutes attempting such repeal to be void so far as it affected the

rights of the purchaser under a contract made before the passage of the act.

The answer also contained the following averments: "Defendant says that he has a vested right to conduct the lottery business by drawing the classes contained in the scheme which the city of Frankfort sold and conveyed to E. S. Stewart under the terms, conditions and covenants of the contract of December 31, 1875, executed and delivered as aforesaid, and that there has never been at any time more than two classes in said scheme drawn in one day, and there are a large number of classes in said scheme yet to be drawn; that his said right under his said contract was authorized and approved by the Commonwealth of Kentucky, repeatedly adjudged valid by the judicial tribunals of this State, and such right has always been held by the courts of this State inviolable and not subject to repeal, alteration or modification by subsequent legislatures. Defendant says that he has paid large sums of money for said scheme devised as aforesaid and said contract, and has made contracts and incurred liabilities involving large sums of money upon the faith of said contract, and relying upon the terms thereof and upon the decisions of the courts of the State adjudging said contract to be valid, obligatory and inviolable."

In support of the contention that the contracts for the purchase of the lottery scheme in question were valid and irrepealable, the defendant in his answer referred to an act of the General Assembly approved May 17, 1886, declaring that "every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the Court of Appeals to be a lawful and existing one, or the lawful grantee, alienee, legatee or assignee of such franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she or it shall have filed with the Auditor of Public Accounts a certified copy of the judgment rendered, and the opinion delivered by the Court of Appeals in a case heard and determined before it, in which it has determined that a lottery could be lawfully operated under said

grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license, (which is hereby authorized and directed to issue on the filing of said copies hereinbefore required,) reciting the filing of said copies, and authorizing the operation of said lottery for one year from the date thereof, on the condition that said licensee shall, within five days thereafter, pay to the said auditor of the State the sum of $2000; and said license issued by said auditor, as hereinbefore directed, and any and all renewals thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the rights of the licensee to operate a lottery for the period therein named, etc."

Under that statute the defendant obtained a license from the Auditor of Public Accounts, from year to year, and paid to the State $2000 annually every year since the passage of that act.

The answer also stated: "And the General Assembly of Kentucky, further recognizing the property rights of this defendant under his said contract, by an act of the General Assembly of the State approved May 12, 1884, enacted that the general council of the city of Louisville should by ordinance provide the payment of $200 per annum for every lottery office or agency therefor in the city of Louisville, which ordinance was accordingly passed by the general council of the city of Louisville and is now a valid and existing law, and this defendant has paid the city of Louisville $200 for each office operated by him, and at the time of the institution of this suit had paid the city of Louisville the sum of $200 for each office he then operated in advance for one year from the time of the issue of the license, and that the said licenses thus obtained have not yet expired."

The defendant, in addition, pleaded *res judicata* in respect of the matters involved in this action. This defence is thus set forth: "The defendant further states that after the making of the contract between the city of Frankfort and said E. S. Stewart, as set forth in the second paragraph hereof, the Commonwealth of Kentucky, by her attorney general,

filed a petition in the Franklin Circuit Court against the city of Frankfort, the said E. S. Stewart and others, in the nature of a writ of *quo warranto*, alleging in said petition that the said E. S. Stewart and others claiming under him were selling lottery tickets under the said grant, claiming under the contract referred to in the second paragraph herein; and further alleged that the said board of councilmen of the city of Frankfort had no title to said lottery franchise and had no authority to sell and convey the scheme as set forth in said contract, and that the defendants in said action were engaged in selling tickets under said contract in violation of law, and that the exercise of the privileges by them was injurious to public morals by tempting the people into the immoral habit of gaming, and that the said defendants were usurping the franchise, all of which matters and things are now relied upon in this action and are the identical matters for which relief is sought in this case, and that by the said petition the plaintiffs herein sought in said action to enjoin and oust the defendants therein from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights claimed herein, and the court was asked to hold the said franchise void and to annul and adjudge as cancelled all rights of the defendants therein; that said defendants filed their answer in said case and joined issue upon the allegations of the said petition; that thereafter, upon motion of the Commonwealth of Kentucky, the said action was transferred from the Franklin Circuit Court to the Oldham Circuit Court; that in the said case such proceedings were had that the court finally entered a judgment declaring that under the act of March 16, 1869, referred to in paragraph 2 hereof, the city of Frankfort and the board of councilmen of said city did obtain the legal title to said lottery franchise and the classes thereof; and, further, that the said city of Frankfort, under the act of March 28, 1872, referred to in paragraph 2, were authorized to sell and dispose of said scheme upon such terms as they deemed proper, and that said act was constitutionally valid and binding and authorized such sale and transfer, and that the contract made between the city of Frankfort and the said E. S.

Stewart, which is the same contract relied upon herein, was a valid and subsisting obligation and enforceable as a legal obligation. From said judgment of the Oldham Circuit Court the Commonwealth of Kentucky prayed an appeal to the Court of Appeals of Kentucky, and the said Court of Appeals of Kentucky, on the 27th day of February, 1878, entered a judgment affirming the judgment of the Oldham Circuit Court, and adjudged in said action that the General Assembly of the Commonwealth of Kentucky, by the act of March 16, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the said act was valid, and that the city of Frankfort, by reason thereof, was the owner of the scheme named in the contract referred to, and that under the act of March 28, 1872, the city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that the said sale to the said E. S. Stewart and the contract in relation thereto was binding and valid and had been entered into in strict conformity with the said acts of the General Assembly. A copy of the pleadings in said case and the opinions and judgments of said courts will be filed herewith as a part hereof. The defendant says that by reason of the proceedings in said action and the judgment of the courts thereupon, the plaintiff is barred from bringing or maintaining this action; that the legality of the act of March 28, 1872, and the validity of the contract of E. S. Stewart with the city of Frankfort are matters *res judicata* by reason of said judgment, and he pleads and relies upon the same herein."

The Federal question presented for our determination arises upon the claim of the plaintiff in error — which was denied by the final judgment of the highest court of Kentucky — that the agreement between the city of Frankfort and E. S. Stewart, by which the latter became the owner of the lottery scheme devised by that city, under the authority of law, was a contract the obligation of which the State was forbidden by the Constitution of the United States to impair either by legislative enactment or by constitutional provision.

If this interpretation of the Federal Constitution be correct,

it will follow that any provision in the constitution or in the statutes of Kentucky forbidding lotteries and gift enterprises in that Commonwealth, and revoking the lottery privileges or charters theretofore granted, is null and void as to the defendant Douglas, who succeeded to the rights acquired by Stewart under the agreement of 1875 with the city of Frankfort. This necessarily results from the declaration that the Constitution of the United Sates is the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the wide spread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple. *Phalen* v. *Virginia*, 8 How. 163.

Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?

These questions arose and were determined, upon much consideration, in *Stone* v. *Mississippi*, 101 U. S. 814, 819, 821.

It will be seen from the report of that case that the legislature of Mississippi chartered the Mississippi Agricultural, Educational and Manufacturing Aid Society, with authority to raise money by way of lottery; and in consideration thereof the society paid $5000 into the treasury of the State, and agreed to pay, and did pay, an annual tax of $1000, together with one half of one per cent, on the amount of receipts derived from the sale of certificates. While the Society's charter was in force, the State adopted a new constitution, declaring that the legislature should never authorize a lottery, nor should the sale of lottery tickets be allowed, nor any lottery theretofore authorized be permitted to be drawn or tickets

therein be sold. This was followed by the passage of an act prohibiting lotteries, and making it unlawful to conduct one in the State. The question was then raised by an information in the nature of *quo warranto*, whether the lottery privilege given by the Society's charter could be withdrawn or impaired by the state legislation — that Society having, as was conceded, complied with all the conditions upon which its charter was granted. The Supreme Court of Mississippi held that the State could withdraw the lottery privilege which it had granted. And that conclusion was questioned upon writ of error sued out from this court.

Chief Justice Waite, who delivered the unanimous judgment of the court in that case, said: "The question is therefore directly presented, whether in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may

resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

It is suggested that, in important particulars, the opinion and judgment in *Stone* v. *Mississippi* was modified by the decision in *New Orleans* v. *Houston*, 119 U. S. 265, 275. So far from this being true the principles announced in the former case were recognized, and held to have no application in the latter case. In *New Orleans* v. *Houston* the question was whether the legislature of Louisiana could destroy or impair a lottery charter granted and authorized by the constitution of that State. This court, speaking by Mr. Justice Matthews, said: "It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision which a subsequent constitution might not destroy without impairing the obligation of a contract, within the sense of the Constitution of the United States, for the reason assigned in the case of *Stone* v. *Mississippi*. But an ordinary act of legislation cannot have that effect, because the constitutional provision has withdrawn from the scope of the police power of the State, to be exercised by the General Assembly, the subject-matter of the granting of lottery charters, so far as the Louisiana State Lottery Company is concerned, and any act of the legislature contrary to this prohibition is upon familiar principles null and void. The subject is not within the jurisdiction of the police power of the State, as it is permitted to be exercised by the legislature under the constitution of the State." So that in *New Orleans* v. *Houston* it was decided, that, while a lottery grant was not a contract within the meaning of the Federal Constitution, the obligation of which was protected against impairment by the State making the grant, the legislature could not strike

down a lottery which the fundamental law of the State had authorized.

In the argument on behalf of the plaintiff in error much stress was laid upon former decisions of the Court of Appeals of Kentucky relating to rights acquired under lottery grants. Our attention has been particularly called to *Gregory* v. *Shelby College Lottery Trustees*, 2 Met. (Ky.) 589, 598. From the report of that case it appears that the legislature of Kentucky in 1838 granted to Shelby College the privilege of raising the sum of one hundred thousand dollars by lottery, with authority to sell or dispose of the scheme or any classes of the lottery. In 1855 the provision of the Revised Statutes, declaring that all lottery privileges should cease, took effect. And the question arose as to the effect of that enactment upon the rights of one who had loaned money to the College upon the faith of the lottery grant, and to secure the loan had taken from the trustees of the institution a mortgage upon their rights under the lottery franchise. The Court of Appeals of Kentucky, conceding that the grant of a privilege to raise money by a lottery was a mere gratuity, was not an act of incorporation, conferred no charter rights, and did not amount to a contract, proceeded: "Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason have been almost universally denounced by the law-making power in different States of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then, to the extent of such rights at least, the law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases: *Dartmouth College* v. *Woodward*, 4 Wheat. 518 to 643; *Fletcher* v.

Peck, 9 Cranch, 87; *University of Maryland* v. *Williams*, 9 Gill & Johnson, 365; *Terret* v. *Taylor*, 9 Cranch, 43, 52; *Louisville* v. *University of Louisville*, 15 B. Mon. 642, 692. The plaintiff, Waller, before the repealing act was passed, had, on the faith of the lottery grant, advanced large sums of money, which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College, and the money was advanced by Waller with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he became thereby invested with the right to the use of the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right of which he could not be divested by an act of the legislature. So far, therefore, as the repealing act interferes with or affects this right, it is unconstitutional and inoperative." These principles were recognized in cases subsequently decided by the same court.

The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the State as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the State seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the State. So that the issue presented makes it necessary to inquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This court must determine — indeed, it cannot consistently with its duty refuse

to determine — upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation.

In *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, which involved the contract clause of the Constitution, it was contended that this court should accept as conclusive the interpretation placed by the Supreme Court of Ohio upon the constitution and laws of that State as affecting certain state legislation which, it was alleged, constituted a contract, the obligation of which could not be impaired by legislation. Mr. Justice Wayne, delivering the unanimous judgment of the court, said: "The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, 'though they have been made in forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the

United States follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 452; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, Shreveport, &c. Railroad* v. *Dennis*, 116 U. S. 665, 667; *N. O. Waterworks Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 493; *Bacon* v. *Texas*, 163 U. S. 207, 219.

In view of these adjudications it is clear that we are not required to accept as authoritative in this case the decision of the Court of Appeals of Kentucky in *Gregory* v. *Shelby College Lottery Trustees*, above cited, to the effect that a legislative revocation of a lottery grant is a violation of the Constitution of the United States so far as such revocation affects rights acquired on the faith of the privilege conferred by the grant, and the exercise of which involves the continuance of that privilege for such time as may be necessary for the full enjoyment of those rights. On the contrary, we hold that a lottery grant is not, in any sense, a contract within the meaning of the Constitution of the United States, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the

faith of or by agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, *if its exercise involves a continuance of the lottery as originally authorized.* All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the State to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the State, are, of course, not affected, and could not be affected, by the revocation of such grant. Here the defendant insists that as the agreement under which Stewart became the owner of the Frankfort lottery scheme was lawful when made, he, as assignee of Stewart, is protected by the Constitution of the United States in carrying on that lottery, despite the prohibition of all lotteries and the revocation of all lottery grants by the present constitution of Kentucky adopted after the transfer to Stewart of the benefit of that scheme. For the reasons stated, this contention must be overruled. It could not be sustained without overruling *Stone* v. *Mississippi*, which we have no inclination to do.

Some stress has been laid by counsel upon the fact that, in an action brought by the State in the nature of *quo warranto* against the city of Frankfort, and which was determined upon appeal by the Court of Appeals of Kentucky on the 27th day of February, 1878, it was adjudged that the contract between that city and Stewart was a valid and binding contract; and, consequently, the State is barred, upon the principle of *res judicata*, from maintaining the present action. The opinion in that case has not been published in the regular reports, but a copy of it appears in the record. It is sufficient, in answer to the contention of the defendant, to say that the case referred to, as appears from the opinion of the state court, involved nothing more than the validity of the agreement of 1875 between the city of Frankfort and Stewart, under the law as it was when such agreement was made, and did not necessarily involve any inquiry as to the power of the State, by legislative or constitutional provision, and without violating

the clause of the Constitution of the United States prohibiting the passage of state laws impairing the obligation of contracts, to revoke an existing lottery grant and prohibit all lotteries within its limits. The thing adjudged in the case referred to fully appears from the statement made by the Court of Appeals of Kentucky of the conclusion which it reached, namely: "We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers and authority equal or exactly similar to those that had by the act of 1838 been conferred on the managers, which include the privilege of raising one hundred thousand dollars by operating a lottery." A decision that the agreement between the city of Frankfort and Stewart was, when made, valid under the laws of Kentucky, did not determine, as between the State and those asserting rights under that agreement, that the State could not, by subsequent legislative enactment or by constitutional provision, and so far as the Constitution of the United States was concerned, prohibit all lotteries, and thereby prevent the exercise by those asserting the right under or by virtue of that agreement, to carry on a lottery against the expressed will of the State.

We have felt some embarrassment arising from the conflict between the present decision and the former decisions of the highest court of Kentucky upon the general subject of lotteries, and as to the power of the State, by contract, to so tie its hands that it may not revoke, in its discretion, grants of lottery privileges and prohibit the carrying on of all lotteries. But that embarrassment has been greatly lessened by the fact that that court, in its opinion in the present case, after referring to *Stone* v. *Mississippi*, said: "It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view. But apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between

the contractual and governmental power of the States, to wit, that the provisions of the Federal Constitution in reference to contracts only inhibits the States from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental." In the same opinion it is well observed that, under any other doctrine than that announced in *Stone* v. *Mississippi*, the legislature, by giving or bartering away the power to guard and protect the public morals, could "convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government."

We perceive no error in the judgment of the Court of Appeals of Kentucky, and it is

Affirmed.

MR. JUSTICE SHIRAS agrees that the judgment should be affirmed, but does not concur in all the reasoning of this court.

UNITED STATES v. UNION PACIFIC RAILWAY COMPANY.

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

No. 133. Argued December 2, 1897. — Decided December 13, 1897.

The questions propounded in the certificate in this case do not present distinct points or propositions of law, clearly stated, so that each can be distinctly answered, without regard to the other issues of law involved,

Statement of the Case.

and they obviously bring the whole case up for consideration; and as to answer them would require this court to consider the several matters thus pressed upon its attention, to pass upon questions of law not specifically propounded, and to dispose of the whole case, it is held, referring to previous decisions, that the certificate is insufficient under the statute.

This was a suit brought by the United States in the Circuit Court of the United States for the District of Kansas against the Union Pacific Railway Company and its receivers, as directed by the act of July 13, 1892, c. 164, 27 Stat. 120, 126, to recover certain amounts "found by the Department of the Interior to be due from said railroad company, its successors or assigns, under the last paragraph of the second article of the treaty with the Delaware Tribe of Indians of May thirtieth, eighteen hundred and sixty, and under the concluding clause of the third article of said treaty, and for damage done the said Indians in the taking and destruction of the property by said railroad company, which sums when recovered shall be used to reimburse the United States for the sum appropriated in the foregoing paragraph."

That sum was $39,675.16, of which $10,715.75 was to be paid to individual members of the Delaware Tribe for improvements on lands sold to the Leavenworth Company, and $28,959.41 was to be paid to individual members of the tribe for right of way through their allotted lands.

The first count of the petition alleged that in the year 1831, and for a long time prior thereto, the United States were the owners in fee simple of all the lands lying north of the Kansas and west of the Missouri rivers, in the then Territory of Kansas, and that by the terms of the treaty made between the United States and the Delaware Indians, proclaimed March 24, 1831, the United States conveyed and secured to that Nation, as a permanent home, a certain tract, describing it, with an outlet; that afterwards, in the year 1854, by the terms of another treaty, the Nation ceded to the United States all their right, title and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in the outlet, with certain designated exceptions.

Statement of the Case.

It was further averred that articles eleven and twelve of the latter treaty provided that the country reserved for the permanent home of the Delawares might on request be surveyed and allotted; and that roads and highways laid out by authority of law should have a right of way through the reservation; "and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money"; that afterwards the Delawares signified their wish that a portion of the lands reserved for their home might be divided and allotted; and thereupon, by the terms of a treaty entered into May 30, 1860, it was provided, among other things, that a portion of the reservation should be surveyed and allotted as stated, and by the last clause of article two thereof, that "the improvements of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained." By article three it was provided that as to the remaining lands, after the tracts in severalty and those for special objects named in the treaty had been selected and set apart, the Leavenworth, Pawnee and Western Railroad Company, a Kansas corporation, should have the prior right of purchase upon the payment into the United States Treasury, which payment should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, should appraise to be the value, and providing that such value should not be placed below the value of one dollar and twenty-five cents per acre, exclusive of the cost of survey.

That, upon payment, a patent should be issued directly to the company; that the United States would accept the trust imposed on them and apply the money resulting from such disposition of the lands in the manner prescribed by the treaty of 1854; and it was "also agreed that said railroad company shall have the perpetual right of way over any por-

tion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

It was then alleged that by the terms of the treaty the United States became, and were the trustees of the Delawares for the purposes provided for therein; that the Leavenworth Company, prior to 1867, accepted the terms of the treaty and agreed to purchase the unallotted lands of the Delawares and to pay for them and the improvements thereon in accordance therewith; and that all the rights of the company in and to the lands and its liability for the lands and improvements, and all the rights and liabilities of its grantee, successor and assignee, the Union Pacific Railway Company, were fixed by the terms of said treaties, and that the Leavenworth Company, and its grantee, successor and assignee, the Union Pacific Railway Company, took the lands "subject to the conditions set forth in said treaties as to the payment therefor and as to the payment for said improvements thereon"; that the United States on October 20, 1860, appointed three commissioners to inspect and appraise the value of the land and improvements which the Leavenworth Company had become entitled to purchase, and they appraised the improvements at the value of $9534.25, and returned the appraisement, a schedule of which was made part of the petition. But at the time of that appraisement and of the purchase of the lands by the Leavenworth Company there were other improvements not included, which were afterwards appraised at the sum of $1181.50, and an itemized statement of these improvements was attached.

The United States further averred that the Leavenworth Company was unable to carry out the terms of the purchase of the lands and improvements and pay for the same as provided for in the treaty, and that afterwards a further treaty was made and entered into on or about July 2, 1861, ratified August 6, 1861, which in terms referred to the provisions for the sale of the lands and improvements in the prior treaties, by which last mentioned treaty it was provided that the

Leavenworth Company might execute its bonds with interest coupons attached, the principal sum to be $286,742.15, and execute a mortgage on one hundred thousand acres of land, as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29, 1861, said mortgage to be conditioned for the payment of the bonds, both principal and interest, the bonds and mortgage being executed by the company in lieu of the payment previously provided for; but no provision was made in the last mentioned treaty for any change in the time or manner of paying for said improvements, and the bonds and mortgage were executed to secure the payment of the purchase price of the lands only, exclusive of the value of the improvements, the amount whereof was not included in the mortgage.

It was also averred that through changes in the name of the Leavenworth Company, and through a consolidation by and with other railroad companies, the Union Pacific Railway Company succeeded to all the franchises, property rights and interests of the said Leavenworth Company, and became and was subject to all the liabilities of that company under and by virtue of the said several treaties, and under and by virtue of the purchase of said Delaware Indian lands and the improvements thereon; that thereafter, by the terms of the treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article first thereof it was provided "that the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, according to the terms of a treaty ratified August 22, 1860, and supplemental treaties, and in accordance with the conditions, restrictions and limitations thereof."

That thereby plaintiffs became and were sureties for the payment of the value of said improvements, and trustees for the Delaware Indians to collect and dispose of the money as provided therein; and that neither the Leavenworth Company nor any of its assignees or successors, nor the Union Pacific

Railway Company, nor its receivers, defendants herein, have paid for said improvements, and that they remain due and wholly unpaid by defendants.

That by an act of Congress, approved July 13, 1892, there was appropriated and paid to the Delaware Indians the sum of $10,715.75, which sum the United States paid to those Indians as sureties under the treaties and in discharge of the trust created thereby.

And plaintiffs said that by the terms of the treaties and by the acceptance thereof by the Leavenworth Company and its grantee, successor and assignee, the Union Pacific Railway Company, the latter became and was liable to plaintiffs, as sureties and trustees, for money paid out and expended on behalf of defendants for said improvements in the sum of $10,715.75, which sum, together with interest thereon from May 30, 1860, was now due and wholly unpaid.

The second count averred that by virtue of the treaties mentioned in the first count, the Leavenworth Company became entitled to a right of way across the Delaware Reservation, and across the lands subsequently allotted in severalty to the Delawares on payment of a just compensation therefor; that the United States under the treaties became trustees for the Delawares to collect and account for the amount due them for such right of way and the sureties of the railroad companies for the payment of the same: That the Leavenworth Company under these treaties laid out a right of way and constructed a railroad over and across the reservation and over and across certain parcels of land allotted in severalty to Delaware Indians, and thereby became liable to the United States as trustees for the Delawares for the damages thereby sustained by the latter; that a reasonable compensation for the right of way across the allotted lands amounted to $28,959.41, which amount was ascertained by an appraisement by a commission appointed under the treaty; that the Union Pacific Railway Company was the successor of the Leavenworth Company, and liable for the amount due the Indians for the right of way; that the amount specified was appropriated and paid the Delaware Indians by the United States under the act of

Counsel for Parties.

July 13, 1892, as sureties, and was due from the railway company.

To these counts demurrers were sustained by the Circuit Court and judgment entered in favor of defendants. The case was then carried to the Circuit Court of Appeals for the Eighth Circuit and that court certified to this court the two counts, the demurrers, and the judgment thereon, and its desire for instruction "upon the following questions and propositions of law arising upon the record in such cause, to the end that it may properly decide said cause:

"First. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892, c. 164, 27 Stat. 120, 126, for improvements upon lands sold to the Leavenworth, Pawnee and Western Railroad Company?

"Second. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way through allotted lands belonging to members of said tribe, which right of way was secured by the Leavenworth, Pawnee and Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

"Third. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?"

Mr. Solicitor General for plaintiffs in error.

Mr. John F. Dillon for defendants in error. *Mr. A. L. Williams* and *Mr. Harry Hubbard* were on his brief.

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

It is settled that the certification provided for in sections five and six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Company* v. *Robbins*, 148 U. S. 266; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60.

By those rules, as repeated in these cases from prior decisions, "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions." *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510.

The questions propounded in this certificate do not present distinct points or propositions of law, clearly stated, so that each could be distinctly answered without regard to the other issues of law involved, and they obviously bring the whole case up for consideration and disposition.

Elaborate argument on behalf of the Government was made at the bar, dealing with the Delaware treaties of 1831, 1854, 1860, 1861 and 1866, and the construction of various provisions thereof; with the construction of the Pacific Railroad act of July 1, 1862, c. 120, 12 Stat. 489; and also with the legislation in relation to the incorporation of the Leavenworth, Pawnee and Western Railroad Company; its change of name; and consolidation with other railroad companies, under the name of the Union Pacific Railway Company. Laws Kansas, 1855, c. 86, p. 914; Act of July 2, 1864, c. 216, 13 Stat. 356; Resolution of March 3, 1869, 15 Stat. 348; Act of March 3, 1869, c. 127, 15 Stat. 324.

Syllabus.

Defendants in error contended that the petition was fatally defective in respect of any ground of liability for the improvements; that there was no sale of the improvements separate from the lands; that the stipulated patent carried title to the improvements with the lands; that by section two of the Pacific Railroad act of July 1, 1862, the United States granted the right of way through the reservation and undertook to extinguish the Indian title; that the grant was of a free right of way, and the United States were estopped by it from maintaining the second cause of action; that this question was *res judicata* by the judgment of the Supreme Court of Kansas in *Grinter* v. *Kansas Pacific Railway*, 23 Kansas, 642; that the line of the Kansas Pacific Company upon the right of way in question was not the line of the Leavenworth, Pawnee and Western Railroad Company or its successor, but of an independent corporation created by an act of Congress; and that even on the theory of the Government the defence of laches and limitations was available and formed a complete bar.

To answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case. It follows that the certificate is insufficient under the statute.

Certificate dismissed.

SPRINGER LAND ASSOCIATION *v.* FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 89. Argued November 5, 1897. — Decided December 13, 1897.

Section 1524 of the Compiled Laws of New Mexico providing for the creation of mechanics' liens for work done on land, required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also

the name of the person by whom he was employed, or to whom he furnished the materials." The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners"; and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said the Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract"; and it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." *Held*, that this claim of lien was sufficient under the statute in respect of all these particulars.

As between the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, does not vitiate the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance.

The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8000 for land never conveyed to him.

To limit the land upon which the lien was given to the strip of land sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would be to unreasonably circumscribe the meaning of the statute.

As the Supreme Court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs and were under said ditch and to be irrigated thereby," it cannot now be urged that the description was void for uncertainty or that the decree included more land than was connected with the ditch.

Statement of the Case.

THIS was a bill filed by Patrick P. Ford against the Springer Land Association and others in the District Court of New Mexico for the county of Colfax, to foreclose a mechanic's lien upon an irrigating ditch and reservoir system; the land covered thereby; the right of way therefor; and the particular lands intended to be irrigated. A cross bill was filed by the Springer Land Association and other defendants. The cause was heard on pleadings and proofs, and on findings of fact and conclusions of law duly made and filed, the District Court entered a decree in favor of Ford, adjudging a lien for the sum of $22,097.75, with interest and costs, on the ditch and reservoirs in question, together with the right of way, specifically describing them, and also on twenty-two thousand acres of land appurtenant to the ditch and to be irrigated thereby, specifying forty-six sections in four designated townships.

It was further decreed that the Springer Land Association and other defendants pay or cause to be paid the sum found due with interest and costs, (three thousand dollars thereof to be paid to the clerk of the court,) within ninety days, and in case of default that the property be sold by a special master and the proceeds distributed as prescribed, three thousand dollars to be retained by the clerk of the court to await the determination of a suit by Dargel, a subcontractor, to recover the amount of $2279.30, with interest and costs, or its payment and discharge by Ford. If a surplus was realized at the sale it was to be held subject to the further order of the court; if a deficiency resulted, the amount was to be reported by the master to the court.

The case was carried to the Supreme Court of the Territory, which found the facts, in substance, to be these:

On October 26, 1888, the Springer Land Association entered into a contract with Patrick P. Ford for the grading work in the construction of a certain ditch line and reservoir system for irrigation in Colfax County, New Mexico, which contract and the specifications forming part of it were set forth at length.

The contract provided: "The party of the first part agrees to furnish all necessary tools and labor, and perform all the

work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made a part of this contract. Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached."

Specification 11 related to allowance for extra work when done under the orders of the engineer.

Specifications 13 and 15 were:

"13. Subcontracts. — Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer."

"15. Estimates. — On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work."

"Previous to the making of the last mentioned contract and on May 1, 1888, the Maxwell Land Grant Company made a contract with C. C. Strawn and associates, who afterwards organized the Springer Land Association, which succeeded to their rights and obligations, by which the Maxwell Company gave to them a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was, among other things, provided that with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises, to be granted to it by the other party, it agreed to set apart and reserve from sale 22,000 acres of its lands, to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement Strawn and his associates were to expend about sixty thousand dollars, or a sufficient sum, to complete the enterprise on the proposed plan." This contract was set forth *in extenso.*

"The title of the lands at that time and at all times afterwards was and remained in the Maxwell Land Grant Company, except as to the rights acquired by Strawn and associates and their successors in interest under said contract. The same contract constituted Strawn and his associates and successors in interest the agents of the Maxwell Company to the extent of and for the purpose of carrying into effect the spirit and intent of the contract as to the sale of the said lands, but that party, the Springer Land Association, had no other title in the lands than as given by said contract.

"Five days subsequent to the making of his grading contract complainant Ford entered into another contract with the Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of eight thousand dollars, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch.

"The contract of May 1, 1888, designated one E. H. Kel-

logg as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Springer Land Association of October 26, 1888, but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer.

"Ford let subcontracts for portions of the work to McGarvey, Dargel and Haynes."

That with Dargel was given in full, and the three were of like form and tenor and approved by the engineer. Each contained this clause: "It is mutually agreed that the amounts of these sub-estimates will in no case be demanded or paid in advance of the payment of the regular estimate."

Estimates, as provided by the contract of October 26, 1888, were made by the supervising engineer from time to time, which were audited and paid by the Springer Land Association up to about May, 1889.

Estimate No. 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving ten per cent, to be $5010.92. The amount of this estimate has never been paid.

June 13, 1889, the engineer gave Ford a written acceptance of the work and a final estimate, set forth at large in the findings. The total amount payable under the contract was $48,553.56. The six prior estimates aggregated $35,928.03, and the last and final estimate was for $12,625.53, but as the sixth estimate of $5010.92 had not been paid the total amount due was $17,636.45.

"This amount the Springer Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to contract; that the engineer's final estimate was erroneous either through fraud, inadvertence or mistake, because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens, and also that Ford should accept the section of land which he had agreed to accept and which he had previously selected in payment of $8000 of the amount of such final estimate.

"The Springer Land Association procured to be made and

properly executed a deed of conveyance by the Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by said Ford, and had the said deed present in the hands of an agent of said Maxwell Company on June 19, 1889, when the representative of the Springer Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon payment to the agent of said Maxwell Company by the Springer Land Association of $4000. The representative of the Springer Land Association had with him at that time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4000 to the agent of the Maxwell Company for the deed if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4000, which Ford disputed as to $300.00 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and reservoir for the amount of his claim. The agent of the Springer Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Springer Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The said disagreement between Ford and Subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. The representative of the Springer Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him in law to accept it."

The sums claimed by the several subcontractors at that time amounted to $7537.72.

Statement of the Case.

Thereupon, on July 3, 1889, complainant Ford filed his notice of claim of lien for $17,634.27 alleged to be due on the contract, including all moneys due subcontractors at that time; and $390.00 for extra work.

This claim asserted a lien on the ditch and right of way and the twenty-two thousand acres of land to secure the payment of said two sums according to the contract, a copy of which and of the specifications was attached to and made part of the claim; stated when the work was commenced, completed and accepted; made the Springer Land Association and others, and the Maxwell Land Grant Company and others, parties to the notice; gave the Maxwell Land Grant Company and others as the reputed owners; stated that claimant was employed to do the work "by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president;" and that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." It was properly verified, duly filed and recorded, and action commenced within the statutory time.

McGarvey and Dargel, subcontractors, filed notices of liens and commenced suits, and Dargel's suit was pending at the date of the decree.

The findings continued:

"It appears by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs — were under said ditch and to be irrigated thereby; that the same were included within the sections described in the notice of lien and bill of complaint. It does not appear that the particular sections described were selected or segregated by the Springer Land Association under its contract of May 1, 1888, as capable of irrigation, and it does appear that in a number of the said sections only portions of the section were selected, because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch. All of said

sections were situated between the line of said ditch and the river and were enhanced in value by reason of its construction.

"It appears that complainant Ford paid to his several subcontractors all amounts due them under the first five monthly estimates, but at the time of the commencement of this suit had not paid what was due them under the sixth estimate (May, 1889) nor under the final estimate of June 13, 1889."

It was also found that there was no collusion between Ford and the engineer as charged in the cross bill; that the acceptance by the engineer was conclusive, and the amount shown by his estimates correct.

The decree was affirmed, 41 Pac. Rep. 541, and an appeal was then taken to this court.

Errors were assigned as follows:

"1. That the claim or notice of lien, to foreclose which this suit was brought, was insufficient in law to create a lien.

"2. That the amount claimed and adjudged as a lien was excessive, and included claims not due or payable.

"3. That the final estimate was not payable by reason of the existence of liens of subcontractors.

"4. That defendant should be entitled to be credited with the sum of $8000 on the final estimate, on account of land which was to have been taken in payment thereon.

"5. That no lien attached to the land outside of the ditches, reservoirs and the right of way for the same."

The Compiled Laws of New Mexico, of 1884, Title 24, c. 1, contain these sections:

"§ 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

"§ 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the

owner of the building, or other improvement or his agent; and every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this act."

"§ 1522. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"§ 1524. Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

"§ 1526. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed; and for which he may receive the same fees as

Counsel for Appellants.

are allowed by law for recording deeds and other instruments."

"§ 1529. Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act; unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

"§ 1530. The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of subcontractors under him who have filed liens for work done and materials furnished, as aforesaid, and in all cases where a lien shall be filed, under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which lien is filed, and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

Mr. Frank Springer for appellants.

Mr. Joel F. Vaile for appellee. *Mr. Edward O. Wolcott*, *Mr. Charles W. Waterman* and *Mr. William W. Field* were on his brief.

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

Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effectuate its object. *Davis* v. *Alvord*, 94 U. S. 545; *Mining Co.* v. *Cullins*, 104 U. S. 176.

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself.

These enactments vary in the different States and Territories, and to the variance in their terms, judicial decisions necessarily conform.

Section 1524 of the Compiled Laws of New Mexico required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials."

The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners;" and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars ($390) for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract;" and

it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof."

We entirely agree with the Supreme Court of the Territory that this claim of lien was sufficient under the statute in respect of all these particulars. It is attacked by counsel for appellants because containing "no statement of the amount of work done; nor of the payments made; nor the estimate or acceptance by the engineer;" and also because "erroneous as to the party from whom due." But this statute did not require, as many such statutes do, "a just and true account," or "a full and true account" of the details of the transaction, and this work was done under a special contract, at so much per cubic yard, to be paid for on engineer's certificates. In our judgment Ford's statement of his demands, with the copy of the contract and specifications annexed, was in reasonable and adequate compliance with the statute.

As to the name of the person by whom Ford was employed, the claim was specific; and the names of the owners or reputed owners of the lands, and their connection with the transaction, were also given with sufficient clearness. With reference to similar statutory provisions, the Supreme Court of California in *Davies Henderson Lumber Co.* v. *Gottschalk*, 81 California, 641, 646, said: "There is nothing in the section, or any other, that requires the material-man to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, whether contractor or agent; nor does the burden of determining whether any contract made, or attempted to be made, between the owner and contractor, was valid or not, rest on him when he comes to file

his lien. He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner, and entitle the material-man to a lien, is a matter of pleading and proof at the trial." And in *Jewell* v. *McKay*, 82 California, 144, it was held that it was not even necessary that the notice of lien should state that the owner of the land had knowledge of the work.

By section 1520 of this statute a lien is given for work or labor done at the instance of the owner of the improvement "or his agent;" by section 1529 it is provided that every improvement "constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein," unless he shall give notice that he will not be responsible for the same; and by section 1522, the land upon which any improvement is constructed, "together with a convenient space about the same," is also subject to the lien if at the commencement of the work it belonged to the person who caused the improvement to be constructed.

The contract of May, 1888, between the Maxwell Land Grant Company and those who afterwards constituted the Springer Land Association was entered into for the construction of this irrigating system, and it expressly made the Springer Land Association "the agent of the Maxwell Land Grant Company," with power to do all acts necessary to carry out the proposed improvement, and to sell and dispose of the lands designed to be benefited thereby; and the findings of the Supreme Court were to the effect that the Maxwell Land Grant Company was the person at whose instance the improvement was made, and knew at the time that the work was being carried on.

The courts below concurred in their findings that the amounts demanded were the amounts due, and the decree provided for the payment of the only outstanding claim of a subcontractor. But it is urged that the aggregate claimed in the notice of lien was so excessive as to invalidate the lien in whole or in part.

We do not understand that as between the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, vitiates the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance.

The contract contained this provision: "The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of lien or claims of all kinds, through failure on his part to liquidate his just indebtedness as connected with this work."

And it is said that "the final estimate of $12,625.53 was not yet due," in that the subcontractors had not been paid in full, and the work, therefore, was not free from all danger of liens. The findings show, however, that by the contracts between Ford and his subcontractors, approved by the supervising engineer, the amounts due the subcontractors, on monthly sub-estimates, were in no case to "be demanded or paid in advance of the payment of the regular estimate;" that Ford on payment of the regular estimates had paid his subcontractors in full; and that the sub-estimates for May and the final sub-estimates had not been paid because appellants had not paid Ford his May and final estimates under their contract with him. The May estimate due him was for $5010.43, and the balance of $12,625.53 contained nearly $4000 of retained percentage, being ten per cent of the amount due for work done up to the time the May estimate was issued; while the amounts claimed by the subcontractors on the completion of the work aggregated $7537.72. It is quite clear that if there were any danger from liens or claims of any kind, this was not "through failure on his part to liquidate his just indebtedness as connected with this work," but solely by reason of the failure to pay him according to the terms of the contract. And it should be noted that the correctness of Ford's claim does not appear to have been questioned until the nineteenth of June, 1889, when one of the subcontractors having become involved in a dispute with Ford over the sum of $300, suggested to the Springer Land Association that the work had not been done according to the con-

tract, a suggestion which the findings show was without foundation.

Appellants' counsel further contended that the lien was excessive because appellants were entitled to a credit of $8000 for land which Ford had agreed to accept in part payment of the final estimate.

At the conference, on the 19th of June, 1889, between the agents of the Maxwell Land Grant Company and of the Springer Land Association, Ford, and the subcontractors, the Maxwell agent had in his possession a deed conveying a section of land to Ford, which he notified the Springer agent he was ready to deliver upon the payment of $4000 by the Springer Land Association. The Springer agent responded that he was willing to pay the $4000 if Ford would settle with the subcontractors, but he did not perform the condition and accept the deed. Nor was any tender of the deed made to Ford, who was simply informed that if he would, compulsorily, do that which the default of the Springer Company had theretofore rendered impracticable, then the Springer agent would obtain the deed for delivery to Ford. Nor did it appear that since that day there had been any offer to deliver, or a declaration of a willingness to deliver, the deed. The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8000 for land never conveyed to him.

Finally it is objected that the demand of $390 for extra work rendered the entire claim of lien inefficacious, but it is obvious that this was not an overstatement which could have that effect. Though there is no specific finding by the Supreme Court in reference to this item, the findings of the District Court show that the extra work was performed under the direction of the engineer, and that the bills therefor were approved by him to an amount exceeding this minor demand,

which under the specifications appellants were bound to pay. It was properly included in the notice of lien, and, being manifestly due, the decree ought not to be reversed or even modified, because it formed part of the amount decreed.

The last error assigned is that no lien attached to the land outside of the ditches, reservoirs and the right of way to the same.

The statute gave a lien for labor performed or materials furnished in the construction of ditches, not only on the ditch and the land through which it was constructed, but on so much of the land about the same as might be required for its use, "to be determined by the court on rendering judgment."

This tract of 22,000 acres was the tract for whose irrigation the ditch was constructed and by which it was to be benefited. The ditch and the land were inseparably connected as parts of the common enterprise, and to sever the ditch from the land would render the ditch practically valueless. The claim of lien stated, the bill in this case averred and the answer admitted, that Ford contracted to perform the work of grading required in the construction of the Cimarron Ditch and its accessories, the ditch being situated as described; and "that the said ditch has and appurtenant thereto along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch, twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows," namely, certain sections enumerated.

The contract with the Maxwell Land Grant Company showed that it caused the improvement to be made for the purpose of supplying water to the entire acreage under the ditch, and in consideration of the construction of the improvement, gave to the Springer Land Association an interest in the 22,000 acre tract. The improvement was projected and constructed upon the property as an entirety, though the contract contemplated that after its completion the tract should be cut up and sold in small holdings, the Maxwell Company manifestly causing the improvement to be made for the express purpose of rendering the land salable.

To limit the land upon which the lien was given to the strip of land sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would, it seems to us, be to unreasonably circumscribe the meaning of the statute. And appellants' pleading not only admitted that all of the 22,000 acre tract was appurtenant to the improvement and benefited by it, but the courts of New Mexico distinctly found this to be so, and that the tract was necessary to the convenient use of the improvement for the purposes contemplated in its construction.

The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same.

This ditch was to expend its waters on this tract and could not be used or operated without it. Each was dependent on the other, and both were bound together in the accomplishment of a common purpose. The lien must apply to the entire tract or be confined to the right of way through which it took its course, and to narrow it down to the latter would be to disregard the very terms of the statute.

Appellants admitted the tract to appertain to the ditch and the Supreme Court so found, and that it was required for the use and operation thereof. We perceive no adequate ground for declining to accept that conclusion.

The description of the land was by sections and townships, and forty-six sections were enumerated. As the sections, if full, would contain 29,440 acres, and as the enterprise embraced 22,000 acres — though it was estimated by the Maxwell contract that the ultimate capacity of the ditch might be adequate to the irrigation of 30,000 acres — it is insisted that the description was void for uncertainty or that the decree was erroneous as including more land than could on any theory be held to appertain to the ditch. But a Congres-

sional township of thirty-six sections does not necessarily contain thirty-six times six hundred and forty acres; and subdivision fifth of section 2395 of the Revised Statutes provides: "Where the exterior lines of the townships which may be subdivided into sections or half sections exceed, or do not exceed six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from north to south."

The Supreme Court pointed out that sixteen of these sections were bounded by the northern and western lines, and held that the court might as well presume that the alleged discrepancy was accounted for by a deficiency in the government surveys, as that the forty-six sections contained the full quantity. And it should be remembered that the acreage occupied by the ditch, the lateral ditches and reservoirs must have been considerable.

Again, as the Supreme Court said, quantity in description must yield to definite description by metes and bounds, or by name and number. Quantity may aid but cannot control such description.

The claim of lien, after describing the ditch, its accessories, and right of way, and the 22,000 acres, added, "all of which ditch, laterals and reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien." This was so stated in the bill and admitted in the answer.

While one of the findings is somewhat obscure, and, standing alone, might create a doubt as to the identification of the particular tract, yet the findings taken together and in connection with the plat evidently made this certain; and as the correctness of the description and acreage was admitted, any contention in this regard comes too late.

The Supreme Court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and

reservoirs and were under said ditch and to be irrigated thereby."

We think it cannot now be urged that the description was void for uncertainty or that the decree included more land than was connected with the ditch.

Decree affirmed.

BRAM *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 340. Argued October 18, 19, 1897. — Decided December 13, 1897.

This was an indictment for murder alleged to have been committed on an American vessel on the high seas. After the crime was discovered, Brown, a sailor, was put in irons and the vessel was headed for Halifax. Before it reached there Brown charged Bram with the commission of the crime, saying that he had seen him do it. Bram was then also put in irons. On the arrival at Halifax, Power, a policeman and detective in the government service at that place, had a conversation with Bram. Bram was indicted at Boston for the commission of the crime, and on his trial Power was offered as a witness for the Government. He testified that he made an examination of Bram, in his own office, in the city hall at Halifax, when no one was present besides Bram and himself; and that no threats were made in any way to Bram, nor any inducements held out to him. The witness was then asked: "What did you say to him and he to you?" To this defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, or that the defendant was held for the United States — for the consul general of the United States. The witness answered questions by the court as follows: "You say there was no inducement to him in the way of

promise or expectation of advantage?" "A. Not any, your honor." "Q. Held out?" "A. Not any, your honor." "Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?" "A. No, sir; not any." "Q. So far as you were concerned, it was entirely voluntary?" "A. Voluntary, indeed." "Q. No influence on your part exerted to persuade him one way or the other?" "A. None whatever, sir; none whatever." The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring defendant as a prisoner to his office and there stripped him; that defendant understood that he was a prisoner, and obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent. The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed. The witness answered as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." "Q. Anything further said by either of you?" "A. No; there was nothing further said on that occasion." The direct examination of this witness was limited to the interview between the witness and the defendant Bram. *Held*,

(1) That this statement made by the accused to a police officer, was evidently not a voluntary confession and was not admissible in evidence against him;

(2) That the objection to its admission, having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness.

The objection that the indictment recited that it was presented upon the oath of the jurors when the fact was that it was presented upon the oath and affirmation of the jurors is without merit.

The objection that neither in the indictment, nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand

juror Merrill, before being permitted to affirm, was shown to have possessed conscientious scruples against taking an oath is also without merit.

As the evidence against Bram was purely circumstantial, it was clearly proper for the Government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime.

The objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled.

THE case is stated in the opinion.

Mr. Asa P. French and *Mr. James E. Cotter* for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error. *Mr. Solicitor General* was on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller while on the high seas bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide as follows:

"She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

"The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was

the officer in charge. The captain, his wife, the passenger Monks and the first mate and the second mate, all lived in the aftercabin, occupying separate rooms. . . . The crew and the steward slept forward in the forward house.

"When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

"The passenger Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock — the exact time is not known, as he says — by a scream, and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room, did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had any one visited his room. Later it was found that Captain Nash, his wife and

Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an axe, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

"The whole crew was called at or about daylight and were informed of the deaths.

"The bodies were removed from the cabin and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

"At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul general of the United States.

"At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

"No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to any one.

"In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate and put him in irons, he making no resistance, but

declaring his innocence. Bram and Brown were both carried into Halifax in irons."

The bill of exceptions further states that when the ship arrived at Halifax the accused and Brown were held in custody by the chief of police at that place, and that whilst in such custody the accused was taken from prison to the office of a detective and there questioned under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew and the passenger were examined before the American consul and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, of Mrs. Nash, and the second mate Blomberg. The trial and the conviction, now under review, related to the first of these charges. The errors which are here assigned as grounds for reversal, are more than sixty in number, and are classified by the counsel for the accused as follows: (*a*) Questions raised preliminary to the trial. (*b*) Questions raised during the trial. (*c*) Questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial, a detective by whom the accused was questioned whilst at Halifax was placed upon the stand as a witness for the prosecution for the purpose of testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

"Nicholas Power, of Halifax, called by the Government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness's office, in the city hall

at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

"The witness was then asked: 'What did you say to him and he to you?'

"To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that the witness was then a police officer acting in his official capacity; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States — for the consul general of the United States.

"The witness answered questions by the court as follows:

"You say there was no inducement to him in the way of promise or expectation of advantage?

"A. Not any, your honor.

"Q. Held out?

"A. Not any, your honor.

"Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?

"A. No, sir; not any.

"Q. So far as you were concerned, it was entirely voluntary?

"A. Voluntary, indeed.

"Q. No influence on your part exerted to persuade him one way or the other?

"A. None whatever, sir; none whatever.

"The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring the defendant as a prisoner to his private office and there proceeded to take extraordinary liberties with him; he stripped him; the defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

"The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

"The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion.

"The direct examination of this witness was limited to the interview between the witness and the defendant Bram.

"On cross-examination of the witness Power, he testified that at the time of the above-stated examination he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston — the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston — when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

"Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: 'What other articles belonging to the defendant did you take possession of at that time?'

"This line of inquiry was objected to by the District Attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination and did not tend to show interest, and the defendant duly excepted, and the exception was allowed."

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such, and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross-examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded the accused renewed his objection, and his exception to the admissibility of the conversation was allowed and regularly noted. The witness then proceeded to give the conversation. To say that under these circumstances the objection which was twice presented

and regularly allowed should have been renewed at the termination of the testimony of the witness, would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. *Rex* v. *Tyler*, 1 C. & P. 129; *Rex* v. *Enoch*, 5 C. & P. 539. See further, as to the object of the rule, *Rex* v. *Court*, 7 C. & P. 486, per Littledale, J.; *People* v. *Ward*, 15 Wend. 231." Nor from the fact that in *Wilson* v. *United States*, 162 U. S. 613,

mention was made of the circumstance that the statement of the accused was a mere denial of guilt accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered, was based not alone upon the nature of the statement but upon "the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an oath has been supposed to exert." (p. 624.)

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie*, (1876) 74 N. C. 148:

"But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice." (p. 150.)

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books.

In 3 Russell on Crimes, (6th ed.) 478, it is stated as follows:

"But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied

promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Green. Ev. (15th ed.) § 219; Wharton Crim. Ev. (9th ed.) § 631; 2 Taylor Ev. (9th ed.) § 872[2]; 1 Bishop's New Crim. Proc. § 1217, par. 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes, following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this court on the subject. *Hopt* v. *Utah*, (1883) 110 U. S. 574; *Sparf* v. *United States*, (1895) 156 U. S. 51, 55; *Pierce* v. *United States*, (1896) 160 U. S. 355, and *Wilson* v. *United States*, (1896) 162 U. S. 613.

A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the Amendment itself. In *Boyd* v. *United States*, 116 U. S. 616, attention was called to the intimate relation existing between the provision of the Fifth Amendment securing one accused against being compelled to testify against himself, and those of the

Fourth Amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject, in *Brown* v. *Walker*, 161 U. S. 591, 596, the court, speaking through Mr. Justice Brown, said:

"The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that

a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes.

In *Burrowes* v. *High Commission Court*, (1616) Bulstr. pt. 3, page 48, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law, (Taylor on Evidence, § 886[2],) certain it is that, without a statute so commanding, in *Felton's case*, (1628) 3 How. St. Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

Lord Hale died December 25, 1676. In the first volume of his Pleas of the Crown, 1st ed. 1736, treating of the subject of confessions in cases of treason, it is said at p. 304:

"That the confession before one of the Privy Council or a justice of the peace being *voluntarily made without torture* is sufficient as to the indictment on trial to satisfy the statute, and it is not necessary that it be a confession in court; but the confession is sufficient if made before him that hath power to take an examination."

In the second volume, at p. 225, it is said:

"When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

"The confession is either simple, or relative in order to the attainment of some other advantage.

"That which I call a simple confession is, where the defend-

ant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40.

"If it be but an extra judicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, tho upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*. 22 Assiz. 71, and Stamf. P. C. Lib. II, cap. 51, fol. 142 *b*."

In chapter 38 of vol. 2, at p. 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip and Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said:

"But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

"2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; . . ."

Gilbert, in his treatise on Evidence, (2d ed. — published in 1760,) says, at p. 140:

". . . But then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."

In Hawkins' Pleas of the Crown, (6th ed., by Leach — published in 1787,) book 2, chapter 31, it is said:

"Sec. 2. . . . And where a person upon his arraign-

ment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace or duress, or from weakness, or ignorance, may refuse to record such confession, and suffer the party to plead not guilty."

In section 3, chap. 46, it is stated that examinations by the common law before a Secretary of State or other magistrate for treason or other crimes not within the statutes of Philip and Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor, (see note to *Gilham's case*, 2 Moody, pp. 194–5,) reads as follows:

"The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, (*vide* O. B. 1786, page 387,) is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Although the English reports, prior to the separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins and Gilbert, both the opinion of Lord Mansfield in *Rex* v. *Rudd*, (1775) Cowp. 331, and that of Mr. Justice Wilson, some years after the separation, in *Lambe's case*, (1791) 2 Leach, (4th ed.) 552, make it certain that the rule as stated by Hawkins, Gilbert and Hale was considered in the English courts as no longer open to question and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be com-

pelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy, came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well settled nature of the rule in England at the time of the adoption of the Constitution and of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and embedded in the Fifth Amendment was noticed by this court in *Wilson* v. *United States*, *supra*, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." 162 U. S. 613, 623.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar con-

dition of fact. Indeed, the embarrassment which comes from the varying state of fact, considered in the decided cases, has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Taylor Ev. § 872[2]. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. *Green* v. *State*, 88 Georgia, 516; *State* v. *Patterson*, 73 Missouri, 695, 705; *State* v. *Matthews*, 66 N. C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for, however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the Constitution. Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. With this understanding of the rule we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century, 1 & 2 Ph. & M. c. 13 and 2 & 3 Ph. & M. c. 10,

justices of the peace were directed on accusations of felony to "take the examination of the said prisoner and information of them that bring him." In 1655, the judges directed that the examination of prisoners should be without oath, J. Kel. 2, and the reason of this rule, Starkie on Evidence, (2d ed. p. 29) says, was that an examination under oath "would be a species of duress and a violation of the maxim that no one is bound to criminate himself." The ruling of the judges in this regard was recognized in the statute of 7 George IV, chap. 64, which, although requiring "information of witnesses" to be "upon oath," simply directed an "examination" of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that before such an examination could be received in evidence it must appear that the accused was made to understand that it was optional with him to make a statement. *Rex* v. *Green*, (1832) 5 Car. & P. 312; *Reg.* v. *Arnold*, (1838) 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was, that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused, tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In *Reg.* v. *Drew*, (1837) 8 Car. & P. 140, and *Reg.* v. *Harris*, (1844) 1 Cox C. C. 106, though the accused had been cautioned not to say anything to prejudice himself,

the further statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and "would" be used for or against him at his trial, was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and was a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurance that the statement of the prisoner would be used were made to him by a police officer. *Reg.* v. *Morton*, (1843) 2 Moo. & Rob. 514, and *Reg.* v. *Furley*, (1844) 1 Cox C. C. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges, as to whether a confession made to a person not in a position of authority over the accused, was admissible in evidence after an inducement has been held out to the prisoner by such person. *Rex* v. *Spencer*, (1837) 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority, *Reg.* v. *Taylor*, (1839) 8 Car. & P. 733; *Reg.* v. *Moore*, (1852) 2 Den. C. C. 522; although, in the last cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction. (p. 527.) There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule, and as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in Russell on Crimes, third volume, at page 501.

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In *Rex* v. *Thompson*, (1783) 1 Leach, (4th ed.) 291, a declaration to a suspected person that unless he gave a more satisfactory account of his connection with a stolen bank note his

interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance, said that the prisoner was hardly a free agent at the time, as though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in which it had been expressed rendering it more efficacious.

In *Cass' case*, (1784) 1 Leach, 293, a confession induced by the statement of the prosecutor to the accused, "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you," was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In *Rex* v. *Griffin*, (1809) Russ. & Ry. 151, telling the prisoner that it would be better for him to confess; in *Rex* v. *Jones*, (1809) Russ. & Ry. 152, the prosecutor saying to the accused that he only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased; in *Rex* v. *Kingston*, (1830) 4 Car. & P. 387, saying to the accused, "you are under suspicion of this, and you had better tell all you know;" in *Rex* v. *Enoch and Pulley*, (1833) 5 Car. & P. 539, saying: "You had better tell the truth or it will lie upon you, and the man go free;" in *Rex* v. *Mills*, (1833) 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it;" in *Sherrington's case*, (1838) 2 Lewin C. C. 123, saying: "There is no doubt thou wilt be found guilty, it will be better for you if you will confess;" in *Rex* v. *Thomas*, (1833) 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them;" in *Rex* v. *Simpson*, (1834) 1 Moody, 410, and Ry. & Mood. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the

suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess; in *Rex* v. *Upchurch*, (1836) 1 Moody, 465, saying: "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you. Pray, tell me if you did it;" in *Reg.* v. *Croydon*, (1846) 2 Cox C. C. 67, saying: "I dare say you had a hand in it; you may as well tell me all about it;" in *Reg.* v. *Garner*, (1848) 1 Den. C. C. 329, saying: "It will be better for you to speak out."

In *Reg.* v. *Fleming*, (1842) Arm., M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said: "The prisoner and the witnesses being both in the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible."

In the leading case of *Reg.* v. *Baldry*, (1852) 2 Den. C. C. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely imported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of *Reg.* v. *Drew*, *Reg.* v. *Harris*, *Reg.* v. *Morton* and *Reg.* v. *Furley*, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon *Cass' case*, *Rex* v. *Thomas*, *Sherrington's case* and *Rex* v. *Enoch*, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak or other intimation given of possible benefit would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C. B., said (p. 432): "There is no doubt as to the appli-

cation of the rule in those cases, which are all familiar to the judges and to the bar."

In the course of the opinion, subsequently delivered by him, Chief Baron Pollock said (p. 442):

"A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything let it be true. It has been decided that that would not prevent the statement being received in evidence by Littledale, J., in the case of *Rex* v. *Court*, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester, *Reg.* v. *Holmes*, 1 Car. & K. 248; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, — the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg.* v. *Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

In *Reg.* v. *Moore*, (1852) 2 Den. C. C. 522, also decided by the Court of Criminal Appeal, an admonition to a person suspected of crime that she "had better speak the truth," was held not to vitiate a subsequent confession, because not made by a person in authority. Parke, B., delivering the opinion of the judges, said, in substance, (p. 526,) that one element in the consideration of the question whether a confession ought to be excluded was "whether the threat or inducement was such as to be likely to influence the prisoner," and "that if the threat or inducement was held out, *actually or constructively* by a person *in authority*, it cannot be received, *however slight the threat or inducement.*"

In *Reg.* v. *Cheverton*, (1862) 2 F. & F. 833, a statement made by a policeman to a person in his custody, that "you had better tell all about it, it will save you trouble," was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible.

In *Reg.* v. *Fennell*, (1881) 7 Q. B. D. 147, the Court for Crown Cases Reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, "upon all the decided cases," held inadmissible a statement made induced by the prosecutor saying to the prisoner in the presence of an inspector of police: "The inspector tells me you are making housebreaking implements; if this is so, you had better tell the truth, it may be better for you."

The latest decision in England on the subject of inducement, made by the Court for Crown Cases Reserved is *Reg.* v. *Thompson*, (1893) 2 Q. B. 12. At the trial a confession was offered in evidence, which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence, on the ground that it had been made under the operation of an inducement held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that "it will be the right thing for Marcellus (the accused) to make a clean breast of it." The evidence having been admitted and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day and Wills, JJ. After stating and adopting the ruling of Baron Parke in *Reg.* v. *Warringham*, 2 Den. C. C. 447 *n*, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C. B., in *Reg.* v. *Baldry*, that the true ground of the

exclusion of statements not voluntary was that "it would not be safe to receive a statement made under any influence or fear." The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the *Fennell case*, and added:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask — Is it proved affirmatively that the confession was free and voluntary — that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

After reviewing the evidence and holding that, under the ruling of Pollock, C. B., in the *Baldry case*, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," the confession ought not to have been received.

Whilst, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority within the rule in England, and therefore that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would *per se* render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russell on Crimes, p. 510, note *t*. In *Reg.* v. *Johnston*, 15 Ir. Com. Law, 60 (1864), this subject was elaborately considered by the

Irish Court of Criminal Appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render *per se* any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes are later in date than *Reg.* v. *Johnston*, although they emanate from *nisi prius* courts and not from appellate tribunals. Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. *Berriman's case*, (1854) 6 Cox C. C. 388; *Cheverton's case*, (1862) 2 F. & F. 833; *Mick's case*, (1863) 3 F. & F. 822; *Regan's case*, (1867) 17 L. T. (N. S.) 325, and *Reason's case*, (1872) 12 Cox C. C. 228.

From this review it clearly appears that the rule as to confessions, by an accused, (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority,) is in England to-day what it was prior to and at the adoption of the Fifth Amendment, and that whilst all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come then to the American authorities. In this court the general rule that the confession must be free and voluntary,

that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset. The facts in the particular cases decided in this court, and which have been referred to, manifested so clearly that the confessions were voluntary, that no useful purpose can be subserved by analyzing them. In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. *Hopt* v. *Utah*, 110 U. S. 174; *Sparf* v. *United States*, 156 U. S. 51, 55. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized; although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction cannot be had by proof of a confession made under inducement, "without corroborating testimony." Rev. Stat. Ind. 1881, § 1802. And, in the Texas Code of Procedure, article 750, it is provided that confessions shall not be used against a prisoner at his trial, "if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offence was committed." Tex. Rev. Stat. 1879.

The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. *Spears* v. *State*, 2 Ohio St. 583. Whether it is one which should be followed by this court in view of the express terms of the Constitution, need not be now considered, as it does not arise under the state of facts here presented. In some it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will, *per se*, exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. *People* v. *McMahon*, (1857) 15 N. Y. 384, followed in *People* v. *Mondon*, (1886) 103 N. Y. 211, 218; *State* v. *Matthews*, (1872) 66 N. C. 106; *Jackson* v. *State*, (1879) 56 Mississippi, 311, 312; *State* v. *Clifford*, (1892) 86 Iowa, 550. This doctrine as to examining magistrates is in some States enforced by statutes somewhat similar in character to the English statutes. (2 Taylor Ev. § 888, note 2.)

In some of the States it has been held that where questions are propounded to a prisoner by one having a right to ask them, and he remains silent, where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weighed by the jury. See authorities collected in Chamberlayne's note to 2 Taylor Ev. 588[4], *et seq.*

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several States, treating of confessions in the divergent aspects in which that doctrine may have presented itself but will content ourselves with a brief reference to a few leading and well considered cases treating of the subject of inducements, and which are, therefore, apposite to the issue now considered.

In the following cases, the language in each mentioned, was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly* v. *State*, (1882) 72 Alabama, 244, saying to the prisoner, "You have got your foot in it, and somebody else was with you;

now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth;" in *People* v. *Barrie*, 49 California, 342, saying to the accused, "it will be better for you to make a full disclosure;" in *People* v. *Thompson*, (1890) 84 California, 598, 605, saying to the accused, "I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way;" in *Beery* v. *United States*, (1893) 2 Colorado, 186, 188, 203, advising the prisoner to make full restitution, and saying, "if you do so it will go easy with you; it will be better for you to confess; the door of mercy is open and that of justice closed;" and threatening to arrest the accused and expose his family if he did not confess; in *State* v. *Bostick*, (1845) 4 Harr. (Del.) 563, saying to one suspected of crime, "the suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater, I don't expect to do anything with you; I am going to send you home to your mother;" in *Green* v. *State*, (1891) 88 Georgia, 516, saying to the accused, "Edmund, if you know anything, it may be best for you to tell it;" or, "Edmund, if you know anything, go and tell it, and it may be best for you;" in *Rector* v. *Commonwealth*, (1882) 80 Kentucky, 468, saying to the prisoner in a case of larceny, "it will go better with you to tell where the money is, all I want is my money, and if you will tell me where it is, I will not prosecute you hard;" in *Biscoe* v. *State*, (1887) 67 Maryland, 6, saying to the accused, "it will be better for you to tell the truth and have no more trouble about it;" in *Commonwealth* v. *Nott*, (1883) 135 Mass. 269, saying to the accused, "you had better own up; I was in the place when you took it; we have got you down fine; this is not the first you have taken, we have got other things against you nearly as good as this;" in *Commonwealth* v. *Meyers*, (1894) 160 Mass. 530, saying to the accused, "you had better tell the truth;" in *People* v. *Wolcott*, (1883) 51 Michigan, 612, saying to the accused, "it will be better for you to confess;" in *Territory* v. *Underwood*, (1888) 8 Montana, 131, saying to the prisoner that it would be better

to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution or make it as light as possible; in *State* v. *York*, (1858) 37 N. H. 175, saying to one under arrest immediately before a confession, "if you are guilty you had better own it;" in *People* v. *Phillips*, (1870) 42 N. Y. 200, saying to the prisoner, "The best you can do is to own up; it will be better for you;" in *State* v. *Whitfield*, (1874) 70 N. C. 356, saying to the accused, "I believe you are guilty; if you are you had better say so; if you are not you had better say that;" in *State* v. *Drake*, (1893) 113 N. C. 624, saying to the prisoner, "if you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you;" in *Vaughan* v. *Commonwealth*, (1867) 17 Gratt. 576, saying to the accused, "you had as well tell all about it."

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective *he was stripped of his clothing*, and either whilst the detective was in the act of so stripping him, or after he was

denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'"

The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason

can it be said that the answer which he gave and which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. Whilst it must not be considered that by referring to these authorities we approve them, it is yet manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime, would not be impelled to say something, when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself, commit the offence, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place where the statements were made and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference

that the statements of Bram were not made by one who in law could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offence, to make this statement to him under circumstances which call imperatively for an admission or denial and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective? "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally im-

ported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language — that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted, "the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration if any degree of influence has been exerted." In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders it unnecessary to pass on the serious question arising from the ruling of the trial court by which in cross-examination the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out by way of cross-examination everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial.

We will now briefly consider the alleged errors of this character.

By plea and supplemental plea in abatement, and by motion to quash, defendant, preliminary to the trial, attacked the sufficiency of the indictment, because one of the grand jurors was permitted to affirm and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when, in fact, it was presented upon the oath *and affirmation* of the jurors. At the hearing of the pleas in abatement, it appeared that when the grand jurors were empanelled one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others. It is also stated in the record, following the recital of the issuance of venires for grand and petit jurors, that —

"In obedience to the said order of court, and to the venires issued thereunder, the following-named grand jurors attended on the fifteenth day of October, A.D. 1896. On that day the said grand jurors were duly empanelled as the grand jury for the October term of this court, A.D. 1896. All of said grand jurors, being empanelled aforesaid, were duly sworn, except grand juror William Merrill, Junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance."

In section 1 of the Revised Statutes of the United States it is provided, among other things, that, in determining the meaning of the Revised Statutes, "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Section 800 also provides that —

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practised in such state courts, so far as such may be practica-

ble by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and empanelling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania."

The Public Statutes of Massachusetts, 1882, chap. 213, section 6, provide as follows:

"SECTION 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words 'this you do under the pains and penalties of perjury' instead of the words 'so help you God.'"

And section 3 of chapter 3 of the same statutes provides as follows (p. 58):

"In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute, that is to say, . . . Fourteenth. The word 'oath' shall include 'affirmation' in cases where, by law, an affirmation may be substituted for an oath."

The objection that the indictment recited that it was presented "upon the oath" of the jurors, when the fact was that it was presented upon the "oath and affirmation" of the jurors, is without merit. Waiving a consideration of the question whether, under the provisions of the statutes to which reference has been made, the word "oath" might not properly be construed as meaning either "oath" or "affirmation," the recital alluded to was purely formal, and if defective was open to amendment. The record disclosing the fact that all of the grand jurors were duly sworn except grand juror William Merrill, Junior, who was "duly affirmed," the defendant could not have been prejudiced by the form of the statement made in the indictment, and the defect, if any, was rendered harmless by the curative provisions of section 1025, Revised Statutes.

The further objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was proven to have possessed conscientious scruples against taking an oath, is practically concluded by the disposition made of the objection just passed upon, and is rendered nugatory by the terms of § 1025, Revised Statutes. Further, the mode of ascertaining the existence or non-existence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. *Commonwealth* v. *Fisher*, 7 Gray, 492; *State* v. *Adams*, 78 Maine, 486.

The remaining assignments which we deem it proper to notice relate to the overruling of objections interposed to questions propounded to certain witnesses in the character of experts. Some of these objections were made to hypothetical questions asked a number of sailors, reciting the condition of things assumed to have been established by the evidence as existing about the time of the killing, viz., the speed of the Herbert Fuller, the condition of her sails, direction of wind, etc., an inquiry as to the effect it would have on the vessel if the wheelman had taken his hands off the wheel, and what effect would be produced by lashing the wheel under similar conditions. These questions were evidently intended to supplement the testimony of Brown, who swore that he stood with both hands on the wheel during the time between twelve and two o'clock, and, consequently, when the murders were committed. The questions were competent, as the testimony sought to be elicited was relevant to the issue. Aside from the testimony of Brown the evidence against Bram was purely circumstantial, and it was clearly proper for the Government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime. The testimony sought to be adduced had this tendency, and the fact that it might operate indirectly to fortify the credit of such person as a witness in the cause could not affect its admissibility.

Dissenting Opinion: Brewer, J., Fuller, C.J., Brown, J.

An objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury after all being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt* v. *Utah*, 120 U. S. 430.

The judgment is reversed and the cause remanded with directions to set aside the verdict and to order a new trial.

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

I dissent from the opinion and judgment in this case —

First, because I think the testimony was not open to objection. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt* v. *Utah*, 110 U. S. 574, 584; reaffirmed in *Sparf* v. *United States*, 156 U. S. 51, 55. The fact that the defendant was in custody and in irons does not destroy the competency of a confession. "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear, or by promises." *Sparf* v. *United States*, *supra*; see also *Wilson* v. *United States*, 162 U. S. 613, 623.

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram, and this general declaration he affirmed and reaffirmed in response to inquiries made by the court and the defendant's counsel. The court, therefore, properly overruled the objection at that time made to his testifying to the statements of defendant. It is not suggested that there was error in this ruling, and the fact that inducements were held out is deduced only from the testimony subsequently given by Power of the

conversation between him and Bram. The first part of that conversation is as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" In this there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive.

It is strange to hear it even intimated that Bram up to this time was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows: "I said, 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." And here, it is argued, was a suggestion of a benefit — the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvellous metaphysical ability, is of little weight in practical affairs. But even if it did carry any such improper suggestion it was made at nearly the close of the conversation, and that this suggestion then made had a retroactive effect and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to comprehend. The only reply

which Bram made to the question containing this supposed improper suggestion was this: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." Can it for a moment be thought that such a reply was so significant that, permitting it to go to the jury, compels the putting at naught this protracted trial, and overthrowing the deliberate verdict of the twelve men who heard the evidence and condemned the defendant? With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that in all this conversation with Bram there was nothing of sufficient importance to justify the reversal of the judgment.

Again, there is a lack of any proper objection or exception, and if there is any one thing which may be considered as settled in all appellate courts it is that an error in the admission of testimony will not be considered unless there was a specific objection and exception at the trial. "To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon." *Hutchins* v. *King*, 1 Wall. 53, 60; *United States* v. *McMasters*, 4 Wall. 680, 682. "Our power is confined to exceptions actually taken at the trial." *Railway Company* v. *Heck*, 102 U. S. 120. See also *Moore* v. *Bank of Metropolis*, 13 Pet. 302; *Camden* v. *Doremus*, 3 How. 515; *Zeller's Lessee* v. *Eckert*, 4 How. 289, 297; *Phelps* v. *Mayer*, 15 How. 160; *Dredge* v. *Forsyth*, 2 Black, 563; *Young* v. *Martin*, 8 Wall. 354; *Belk* v. *Meagher*, 104 U. S. 279; *Hanna* v. *Maas*, 122 U. S. 24; *White* v. *Barber*, 123 U. S. 392, 419; *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383; *Anthony* v. *Louisville & Nashville Railroad*, 132 U. S. 172; *Block* v. *Darling*, 140 U. S. 234; *Bogk* v. *Gassert*, 149 U. S. 17.

It is true these were civil cases. For it is only in the later history of this court that we have had jurisdiction of writs of

error in criminal cases, but the law is equally applicable to the latter. "It is the duty of counsel seasonably to call the attention of the court to any error in empanelling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and in case of an adverse ruling to note an exception." *Alexander* v. *United States*, 138 U. S. 353, 355. "The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule." *Sparf* v. *United States*, 156 U. S. 51, 56; *Holder* v. *United States*, 150 U. S. 91; *Tucker* v. *United States*, 151 U. S. 164.

It is true the defendant objected to the admission of the conversation before it was given, but upon the state of facts as then presented unquestionably the trial court ruled properly in permitting the witness to testify, for he positively declared that there was neither threat nor promise, intimidation or inducement. If it be true, as the court now holds, that in the progress of his testimony it was developed that he did make a statement which carried an inducement — a suggestion of hope — it was then the duty of the defendant to call the attention of the court to the matter, either by objecting to any further disclosures of the conversation, or else by a motion to strike out. Nothing of the kind took place. Defendant was apparently content to let all of the subsequent conversation come in. Can it be held that the court erred in not of its own motion stopping the witness, or striking out the testimony, or instructing the jury to disregard it, when defendant asked nothing of the kind? Surely by this decision we practically overrule the long line of authorities heretofore cited affirming the necessity of calling the attention of the trial court to the specific matter, obtaining its ruling thereon and saving an exception thereto before there is any jurisdiction in this court to review. Nor is this a mere technical and arbitrary rule which may be dispensed with whenever the exigencies of any case seem to demand, and in no other way a ground for reversal can be discovered. It may be, and, undoubtedly, often is the case, that though incompetent testimony be given the defendant prefers that it shall remain in order,

for certain purposes, to take advantage of it in the argument before the jury. Can it be possible that he may obtain this advantage, and, having obtained and used it, insist that, because of such incompetent testimony, he is entitled to a reversal of the judgment against him? *Wilson* v. *United States*, 162 U. S. 613, 624. Who shall say that this defendant, though at first objecting to any testimony respecting his statements, yet, after hearing what the witness said, did not prefer that such testimony remain, as it disclosed that, at the very first moment he was informed that Brown charged him with the crime, he protested that Brown was not in a position where he could see who did the killing? Indeed, for anything in this record to the contrary, he, when a witness in his own behalf, may have given the same version of the conversation, and admitted that his statements were voluntarily made. Who shall say that he did not wish to argue before the jury that the claim made of Brown's inability to see what took place was not an excuse suggested only by the exigencies of the trial, but was presented at the very first moment of the charge; and if he was willing to let the testimony remain and have all the advantage which he could take of it in argument before the jury, can it be that he can now come to this court and say "true I did not object to this specific testimony, nor ask to have it stricken out, but it was incompetent," and obtain a reversal on the ground of its admission?

I dissent, therefore, first, because I think the testimony was properly received; and, secondly, because no motion was made to strike it out and no exception taken to its admission.

ADAMS *v.* HENDERSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 70. Argued and submitted November 1, 1897. — Decided December 6, 1897.

A. & S. owned a tract of land in a township numbered 5 which was within the limits of the Union Pacific Railroad grants and was acquired from that company after the execution of its mortgages, its deed reserving to

the company the exclusive right to prospect for coal and other minerals on the lands. A. & S. contracted to sell this tract to R. & H., representing that they had a good and indefeasible estate in fee simple in it, and agreeing to furnish an abstract of title. R. & H. agreed to buy the tract for a sum named, to be paid partly in cash and partly by notes secured by mortgage on the property. The deed, mortgage, notes and money payments were accordingly made and exchanged in supposed compliance with the agreement, but no abstract of title was furnished. In the deed and mortgage the land was by mistake of the scrivener described as township No. 6 instead of township No. 5. A. & S. had no interest in or title to land in township No. 6. No patent was ever issued by the Government for land in township No. 5. R. & H., on learning the facts, demanded the return of the money paid, and of the notes, claiming to rescind the contract of sale. A. & S. tendered a deed of the land in township No. 5. Subsequent to the tender, the Union Pacific Company released the land from claim under the coal reservation, but not as to other minerals. *Held*, that R. & H. were not bound to accept the deed tendered, and were entitled to have the contract rescinded, and to receive back the money paid by them.

THE case is stated in the opinion.

Mr. J. M. Wilson for appellants. *Mr. John F. Dillon*, *Mr. E. Ellery Anderson* and *Mr. P. L. Williams* filed a brief for same.

Mr. Charles C. Richards and *Mr. James H. Macmillan*, for appellees, submitted on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By a final decree of the District Court of the Fourth Judicial District of the Territory of Utah a contract for the sale of certain land, made March 27, 1890, between L. B. Adams and W. N. Shilling on one side, and Edward A. Reed and H. H. Henderson on the other side, and three promissory notes given by the purchasers, together with a mortgage executed by them to secure the payment of such notes, were adjudged to be null and void.

It was also adjudged that Henderson and Burgitt — the latter having become guardian of the person and estate of Reed who was incapable of conducting his own affairs — recover of Adams and Shilling the amount paid by Henderson

and Reed on the agreed price of the land purchased by them from Adams and Shilling.

The decree was affirmed by the Supreme Court of the Territory, and the case is here for review upon the appeal of Adams and Shilling.

The material facts out of which the case arises, and which are embodied in a report of a special master in chancery, are as follows:

In March, 1890, Shilling and Adams, in response to an inquiry made by Reed and Henderson, stated that they owned and had a good, indefeasible title in fee simple to 440 acres of land lying a few miles west of Ogden City, Weber County, Utah Territory.

The lands referred to — as was understood by all parties at the time — were the east half of section nine, township *five* north of range two west of the Salt Lake meridian; the south half of the southwest quarter of said section; and the northeast quarter of the southwest quarter of that section.

Reed and Henderson had not at that time seen the land, and had no knowledge as to the title. But Shilling and Adams promised that they would furnish an abstract of title. Reed and Henderson, relying and acting upon the representation of Adams and Shilling that they had a good and indefeasible estate in fee simple to the lands inquired about, without investigating the title, purchased an undivided two thirds interest in the 440 acres for the sum of $7333.32, of which one third was to be paid and was paid in cash, and time was given for the payment of the balance with interest. They would not have made the purchase if they had not believed the above representation as to title to be true.

On the 27th of March, 1890, Reed and Henderson received from Adams and Shilling a deed of general warranty for the following land: An undivided two thirds of the east half of section nine, township *six* north of range two west of the Salt Lake meridian, of the south half of the southwest quarter of that section, and of the northeast quarter of the southwest quarter of the same section, in Weber County, Utah.

The land contracted for, it will be observed, was in town-

ship *five*, while the land actually conveyed was in township *six*. But the grantors intended by the above deed to convey an undivided two thirds of the land in township five, and the grantees supposed that the estate embraced by the conveyance was that which they intended to purchase. But by mistake of the scrivener, the premises conveyed were described as lying in township six.

At the time the above deed was received the grantees, in addition to the cash payment of one third of the purchase price, executed two promissory notes payable to the grantors for the sum of $2444.45, each bearing eight per cent interest, payable one year and six months from March 26, 1890, and secured by a mortgage on the premises. But in that mortgage, by the mistake of the scrivener who prepared it, the land was described as lying in township six. The mortgage was duly signed, witnessed and acknowledged, Reed and Henderson, at the time, fully believing and acting upon the representation of the grantors as to title, and paying to the grantors the interest on said notes down to and including September 26, 1890, which amounted to $180. They also signed a promissory note of June 26, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, as the interest on the above notes, which were held by the bank. The note last named was brought into court, and when the final decree was rendered it was still in court for the defendants.

The plaintiffs Shilling and Adams failed to furnish an abstract of title; and Reed and Henderson, having an opportunity to sell the land in township five, and assuming that that was the land conveyed to and mortgaged back by themselves, procured an abstract on the 3d day of September, 1891.

The above lands in township five are within ten miles of the line of the Union Pacific Railroad, and within the limits of the lands granted to that company by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489. They lie in a valley at the base of the Wasatch Mountains, and had theretofore been used and cultivated as agricultural lands. But no exploration or examination has ever been made on them for coal or minerals of any kind or description.

As bearing on the condition of the title to the land in township five, it may be stated that the Union Pacific Railroad Company twice mortgaged all the lands granted to it by the act of Congress of July 1, 1862, c. 120, 12 Stat. 489, and the act amendatory thereof approved July 2, 1864, c. 216, 13 Stat. 356, one of the mortgages being dated April 16, 1867, and the other December 18, 1873.

Adams and Shilling acquired by proper conveyance made in 1889 all the interest of the Union Pacific Railroad Company in the lands in township five sold by them to Reed and Henderson, and freed from the liens created by the above mortgages, except that the deed received by them from that company contained a clause, *reserving* "to the said Union Pacific Railroad Company the *exclusive right* to prospect *for coal and other minerals* within and underlying said lands, and to mine for and remove the same if found, and for this purpose it shall have the right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor."

No patent has ever issued from the Government for the land in township five.

Parties applied to Reed and Henderson for the purchase of that land, but they declined and refused to buy, and a sale by them was defeated.

Within two days of the 3d of September, 1891, and before the bringing of this action, Reed and Henderson ascertained that the plaintiffs were not the owners of and had no title to the land which the deed from Adams and Shilling purported to convey to them, that is, to the land in township *six*.

On or about the 4th day of September, 1891, Reed and Henderson notified Adams and Shilling that they rescinded the contract of sale, and demanded not only the return to them of the moneys paid on account of their purchase, with interest, but the surrender of the two notes of $1444.45 each, bearing date March 27, 1890, and the note for $391.10, dated June 26, 1891. All of those notes had been returned by the bank to Adams and Shilling.

After Reed and Henderson notified Adams and Shilling of

the rescission of the contract of sale, and before the bringing of this suit, Adams and Shilling tendered another deed — a special warranty deed, containing a proper description of the land intended to be sold by them to Reed and Henderson. The latter refused to accept that deed, saying that they rescinded the contract of sale; that Adams and Shilling did not have a good title to the land described therein; and urging the objection also that the deed was not one of general warranty. The deed so tendered was dated September 29, 1891.

At the time Adams and Shilling tendered the deed of special warranty, the title to the land therein described was incumbered by the above reservation in the deed of 1889 made by the Union Pacific Railroad Company to Adams and Shilling, of an exclusive right in the Union Pacific Railroad Company to mine, under said land, for coal and other minerals, and to remove the same.

Subsequently, the Union Pacific Railroad Company executed and delivered to Reed and Henderson a quitclaim deed dated November 2, 1891, and which was acknowledged November 17, 1891, and duly recorded on the 8th of January 1892. This deed released the land in township five from the claim of that company under the *coal* reservation contained in the deed of 1889. But it did not release the right of that company to prospect for and mine "other minerals" under that land.

On the 28th of March, 1890, Reed and Henderson let, leased and demised unto Adams and Shilling, who were occupying the land, for the term of six months from that date the land in township five. But neither Henderson or Reed ever actually occupied any part of it.

Neither of the notes described in the mortgage of March 27, 1890, made by Reed and Henderson have been paid. Adams and Shilling are still the owners and holders of them, as well as of the mortgage. The amount unpaid on those notes is the principal of each one, with interest from September 26, 1890, at the rate of eight per cent. per annum.

The relief sought by the suit was a decree reforming the mortgage given by Reed and Henderson so as to correctly

describe the land in township five, and then a sale thereof in satisfaction of the costs of the action, and the balance of the purchase money, with a personal decree for any deficiency in purchase price that may be found to exist.

The defendants controverted the right of the plaintiffs to any decree, and, by cross-complaint, asked the cancellation of the above mortgage and notes, and a judgment for the amount they had paid to the plaintiffs with interest.

The decree rendered was in accordance with the prayer of the cross-complaint. In legal effect it was a decree rescinding the contract between the parties, because of the inability of the plaintiffs to make a sufficient title to the land sold by them.

Under the facts thus stated, the case is within a very narrow compass. It is found, and the plaintiffs and defendants agree, that the former intended to sell, and the latter intended to buy, the land in township five. By mistake the vendors conveyed land in another township which they did not intend to sell, to which they had no title, and which the defendants had no thought of buying; and by mistake the grantees, in order to secure the purchase price for the land they in fact purchased, mortgaged back to the plaintiffs the land in township six which the latter had assumed to convey to them. That a court of equity has power to correct this mutual mistake, make the instruments given in execution of the contract conform to the real intention of the parties, as established by clear and convincing proof, and hold the parties to their actual agreement, cannot be doubted.[1] But before the mortgage executed by the defendants can be reformed so as to properly describe the land which the plaintiffs intended to sell, and which the defendants intended to buy and mortgage

[1] *Snell* v. *Assurance Co.*, 98 U. S. 85, 88, 89; *Simpson* v. *Vaughan*, 2 Atk. 31; *Henkle* v. *Royal Exchange*, 1 Vesey Sen. 317; *Gillespie* v. *Moon*, 2 Johns. Ch. 585; *Keisselback* v. *Livingston*, 4 Johns. Ch. 144, 148; *Inskoe* v. *Proctor*, 6 T. B. Mon. 311, 316; *Hendrickson* v. *Ivins*, 1 N. J. Eq. 562, 568; *Wesley* v. *Thomas*, 6 Har. & J. 24, 26; *Newsom* v. *Bufferlow*, 1 Dev. Eq. 379; *Brady* v. *Parker*, 4 Ired. Eq. 430; *Bailey* v. *Bailey*, 8 Humph. 230; *Clopton* v. *Martin*, 11 Alabama 187.

back, it must appear that the plaintiffs have such title as they represented themselves to have when selling the land. A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.

That the plaintiffs have no such title is too clear to admit of dispute. They hold under the Union Pacific Railroad Company. They accepted a conveyance from that company which expressly reserved, in its favor, and without limit of time, an exclusive right not only "to prospect for coal and other minerals" under the land in question, and "to mine for and remove the same if found," but "a right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor." It does not appear that the railroad company is under any legal obligation to surrender or waive this reservation. The plaintiffs cannot compel it to do so. It is true that the reservation was subsequently released or withdrawn, so far as it related to coal, but it is in full force as to other minerals. So that the plaintiffs, in effect, ask that, instead of a good and indefeasible title in fee simple, the defendants shall take and pay for land incumbered with the right of the railroad company for all time, to pass over and across it for the purpose of prospecting for and mining minerals other than coal. A court of equity could not compel the defendants to take and pay for land thus incumbered without making for the parties a contract which they did not choose to make for themselves. "Equity," this court said in *Hunt* v. *Rousmanier*, 1 Pet. 1, 14, "may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences."

Reference was made in argument to the fact that no patent has ever been issued to the railroad company for the land in

question, and it has been suggested by the defendants that if it was discovered, before a patent issued, that it was mineral land, the title of the company would fail altogether; for the grant made by Congress to the company did not include mineral lands. *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, 381. We do not think it necessary to consider this aspect of the case, nor to determine whether the plaintiffs would be entitled to the relief asked, if the mineral reservation had not been made by the railroad company, and nothing else appeared affecting the title except the fact that no patent had been issued by the United States, together with a possibility that before the issuing of a patent the land might be ascertained to be mineral land which did not pass under the grant by Congress. We forbear any expression of opinion upon that point, because if it be assumed for the purposes of this case that the fact just stated would not stand in the plaintiffs' way, we are of opinion that the mineral reservation made by the railroad company is in itself such an incumbrance as prevents the plaintiffs from making a good and indefeasible title to the land.

It is suggested that the reservation as to "other minerals" ought not to be deemed an obstacle to the relief asked, because it may never appear that there are any minerals under the land; that it cannot be assumed in the absence of proof that the defendants are likely to be disturbed in the full and complete enjoyment of the land for every purpose for which it is adapted. On the other hand, it cannot be affirmed, in view of the discovery of valuable minerals in many parts of the West, that there are no minerals, other than coal, under the land in question. What the defendants are entitled to is a marketable title — a good and indefeasible title in fee. But that they will not obtain, if forced to take the land subject to the railroad company's right of way over it for the purpose of prospecting for and mining minerals, which may be taken off, when found. From that burden they cannot be relieved in any way except by the voluntary action of the railroad company.

But it is contended by the plaintiffs that the act of March 3,

1887, c. 376, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," 24 Stat. 556, the act of March 2, 1896, c. 39, 29 Stat. 42, and the concurrent resolution of June 10, 1896, 29 Stat. App. p. 14, confirmed as against the United States the right and title of *bona fide* purchasers of lands contained within the limits of railroad grants; so that, as against such *bona fide* purchasers, the United States, by the acts cited, expressly disclaims any rights whatever, and confirms absolutely the title of such *bona fide* purchasers. By this contention is meant that the act of March 3, 1887, as the same has been construed by this court in *United States* v. *Winona & St. Peter Railroad*, 165 U. S. 463, 466, 469, protects the title of Adams and Shilling as *bona fide* purchasers, even if, before a patent was issued by the United States, the lands in question should prove to be mineral lands.

It is sufficient, upon this point, to say that if the legislative enactments referred to have any reference whatever to *mineral* lands — if they were held applicable to lands purchased in good faith from the railroad company, and which turned out to be mineral lands that Congress never granted — that would only remove one of the difficulties which, it is insisted, are in the way of plaintiffs. For, if the plaintiffs' title is, under the legislation of 1887 and 1896, good as against the United States, there will still remain the incumbrance upon it arising from the right reserved by the railroad company, for all time — whether the plaintiffs or their vendees consented or not — to go upon the lands in question, for the purpose of prospecting and mining for minerals other than coal, and removing any found there. A patent would convey the interest of the United States in the land. But it would not destroy or release the mineral reservation made by the Union Pacific Railroad Company in its deed to Adams and Shilling. Purchasers from Adams and Shilling would be bound by that reservation, even if the United States issued a patent to the railroad company or to its vendees.

The result of these views is that the defendants were not

Statement of the Case.

bound to accept the deed tendered by the plaintiffs; and as it appears that the plaintiffs cannot make such a title as they agreed to give, as the cash payment was made upon the basis of a good and indefeasible title in the plaintiffs, the defendants were entitled upon their cross-complaint, framed in accordance with the established modes of procedure in the Territory, to have a decree which, in effect, rescinds the contract, and gives them back what they paid.

Affirmed.

In re TAMPA SUBURBAN RAILROAD COMPANY.

ORIGINAL.

No number. Argued November 29, 1897. — Decided December 20, 1897.

A writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise.

Where, as in this case, an order is made by a Circuit Court, appointing a receiver, and granting an injunction against interfering with his management of the property confided to him, an appeal may be taken to the Circuit Court of Appeals, carrying up the entire order.

By denying the application in this case for a certiorari, the Court must not be understood as intimating an opinion that a Circuit Judge has power to grant injunctions, appoint receivers, or enter orders or decrees, *in invitum*, outside of his circuit.

The Consumers Electric Light and Street Railroad Company of Tampa executed a mortgage to the Central Trust Company of New York, July 1, 1895, to secure an issue of bonds amounting to $350,000 upon all the property of the company, including its street railways, franchises and leases, and, among other things, all its rights under a lease from the Tampa Suburban Railroad Company, made or to be made, and covering all the property of the latter.

On July 22, 1897, the Trust Company presented its bill of complaint against the Consumers and Suburban Companies for the foreclosure of its mortgage on an alleged default in the payment of interest due July 1, 1897, to one of the Circuit

Judges for the Fifth Judicial Circuit, at the town of Wadsworth, in the State of Ohio, and made application thereon for the appointment of a receiver. It was admitted that this application was made *ex parte*, but claimed that one Chapin, president of the companies, consented thereto. The Circuit Judge thereupon, on that day, granted an order taking jurisdiction; directing that cause be shown at Tampa, in the State of Florida, August 4, 1897, why a receiver should not be appointed; and in the meantime restraining defendants from interfering with or disposing of the mortgaged property. This order was transmitted to be entered as of July 22, 1897, in the Circuit Court for the Southern District of Florida, and was so entered, and the bill filed as of that date. Notice was then given to defendants that, on the bill of complaint and the affidavit of Chester W. Chapin, complainant would apply to said Judge of the Circuit Court "at his chambers at Wadsworth, Medina County, Ohio, on the third day of August, 1897, for an order appointing a temporary receiver." On that day counsel for the Trust Company and counsel for defendants appeared before the Circuit Judge at Wadsworth, Ohio; but counsel for the Suburban Company objected to the jurisdiction and authority of the Circuit Judge to make or enter any order or decree outside the territorial limits of the Fifth Judicial Circuit of the United States, in which the suit was pending. These objections were overruled and an amendment and supplement to the bill of complaint were then presented to the Circuit Judge, together with a number of affidavits on behalf of complainant, to which the Suburban Company objected, on various grounds, which objections were overruled. Thereupon the Suburban Company filed an answer to the original bill of complaint and certain affidavits and documents. Argument was then had and an order signed by the Circuit Judge at Wadsworth, Ohio, on the third day of August, 1897, which, after appointing Chester W. Chapin receiver, and directing him to take immediate possession "of all and singular the property above described, wherever situated and found, and to continue the operation of the railway and plant of the defendant companies and conduct systematically their business

in the same manner as at present, and discharge all the public duties obligatory upon the defendants or either of them;" thus continued:

"Each and every of the officers, directors, agents, and employés of the said defendants or either of them are hereby required and commanded forthwith, upon demand of the said receiver or his duly authorized agent, to turn over and deliver to the said receiver or his duly constituted representative all the property of the defendant companies above mentioned, and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, and other property in his or their hands or under his or their control, and each and every of such directors, officers, agents, and employés are hereby commanded and required to obey and conform to such orders as may be given to them from time to time by said receiver or his duly constituted representative in conducting the operation of the said property and in discharging his duty as receiver, and each and every of such officers, directors, agents, and employés of the defendant companies or either of them are hereby enjoined from interfering in any manner whatever with the possession or management of any part of the property over which the receiver is hereby appointed, or from interfering in any way to prevent the discharge of the duties of such receiver."

The receiver was then authorized by the order to operate the street railway system and other property, with the usual provisions in that regard, being required to give bond to be approved by the clerk of the court or by a judge thereof, conditioned for the proper discharge of his duties. The order concluded: "And it is further ordered that the original and supplemental bills in this cause, and all exhibits, affidavits and other papers filed therein, be transferred to and filed in the clerk's office, at Tampa, Florida, at which place all process shall be returnable."

This order was transmitted by the Circuit Judge by letter from Wadsworth, Ohio, under date August 4, 1897, to the clerk of the Circuit Court at Jacksonville, with directions to file it, which letter informed the clerk that the Circuit Judge

had sent by express to him "supplemental bill and numerous affidavits offered by counsel, which, on receipt, also file, of same date as order appointing receiver. Attached to the order appointing receiver I have appended an order directing the original bill and all the affidavits and exhibits filed to be transferred to the clerk's office at Tampa."

The Tampa Suburban Railroad Company presented its petition to this court for a writ of certiorari directed to the Circuit Court for the Southern District of Florida to remove the proceedings in question for review, and on the application to file the petition, a rule to show cause was granted, to which return has been made.

The petition set forth in detail the matters above stated, in brief, with others, and insisted that the orders made by the Circuit Judge in the State of Ohio were void for want of jurisdiction; that the mortgage of the Consumers Company was invalid for not having been properly executed, as required by the statutes of Florida; that foreclosure was prematurely sought because the default in the payment of interest had not been continued for sixty days, contended to be a condition provided in the mortgage; that the original bill and exhibits were not before the Circuit Judge when the order of August third was granted; that the Circuit Judge improperly considered the amended bill and accompanying affidavits when notice thereof had not been given; that the restraining order was not limited in duration; and that there was no proof of danger of irreparable damage by delay. It was admitted that on the 22d of July and until and long after the 3d of August, the District Judge for the Southern District of Florida and both Circuit Judges and the Circuit Justice were absent from the Fifth Judicial Circuit, and petitioner charged that it had filed in the Circuit Court for the Southern District of Florida motions to discharge, annul and set aside the orders of July twenty-second and August third; but that the motions had remained undisposed of up to October ninth, when the petition was verified, because there was no judge of the United States courts within that circuit who had authority to hear and determine the same.

Mr. Noah Brooks Kent Pettingill for petitioner. *Mr. Thomas Mitchell Shackleford* was on his brief.

Mr. Adrian H. Joline opposing. *Mr. Henry W. Calhoun* was on his brief.

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

By section 716 of the Revised Statutes it is provided that: "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This undoubtedly authorized the issue of writs of certiorari in all proper cases. *American Construction Co.* v. *Jacksonville, Tampa &c. Railway*, 148 U. S. 372, 380.

In the case of *In re Chetwood*, 165 U. S. 443, 461, we allowed the writ to bring up for review certain final orders of the Circuit Court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of its inherent general powers, under the Constitution, did not arise.

By this application the review of two interlocutory orders is sought, the one, a preliminary restraining order, and the other appointing a receiver and continuing the injunction in aid of the receivership, on the ground that both these orders were void for want of power in the Circuit Judge to grant them outside of his circuit.

That this presents a question of grave importance is obvious, but it is objected that the application cannot be entertained because the appellate jurisdiction of this court can only be exercised in respect of final judgments or decrees, and, also, because there is another adequate remedy. We need not consider the first of these objections, as the second is sufficient to dispose of the application.

When sought as between private persons, the general rule

is that the writ of certiorari, such as asked here, will be granted or denied, in the sound discretion of the court, on special cause or ground shown; and will be refused where there is a plain and equally adequate remedy by appeal or otherwise.

By the seventh section of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828, as amended by the act of February 18, 1895, c. 96, 28 Stat. 666, it is provided: "That where, upon a hearing in equity, in a District Court or a Circuit Court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the Circuit Court of Appeals."

The suit in which the orders complained of were entered is one in which an appeal from a final decree might be taken to the Circuit Court of Appeals, and this even though the question of the jurisdiction of the Circuit Court was involved. *United States* v. *Jahn*, 155 U. S. 109. An appeal to the Circuit Court of Appeals might, therefore, have been taken from these orders or from an order refusing to set them aside and dissolve the injunction. We are not called on to say that an appeal would lie from an order simply appointing a receiver, but where the order also grants an injunction, the appeal provided for may be taken, and carries up the entire order, and the case may, indeed, on occasion, be considered and decided on its merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518.

The application for leave to file this petition must, therefore, be denied; but we must not be understood as intimating an opinion that a Circuit Judge has power to grant injunctions, appoint receivers or enter orders or decrees, *in invitum*, outside of his circuit.

Leave denied.

MICHIGAN LAND AND LUMBER COMPANY *v.* RUST.

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

No. 57. Argued October 25, 26, 1897. — Decided December 13, 1897.

The act of September 28, 1850, c. 84, granting swamp lands to the several States, was a grant *in præsenti*, passing title to all lands which at that date were swamp lands, but leaving to the Secretary of the Interior to determine and identify what lands were, and what lands were not, swamp lands.

Whenever the granting act specifically provides for the issue of a patent, the legal title remains in the Government until its issue, with power to inquire into the extent and validity of rights claimed against the Government.

Although a survey had been made of the lands in controversy which indicated that they were swamp lands, it was within the power of the land office at any time prior to the issue of a patent to order a resurvey and to correct mistakes made in the prior survey.

The facts in this case clearly show an adjustment of the grant upon the basis of the resurveys, and their acceptance by the officer of the State charged by the act of Congress with the duty of so doing, and this makes such adjustment final and conclusive.

The act of March 3, 1857, c. 117, did not operate to confirm to the State of Michigan the title to all lands marked on the approved and certified list of January 13, 1854, as swamp and overflowed lands, and direct the issue of a patent or patents therefor, but it simply operated to accept the field notes finally approved as evidence of the lands passing under the grant, leaving to the land department to make any needed corrections in the surveys and field notes.

The decision in *Martin* v. *Marks*, 97 U. S. 345, does not conflict with this construction of the act of 1857.

This was an action of ejectment commenced in the Circuit Court of the United States for the Eastern District of Michigan on February 11, 1888. On November 28, 1892, the case came on for trial before the court and a jury. At the close of the testimony the jury, under the instructions of the court, returned a verdict for the defendants. On May 7, 1895, this judgment was affirmed by the Court of Appeals, 31 U. S. App. 731, and to review such judgment the case was brought

Counsel for Plaintiff in Error.

here on writ of error. The land in dispute is situated in Clare County, being the S. E. ¼ of S. E. ¼ of sec. 20; N. W. ¼ of S. W. ¼ of sec. 21; N. W. ¼ of S. E. ¼ of sec. 22; N. W. ¼ of N. W. ¼ of sec. 28; N. ½ of S. W. ¼ of sec. 29; N. ½ of N. E. ¼ of sec. 35, township 18, range 3 W.; and E. ½ of S. W. ¼ of sec. 1, township 18, range 4 W., and amounting to 400 acres, the undivided half of which only was claimed by plaintiff.

The contention of the plaintiff, generally speaking, is that this was swamp land, and granted to the State of Michigan by the act of Congress of date September 28, 1850, c. 84, 9 Stat. 519, granting swamp lands to the several States; that it was included in a list of such lands in the Ionia land district, approved by the Secretary of the Interior and forwarded to the governor of Michigan on January 13, 1854; that the act of March 3, 1857, c. 117, 11 Stat. 251, confirmed the action of the Secretary of the Interior, and thereby passed the title to the State of Michigan, by which State it was, on October 14, 1887, conveyed to plaintiff's grantor.

The defendants, on the other hand, contend that the original surveys of the public lands in the State of Michigan were erroneous; that, at the instance of the State, Congress ordered resurveys, which resurveys were carried on from the years 1842 to 1857; that, while it is true this land was by the original surveys classed as swamp land and included in the Ionia land district list approved and certified to the State of Michigan, the resurveys showed that it was not land of that description; that a new list for that district, not including this land, was in 1866 made out and certified to the State; that such new list was accepted by the State as correct, and a patent for the lands described therein issued to and received by it; that after all this had taken place and in 1870 the land in question was sold by the officers of the United States at auction after public advertisement and that patents were duly issued upon such sale, under which patents the defendants claim title.

Mr. Frank S. Robson and *Mr. A. B. Browne* for plaintiff

in error. *Mr. J. W. Champlin* and *Mr. A. J. Britton* were on their briefs.

Mr. Benton Hanchett and *Mr. Ashley Pond* for defendants in error.

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

This case involves questions of the power of the land department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the Secretary of the Interior in approving and certifying to the Governor of the State a list of such lands, and of the effect of the confirmatory act of 1857. There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly upon the documentary evidence.

The act of 1850 made a grant *in præsenti;* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Rice* v. *Sioux City & St. Paul Railroad*, 110 U. S. 695; *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134. But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was entrusted to the Secretary of the Interior. Section 2 contains this provision:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in said State of Arkansas, subject to the disposal of the legislature thereof."

It may be remarked in passing that while the first and second sections refer specifically to the State of Arkansas, section 4 of the act makes it applicable to all the States. It is true that in the first section Congress defines the lands granted as "swamp and overflowed lands, made unfit thereby for cultivation;" and section 3, referring to the lists and plats ordered by section 2 to be made out by the Secretary of the Interior, contains this further specification as to the character of the lands granted:

"That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

But while Congress thus defined what it intended to grant as swamp and overflowed lands it entrusted, as appears from section 2, the identification of those lands to the Secretary of the Interior.

It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Works* v. *American Emigrant Co.*, 164 U. S. 559, 574, it was said, speaking in reference to this matter, and after a full review of the previous authorities: "When he" (that is, the Secretary of the Interior) "made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Chouteau* v. *Eckhart*, 2 How. 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S.

78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. § 2449; *Frasher* v. *O'Connor*, 115 U. S. 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent, *Bagnell* v. *Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. "A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination." *Miller* v. *Kerr*, 7 Wheat. 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *United States* v. *Stone*, 2 Wall. 525, 535; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378, 396; *Bicknell* v. *Comstock*, 113 U. S. 149, 151; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286; *Williams* v. *United States*, 138 U. S. 514. This jurisdiction of the department has been maintained in cases of preëmption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard* v. *Alexander*, 157 U. S. 372, and cases cited in the opinion; *Parsons* v. *Venzke*, 164 U. S. 89.

In *Knight* v. *United States Land Association*, 142 U. S. 161, is a full discussion by Mr. Justice Lamar of the power of the Secretary of the Interior over proceedings in respect to the

disposition of public lands, and on page 178 it is said, as illustrative of the scope of that power: "For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul." And, again, on page 181 is this language: "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands." See also *Orchard* v. *Alexander*, 157 U. S. 372, 381, 382; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 34. This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. *Cragin* v. *Powell*, 128 U. S. 691. In *Tubbs* v. *Wilhoit*, 138 U. S. 134, 143, the court quoted with approval this passage from a letter of the Secretary of the Interior: "There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general." And in *New Orleans* v. *Paine*, 147 U. S. 261, the question was presented as to the power of the department to order a new survey, and on page 266 the rule was thus stated: "If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself,

or his successor, as are the interlocutory decrees of a court open to review upon the final hearing." So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the State of Michigan, it was within the power of the land department, at any time prior to the issue of a patent, of its own motion, to order a resurvey, and correct by that any mistakes in the prior survey.

But in this case it is not necessary to rely alone on the general power vested in the land department, for as early as 1842 the attention of the legislature of Michigan was called to the fact that there had been errors in the surveys of public lands within the State, and a resolution was passed by it in these words:

"Whereas, it has been satisfactorily made to appear to this legislature that large districts of lands lying within the limits of the State of Michigan have been returned by some of the deputy United States surveyors to the general land office as surveyed, where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless; and whereas, the United States surveyor general of this land district has caused the lands so represented as surveyed to be offered for sale, to the very great injury of the State of Michigan and the citizens thereof; therefore,

"*Be it resolved by the Senate and House of Representatives of the State of Michigan*, That the President of the United States be requested to cause the subdivisions of the following townships of land, situate within the State of Michigan, and which have been represented to have been surveyed, but which have either not been surveyed or have been so imperfectly surveyed that said work is valueless, to be surveyed at as early a day as may be consistent, viz.:

* * * * *

"*Resolved*, That the governor be requested to transmit the foregoing preamble and resolution to the President of the United States." Laws Mich. 1842, No. 8.

A letter, enclosing a copy of this resolution, was forwarded to the Commissioner of the General Land Office, and by him

referred to the President, who endorsed it as follows: "Let the matter be referred to the surveyor general, with instructions as indicated, and let the Governor of Michigan be informed of the measures to be adopted." Thereupon proceedings for new surveys were taken by the land department, of which fact the Governor of the State was duly informed. It is true that in the resolutions of the Michigan legislature 81 townships were specifically named, and that the land in controversy was not included within those townships, but it appears that on the strength of the information thus furnished the land department proceeded to make new surveys of other lands than those specifically mentioned by the legislature, and the attention of Congress having been called to the matter, it from 1845 to 1856 inclusive made appropriations for correcting surveys in the State of Michigan. Act of March 3, 1845, c. 71, 5 Stat. 752, 762; Act of August 10, 1846, c. 175, 9 Stat. 85, 95; Act of March 3, 1849, c. 100, 9 Stat. 354, 365; Act of September 30, 1850, c. 90, 9 Stat. 523, 530; Act of March 3, 1851, c. 32, 9 Stat. 598, 611, 612; Act of March 3, 1853, c. 97, 10 Stat. 189, 204; Act of August 4, 1854, c. 242, 10 Stat. 546, 565; Act of March 3, 1855, c. 175, 10 Stat. 643, 660; Act of August 18, 1856, c. 129, 11 Stat. 81, 86. The last three appropriations were made after the sending of the approved list for the Ionia land district to the Governor on January 13, 1854.

It may be noticed here, in passing, that in the adjustment of the swamp land grant for the State of Michigan the land department did not include in one list all the swamp lands within the State, but made out several lists, apparently one at least for each land district.

Not only was there general knowledge on the part of the authorities of the State, as of those at Washington, of the existence of errors and mistakes in the original surveys of public lands in the State of Michigan, but also was there particular information as to supposed errors in the surveys of the land in controversy. After the passage of the act of 1850 the Commissioner of the general land office instructed the surveyor general of the State of Michigan to examine the

field notes of the surveys on file in his office and report therefrom a list of the lands which were swamp or overflowed. From time to time the surveyor general forwarded to the land department lists in accordance with these instructions. On March 29, 1852, he forwarded a list containing the land in question, and in the letter accompanying is found this language: "The districts reported by Judge Burt and Hiram Burnham to be fraudulent are embraced in this list and marked 'F'," and in that list the district containing the land in controversy is marked with the letter "F," so that upon the records of the general land office was to be found information that the survey of this particular land was reported to be erroneous, and as such was likely to be included in resurveys then pending. The report of the commissioner of the state land office to the legislature of the State, for the year ending November 30, 1856, contains this statement: "Patents are now received for all these lands in the State except those situate in the Ionia land district, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which have been delayed in consequence of extensive resurveys by the General Government, which, in some instances, changes the amount and character of the land." And again, after speaking of the application for the purchase of particular tracts, he says they have been denied, because "no valid sale could be made until after a compliance with the law requiring advertisement of a public offering to be published in each county of the State; and such public sale or offering has not been deemed advisable until after the title of the State to the grant should be wholly confirmed by the issue of the patents, and the numerous corrections and restatements of the lists necessary to be previously made by the department at Washington." And still again: "It is well known that many tracts, and sometimes almost entire sections, are now considered as among the best of farming lands, or extensively covered with pine and other valuable timber."

Upon the resurveys the land in controversy was shown not to be swamp and overflowed land, and lists conforming to these new surveys were duly approved and certified by the

Secretary of the Interior and forwarded to the Governor of the State of Michigan; the receipt of such lists was acknowledged and a request made for patents for the lands described therein, and patents were issued and accepted conveying such lands.

These facts indicate very clearly an adjustment of the grant upon the basis of the resurveys. Undoubtedly the beneficiary of such a grant is interested in its adjustment and may properly be heard before the officers of the grantor in determining what lands are embraced within it, and any assent by the grantee to a determination made by the officers of the grantor as to the lands passing within the grant would be binding upon it. In this case the grant was for the benefit of the State of Michigan, but in the act of 1850 making the grant, Congress, as it had a right to do, clearly indicated the officer of the State, to wit, the Governor, whose action in the premises should be the action of the grantee. Under these circumstances, it being known that there were errors in the surveys, and the legislature of the State having requested action to be taken to correct these errors, and resurveys having been undertaken, and while they were being prosecuted for the purpose of correcting such errors, a list of lands, which by the original surveys appeared to be swamp and overflowed, was made out and forwarded to the Governor. Upon the records of the land department the original survey of the district containing the land in controversy was at that time challenged as fraudulent. After the list containing this land had been forwarded to the Governor and his request for a patent returned to the land department, a patent was issued not including this land. Subsequently the resurveys were finished and according to them this land was excluded from the grant. Thereupon a new and corrected list containing the lands, which by the resurveys were shown to be swamp and overflowed, was made out, approved by the Secretary of the Interior and forwarded to the Governor. Upon its receipt the Governor requested patents to be issued, and patents were issued conveying the lands specified therein. This clearly shows an acceptance by the officer of the State, charged under the act of Congress with the duty of so doing, of the resurveys as within the

authority of the land department, and makes the adjustment of the grant upon the basis of such resurveys final and conclusive. The act of the State in accepting the new and corrected survey as the basis of adjustment is tantamount to a waiver of any claims under the prior and erroneous survey, for it cannot be that a grantee accepting a patent for lands which according to a final and correct survey are shown to be within the terms of the grant can thereafter be heard to say, Notwithstanding I have taken all the lands shown to belong to me by this correct survey, I also claim lands which by a prior and erroneous, if not fraudulent survey, appeared to pass under the grant. He cannot in that way enlarge the scope of the grant, and after taking lands which are finally determined to pass under the grant say, I also insist upon lands which upon such final survey are shown not to be within the grant, simply because under a prior erroneous survey they appeared to be within its terms.

We come now to consider the effect of the act of March 3, 1857, c. 117, 11 Stat. 251, which provided:

"That the selection of swamp and overflowed lands granted to the several States by the act of Congress . . . heretofore made and reported to the commissioner of the general land office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage."

It is contended by the plaintiff that the purpose and effect of this act were to confirm to the State of Michigan the title to all lands marked on the approved and certified list of Jan-

uary 13, 1854, as swamp and overflowed lands, and to direct the issue of a patent or patents therefor. Whatever question might have existed, were it not for this act, as to whether any of the lands marked on such lists were swamp and overflowed lands, and whatever authority there might otherwise be in the land department to make corrections, Congress, which had full power over the matter, by it in terms granted to the State these lands; such action by Congress was a finality; thereafter no inquiry could be made as to the character of the lands; no correction of the list; and the full equitable title passed to the State, beyond the possibility of challenge. It is insisted that Congress must have known of the alleged irregularities in the surveys; known of the approval by the Secretary of the Interior of this list; that it had been forwarded to the Governor; that the Governor had accepted and requested the issue of patents; and with this knowledge passed this act, intending thereby to remove all question as to the character of the lands, to put an end to the necessity for any further examination, and to make this list the single and absolute evidence of the lands it was granting to the State of Michigan. There would be force in this contention if the act of 1850 contained simply a grant to the State of Michigan, and there were but a single list of swamp lands in that State. It might then well be said that this act was passed with reference solely to the conditions existing in respect to this attempted selection of swamp and overflowed lands in that State, but the act of 1850 was a grant to all the States, and the act of 1857 must, therefore, be construed as applicable to the conditions existing in all of the States. It is contended by the defendants that it applies only to those States in which the state authorities had attempted to make selections of swamp and overflowed lands within their limits, and had communicated such selections to the land department, and that its purpose was simply to confirm to the States lists which constituted selections made by them, and with reference to which the Secretary of the Interior had delayed and neglected to act; and they refer to the opinion of this court in *Tubbs* v. *Wilhoit*, 138 U. S. 134, 137, in which it is said:

"In consequence of the delays in certifying the lists and the inconveniences which followed, the legislatures of several States, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties claiming under the State and parties claiming directly from the United States led to various acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. Act of March 2, 1855, 10 Stat. 634, c. 147; act of March 3, 1857, 11 Stat. 251, c. 117."

This argument is entitled to consideration because the word "selection" applies more naturally to the action of the grantee in reporting to the land department the lands which it claims, than to the action of the land officers in identifying from the field notes what are and what are not swamp and overflowed lands. The term "selection" is not an apt word to describe the identification of certain lands according to evidence presented of their character. But we need not rest on this. Conceding that the statute applies not merely to those cases in which affirmative action had been taken by the States, but also to those in which without any such action the only proceedings had been those in the land department of the United States, still we think that it cannot be held that this act is to be construed as expressing a purpose to make the list in this case, approved and certified to the State, a finality as to the lands passing under the grant and an absolute transfer of the equitable title.

In order to fully understand the matter attention must be called to the act of 1850. That granted, as has been seen, swamp and overflowed lands, and directed the Secretary of the Interior, as soon as practicable, to make an accurate list and plats of such lands and transmit the same to the Governor, and thereafter, at his request, cause a patent to be issued. The manner in which the Secretary should discharge this duty, the evidence that should be required by him as to the character of the lands, were not prescribed by the act; the matter was left to his discretion. The Secretary sent out

instructions to the surveyor general of the State of Michigan to make lists of the unsold swamp lands, as shown by the field notes on file in his office. From these instructions we quote this passage: "The only reliable data in your possession, from which these lists can be made out, are the field notes of the surveys on file in your office, and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them; if not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." On receipt of a letter containing notice of this from the surveyor general the Governor replied that he did not have authority to incur any expense in the matter, and afterwards referred it by message to the legislature, which body, by act passed June 28, 1851, Laws of Michigan, 1851, p. 322, adopted the surveys on file in the surveyor general's office as the basis of adjustment. The effect of this legislative action was not to make an erroneous survey conclusive nor to preclude the land department from the exercise of its unquestioned jurisdiction to correct surveys, but simply to accept the field notes finally approved as the evidence of the lands passing under the grant, leaving to the land department to make any needed corrections in the surveys and field notes. In other States different action was taken by the state authorities, as appears from the opinion of this court in *Tubbs* v. *Wilhoit*, *supra*. Now, the obvious purpose of this act of 1857 was to ratify and confirm the various steps taken by the Secretary of the Interior in the selection of swamp and overflowed lands. It was general in its terms, reaching to all the States, and the different modes by which identification of the swamp and overflowed lands had been attempted to be accomplished. It cannot fairly be construed as intending to put an end to all further inquiry in the land department, nor to oust that department of jurisdiction to inquire into and correct any frauds or mistakes, but was a general ratification and confirmation of the methods pursued. It cannot be supposed that Congress intended by this act to condone all frauds, to prevent the correction of errors or mistakes, to take every-

thing as it then appeared on the records of the land department, and, forbidding any further inquiry, declare that lands which by such records, through error or fraud, appeared to be swamp and overflowed, should be granted to the State. It was not an act to enlarge the grant of 1850. It was not an act to oust the land department of its ordinary jurisdiction to inquire into and ascertain what were swamp and overflowed lands, but was an act confirming and ratifying the methods thus far pursued. Congress must have been aware of the fact that there were charges of fraud or mistake in reference to the surveys in the State of Michigan. It had appropriated large sums for resurveys. They had partially been made, and mistakes, if not frauds, had been found. It does not appear that such charges existed in reference to the surveys in other States; at any rate, it is not to be presumed that all surveys in all the States were fraudulent or erroneous, and it would require very clear and direct language before the intent could be imputed to Congress to ignore the existence of alleged frauds and errors in the one State and to confirm titles to lands in that State based upon such fraudulent or erroneous surveys, and thereby enlarge, perhaps very materially, the amount of the grant to such State. The language of the act does not compel any such conclusion as to the intent of Congress.

The decision in *Martin* v. *Marks*, 97 U. S. 345, does not conflict with this construction of the act of 1857. It is true this language is found in the opinion: "After the passage of that act the land department had no right to set aside the selections." But in that case there was no question of the power of the land department to correct errors or mistakes. The plaintiff relied on a list made by the surveyor general of Louisiana of swamp and overflowed lands, which list, containing the land in dispute, had been forwarded to the general land office, and there filed. It did not appear that this list had been formally approved by the Secretary of the Interior, as contemplated by the act of 1850. The defendant relied on a patent from the United States, issued long thereafter. It was held that the act of 1857 dispensed with the formal approval by the Secretary of the Interior, and confirmed the lists made

and filed with the commissioner of the general land office. And in view of that fact, and as no question had been made in the land department of the correctness of the survey, it was adjudged that the equitable title of the State to the land was perfect. So, in this case, if there had been no challenge of the original surveys, no attempt at a resurvey or to correct errors or mistakes, and there had been simply a lack of the formal approval of the list by the Secretary of the Interior, that case would have compelled an adjudication that the full equitable title had passed to the State of Michigan, and would have invalidated the patent subsequently issued by the United States directly to the parties under whom the defendants claim. But that is far from deciding that all power in the land department to inquire into frauds or errors in the surveys was taken away and all frauds upon the Government in such surveys condoned. It was merely a decision that as the identification by the surveyor general of the land as swamp land had not been challenged for fraud or mistake, it was binding on the question of title, and the approval by the Secretary of the Interior and the issue of the patent were simply ministerial acts. See also *Blanc* v. *Lafayette*, 11 How. 104.

We see no error in the judgment of the Court of Appeals, and it is, therefore,

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY.

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

No. 121. Argued November 30, December 1, 1897. — Decided December 20, 1897.

The withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grants of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the construction of a railroad, exempted such lands from the operation of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864; though it may be

Statement of the Case.

that a different rule would obtain if the grant to the State had been of a later date than that to the Northern Pacific Company.

As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants, and not on the times of the filing of the maps of definite location.

It is not intended hereby to question the rule that the title to indemnity lands dates from selection, and not from the grant: but all here decided is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

THE facts in this case are as follows: On June 3, 1856, c. 43, 11 Stat. 20, Congress made a grant to the State of Wisconsin to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within fifteen-mile limits. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864, c. 80, 13 Stat. 66, to one of ten alternate sections on each side per mile with indemnity limits extended to twenty miles from the line of the road. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, one of the defendants herein, became the beneficiary of this grant. The road was afterwards constructed, and the lands in controversy are more than fifteen but less than twenty miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864 were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local land officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883 the defendant railway company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the commissioner of the general land office for his approval. In the same year the State of Wisconsin issued patents for the lands to that company, which thereafter sold and conveyed them to the grantor of its co-defendant, the land, logging and manufacturing company. On a readjust-

ment of the land grant the railway company's title failed, and thereafter the grantee of the railway company purchased them, pursuant to the act of March 3, 1887, c. 376, 24 Stat. 556.

On the other hand, the Northern Pacific Railroad Company, plaintiff and appellant, on July 2, 1864, c. 217, 13 Stat. 365, 367, received a grant from Congress. The third section of the act making this grant contains this description of the lands granted:

"Every alternate section of public land . . . to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

On July 30, 1870, plaintiff fixed the general route of its road and filed plats thereof with the Secretary of the Interior. On August 13, 1870, a withdrawal of the lands within twenty miles of this route was ordered in aid of the grant. On July 6, 1882, plaintiff definitely fixed that portion of its line opposite these lands. They are within the limits of the above-mentioned withdrawal, and also within the place limits of plaintiff's grant, as those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, as above described, the plaintiff filed its bill on May 3, 1893, in the Circuit Court of the United States for the Western District of Wisconsin, to restrain the issue of patents to the manufacturing company, and to quiet its own title. A demurrer to this bill was, in May, 1894, sustained, and a decree

entered dismissing the bill. On appeal to the Court of Appeals for the Seventh Circuit this decree was affirmed, 34 U. S. App. 66, and thereupon the plaintiff brought the case to this court for review.

Mr. C. W. Bunn for appellants.

Mr. Thomas Wilson for appellees.

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

But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed."

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46, 54; *Spencer* v. *McDougal*, 159 U. S. 62.

While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense. It is said that the phraseology of the various Congressional grants is different, and therefore each one must be considered by itself. This, in a general way, may be admitted, but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant.

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the State or the railway company, for that was contingent upon things thereafter to happen; first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words "free from preëmption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the

right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620. And such is the general rule in respect to railroad land grants.

Leavenworth, Lawrence &c. Railroad v. *United States*, 92 U. S. 733, furnishes an apt illustration. In that case the granting act contained this provision: "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." And it was contended that an Indian reservation was not excepted from the grant because the lands were not reserved to the United States. Upon this the court said (pp. 741, 747): "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. . . . Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes." See also *Newhall* v. *Sanger*, 92 U. S. 761, in which it was provided that the grant "shall not defeat or impair any preemption, homestead, swamp land or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler;" and it was held that the lands within the boundary of an alleged Mexican or Span-

ish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands were not within the grant to the company. In *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 606, it was said: "Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands."

There is no force in the contention that this construction might operate to defeat the entire grant to the plaintiff. At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively, (Sec. 8,) contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road's traversing a comparative wilderness it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers and few, if any, land grants. It knew, therefore, that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant. It must be presumed that Congress acted and would act in good faith, and, of course, there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants. On the other hand, it must be noticed that the grant to the State of Wisconsin to aid in the construction of the road of the defendant railway company was prior to that to the plaintiff, and also that prior thereto the defendant had filed its map of definite location. In passing the act of July 2, 1864, it is, therefore, reasonable to suppose that Congress had in mind its earlier grant, and did not intend that it should be diminished in any manner thereby, but meant that the defendant railway company should receive either within its place or indemnity limits the full amount of its lands. This, doubtless, was one of the considerations which made the grant to the Northern Pacific of so large an extent.

It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

We see no error in the record, and the decree of the Court of Appeals is

Affirmed.

WILSON v. LAMBERT.[1]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 164. Argued December 13, 14, 1897. — Decided January 3, 1898.

Courts of equity have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which, it is claimed, is unconstitutional, and therefore does not avail to confer the powers sought to be exercised.

[1] The docket title of this case is Craighill & others v. Lambert & others.

The sixth section of the act of September 27, 1890, c. 1001, 26 Stat. 492, authorizing the establishment of Rock Creek Park in the District of Columbia, does not violate the provisions of the Constitution of the United States, and is valid.

In January, 1895, Mary Van Riswick, widow, and Avarilla Lambert, and Martina Carr, children and heirs of John Van Riswick, deceased, filed a bill of complaint in the Supreme Court of the District of Columbia against the Commission under the Rock Creek Park Act of September 27, 1890, c. 1001, 26 Stat. 492, seeking to restrain the said Commission from assessing lands of the complainants for any portion of the cost and expenses of locating and improving the Rock Creek Park, for the alleged reason that the sixth section of the said act, under which the Commission was acting in proposing to make such assessment, was unconstitutional and void.

The cause was so proceeded in that, on September 30, 1895, the Supreme Court of the District rendered a final decree as prayed for in the bill. From that decree an appeal was taken to the Court of Appeals of the District of Columbia, and by that court, on March 17, 1896, the decree of the Supreme Court of the District was affirmed. The cause was then brought to this court on appeal.

Mr. Solicitor General for appellants.

Mr. Tallmadge A. Lambert and *Mr. John B. Henderson* for appellees.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

Courts of equity undoubtedly have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers sought to be exercised. *Dows* v. *Chicago*, 11 Wall. 108; *Union Pac.*

Railway v. *Cheyenne*, 113 U. S. 516; *Ogden City* v. *Armstrong*, 168 U. S. 224; Dillon's Mun. Corporations, vol. 2, § 922, 4th ed.

Accordingly if, in the present case, the sixth section of the act of September 27, 1890, entitled "An act authorizing the establishment of a public park in the District of Columbia," and upon which the defendants rely for their authority to act, is, indeed, unconstitutional and void, for all or any of the reasons urged against it, we think that the complainants are entitled to a remedy by a direct proceeding in a court of equity. For the reasons mentioned in the cases above cited and in numerous others, the remedy at law could not be regarded as plain and adequate.

The validity of the section in question has been heretofore considered and determined by this court in the case of *Shoemaker* v. *United States*, 147 U. S. 282. The objections which in that case were ably but ineffectually urged were, in the main, those of which we now hear. It is true, however, that the question there arose incidentally and by way of argument. Persons whose property was made liable to assessment for special benefits were not ostensible parties to the cause; nor was the question raised by any special assignment. Hence this court, though undoubtedly called upon to consider the validity of the act as a whole, and in all its parts and sections, did not deem it necessary to discuss the validity of the sixth section at any length. In view, however, of the fact that we are now confronted with a specific arraignment of the sixth section, and of the further fact that the courts below, in able opinions, have held that the section is fatally defective in form and substance, we have felt constrained to carefully reconsider the question.

It is obvious, and we understand it to be conceded, that neither the act, nor this particular part of it, can be assailed because the subject-matter is outside of the power of Congress. But, while the general power to legislate exclusively for the District of Columbia is not disputed, nor the competency of Congress, in the exercise of that power, to establish a public park, it is contended that, under the limitation upon

that power contained in the Fifth Amendment, protecting the citizen from being deprived of life, liberty or property without due process of law, Congress, when erecting a work which is expressly declared to be perpetually dedicated to the use and enjoyment of the people of the United States, should defray the cost thereof out of the funds of the entire nation. It is further contended in the brief of the appellees that a tax for raising a fund for such a purpose to be valid ought to be levied and apportioned as a direct tax, among the several States according to their respective numbers. This latter proposition, however, was not approved by the courts below, and we need not discuss it. *Craighill* v. *Van Riswick*, 8 D. C. App. 185.

The reasoning upon which those courts proceeded seems to have been that, upon general principles of constitutional law, when the works, whose cost is to be defrayed by taxation, are public, the public alone should pay for them, and the present case is compared to one where, upon the erection of a court house or post office, the private property of individuals adjacent to such structure should be specially taxed for the supposed greater convenience enjoyed of access thereto.

Upon a final analysis this proposition will be found to resolve itself into a denial of the validity of special assessments in any case where the work in question is undertaken by the public authorities, without the express assent or desire of the property holders. The effort made to distinguish between streets and highways, as constituting proper subjects of taxation for special benefits, and public parks, as matters of such a general nature as not to justify special assessment, does not appear to us to be successful. Legislation of this character, both in respect to its justice and its constitutional validity, has been thoroughly discussed by the judicial tribunals of nearly every State in the Union. We shall briefly notice a few of the leading cases.

By a statute of 1875 a board of park commissioners were authorized to locate and lay out within the city of Boston a public park, to take such lands as the board should deem desirable therefor, and to assess upon any real estate in Bos-

ton which, in the opinion of the board, should receive any benefit or advantage from such locating and laying out, beyond the general advantages to all real estate in the city, "a proportional share of the expense of such location and laying out." The board purchased a large tract of flats, over part of which the tide flowed, the rest being marsh, and proceeded to lay out avenues and to fill them with gravel; and when but a small part of the area was filled, and none of the avenues were completed, passed an order declaring that they had taken, and did thereby take and create a public park, certain land, being in fact that already purchased, and also passed a further order reciting that, whereas by the previous order a park was located and laid out, they laid an assessment upon certain lands benefited thereby. It was held by the Supreme Judicial Court of Massachusetts, on a petition for a writ of certiorari, by the owners of estates so assessed, to quash the assessment, that the park was laid out within the statute, and that the court could not say, as matter of law, that the estates of the petitioners had not been benefited by what had been done at the time the assessment was made. *Foster* v. *Park Commissioners of Boston*, 133 Mass. 321; *Holt* v. *Somerville*, 127 Mass. 408.

In 1834, in pursuance of authority given by statute, the common council of the city of Albany directed the opening of a public square in that city. It was held by the Supreme Court of the State of New York that the taking the grounds of individuals in a city, to convert into a public square, is taking property for public use as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon the owners of adjoining property, instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use. In the opinion it was said by Chief Justice Savage:

"The second reason assigned against the constitutionality of these proceedings is that the purposes for which the property is thus taken are not public, because the benefit is limited to and the expense assessed upon a few individuals. Private property is taken for public use when it is appropriated to the

common use of the public at large. A stronger instance can not be given than that of a lot of an individual in a city converted into a street; the former owner has no longer any interest in or control over the property, but it becomes the property of the public at large, and under the control of the public authorities. A public square depends on the same principle; it is for public use, whether it is intended to be travelled upon or not. The mode of compensation for such property is not important. It was formerly out of the public purse; but there is no injustice in requiring those individuals to make compensation who receive from the improvement an equivalent or more in the enhanced value of their own adjacent property; and whether the number is large or small does not affect the question." *Owners of Ground* v. *Albany*, 15 Wend. 374.

So, in 1871, it was held by the Court of Appeals of New York, in the case of the erection of a public park in the city of Brooklyn, that lands taken for such a purpose are taken for a public use, and the right to assess benefits upon adjacent property was assumed as unquestionable. *Brooklyn Park Com.* v. *Armstrong*, 45 N. Y. 234; *In re New York Central Park*, 63 Barb. 282; *S. C.* 99 N. Y. 569. The validity of laws authorizing the condemnation of lands for the purpose of public parks has been affirmed by the Supreme Court of Illinois, *People* v. *Williams*, 51 Illinois, 63; *Cook* v. *South Park Com.*, 61 Illinois, 115; *West Chicago Park Com.* v. *Western Union Tel. Co.*, 103 Illinois, 33; and by the Supreme Court of Pennsylvania, *Mercer* v. *Pittsburgh, Fort Wayne & Chicago Railroad Co.*, 36 Penn. St. 99; and by the Supreme Court of Missouri, *St. Louis Co.* v. *Griswold*, 58 Missouri, 175. Numerous other cases to the same effect will be found collected in Dillon's Mun. Corp. vol. 2, sec. 643, 4th ed.

That the act dedicates and sets apart this park "for the benefit and enjoyment of the people of the United States" does not, as we think, make it so far a work *sui generis* as to take it out of the range of the principles of the foregoing cases. The residents and property holders of the District of Columbia must be regarded as coming within the class of beneficiaries;

and, so far from being injured by the declaration that the park shall also have a national character, it is apparent that thereby the welfare of the inhabitants of the District will be promoted. Whatever tends to increase the attractiveness of the city of Washington, as a place of permanent or temporary residence, will operate to enhance the value of the private property situated therein or adjacent thereto.

If, then, there be no solid ground of distinction between other works of public improvement and the public park designed by this legislation, as proper subjects for the application of the rule of assessment for special benefits, it will not be necessary for us to enter at large upon the subject apart from that supposed distinction. That has been so recently and so fully discussed by this court in the case of *Bauman* v. *Ross*, 167 U. S. 548, that nothing remains to be added. It may be proper to observe that the decision in that case was not announced till after the judgment in the courts below in the present case had been entered.

Having reached the conclusion, then, that the sixth section of the Rock Creek Park Act is not invalid for want of conformity to constitutional principles, we think it follows that the decrees of the courts below should be reversed, and the bill of complaint be dismissed.

The other objections, so forcibly dwelt on, are all questions of construction and administration, and should be permitted to arise and be determined in the regular procedure of the court to which Congress has assigned the duty of carrying the provisions of the act into effect. It may turn out that the practical difficulties anticipated may disappear when dealt with by that court, to which power is given to "hear and determine all matters connected with said assessment, and to revise, correct, amend and conform said assessment, in whole or in part, or order a new assessment." It does not yet appear that these appellees will, when final action shall have been taken, have any substantial grounds of complaint. The difficulties of construing the act are not necessarily in the act itself, but in its application to the subject-matter. Its provisions are somewhat vague and obscure; and it is possible that further legis-

lation may be found requisite to carry out the intentions of Congress. But such questions are not now before us for determination. Should errors supervene in the administration of the act, parties affected will have redress by appeal.

We adopt the observation made in the dissenting opinion in the Court of Appeals: "There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation, and the production of unnecessary delay and expense — to say nothing of the unnecessary vexation to parties."

The decree of the Court of Appeals is reversed; and the cause is remanded with directions to said court to reverse the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with directions to dismiss the bill of complaint.

SHEPARD *v.* ADAMS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 134. Submitted December 2, 1897. — Decided January 3, 1898.

When the court below has not acquired jurisdiction over a defendant by a valid service of process upon him, a judgment against him can be reviewed here through a writ of error directly sued out to this court.

While it was the undoubted purpose of Congress in enacting in the act of June 1, 1872, c. 255, § 5, embodied in Rev. Stat. § 914, that the "practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding," to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of

Statement of the Case.

remedies provided by state legislation, yet it was also the intention to reach that uniformity largely through the discretion of Federal courts, exercised in the form of rules, adopted from time to time, so regulating their own practice as might be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

The summons in this case was issued under a general rule adopted to make proceedings in the District Court conform to those existing at that time under the state statutes; and if the court has not changed its rules to make its proceedings conform to subsequent statutes changing the state proceedings, it is to be presumed that its discretion was legitimately exercised both in adopting and in maintaining the rule.

THIS was an action brought in the District Court of the United States for the District of Colorado, by Frank Adams, receiver of the Commercial National Bank of Denver, against J. B. Shepard on a promissory note, dated June 7, 1893, wherein said Shepard promised to pay to the said bank, thirty days after date, the sum of twenty thousand dollars.

A writ of summons, in the form prescribed by the rule of that court, was sued out against the said defendant on the 24th day of August, 1895, whereby he was required to appear and demur or answer to the complaint filed in said action in said court within ten days, (exclusive of the day of service,) after the summons should be served on him, if such summons should be made within the county of Arapahoe, otherwise within forty days from the day of service.

On August 27, 1895, the deputy marshal made return of said writ as served that day on the defendant at Denver, county of Arapahoe.

Within ten days after the service of said summons, to wit, on the 4th day of September, 1895, the defendant, by his attorneys, specially appeared and moved the court to quash the summons for the following reasons:

"First. Said summons is not such a summons as is provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons, instead of thirty days, as provided by the statutes of Colorado.

"Second. The copy of said summons served upon said

defendant is not certified to as a true copy by the clerk of this honorable court."

Thereafter, to wit, on the 4th day of January, 1896, the court, after hearing argument of counsel, overruled said motion, and the defendant electing to stand by said motion, rendered judgment in favor of the plaintiff and against the defendant, according to the prayer of the complaint.

A bill of exceptions was signed and a writ of error allowed to the Supreme Court of the United States.

It appears, by the bill of exceptions, that, on March 17, 1877, the general assembly of the State of Colorado passed an act entitled "An act providing a system of procedure in civil actions in the courts of justice of the State of Colorado," which act contained the following provisions: Code, 1877, c. 3.

"Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought and the issuing of a summons therein; provided, that after the filing of the complaint a defendant in the action may enter his appearance therein, personally or by attorney, which appearance shall be equivalent to personal service of the summons upon him."

"The time in which the summons shall require the defendant to answer the complaint shall be as follows: 1st. If the defendant is served within the county in which the action is brought, ten days. 2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days. 3d. For all other cases, forty days."

The summons in this cause was issued and made returnable under and in pursuance of a general rule of the District Court of the United States for the District of Colorado, adopted on October 10, 1877, which is in the following terms:

"Actions at law shall be commenced by filing a complaint with the clerk, upon which a summons shall be issued, directed to the defendant, requiring him to appear and demur or answer to the complaint within ten days from the day of service, if such service shall be made within the county from which the summons was issued, and within forty days from the day of service if such service shall be made elsewhere in the district.

Except as provided in these rules and in the laws of the United States, the summons and the pleadings, and proceedings in the action shall be as prescribed in the laws of the State."

It further appears that the general assembly of the State of Colorado passed an act on April 7, 1887, repealing the above provisions in the act of 1877, and enacting as follows:

"Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

"The complaint must be filed within ten days after the summons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of defendant, to be recovered of plaintiff or his attorney."

It also appears that the said general assembly, on April 19, 1889, passed an act, since then and now in force, containing the following provision:

"Section thirty-four of an act entitled 'An act to provide a code of procedure in civil actions for courts of record in the State of Colorado, and to repeal all acts inconsistent therewith,' approved April 7, 1887, is hereby amended to read as follows:

"The summons shall state the parties to the action, the State, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the State, ten days additional to the time specified in the

summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

Mr. T. J. O'Donnell for plaintiff in error.

Mr. C. S. Thomas, *Mr. W. H. Bryant* and *Mr. H. H. Lee* for defendant in error.

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

This case is brought here, under section 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the District Court of the United States for the District of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the District Court, redress for which should have been sought in the Circuit Court of Appeals. It is said that the question of whether or not the District Court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of *Smith* v. *McKay*, 161 U. S. 355, is cited as sustaining such a view.

In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the Circuit Court, within the meaning of section 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if

the court was wrong in so deciding, it was an error for which the defendant should have sought his remedy in the Circuit Court of Appeals.

The present case differs from *Smith* v. *McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court.

The case, then, being properly before us, we must next consider whether the court below erred in assuming and exercising jurisdiction in the cause by rendering a final judgment against the defendant.

It is contended that the defendant had not been brought within the jurisdiction of the court by a proper writ of summons, and that the defendant, having duly asserted an objection, the judgment entered is void.

It is not denied that the writ in question was in conformity with the existing rule of the District Court of the United States, regulating the service of process, but it is claimed that the rule and proceedings thereunder are invalid because they did not conform to the provisions of the act of the general assembly of Colorado, providing a system of procedure in civil actions in the courts of justice of that State.

The proposition is based on the supposed meaning and effect of the act of Congress of June 1, 1872, as found in section 914 of the Revised Statutes, in the following terms: "The practice, pleadings and the forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

This section is construed by the plaintiff in error as constituting a peremptory order or direction to the District and Circuit Courts to make their rules regulating the terms and

service of their writs to strictly conform to the provisions of the state statutes regulating such matters.

Waiving any inquiry whether it is competent for a private party, duly served with process in pursuance of the directions of an existing general rule of a court of the United States, to bring into question the validity of such a rule, we think that upon a reasonable construction of section 914 and of cognate sections, presently to be mentioned, the validity of the summons and judgment in the present case can be sustained. It is obvious that a strict and literal conformity by the United States courts to the state provisions regulating procedure is practically impossible, or, at least, not without overturning and disarranging the settled practice in the Federal courts.

The state code of Colorado provides that civil actions shall be commenced by the issuing of a summons or the filing of a complaint; that the summons may be issued by the clerk of the court or by the plaintiff's attorney; it may be signed by the plaintiff's attorney; it may be served by a private person not a party to the suit. All writs and processes issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. Sec. 911, Revised Statutes. The processes and writs must be served by the marshal or by his regularly appointed deputies. Secs. 787 and 788, Revised Statutes.

The very section (914) relied on by the plaintiff in error, takes notice of the impossibility of an entire adoption of state modes of proceeding by providing that conformity is only required "as near as may be."

Section 915, Revised Statutes, provides that in common law cases in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are provided by the laws of the State in which such court is held; and that such Circuit or District Courts may, from time to time, by general rules, adopt such state laws as may be in force in the States where they are held in relation to attachments and other process.

Section 916, Revised Statutes, provides that the party re-

covering a judgment in any common law cause, in any District or Circuit Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by laws of the State in which the court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such Circuit or District Court; and that such courts may, from time to time by general rules, adopt such state laws as may hereafter be in force in each State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Section 918, Revised Statutes, provides "that the several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of Congress to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the Federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

In *Nudd* v. *Burrows*, 91 U. S. 426, it was sought to interpret the act of June 1, 1872, (sec. 914, Revised Statutes,) as bringing the Federal judges, when charging a jury in Illinois within the practice act of that State, directing that the court, in charging the jury, shall instruct them only as to the law of the case, and give no instructions unless reduced to writing. But this court held that the statute was not intended to have

such an application, and that the course of the court, in charging juries, was not within the act.

In *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, a similar view was taken, and it was held that, in respect to submitting interrogatories to the jury and to entertaining motions for a new trial, the Circuit Court of the United States was not, by reason of the provisions of the act of June 1, 1872, constrained to follow a state law regulating those matters; and it was said: "The conformity is required to be 'as near as may be' — not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statute which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

To the same effect is *In re Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, where it was held that the practice and rules of the state court do not apply to proceedings taken in a Circuit Court of the United States for the purpose of reviewing in this court a judgment of such Circuit Court; and that such rules and practice, embracing the preparation, perfection, settling and signing of a bill of exceptions, are not within the "practice, pleadings and forms and modes of proceeding" which are required by section 914 of the Revised Statutes to conform as "as near as may be" to those existing at the time in like causes in the courts of record of the State.

In *Southern Pacific Company* v. *Denton*, 146 U. S. 202, the subject and the cases were reviewed at some length, and it was held that a statute of a State, which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of non-residence, is not applicable to actions in a Circuit Court of the United States, held within the State, under Revised Statutes, § 914. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Lincoln* v. *Power*, 151 U. S. 436.

Statement of the Case.

The general rule, under which was issued the summons by which the plaintiff in error was brought into court, was adopted by the District Court of the United States for the District of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, have been since enacted, but the District Court has not seen fit to alter its rules, from time to time, in subserviency to such changes. We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question; and its judgment is accordingly

Affirmed.

Mr. Justice White and Mr. Justice Peckham dissented.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY *v.* COLUMBIAN EQUIPMENT COMPANY.

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

No. 427. Submitted November 29, 1897. — Decided January 3, 1898.

An interlocutory order appointing a receiver is not appealable from the Circuit Court of the United States to the Circuit Court of Appeals, and does not become so by the incorporation into it of a direction to the defendant, his agents and employés, to turn over and deliver to the receiver the property in his or their hands.

The facts in this case are as follows: On April 5, 1897, upon a bill duly filed by the Columbian Equipment Company, an interlocutory order was entered in the Circuit Court of the United States for the Northern District of Alabama, appointing Philip Campbell receiver of the property of the Highland Avenue and Belt Railroad Company. Such order, besides the

mere matter of appointment and a description of the property, contained the following provisions:

"The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

"And the said Highland Avenue and Belt Railroad Company and each and every of its officers, directors, agents and employés are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

"Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employés as may be required for the proper discharge of the duties of his trust.

"Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defence of any and all suits or proceedings now pending in any court against said company, the prosecution or defence of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said company.

"Said receiver is hereby required to give bond in the sum of $10,000, with personal security, or the security of some

responsible guaranty and indemnity company, satisfactory to the clerk of this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

"And the court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims and in all respects to regulate and control the conduct of said receiver."

The railroad company appealed from this order to the Circuit Court of Appeals for the Fifth Circuit, which court, on June 16, 1897, certified to this court the following question: "The question upon which instructions are desired and respectfully asked is: was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction or the necessary equivalent of an injunction?"

Mr. Alexander T. London and *Mr. Samuel A. Putnam* for Highland Avenue Belt Railroad Company.

Mr. John F. Martin and *Mr. Henry D. Hotchkiss* for Columbian Equipment Company.

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

Is an interlocutory order appointing a receiver appealable from the Circuit Court to the Circuit Court of Appeals? And if such an order, standing alone, be not appealable, does it become so by the incorporation into it of a direction to the defendant, its officers, directors, agents and employés, to turn over and deliver to the receiver the property in their hands? These questions must be determined by a consideration of section 7 of the act of March 3, 1891, c. 826, creating Circuit Courts of Appeal, 26 Stat. 517, as amended February 18, 1895, c. 96, 28 Stat. 666. The section provides —

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued,

refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further*, That the court below may in its discretion require, as a condition of the appeal, an additional injunction bond."

Under this section it has been decided that when an appeal is taken from an interlocutory order or decree granting or dissolving an injunction the whole of such interlocutory order or decree is before the Court of Appeals for review, and not simply that part which grants or dissolves the injunction, and that on the hearing in the Court of Appeals that court may consider and decide the case upon its merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *In re the Tampa Suburban Railroad Company*, *ante*, 583. But each of those cases proceeded upon the fact that there was a distinct order granting, continuing or dissolving an injunction. In the case at bar there is no such order. It is true, following the order of appointment, there is a direction to the defendant, its officers, directors and agents, to turn over to Campbell the property of which he is appointed receiver, but that is only incidental and ancillary to the receivership. This is obvious; for if the court subsequently entered an order, in terms setting aside only the appointment of the receiver, all the other parts of the original order would immediately and without specific mention disappear and cease to have any force. Indeed, the mere appointment of a receiver carries with it the duty on his part of taking possession, and the further duty of those in possession of yielding such possession. So that while as a part of an

order appointing a receiver there is something in the nature of a mandatory injunction, that is a command to the receiver to take and to the defendant to surrender possession, yet such command is not technically and strictly an order of injunction.

The last proviso in the section emphasizes this distinction: "The court below may in its discretion require, as a condition of the appeal, an additional injunction bond." The bond is described. It is not a bond to secure against injuries which may result if a receiver is wrongfully appointed or discharged, but is technically an injunction bond; that is, a bond to answer for damages in case of a wrongful order either granting, continuing or vacating an injunction. Receivership implies possession, and if no bond can be required to guard against loss from taking or surrendering possession it is difficult to perceive the significance of an additional injunction bond in a receivership case. The question is not, whether included in an order appointing a receiver, there may not be, either expressed or implied, some directions of a mandatory character, something in the nature of an injunction, but whether Congress in this legislation provided for appeals in cases other than those in which an injunction, technically speaking, is either the sole or a principal part of the order or decree. Orders granting injunctions and orders appointing receivers are, in the common understanding of the profession, entirely independent. The distinction between the two is clearly recognized in the text books and in the reports. We have separate treatises on injunctions and on receivers. The separation between them is one which runs through the law, and while it is true that the mandatory features which, either expressly or by implication, attend orders appointing receivers, are sometimes made the matter of discussion in treatises on receivers, or the subject of comment in decisions concerning receivers, yet the distinction is never forgotten. Familiar, as it must be assumed to have been, with this generally recognized distinction, Congress, if it had intended that appeals should be allowed from orders appointing receivers, as from orders in respect to injunctions, would doubtless have expressly named such orders. Its omission of the one and the men-

tion of the other is a clear declaration that only one should be the subject of appeal and the other not. And it would savor of judicial legislation to hold that, although Congress has not authorized appeals from orders appointing receivers, the mere fact that in such an order there is a direction of a mandatory character, either expressed or implied, in respect to taking possession, makes it appealable, as an order granting an injunction.

For these reasons we are of opinion that the question should be answered in the negative, and it will be so certified to the Court of Appeals.

HALL *v.* UNITED STATES.

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

No. 312. Argued November 29, 1897. — Decided January 3, 1898.

The defendant, who was employed as a postal clerk at station F in the city of New York, was indicted under Rev. Stat. § 5467. The indictment contained three counts; the first two under the first part of § 5467; the third count under the last clause of that section. The evidence showed that the Government detectives prepared a special delivery letter, designed as a test or decoy letter, containing marked bills, and delivered it, bearing a special delivery stamp, to the night clerk in charge of branch station F of the post office in this city. The defendant was not a letter carrier, but a clerk employed at that office, whose duty it was to take charge of special delivery letters, enter them in a book kept for that purpose and then place them in course of transmission. The letter in question was addressed to Mrs. Susan Metcalf, a fictitious person, 346 E. 24th street, New York city, fictitious number. The letter was placed by the night clerk with other letters upon the table where such letters were usually placed, and the defendant, entering the office not long after, took this letter, along with the others on the same table, removed them to his desk, and properly entered the other letters, but did not enter this letter. On leaving the office not long after, the omission to enter the letter having been observed, he was arrested, and the money contents of the letter, marked and identified by the officers, were found upon his person. The officers testified upon cross-examination that the address was a fictitious one; that the letter was designed as a test letter,

and that they did not intend that the letter should be delivered to Mrs. Susan Metcalf or to that address and that it could not be delivered to that person at that address. *Held*, that the evidence was sufficient to sustain a conviction under the third count of the indictment.

THE case is stated in the opinion.

Mr. Arthur C. Butts for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The defendant was indicted in the Circuit Court of the United States for the Southern District of New York in October, 1896, for embezzling and stealing a certain letter and its contents, described in the indictment, containing money. The indictment was under section 5467, Revised Statutes, which is set out in the margin.[1] The defendant was employed in a department of the postal service as a clerk at

[1] SEC. 5467. Any person employed in any department of the postal service who shall secrete, embezzle or destroy any letter, packet, bag or mail of letters entrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post office or branch post office established by authority of the Postmaster General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock or other pecuniary obligation or security of the Government, or of any officer or fiscal agent thereof, of any description whatever; any bank note, bank post bill, bill of exchange or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance or discharge of or from any debt, covenant or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of

station F, a branch post office of the United States in the city of New York.

The indictment contained three counts. The first and second counts charged that the defendant wilfully embezzled, etc., the letter, which was intended to be delivered by a letter carrier. These counts were drawn with reference to the first clause in the statute above referred to. The third count is under the second clause of the statute, and alleged that the defendant, "being then and there employed in a department of the postal service of the United States, to wit, as clerk at station F, a branch post office of the United States, in the said city of New York, did unlawfully, wilfully and feloniously steal, take and carry away a certain United States Treasury note of the denomination and value of one dollar, and three silver certificates of the United States, each of the denomination and value of one dollar, the said treasury note and the said silver certificates then and there being the money and property of one Joseph E. Jacobs, and the same treasury note and the same silver certificates were then and there feloniously stolen and taken, as aforesaid, by the said William R. Hall from and out of a certain letter which then and there had come into his possession in his capacity as such clerk, as aforesaid, and by virtue of his said office and employment, and the said letter was directed in the tenor following — that is to say: 'Mrs. Susan Metcalf, No. 346 E. 24th St., New York City, N. Y.,' *and the same was then intended to be delivered by a letter carrier*, and had not then been delivered to the party to whom the same was directed," against, etc.

The defendant was arraigned, pleaded not guilty and was subsequently tried at a term of the United States Circuit Court for the Southern District of New York, and convicted and sentenced to imprisonment at hard labor in the Kings County penitentiary for the term of two years.

---

any letter, packet, bag or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.

Opinion of the Court.

Upon the trial, after the evidence had been given on the part of the prosecution and the Government had rested its case, the counsel for the defendant asked the court to direct the jury to acquit the defendant upon several grounds, (1) that the evidence failed to prove the crime charged in the indictment; (2) that a material allegation to be proved by the Government was the fact that the letter, described in the indictment and alleged to have been secreted, destroyed and embezzled and its contents stolen by the defendant, was intended to be delivered by a letter carrier, while the uncontradicted evidence showed that such letter was not intended to be delivered by a letter carrier, and therefore a material allegation in the indictment was not only not proved but was absolutely disproved; (3) that there was a fatal variance between the indictment and the proofs offered to sustain it by the Government, and the defendant should therefore be acquitted.

The motion to direct an acquittal was denied by the court and the defendant duly excepted. The defendant sued out a writ of error from this court to review the judgment of conviction, and the validity of the exception to the refusal of the court to direct the jury to acquit is the sole question now before us.

After his conviction the defendant moved in arrest of judgment and for a new trial. The judgment was arrested on the first two counts, and the motion for a new trial was denied. We take a statement of the facts proved upon the trial, from the opinion delivered by the learned judge in denying that motion, as we think the statement contains all that is material for the consideration of the case, and that it is a correct summary of the evidence in the particulars mentioned. It is as follows:

"The evidence showed that the Government detectives prepared a special delivery letter, designed as a test or decoy letter, containing marked bills and delivered it, bearing a special delivery stamp, to the night clerk in charge of branch station F of the post office in this city. The defendant was not a letter carrier, but a clerk employed at that office, whose duty it was to take charge of special delivery letters, enter

them in a book kept for that purpose, and then place them in course of transmission. The letter in question was addressed to Mrs. Susan Metcalf, a fictitious person, 346 E. 24th street, New York city, a fictitious number. The letter was placed by the night clerk with other letters upon the table where such letters were usually placed, and the defendant, entering the office not long after, took this letter, along with the others on the same table, removed them to his desk and properly entered the other letters, but did not enter this letter. On leaving the office not long after, the omission to enter the letter having been observed, he was arrested and the money contents of the letter, marked and identified by the officers, were found upon his person. The officers testified upon cross-examination that the address was a fictitious one; that the letter was designed as a test letter, and that they 'did not intend that the letter should be delivered to Mrs. Susan Metcalf or to that address,' and that 'it could not be delivered to that person at that address.'"

The question now before us is whether the evidence is sufficient to sustain this conviction under the third count of the indictment. We think it is. Section 5467, Revised Statutes, describes two distinct offences; the first clause of the section is directed against any person employed in any department of the postal service who secretes, embezzles, etc., any letter entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier or other person employed in any department of the postal service, or forwarded through or delivered from any post office or branch post-office established by the authority of the Postmaster General, and which shall contain any note, etc. This is one of the offences set forth in that section. The other offence set forth in the same section does not in terms provide that the letter must have been intended to have been conveyed by mail or carried or delivered by any mail carrier, letter carrier, etc., but it provides that "any such person," (meaning thereby any person employed in any department of the postal service as described in the first part of the section,)

"who shall steal or take any of the things aforesaid out of any letter, packet, bag or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

A test or "decoy" letter comes within the statute. *Goode* v. *United States*, 159 U. S. 663; *Montgomery* v. *United States*, 162 U. S. 410.

Although the section provides the same punishment for all the various acts set forth therein, yet the section itself clearly describes two different classes of offences. *United States* v. *Wight*, 38 Fed. Rep. 106. The proof would not show a violation of the first part of the section unless it appeared that the letter entrusted to the person employed in the postal service, or which came into his possession, was one which was intended to be conveyed by mail, or carried, or delivered, by a mail carrier, mail messenger, route agent, letter carrier or other person employed in any department of the postal service, or that it was forwarded through or delivered as stated in the section. Whether the proof here does not show that the letter in question was such a letter, it is not now necessary to say, because the judgment was arrested upon the first two counts covering that clause of the section. Although a motion in arrest of judgment cannot properly be made upon the ground that the evidence is insufficient to prove the case under the indictment, or under any particular count thereof, because such motion is confined to matters appearing upon the face of the record itself, 1 Archbold Cr. Pr. & Pl. (7 Am. ed.) 671 and notes, yet, as the motion was entertained and judgment was actually arrested upon the first two counts, those counts are not now in question.

The other clause of the section provides for a distinct offence, and under that it is not necessary to aver that the letter was intended to be conveyed by mail or delivered by a letter carrier, etc., as provided in the first clause, and it covers the case of any person employed in any department of the postal

service who steals or takes any of the things, already described in the section, out of any letter, etc., which shall have come into his possession either in the regular course of his official duties or in any other manner whatever, provided the same shall not have been delivered to the party to whom it is directed. We think this is entirely plain. *United States* v. *Wight*, *supra*.

We think the indictment must show under this clause — and this third count does show — that the letter, the contents of which were stolen by the person employed in the postal service, was one which had come in some way or manner under the jurisdiction and into the possession of the Post Office Department; for the statute does not refer to letters in regard to which that department has not and was not intended to have any concern or any duty to perform, such as letters which have not been deposited or left in any manner in any post office or street letter box, or given to a carrier or other agent of the department, and which remain entirely outside of that department, and where the stealing of such letters or their contents at that time is not of Federal cognizance. The evidence shows that this letter was within the possession and jurisdiction of the department, in the branch post office in New York, and that while undelivered to the party to whom it was addressed, its contents were stolen by defendant, who was a person in the postal service. Such stealing comes within the statute. That it was a test or decoy letter is immaterial, as already shown. If the letter be within the lawful possession of the Post Office Department, the stealing of the contents of such letter by a postal employé is a violation of the latter part of the section of the statute. This letter was thus within the jurisdiction and possession of the Department, and the defendant then stole its contents.

It is urged, however, that the conviction cannot be sustained under this third count because it contains, in addition to the particular allegations necessary to bring the act within the latter part of the section, an allegation that the letter, the contents of which were stolen, was intended to be delivered by a letter carrier. This fact forms no part of the offence men-

tioned in the second clause of the section in question, and it was therefore unnecessary to allege it. As the third count does contain such an averment, the counsel for the defendant argues that it became necessary to prove the fact thus averred, and, as it was (he argues) unproved, the defendant should have been acquitted by direction of the court. The result of such a holding would be to say that where an indictment contained all the necessary averments to constitute an offence created by the statute, if an averment wholly unnecessary and entirely immaterial be added, the prosecution must fail unless it prove such unnecessary averment, although proving every fact constituting the offence provided by the statute. We are of opinion that it was not incumbent upon the prosecution to prove this averment in order to sustain a conviction under this count.

Without this averment the third count contains every fact necessary to be proved in order to constitute an offence under the second clause of the statute, and the evidence in the case is sufficient to authorize the defendant's conviction upon that count. The character of the offence, as provided by statute, is not changed by this unnecessary averment, nor is the sufficiency of the evidence to sustain a conviction under the third count at all impaired if it be assumed that it did not show that the letter was intended to be delivered by a letter carrier. This is unlike a case where an unnecessary amount of description of an article to be identified by the description is contained in the indictment. Under those circumstances, it has been sometimes held that the description must be proved as laid, because it went to the identification of the article described. Nor is it like the case of an indictment for perjury or one for a libel where the sworn statement alleged to be false or the article alleged to be libellous must be proved substantially as averred in the indictment. In such cases the matter set forth constitutes the offence and must be proved accordingly. But here, every necessary fact is averred and proof sufficient to sustain a conviction has been given in regard to each fact. Because the pleader unnecessarily made an averment of a totally immaterial fact, the Government was

not therefore bound to prove it in order to sustain a conviction. For this reason there was no fatal variance between the offence set forth in the indictment and the proof. *Montgomery* v. *United States* and *Goode* v. *United States*, *supra*.

The judgment of conviction must be

Affirmed.

CROSSLEY *v.* CALIFORNIA.

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

No. 470. Submitted December 14, 1897. — Decided January 3, 1898.

In a trial before a state court for murder charged to have been committed within the State, it is for the state court to decide whether the question of whether the evidence tended to show that the accused was guilty of murder only in the second degree shall or shall not be submitted to the jury, and its decision is not subject to revision in the Circuit Court of the United States, nor here.

A writ of *habeas corpus* cannot be made use of as a writ of error.

While the derailment of a train carrying the mails of the United States is a crime which may be punished through the courts of the United States under the provisions of the statutes in that behalf, the death of the engineer thereof produced thereby, is a crime against the laws of the State in which the derailment takes place, for which the person causing it may be proceeded against in the state court through an indictment for murder.

THE case is stated in the opinion.

No appearance for appellants, and no brief filed for them.

Mr. W. F. Fitzgerald and *Mr. W. H. Anderson*, for appellees, submitted on their brief.

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

Worden was convicted in the Superior Court of the county of Yolo, California, of the crime of murder in the first degree, and sentenced to be hanged. The Supreme Court of Cali-

fornia affirmed the judgment. *People* v. *Worden*, 113 California, 569.

Being in custody, awaiting execution, an application for the writ of *habeas corpus* was made on behalf of Worden to the Circuit Court of the United States for the Northern District of California, the application denied, and the petition dismissed. The case was then brought to this court.

Two grounds were relied on as justifying the issue of the writ.

First. That there was no evidence that Worden was guilty of murder in the first degree; that the evidence showed, or tended to show, that he was guilty, at most, of murder in the second degree; and that the trial court only submitted to the jury the question as to whether or not he was guilty of murder in the first degree. This was matter of error, and with its disposition by the highest tribunal of the State, it was not within the province of the Circuit Court to interfere. Nor can the writ of *habeas corpus* be made use of as a writ of error.

Second. That the state courts had no jurisdiction because Worden was convicted of the murder of one Clark, committed by derailing a train of which Clark was the engineer; that this was a special train "exclusively engaged in the carrying or transportation of the mail of the United States;" that the effect of the derailment "constituted an obstruction or stopping of the transmission of United States mail, and was a restraint and retarding of the interstate commerce of the United States;" that he, therefore, was guilty, if at all, of offences against the laws of the United States, (§§ 5440, 3995, Revised Statutes; Act July 2, 1890, c. 647, 26 Stat. 209,) and that any offence committed by him was solely cognizable in the courts of the United States.

But it is settled law that the same act may constitute an offence against the United States and against a State, subjecting the guilty party to punishment under the laws of each government; and may embrace two or more offences. *Cross* v. *North Carolina*, 132 U. S. 131, and cases cited. And see *Teal* v. *Felton*, 12 How. 284, 292.

Syllabus.

There is no statute of the United States under which Worden could, on the alleged facts, have been prosecuted for murder in the courts of the United States. He was convicted of that crime in the administration of the laws of California, Penal Code, Cal. §§ 187, 188, 189; §§ 17, 587; and the conviction has been sustained by the highest court of the State.

As indicating that the prosecution was in the ordinary course, the language of that court in the opinion delivered on affirming the judgment may not improperly be quoted. Among other things the court said: "The charge fully informed the jury that an intent to take human life is a necessary element of murder in the first degree. They were told that in order to convict the appellant of murder in the first degree they must be convinced beyond a reasonable doubt that the appellant, either personally or in concert with others, killed the deceased with malice aforethought by some kind of wilful, deliberate and premeditated killing, and that 'in order to constitute murder in the first degree, the intent to kill must be the result of deliberate premeditation.' This principle was given to the jury in various forms; and it is beyond question that the evidence abundantly warranted the jury in finding the appellant guilty of murder in the first degree — murder of a most aggravating and shocking character. There was an unnecessary allusion to the fact that the derailing of a train is a felony; but that in no way changed the general nature of the charge." 113 California, 569, 576.

No ground existed on which the Circuit Court could have held these proceedings void, and the writ was properly denied.

Order affirmed.

CONDE *v.* YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 143. Argued December 6, 1897. — Decided January 3, 1898.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be

Statement of the Case.

a title or right of the plaintiff in error and not of a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it.

In September, 1889, Witherby and Gaffney entered into a contract with the Government of the United States to construct certain buildings at Sackett's Harbor, New York. Thereafter they purchased from York and Starkweather lumber and materials, which were used in the construction of the buildings, and on March 27, 1890, were indebted on account of these materials in the sum of more than $3000. Being so indebted, Witherby and Gaffney on that date executed and delivered to York and Starkweather an instrument in writing, as follows:

"Whereas we have a contract with the United States Government for the construction of buildings and officers' quarters at Madison Barracks, Sackett's Harbor, Jefferson County, N. Y.;

"And whereas we are indebted to York and Starkweather, of Watertown, N. Y., in the sum of three thousand dollars and more on account of materials furnished us by them that were used in said buildings and quarters;

"And whereas there will be due and payable to us on account of our work, etc., from the Government considerable sums of money before and on the completion of our said work;

"Now, therefore, of the moneys due and to become due us from the said Government, we do hereby for value received assign and transfer to said York and Starkweather the sum of three thousand dollars, and do hereby authorize, empower, request and direct Lieutenant J. E. Macklin, R. Q. M. Eleventh Infantry, U. S. A., through whom payments are made for such construction, to pay to said York and Starkweather on our account for such construction the full sum of three thousand dollars, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2500 on the completion of said work by us, and when the

balance of our contract with the Government becomes due and payable to us."

On the seventh of April, Witherby and Gaffney paid York and Starkweather $500, but no further payment was made by them. On May 15, 1890, Lieutenant Macklin, the disbursing agent of the United States Government at Sackett's Harbor gave a draft on the Treasury to the amount of $4400 to Witherby and Gaffney, which was turned over by them on that day to Conde and Streeter. Before Conde and Streeter received this draft, they had been fully notified of the paper delivered to York and Starkweather, and while the draft was in their hands, York and Starkweather demanded $2500 thereof from them, which they refused to pay or any part thereof. Conde and Streeter asserted a prior right to the draft and moneys in question by virtue of an alleged oral agreement with Witherby and Gaffney to secure the payment of certain notes upon which they were liable as indorsers and for individual claims they held against them. Conde was one of the sureties on Witherby and Gaffney's bond to the Government, and it seems to be conceded that Witherby and Gaffney obtained the money on Conde and Streeter's accommodation indorsements for the purpose of enabling them to carry on the work under the contract. Conde and Streeter applied the money to pay notes to the amount of $3200 which they had endorsed, and individual claims to the amount of $600, and about $600 was returned to Witherby and Gaffney.

April 16, 1890, Witherby and Gaffney executed to Conde and Streeter an agreement by which they promised to pay off and discharge from the money to be received by them from the Government certain notes endorsed by Conde and Streeter and certain individual indebtedness held by them against Witherby and Gaffney. On April 18, Witherby and Gaffney made a written assignment to Conde and Streeter of sufficient of the money in question to pay the notes and claims mentioned, in these words:

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value

received to John C. Streeter and Wm. W. Conde sufficient of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the aforegoing agreement."

York and Starkweather brought suit against Conde and Streeter in the Supreme Court of New York for the county of Jefferson. Two defences were set up by Conde and Streeter, the second of which was "that the money, claim and property claimed by the plaintiffs in this action to have been assigned to them by Witherby and Gaffney at the time of the pretended assignment thereof, constituted and was a claim against the United States Government, which had not been allowed, or the amount due thereon ascertained, or the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and is not acknowledged by the person making the same before an officer having authority to take acknowledgments of deeds, and is not certified by such officer; and that said pretended assignment is in violation of the laws of the United States and of the State of New York, and that the plaintiffs never derived any interest in the said contract with the United States by virtue of the said pretended assignment or otherwise, and are not the real parties in interest in this action and ought not therefore to maintain the same; that said Witherby and Gaffney never transferred any interest in the said contract to the said plaintiffs."

The trial resulted in a verdict in favor of York and Starkweather, upon which judgment was entered, which was affirmed by the general term, and that judgment affirmed by the Court of Appeals. *York* v. *Conde*, 147 N. Y. 486. A writ of error was then allowed from this court.

Mr. Elon R. Brown for plaintiffs in error.

Mr. Henry Purcell for defendants in error.

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

Plaintiffs in error contended in the courts below that they were entitled to the fund in question by virtue of an oral

transfer prior to the assignment to defendants in error, and of the writings executed subsequently thereto; and that defendants in error acquired no right to the fund by their assignment because such assignment was in violation of section 3477 of the Revised Statutes of the United States. But they did not claim that they acquired any right or title to the fund by reason of that section, nor was its validity questioned in any way.

In delivering the opinion of the Court of Appeals of New York, its able and experienced Chief Judge said:

"The claim set up by the defendants in their answer, that prior to the assignment to the plaintiffs, Witherby and Gaffney had verbally assigned to them the money to become due on the contract, as security for their indorsements, was tried before the jury and found against them and need not be further considered. There can be no doubt that under the general rule of law prevailing in this State the plaintiffs, under the assignment of March 27, 1890, acquired an equitable, if not a legal, title to the money payable on the contract of Witherby and Gaffney with the Government to the extent of $3000, and that the defendants, having acquired possession of the draft for the final payment on the contract, by delivery from Witherby and Gaffney, to secure an antecedent liability, on being notified of the claim of the plaintiffs, held the draft and the fund it represented, as trustee of the plaintiffs, to the extent of their claim. *Field* v. *Mayor, &c.*, 6 N. Y. 179; *Devlin* v. *Mayor, &c.*, 63 Id. 8.

"But the contention is that the plaintiffs took nothing under the assignment to them, because, as is claimed, the transaction was void under section 3477 of the Revised Statutes of the United States, to which reference has been made. That section is as follows: 'All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed

in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same.'

"This section has been considered in several cases by the Supreme Court of the United States. If that court has construed the section so as to determine the point involved in this case we should deem it our duty to follow its decision. The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question, nor will our decision affect any right of the defendants based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby and Gaffney. They seek to defeat the right of the plaintiffs under their prior assignment of a portion of the fund, and invoke section 3477 to establish that the assignment was void and conferred no right. But on a question of statutory construction of an act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court."

Many decisions of this court in respect of section 3477 were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to secure an honest debt, while they might be disregarded by the Government, to be sustained as between the parties so far as to enable the transferees, after the Government had paid over the money to its contractors, to enforce them against the latter, or those tak-

ing with notice. The court held, in effect, that such was the transaction in the case at bar, and that the transfer to York and Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the Government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the Government. The United States had, in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the proper distribution of which depended on the equities between them. What the New York courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingly.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it.

In *Aldrich* v. *Ætna Company*, 8 Wall. 491, the question was whether the mortgage of a vessel, properly recorded under an act of Congress, gave a better lien than an attachment issued under a state statute, and the decision by the state court was that it did not. The construction of the act of Congress and its force and effect as it respected the mortgage security under which defendants claimed a right or title paramount to that of the attachment creditor was necessarily directly involved, and a proper case for review existed.

In *Railroads* v. *Richmond*, 15 Wall. 3, in a suit on a contract defendants set up that the contract had been rendered void and of no force and effect by provisions of the Constitution of the United States and of certain acts of Congress, and

the decision of the Supreme Court of Iowa was adverse to that defence. The case being brought here, a motion to dismiss the writ of error was denied.

In each of these cases the defence was rested upon a title or right of defendants specially claimed under the Constitution or laws of the United States, and being adversely disposed of, jurisdiction obtained.

Here no such contention was put forward. The materials of plaintiffs below had gone into the buildings, while, on the credit of defendants, money had been raised for their construction. Both held written agreements, from the same source, for the money when paid over, but that of defendants below was subsequent in date to the other. Neither asserted any right under § 3477.

In *Walworth* v. *Kneeland*, 15 How. 348, it was ruled, where a case was decided in a state court against a party who was ordered to convey certain land, and he brought the case up to this court on the ground that the contract for the conveyance of the land was contrary to the laws of the United States, that this was not enough to give jurisdiction to this court under the twenty-fifth section of the Judiciary Act. The state court decided against him on the ground that the opposite party was innocent of all design to contravene the laws of the United States. Mr. Chief Justice Taney, however, said: "But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in

the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. . . . Neither can the writ of error be supported on the ground that Walworth was unable to purchase, at one dollar and twenty-five cents per acre, another portion of the land mentioned in the contracts, in consequence of its subsequent cession by the United States to the Territory of Wisconsin. Whether that cession, and the enhanced price at which it was held, absolved him from the obligation of performing any part of the contract, depended altogether upon its construction. The rights of the parties did not depend on the act of Congress making the cession, but upon the contract into which they had entered. And the construction of that agreement, and the rights and obligations of the parties under it, were questions exclusively for the state court; and over its decree in this respect this court has no control."

In *Jersey City & Bergen Railroad* v. *Morgan*, 160 U. S. 288, in an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defence was that a silver coin offered by him in payment of his fare was so abraded as to be no longer legal tender, and that defence was overruled. And a writ of error having been sued out by the railroad company from this court to review the judgment thereupon rendered against it, we held that the writ could not be maintained. It was there said: "The claim which defendant now states it relies on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. *Missouri* v. *Andriano*, 138 U. S. 496, and cases cited. And, although denying plaintiff's claim, defendant did

not pretend to set up any right it had under any statute of the United States in reference to the effect of reduction in weight of silver coin by natural abrasion."

Writ of error dismissed.

McHENRY *v.* ALFORD.

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

No. 189. Argued December 2, 3, 1897. — Decided January 3, 1898.

The ruling in *United States* v. *Union Pacific Railroad*, 168 U. S. 505, that each question certified to this court from a Circuit Court of Appeals "had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case, and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions," is affirmed and followed; and, being applied to the questions certified in this case, makes it necessary for the court to decline to answer the first, the second and the sixth questions.

Chapter 99 of the Laws of the Territory of Dakota of 1883 provided for the taxation of the lands of the Northern Pacific Railroad Company granted to it by Congress, outside of its right of way and not used in its business, while owned by the company and not leased, through the payment of percentages on gross earnings as provided for therein; the plain meaning of that act being to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting to the amount and in the manner described in the act.

That legislation was not in conflict with the provision in the act of March 2, 1861, c. 86, 12 Stat. 239, providing that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

It is not necessary to decide whether the act of 1883 conflicts with the Constitution in that it lays taxes upon earnings arising from transportation of persons and property between different States.

The objection that the act of 1883 violates the Fourteenth Amendment is untenable.

Statement of the Case.

The railroad company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and the court answers the fourth question in the negative.

The next and fifth question is answered in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might be waived by the public authorities, and as the moneys were in fact paid to and received by the officers of the Territory and went into its treasury, and never have been returned or tendered back, there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, and that court certifies several questions concerning which it desires the instruction of this court for the proper decision of the cause. These questions are founded, among other papers, upon the bill of complaint which forms part of the record herein. It appears that the bill was filed by the complainants' predecessors (who were receivers of the property of the Northern Pacific Railroad Company) on the 22d day of March, 1894, in the district court of the fourth judicial district of North Dakota, sitting for the county of Richland in that State. It was filed, among other things, for the purpose of obtaining a decree adjudging that certain alleged and pretended and attempted assessments, under state authority, were null and void, and that all certificates and deeds executed by virtue of such assessments were void and constituted clouds upon the title to the lands described therein, and which were alleged to be owned by the corporation of which the plaintiffs were receivers. Some of the individual defendants named in the bill were alleged to have purchased, at a tax sale under the assessments, separate portions of the property of the company situated in Richland County, and to have received certificates or deeds from the county officials purporting to convey to each of them certain portions of such property. Upon a petition of one of the individual defendants named Sumner R. Clark, alleging diverse citizenship between the parties and the existence of a separate con-

troversy between the petitioner and the complainants, a removal of the cause to the United States Circuit Court for the District of North Dakota was prayed for, and on the 5th of September, 1894, the court granted the petition and made an order for the removal of the cause. Upon a trial of the issues joined in the case, the Circuit Court of the United States for the District of North Dakota dismissed the complainants' bill, and the complainants thereupon appealed to the United States Circuit Court of Appeals for the Eighth Circuit.

It appears from the complainants' bill, that the Northern Pacific Railroad Company was a corporation created and existing by virtue of an act of Congress, approved July 2, 1864, c. 217, 13 Stat. 365, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route." The third section of that act, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, granted to the railroad company, its successors and assigns, certain portions of the public lands, as mentioned in the section. Pursuant to the provisions of the act, and prior to the year 1888, the company had definitely fixed the line of its railroad, and prior to that year had constructed and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly and through the Territory of North Dakota to the waters of Puget Sound; and prior to, and during the year 1888, many thousand acres of land in North Dakota were owned by the railroad company, under the land grant above mentioned, although patents for a portion of the same were not issued until June 24, 1893, and, for another portion, not until June 18, 1894. (No question is made by the complainants herein that the lands owned by the company were not taxable in 1888 on account of the fact that the company had not then received patents from the United States therefor.)

On the 31st of May, 1870, Congress adopted a resolution authorizing the company to issue bonds for the construction of its road, and to secure the same by mortgages on its prop-

erty of all kinds and description, real, personal and mixed, including its franchises as a corporation. Under that resolution the company executed, at different times, several mortgages to secure the payment of a hundred millions or more of bonds issued to aid in the construction of the road, and these mortgages covered all the property of the company, including the lands granted to it by the United States under the act of 1864.

In 1893 the company was insolvent and unable to meet the interest upon its bonds or to pay its other indebtedness, and in that year suits were duly commenced against it by creditors to recover the amount of its indebtedness, and also, by the trustee mortgagee, to foreclose the mortgages, in which suit receivers were appointed, and the complainants are their successors.

On March 9, 1883, the legislature of the Territory enacted a statute, entitled "An act to provide for the levy and collection of taxes upon railroad property of railroad companies in this Territory," Laws of 1883, c. 99, p. 211, the first and fifth sections of which are set forth in the margin.[1] This act was repealed by chapter 105 of the Laws of 1889.

---

[1] Act of 1883.

Section 1. *Percentage of Gross Earnings to be Paid in Lieu of Other Taxes.* — In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated, that is to say: Every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one half (½) on or before the fifteenth day of February, and one half (½) on or before the

Statement of the Case.

Subsequently, and on the 7th day of March, 1889, the legislature of the Territory passed another act, entitled "An act for the levy and collection of taxes upon property of railroad companies in this Territory."

Section 7 of the act of 1889 is set forth in the margin.[1]

---

fifteenth day of August, in each year, and for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this Territory, or any other person appointed by law, to examine under oath the officers and employés of said company, or other persons, and if any person so examined by the governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centums, it is hereby declared that the Territory shall have a lien upon the railroad of said company and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the Territory shall have and take precedence of all demands, decrees and judgments against said company.

SEC. 5. *Lands Subject to Taxation.*—The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased or contracted to be sold or leased; and on or before the first day of April of each year, each railroad company having lands within this Territory, shall return to the county clerk of each county, full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A.D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of December, A.D. 1882.

[1] ACT OF 1889.

SEC. 7. *Any Railroad Company* which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now

Statement of the Case.

The Northern Pacific Railroad Company, within thirty days after the passage of the act of 1889, duly accepted its provisions, and within thirty days from that date paid into the treasury of the Territory the entire amount of taxes and interest theretofore claimed by the Territory as due and remaining unpaid to it from the company on local and interstate earnings under the act of 1883, excepting that the second half of the sum due from the company to the Territory for the taxes of 1888, according to the provisions of the act of 1883, was not paid to and received by the treasurer of the Territory until August 15, 1889. The whole tax for 1888, under the act of 1883, amounted to nearly $100,000, while for all the years in which the company was in arrear under the act of 1883 (including the year 1888) the amount paid was nearly $200,000.

In the year 1888 the usual proceedings were taken by the officials of Richland County to assess all the property in the county under the general assessment laws of the Territory,

---

in arrears in the payment of taxes assessed under chapter 99 of the Laws of 1883, shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and in the manner provided for the assessment and the taxation of the property of individuals of this Territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account, and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the fifteenth day of August, 1889.

and in such assessment the land grant lands of the railroad company were included, (regardless of the act of 1883,) and thereafter in due course the taxes thus levied, not having been paid by the company, the treasurer of the county on the 4th day of November, 1889, attempted and pretended to sell many parcels of land belonging to the railroad company and being in the county already mentioned, for the purpose of collecting the taxes unpaid thereon, and no redemptions of the lands having been made, the county treasurer executed to the persons who purchased the lands or their assignees, some of whom are defendants in this suit, deeds purporting to convey the lands so sold to such persons, and these deeds are alleged to be invalid, but still a cloud upon the title of the company to the lands described therein.

The bill also sets forth a great many different alleged errors, irregularities and omissions on the part of the taxing authorities in taking proceedings to levy the taxes, by reason of which, as alleged, the taxation of the property of the company was illegal and the deeds were null and void.

A joint and several demurrer and answer to the bill was served upon the part of the defendants, taking issue upon some of the allegations of fact in the bill and demurring to other parts thereof, but a sufficient statement of the case has already been made to lead to a proper understanding of the questions hereinafter discussed.

Mr. C. W. Bunn for McHenry.

Mr. Edgar W. Camp for Alford.

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

The learned Circuit Court of Appeals has certified to this court six questions, concerning which it desires the instruction of this court for a proper decision of the cause. The following are the questions so certified:

"1. Has the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?

"2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the Territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?

"3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

"4. If such was the purpose of the act was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

"5. Conceding that the purpose of chapter 99 of the Laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainant to the equitable relief sought?

"6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?"

Of these questions, we think we ought to answer only the third, fourth and fifth. The first, second and sixth come within our rulings in the cases of *Jewell* v. *Knight*, 123 U. S. 426; *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60, and *United States* v. *Union Pacific Railroad*, *ante*, 505.

In the case last cited, in speaking of the rules which govern the certification provided for in sections 5 and 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the Chief Justice

repeated those rules as derived from prior decisions, and said that "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case, and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions."

Guided by these rules, we find that the first question does not comply with their requirements. No single question of law is plainly raised therein. The record only shows that the case was commenced in a state court, and was removed upon the petition of one of the individual defendants into the Circuit Court of the United States for the District of North Dakota. Neither party (so far as appears from the record) raised any question of jurisdiction in the Circuit Court to hear and determine the whole case. Whether there is some defect supposed to exist in the petition for removal, or whether the controversy was or was not a separable one, or whether the citizenship of the different parties was not sufficiently alleged or did not sufficiently appear; whether the petition was filed in the proper time, or the bond was sufficient in form, or the approval of the court was or was not sufficient, all these questions are possible subjects of inquiry in order to answer the general question submitted to us. We should not be asked to grope our way through the papers submitted and examine every objection that imagination could raise, with no hint as to what, if any, objection is really supposed to exist. Some of the above enumerated possible objections could not in any event be answered in the present state of the record, which does not contain all the facts necessary to be known in their consideration. If the whole case were here upon writ of error or appeal, we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to do so when questions only are certified to us, unless presented in proper form.

The second question we regard as equally objectionable. The question certified is not a distinct point or proposition of law clearly stated so that it can be definitely answered without regard to other issues of law or fact in the case. What is the particular condition of the title to the lands which raises the doubt as to their being subject to taxation and induces the certification of the whole question to this court? This is not stated, and we are left to discover any or all possible objections by reading the bill and then conjecturing what the particular objection may really be.

What might otherwise have been considered as an objection, regard being had to the decision of this court in *North Pacific Railroad* v. *Traill County*, 115 U. S. 600, would seem to have been rendered of no force by the act of Congress of July 10, 1886, c. 764, 24 Stat. 143, providing for taxation of railroad grant lands. The question of law arising from the condition of the title is neither plainly stated nor is the condition itself clearly presented.

The sixth question, for the same reasons, cannot be answered. There is no plain statement of a distinct proposition of law. We are left to read the whole of that part of the bill alleging many different facts said to constitute various and separate irregularities, each of which might be a separate and distinct question of law, but all of which are joined together in an inseparable mass.

Questions of the character of the three thus described are not within the meaning of the act of 1891, and certifying them confers no jurisdiction upon this court to answer them.

We come then to the consideration of the third, fourth and fifth questions, and we will proceed to answer them.

The wording of the third question may at first sight render its meaning somewhat obscure. We are asked whether it was "the purpose of chapter 99 of the Laws of Dakota of 1883 to *exempt* from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way, and are not shown to be used in its business as a common carrier?" We

should answer — No, it was not the intention to exempt from but to change the mode of taxation.

This court, in *Northern Pacific Railroad* v. *Clark*, 153 U. S. 252, at page 271, in speaking of the act of 1889, which in this particular (that of substituting an assessment upon gross earnings) is similar in substance to the act of 1883, said that the act did not *exempt* the property of the railroad company from taxation, but that it merely substituted one method of taxation for another upon the terms and conditions specified.

But we take the true meaning of the question to be whether the act exempts from taxation the lands granted to aid in the construction of the railroad company in any other manner than as provided for in that act. Thus interpreting the meaning of the question, we are of opinion it should be answered in the affirmative.

The language of the act in its first section seems to be so plain as to be beyond the necessity of construction. The act says that the payments therein provided for are "in lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad company." These payments are also said to be "in full of any and all other taxation and assessments whatever upon the property aforesaid."

In addition to this plain language, the act, for the purpose of securing the payment of the taxes as provided, gives to the Territory a lien upon the railroad of the company and upon all its property, estate and effects whatsoever, personal, real or mixed. This provision for a lien upon all property of the company, together with the provision of section 5, that "the lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased or contracted to be sold or leased," is additional proof to conclusively show that the lands while

owned by the company and not leased, etc., shall not be taxed other than as they are taxed by the act and through the payment of the percentages on the gross earnings, as provided for therein. The principle that exemption from taxation must be clearly shown, and that it generally applies (if at all) only to property used in the business of the company claiming the exemption, is acknowledged and assented to. The case of *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662, is an illustration of the principle, but it does not here apply. The language of this act is clear and absolute. It is also not the case of an exemption from taxation but the substitution of one method for another. The land here in question is, in addition, closely connected with the business of the company. We shall show this more at length hereafter.

The learned counsel for the defendants argues that if the payment of the percentage of the earnings under this act was intended to be in lieu of the land tax, then a part at least of the payment would have been divided among the counties according to the value of the granted lands unsold within such counties, because, as he says, it is a well-known fact that many counties of North Dakota contain large tracts of land owned by this company but do not contain a mile of the line of its road, and under the provisions of this law a county thus situated received no part of the gross earnings tax. But this argument goes only to the alleged injustice of the appropriation of the tax when paid, and not to its extent or character.

Under the act of 1889 it is admitted that the legislature intended the exemption of lands like these in controversy from any taxation other than the indirect kind arising from the taxation of gross earnings, because under that act a part of the proceeds of the tax was divided among the counties according to the acreage of the unsold granted lands, even where no portion of the railroad was contained in such county. But the language of the exemption above described is substantially the same in both acts. The later act simply makes an appropriation of the proceeds of the tax somewhat different from that of the earlier one. The exemption was the same in each and founded upon the same language.

While the later act, perhaps recognizing the injustice in bestowing no portion of the tax collected upon those counties through which the road did not run, although lands of the company were therein situated, altered the disposition and appropriated a portion to the counties in which some of the lands were situated, yet no difference as to the intention of the legislature to exempt all the lands can be properly based upon this alteration. The exemption of the lands from a tax other than as therein provided for is based upon the same language in each act, and is perfectly plain in both.

It is also seen that by the act of 1879, c. 46, p. 122, Session Laws of Dakota, a system of taxation of certain specified property of railroad companies by a tax on their gross earnings was provided for, and the tax thus collected was stated in the act to be "in lieu of all other taxation . . . of the roadbed, right of way, stations or depot grounds, tracts, rolling stock, water stations," etc., "used in or incident to the operation of such railroad."

This act by reason of the tax on the gross earnings, limits the freedom from taxation, to the roadbed, as above stated, and property "used in or incident to the operation of such railroad." The act also provides that "all property of railroads not above enumerated, subject to taxation, shall be treated in all respect, in regard to assessment and equalization, the same as similar property belonging to individuals, whether said lands are derived from the general government or from other sources."

The difference between the language of the act of 1879 and that of 1883 is most marked. Instead of enumerating the particular property which is to be regarded as exempt from other taxation by reason of the tax on gross earnings, and providing for the taxation of the rest of the property of the railroad the same as similar property of the individual, as is the case in the act of 1879, the act of 1883 says the tax is in lieu of any and all other taxes upon any railroad within the Territory or upon the equipment or upon any other property situated in the Territory.

Does not this different language import, clearly and plainly, a different intention?

We are unable to think of any language of plainer meaning than that used in this statute, and there can be no doubt, as it seems to us, that its meaning is to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting of the amount and in the manner described in the act.

This same question was argued in the Supreme Court of the State, and decided by it in 1892, in accordance with the views we have above expressed. *Northern Pacific Railroad* v. *Barnes*, 2 North Dakota, 310. It was afterwards decided in another way in *Railroad Co.* v. *McGinnis*, 4 North Dakota, 494, somewhat upon the theory that, as it was a Federal question, the court would follow the decision to that effect by a Federal court. 47 Fed. Rep. 681.

We are not embarrassed by these conflicting decisions, and we have no difficulty in answering the third question in the affirmative.

We come now to the fourth question which involves, among other things, the construction of one of the sections of the organic act creating the Territory of Dakota, (act of March 2, 1861, c. 86, 12 Stat. 239, at sec. 6, p. 241,) the material portion of which relating to the authority of the territorial legislature provides that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." The same provision in substance is found in section 1925, Revised Statutes, relating to the legislative assemblies of Colorado, Dakota and Wyoming.

It is argued by counsel that, although under this provision of the organic law, the territorial legislature could generally select the subjects of taxation, and could classify property for that purpose, and that these different classes of property could be valued or taxed by different methods, nevertheless the act of 1883, under consideration, is in excess of the lawful exercise of any of the powers granted under the organic act,

notwithstanding that act in the section above alluded to provided that "the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." There must be some solid ground for making a distinct classification of property, and such ground does not exist, as is contended, by reason of any of the facts herein mentioned.

Viewing the character, condition and use of these lands, it is said to be plain that they are simply "property owned by a railroad," and not "railroad property," as described in the title to the act of 1883, and that the two are not equivalent terms; that although railroad property might be taxed in a special method and at a special rate, yet by the term "railroad property" is simply meant property necessary for use in the usual daily conduct of the business of the company as a common carrier by rail, and that any lands outside of that use, although owned by a railroad company, could not be classified and taxed in any different manner from land owned by an individual, otherwise such classification would be purely arbitrary, and the taxation in that way would be illegal; that no earnings arise from these lands which are assessed under the act, because the earnings upon which the tax is assessed are by the terms of the act restricted to "the gross earnings . . . arising from the operating of such railroad," and such earnings are not created by nor do they arise from nor are they in any way connected with these lands, which are therefore not taxed at all under this act, and no justification for their special classification for purposes of taxation can on that account be found.

All these various statements are made in the course of the main and general argument that these lands cannot be taxed under an act like that of 1883, because there is no sound distinction between such lands owned by the company and ordinary lands owned absolutely by an individual.

We do not concur in the accuracy of the description as to the condition of these lands, and we are not, therefore, impressed with the force of the argument based upon it. The

lands are not purely and simply owned or held for sale or other disposition for profit, and in no way connected with the use or operation of the railroad, and in regard to them the company is not a landed proprietor, on the same footing with any other proprietor of lands, and it is not correct to say that these lands do not substantially, though indirectly, contribute towards the gross earnings of the railroad company, as provided in the act of 1883, nor can it be admitted that in merely taxing the gross earnings arising from the operation of the road these lands are not taxed at all. The lands are closely connected with the railroad and with its operation, and they are not in the same condition as a subject for taxation as are the lands of an individual. While we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners, yet, where the situation and the possible use and the present condition of the ownership of lands are wholly different, such as they are in this case from ordinary ownership, a classification is not arbitrary nor unreasonable which places such lands outside the class of lands owned in the ordinary way by individuals.

Although the act here provides for the taxation of the gross earnings arising from the operation of the road, the phrase means earnings which arise because of its operation. The road is in operation, and the earnings which it is thereby enabled to make are to be taxed. Property which the company owns, and which has enabled and continues to enable it to operate its road, is part of the property from which the earnings arise by reason of such operation, and is within the meaning of the act. These lands are of this description. Although they are not taxed directly, yet the same is true of the right of way, the roadbed, the engines, cars and water tanks, all of which are confessedly "railroad property," without which the road could not be operated. In substance, it must be said that without the existence of all the various pieces of property just enumerated, gross earnings would be quite impossible. It is also true in regard to these lands. It

is not a question of what might under other circumstances have been their condition with relation to the railroad. We must take the circumstances that actually did exist at the time this act was passed for the purpose of determining this question. And, looking at those facts, we see that unquestionably these lands have indirectly contributed to the gross earnings derived from operating the road, and that such earnings have arisen and been made possible by reason of the lands. They have not only aided in making these gross earnings possible, but they have formed, and do still form, a material factor in the combination of circumstances contributing to the construction of the railroad, to its operation and to its earnings.

They originally formed a part of the public domain, and were granted by Congress for the purpose of aiding in the construction of this railroad to the Pacific coast, and were given to and accepted by the company, subject to the conditions named in the eighth section of the act. When the lands finally became the property of the company, they were impressed with a trust in favor of the Government, as representing the public, that they should be used for the purpose for which they were granted, and the company was not even allowed to mortgage or create any lien upon them in any way except by the consent of the Congress of the United States. Act of July 2, 1864, 13 Stat. 365, at page 370, section 10.

Subsequently it was found that the road could not be built under the conditions at first imposed, and Congress, therefore, in 1870, authorized the company to issue bonds for the construction of its road and to secure the same by mortgage. Under such authority, mortgages were thereafter made to secure bonds for more than a hundred million of dollars, the proceeds of which were used in building the road. These lands have, therefore, actually and directly contributed in a large measure and have formed a most potent factor towards building the road and enabling it to be operated and to earn moneys by reason of such operation. How can it be correctly said that they are not in any way taxed by a tax on the gross earnings of the road arising from its operation, when the road

could only be constructed and operated by reason (among others) of the moneys raised upon the security of these very lands? The present insolvency of the railroad company shows that the lands must form a most important item in the ability of the company or its successors to continue the operation of the road and make any earnings whatever.

If it be assumed that after the lands became the property of the company it was at that moment no more restricted in their sale than any other corporation organized to buy and sell real estate, and that it had the entire right to sell, or not to sell, or to mortgage to whom and at what price it might obtain, and that it owned the land like an individual, still the question is presented as to what was the actual condition of affairs when the act of 1883 was passed. At that time these lands were so closely connected with the railroad, its construction and operation, as in effect to be part and parcel thereof; they stood as security for millions of bonds issued to secure the construction and operation of the road, and upon these facts the reason and justification for a classification, such as was made in that act, are plainly apparent. At that time totally different circumstances than those which surround an individual in the absolute ownership of his property existed in relation to these lands. As they made the gross earnings possible, it cannot be said, with the least regard to the fact, that those earnings did not in part issue out of the lands upon the same principle that they partly issued out of the right of way, the roadbed, track, engines, cars, tanks and other confessedly "railroad property." There is no difference in principle between the two classes of property so far as this question is concerned. Then, too, the road of the company runs through the whole State, hundreds of miles; it owns thousands upon thousands of acres therein, granted it for the purposes stated, and these lands it has accordingly pledged to redeem its bonds issued as mentioned. Its building was a work of national importance, and it was built for use by the Government, as well as for other purposes. Surely all these various facts justify a classification of such an entity for taxation by a different method and upon different lines than the

individual, and lands thus situated and owned are in a materially different condition from lands absolutely owned by an individual.

It is said this reasoning, while it might be applicable to the Northern Pacific Railroad Company, would not be applicable to many other railroads which had no land grants, or which were not situated as is the company in question, and that as the law is in its terms general and applies to all roads, this company cannot obtain its benefit without showing that it is a valid provision in regard to all railroad property. But if the property of this company is so situated and the facts regarding it are so materially different from other real estate as to fulfil the conditions upon which a general classification may be proper, we think the company could avail itself of the act even if some other companies could not.

Many cases are cited, in the brief of counsel, from the different States having provisions in their constitutions somewhat similar to those found in the organic act of Dakota, and in which States it has been held that the legislature is not confined to taxation in precisely the same method for all classes of property, but that it has power to classify and to provide different methods of taxation of the property so classified. The particular facts arose in and the cases are cited from Wisconsin, Iowa, Kansas, Louisiana, Michigan, New Jersey, Pennsylvania, Mississippi, Missouri and Illinois. They are cited in the margin.[1]

---

[1] *Wisconsin Central Railroad* v. *Taylor County*, 52 Wisconsin, 37; *Griswold College* v. *Iowa*, 46 Iowa, 275; *Missouri River &c. Railroad* v. *Morris*, 7 Kansas, 210; *Francis* v. *Atchison, Topeka &c. Railroad*, 19 Kansas, 303; *Louisiana State Lottery Company* v. *New Orleans*, 24 La. Ann. 86; *New Orleans* v. *Kaufman*, 29 La. Ann. 283; *New Orleans* v. *Davidson*, 30 La. Ann. 554; *New Orleans* v. *Fourchy*, 30 La. Ann. 910; *People* v. *The Auditor*, 7 Michigan, 84; *Youngblood* v. *Sexton*, 32 Michigan, 406; *State ex rel. Vail's Executors* v. *Runyon*, 41 N. J. Law, 98; *Kittanning Coal Company* v. *Commonwealth*, 79 Penn. St. 100; *Mississippi Mills* v. *Cook*, 56 Mississippi, 40; *Crow* v. *State*, 14 Missouri, 237; *Hamilton* v. *St. Louis County Court*, 15 Missouri, 3; *State* v. *North*, 27 Missouri, 464, 483; *Illinois Central Railroad* v. *McLean County*, 17 Illinois, 291; *State* v. *Crittenden County*, 19 Arkansas, 360; *St. Louis, Iron Mountain & Southern Railroad* v. *Berry*, 41 Arkansas, 509; *Arkansas Midland Railroad* v. *Berry*, 44 Arkansas, 17.

Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the organic act.

Objection is also made to the act of 1883 on the ground that it is in violation of the commerce clause of the Federal Constitution in that by its terms taxes are laid upon earnings arising from the transportation of persons and property between different States, etc. In other words, that the tax is not confined to earnings which arise from the transaction of its business wholly within the State. It is said that the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, holding that the imposition of taxes upon gross receipts of railway companies was not illegal, although the gross receipts were made up in part of freights received from the transportation of merchandise from one State to another or through one State into another, has been overruled by the subsequent cases in this court, among which are those of *Fargo* v. *Michigan*, 121 U. S. 230, 244; *Philadelphia & Southern Steamship Company* v. *Pennsylvania*, 122 U. S. 326; and it is claimed that the case is not brought under that of *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217, in that there is no provision for ascertaining the amount of gross earnings derived from interstate commerce and for the taxation of the balance only.

A perusal of the first section of the act does not render it at all clear that there was intended to be a tax of any portion of the gross earnings of the corporation which arose from interstate commerce. The language of the act which declares that the tax should be paid into the treasury of the Territory upon a percentage of all gross earnings of the corporation owning or operating such railroad "arising from the operation of such railroad as shall be situated within the Territory," gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce. But there is great force in the claim that the act is not subject to the objections mentioned in the above cases reported in 121 and 122 United States, and the cases

therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax, and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings.

We do not think it necessary, however, to decide this question, because we are of opinion that, by the act of 1889, the legislature proffered the company a compromise as to the taxes claimed to be due and the company accepted the same. Construing the act of 1883 as we do, and as meaning to exempt the company from the payment of all other taxes than those therein named, upon all its property of every name and nature, we find that in 1889 this company had been in default in the payment of its taxes under the act of 1883 for the years 1886, 1887 and 1888. It owed nearly two hundred thousand dollars in taxes for those years under that act. The taxing authorities of the county of Richland had also assumed to tax the lands of the company for the year 1888 in the same way as if owned by individuals, but the tax as thus assessed had not been paid by the company. In this state of affairs the act of 1889 was passed, the effect of which was to say to the company, if you will pay all the taxes that are due under the act of 1883, you may then accept and come in under

the provisions of this act. And there is in addition to this offer a clear and necessary implication from the language used in the act that if the company would pay those taxes in full which were thus in arrear such payment would operate as a discharge of all claims for taxes, including those claims made by virtue of the proceedings to tax the lands of the company under the general law. It certainly is not possible to believe that the legislature intended to make it a condition for the acceptance of the act of 1889 by the company that it should not only pay all the taxes which were provided for under the act of 1883, (and which by the terms of that act were in full of all other taxation,) and for the payment of which the company might be in default, and yet and in addition should still be liable to pay the taxes as assessed in Richland County under the general law. We cannot suppose the legislature intended to compel the payment of taxes twice, and therefore the language of the act of 1889 providing for the payment of all taxes in arrear under the act of 1883 as a condition for the acceptance of the act of 1889, implied that such payment should also be in full of all other claims for taxes assessed for the same years. Such a condition and proposition were entirely within the power of the legislature to impose and make, and when the proposition was accepted and the condition performed by the payment of money into the treasury of the Territory, all claim for taxes under any general law levied directly upon the lands necessarily fell with such payment and acceptance. This implied release of the taxes for the year 1888, which the authorities had assumed to levy under the general law and not under the provisions of the act of 1883, arises from the language of the act of 1889, and is just as strong and just as clear as if it had been stated in so many words in that act. That which arises by plain and clear implication from the language used in an act is as much a part of the act as if the implication had been embodied in so many words.

It may be said that the money should have been paid, if at all, within thirty days after the passage of the act. Possibly, if the payment had not been made within that time and the

company subsequently had offered to pay it, the money might have been refused by the authorities of the Territory, as not paid in time. But the question of the time of payment was one which might be waived by the public authorities, and the objection was in law and in fact waived by the receipt and retention of the money.

The other objection made to the act of 1883, that it violates the Fourteenth Amendment, we think untenable under the views we have above expressed.

Basing our opinion upon the facts of this case, we would say that for the reasons herein stated the company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and we formally answer the fourth question in the negative.

The next and fifth question we answer in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might, as we have already stated, be waived by the public authorities, and when the moneys were in fact paid to and received by the officers of the Territory and went into its treasury, and never have been returned or tendered back, we think there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time.

To sum up, therefore, we do not answer the first, second and sixth questions. The answers to the third, fourth and fifth we make as above stated, and they will be

So certified.

CASTILLO *v.* McCONNICO.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 48. Argued October 19, 20, 1897. — Decided January 3, 1898.

This action was brought and prosecuted to final judgment in the state courts of Louisiana. Its object was to recover land in New Orleans which had been sold for nonpayment of taxes and had passed from the purchaser at the tax sale by sundry mesne conveyances to the defendant. The grounds on which it was sought to avoid the sale were alleged defects in the statement of the name and of the sex of the owner in the advertisements of sale. The judgment of the trial court was in favor of the defendant, and that judgment was affirmed by the Supreme Court of the State. Touching the objections made to the proceedings the latter court said: "The act of 1884 makes the deed conclusive of the sufficiency of the assessment of the property sold under it. The question of the competency of this legislation in this respect has been before this court on repeated occasions. The argument now addressed to us against the constitutionality and interpretation of the act must be viewed as directed against a series of decisions of this court. To those decisions we must adhere." It was claimed in argument here that though no Federal question was directly raised in the trial in the state court, one was necessarily involved in the decision. *Held*, that this court had no jurisdiction to review the decision of the Supreme Court of the State.

THE case is stated in the opinion.

Mr. William Winans Wall for plaintiff in error. *Mr. John Watt* was on his brief.

Mr. J. Zach. Spearing for defendant in error. *Mr. Richard Henry Lea* and *Mr. Thomas H. Thorpe* filed a brief for same.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error, who was plaintiff in the trial court and appellant in the Supreme Court of Louisiana, prosecutes this writ of error to the judgment of the Supreme Court of Louisiana, affirming a decision of the trial court. The suit was commenced in the Civil District Court of the parish of

Orleans to recover a square of ground situated in the city of New Orleans, the proceeding being known under the Louisiana code as a petitory action. La. C. P., Art. 43 *et seq.* The petition alleged the ownership by the plaintiff of the square of ground, and averred that the defendant McConnico was in possession and claiming title thereto. It alleged that the source from which the defendant asserted his title to have been deraigned was a tax sale made by a state tax collector in November, 1885, to enforce delinquent state taxes for the years 1876, 1877 and 1878, at which sale Orloff Lake was the purchaser. It was averred that Lake sold the property, thus bought by him, in December, 1885, to one Lallance, who, in January, 1891, sold it to Lang; that he in turn sold, in February, 1892, to Fitzpatrick and Reese, each in equal undivided proportions, and that each of them in 1893 and 1894 respectively conveyed their undivided interest to the defendant McConnico. The petition charged that the tax sale, upon which the title of the defendant rested, was absolutely void, because, although the property belonged to the petitioner, whose name was Rafael Maria Del Castillo, the taxes thereon for the years 1876, 1877 and 1878, to enforce the payment of which the tax sale had been made, were assessed in the name of R. Castillo. It was also alleged that the tax sale was void because, in the advertisement which preceded it and which was made by the Louisiana law a prerequisite to a valid sale, the property was described as belonging to Rafael Maria Del Castillo, or her estate and heirs; that, as petitioner was a male person, the adding to the name the words "or her estate and heirs" caused the advertisement to be nothing worth and the sale thereunder to be null. The various acts of sale in the chain of title, from Lake, the purchaser, at the tax sale, to the defendant McConnico, were referred to in the petition, which prayed that not only the tax sale, but all these various transfers between the several parties, be declared to be void and the petitioner be recognized as the owner of the property and entitled to the possession thereof.

McConnico the defendant by answer asserted the validity of his title and called his vendor in warranty, who in turn by

answer became a defendant in the cause, set up the validity of his title and called his vendor in warranty, and so on down to and including Lallance, the transferee from Lake who bought at the tax sale. All the defendants who were called in warranty averred that they were purchasers in good faith for adequate value, one alleging that after contracting to buy the property from his vendor he became doubtful about the validity of the tax sale, and had declined to carry out his contract, and that in a suit brought against him to compel compliance, a final decree had passed between himself and his vendor adjudging the title to be valid and compelling him to become the purchaser under his agreement, the price paid being the full value of the property. Another of the defendants averred that after his purchase of the property, finding that it had been forfeited to the State of Louisiana for taxes due by Castillo subsequent to the years to enforce which the tax sale had been made, he had paid the sum of the taxes, and thus held the property, not only under the tax sale, but under the title which the State of Louisiana had acquired by forfeiting the property, and which enured to his benefit in consequence of his having made the redemption. One of the defendants, McConnico, specifically pleaded by way of exception the conclusive presumptions created by Act No. 82 of 1884, as debarring the court from considering the errors in the assessment and sale which were alleged in the petition. Two of the other defendants, reserving the defences set up in their respective answers, excepted on the ground of no cause of action. The Act No. 82 of 1884, which was necessarily pleaded by McConnico's exception, and the consideration of which was also presented by the exceptions of no cause of action filed by the two other defendants, was substantially as follows: It made it the duty of the tax collectors to advertise for sale at public auction "all property on which there remained unpaid taxes due to the State prior to December 31, 1879." It provided for thirty days' advertisement, and directed the tax collectors, where property was bought at a tax sale, to make a deed thereof to the purchaser, and the deed thus to be made, the statute said, "shall be *prima facie* evi-

dence of the following facts: 1st. That the property conveyed was subject to taxation; 2d. That none of the taxes for which said property was offered were paid, *and said deed shall be conclusive evidence* of the following facts: 1st. That the property was assessed according to law; 2d. That the taxes were levied according to law; 3d. That the property was advertised according to law; 4th. That the property was adjudicated and sold as stated in said deed; and, 5th. That all the prerequisites of the law were complied with by all the officers from the assessment up to and including the execution and registry of the deed to said purchaser; and duly certified copies of said deeds shall be full proof without further evidence of all contained therein." Louisiana Acts of 1884, p. 104.

The trial court heard the exceptions separately from the merits and overruled them. The case was subsequently tried and judgment was rendered in favor of the defendants rejecting the demand of the plaintiff. This judgment was, on appeal, affirmed by the Supreme Court of the State of Louisiana. *Castillo* v. *McConnico*, 47 La. Ann. 1473, 1475. The court in its opinion, which is a part of the record in this cause, *Egan* v. *Hart*, 165 U. S. 188, 189, after deciding that the tax sale in question was authorized by the state statute, said:

"It is argued on behalf of the plaintiff that the property was not properly assessed for taxes prior to 1879, because the assessment was in the name of R. Castillo instead of Rafael Maria Del Castillo. We are relieved of the necessity of passing on the question of the sufficiency of this assessment. The act of 1884 makes the deed conclusive of the sufficiency of the assessment of the property sold under it. The question of the competency of this legislation in this respect has been before this court on repeated occasions. The argument now addressed to us against the constitutionality and interpretation of the act must be viewed as directed against a series of decisions of this court. To those decisions we must adhere and hold the act precludes the inquiry. *In the matter of Orloff Lake*, 40 La. Ann. 142; *In re Douglas*, 41 La. Ann. 765; *Breaux* v. *Negrotto, Jr.*, 43 La. Ann. 426 *et seq.*"

Opinion of the Court.

Referring to the thirty days' advertisement which preceded the tax sale, the court said: "In this case the advertisement gave the full name of plaintiff, adding her estate or heirs. In our view the advertisement conformed to the requirement of the act."

The defendant in error asserts that we have no jurisdiction to review the decision of the state court because no Federal question appears by the record to have been raised either in the trial court or in the Supreme Court of Louisiana, and because no question of that nature was decided in either of these courts, or if a Federal controversy was passed upon by the Supreme Court of the State, the decree of that court is sufficiently sustained, apart from any Federal question which may have been referred to in the opinion. To the contrary, the plaintiff in error contends that a Federal question was necessarily involved in and was passed on by the decision below, and that the issue so determined was there duly presented for consideration. The first of these propositions is thus evolved. The defects asserted to exist in the tax assessment and sale were, it is claimed, so radical in their nature that they would, if they had been considered, have caused the assessment and sale to amount to a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States. From this premise is deduced the conclusion that the action of the state Supreme Court in refusing to consider the proof as to the existence of the defects was equivalent to taking property without due process of law. In other words, the argument is that the decision below, in effect, held that by virtue of the presumption engendered by the Louisiana act of 1884, and arising from the tax collector's deed, the plaintiff was estopped from claiming his property, even although there had been no assessment and no sale at all. Whilst it is conceded that the Federal question which is thus asserted to be necessarily involved in and embraced by the decision of the Supreme Court of Louisiana, does not appear to have been raised on the record either in the trial court or the Supreme Court, this fact is claimed to be immaterial. The system of practice prevailing in Louisiana, it is

argued, rendered it impossible to place the Federal question on the record in the strict sense of the word, and caused it to be possible only to present such issue by means of the brief of counsel filed in the Supreme Court of the State before the hearing. This brief, duly certified by the clerk of the Supreme Court of the State of Louisiana, has been presented, and it is argued that, in view of the system of practice obtaining in the State of Louisiana, this court may look to the brief as a legitimate source of information, and *Stewart* v. *Kahn*, 11 Wall. 493, is relied on as supporting this proposition.

To decide the issue as to jurisdiction, we will at the outset ascertain whether a Federal question was necessarily involved in the decision of the state Supreme Court. Even though it be that a Federal controversy was decided, nevertheless if the questions of a purely state character, upon which the Supreme Court of Louisiana passed, are completely adequate to sustain the decree by that court rendered, wholly independent of the Federal question, it will result that no Federal issue is presented for review. *Egan* v. *Hart*, 165 U. S. 188, 191; *Powell* v. *Brunswick County*, 150 U. S. 433, 441, and authorities referred to in both of the foregoing cases. And if this conclusion be reached it will be unnecessary to consider whether, under the practice which prevails in Louisiana, the Federal question could have been presented in any other mode than by brief of counsel, and whether this fact would authorize this court to go beyond the technical record and look to such brief to aid in determining whether the Federal issue was duly set up and claimed.

Because the court below applied the statutory presumption of correctness arising from the tax collector's deed, and refused to consider the alleged defects in the assessment and sale, it does not follow that, if the presumption had not been applied and the alleged imperfections in the assessment had been given their full weight, want of due process of law would have resulted from maintaining the sufficiency of the assessment and from upholding the validity of the tax sale. It follows that, in order to ascertain whether a Federal question was necessarily involved in the decision of the lower court, we are com-

pelled to determine whether the vices asserted to exist in the assessment and sale were of such a nature as to cause the enforcement of the assessment and sale to deprive the plaintiff in error of his property without due process of law. The contention advanced in argument on this subject is much broader than the case justifies; thus it is said, the state statute directs that from a tax collector's deed a conclusive presumption of a previous assessment shall be deduced, hence the statute in terms is repugnant to the Fourteenth Amendment since it takes property under a tax sale, although no assessment whatever had ever been levied on the property so taken. But, as thus stated, the proposition presents a purely moot question. The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law.

We come, then, to consider whether the alleged defects in the assessment and in the advertisement were of such a nature as to cause the enforcement of the one and the upholding of the other to so operate as to deprive the plaintiff of his property without due process of law. The error in the advertisement was that, although the publication gave the full name Rafael Maria Del Castillo, it was accompanied with the addition "or her estate and heirs," and the alleged defect in the assessment was that the property was assessed in the name of R. Castillo, when the real name of the owner was Rafael Maria Del Castillo. The decision of the state court that the advertisement was sufficient under the Louisiana statute involved purely a state question, which we accept and follow. Conceding that a sale to enforce taxes made without notice, actual or constructive, would be a want of due process of law, it is yet obvious that the publication for thirty days required by the state law was sufficient notice to constitute due process of law, and that the mere fact that there was affixed to the name inserted in the advertisement the words "or her estate and heirs" did not destroy the efficacy of the advertisement, and

did not cause it to be, in legal contemplation, no notice whatever. The contrary proposition could only be supported upon the theory that, although a complete description of the property and the full name of the owner were inserted in the advertisement, the mere addition of the words referred to were so calculated to deceive and mislead as to render the notice legally inoperative. But such assumption would be to the last degree technical and unreasonable, and cannot be indulged in.

We dismiss, then, from view the alleged defects in the advertisement, and will consider the assessment. In doing so we will take notice of, and give full effect to, the fact that the name placed on the assessment roll was R. Castillo instead of Rafael Maria Del Castillo, which was the full name of the owner of the property assessed. Although the law of Louisiana under which the assessments in question were made provided for the placing of the name of the owner on the assessment roll where such name was known, it also directed that the property assessed should be described in the assessment roll. The statutes, moreover, expressly fixed a time when the assessment rolls should be exposed for examination and correction, and furnished ample opportunity, not only for revision as to valuation, but also for judicial correction of any legal error which might be asserted to exist in the assessment. The notice required by the statute to be given of the opening of the assessment rolls for inspection and revision was not addressed to each particular person assessed, but was afforded by a general publication, calling upon all persons having property subject to taxation to come forward and ask for such correction as they desired to have made. Louisiana Acts, Extra Session of 1877, pp. 154, 155; Louisiana Acts of 1871, p. 118. Beyond peradventure, this statute afforded both constructive and actual notice of the making of the assessment, and ample opportunity to any property owner to correct or resist the same if he deemed himself injured thereby. It cannot be doubted that in the exercise of its taxing power the State of Louisiana could have directed that the property subject to its taxing authority should be assessed without any

reference whatever to the name of the owner, that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. As said in *Witherspoon* v. *Duncan*, 4 Wall. 210, 217, "It is not the province of this court to interfere with the policy of the revenue laws of the States, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner, or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes."

The claim, then, is that the assessment in question did not constitute due process of law within the Fourteenth Amendment because of error in the name of the owner, although the assessment would have been due process if under the state law it had not been required to mention the name of the owner, that is to say, that the assessment is repugnant to the Constitution of the United States, because of the lesser when it would not have been in conflict with the Constitution for the greater omission. This deduction demonstrates the error of the proposition relied on, and it cannot be escaped by saying that although the State had the power, without violating due process of law, to dispense with the name, nevertheless where the state statute has directed the use of a name in making an assessment, a defective giving thereof renders the assessment wholly void and a want of due process of law. This argument is answered by *Williams* v. *Supervisors of Albany*, 122 U. S. 154, 164, where, in considering the power of a State as to the assessment and collection of taxes, speaking through Mr. Justice Field, it was said:

"The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from

neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired."

The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the State, and as it is solely the result of such authority may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several States. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. *Pittsburg, Cincinnati &c. Railway* v. *Backus*,

154 U. S. 421; *Kentucky Railroad Tax cases*, 115 U. S. 321; *Davidson* v. *New Orleans*, 96 U. S. 97.

Bearing the foregoing elementary principle in mind, we will briefly notice the adjudicated cases upon which the plaintiff in error relies.

The authorities referred to tending to establish that where the law requires an assessment to contain the name, the omission of the name renders the assessment void, are inapposite to the question under consideration. We are not here concerned with the meaning of the Louisiana statutes, or whether we would hold as an original proposition, were we construing them, that a defect in the name of the person assessed would not be a material variance. The Supreme Court of the State of Louisiana has construed the statutes of that State otherwise. The issue which we are to determine is not what interpretation should be given to the statutes of the State of Louisiana, but whether, accepting the meaning affixed to the statutes of that State by the court of last resort of the State, their provisions as so interpreted are repugnant to the Constitution of the United States, because not affording due process of law. The previous adjudications of the Supreme Court of Louisiana referred to by that court in its opinion and upon which it rested its decree in this case, in effect hold that under the Louisiana law a mistake in the name did not render the assessment void, and therefore that the conclusive presumption engendered by the Louisiana act of 1884 was not intended to, and did not make valid a wholly void assessment. Because in a case decided subsequently to the one now under review the Supreme Court of the State of Louisiana has held that an assessment in the name of a person deceased rendered such assessment wholly void, it does not follow that the court thereby departed from the ruling which it had made in this case, and which had been by it rested upon a line of decisions declared by it to have conclusively settled the law of Louisiana on the subject, and which, in effect, it announced had become a rule of property in that State. The case of *Marx* v. *Hanthorn*, 148 U. S. 172, in no way conflicts with the foregoing considerations. That case came to

Syllabus.

this court on appeal from a Circuit Court of the United States, and its decision involved ascertaining the meaning of the tax laws of the State as interpreted by the court of last resort thereof. In performing this duty the court adopted and followed the construction given to the tax laws of the State by the Supreme Court of the State whence the case came.

There is a claim asserted in argument that as a particular section of the act of 1884 provided that the sum of the bid at a tax sale should be paid into the state treasury, therefore it is clearly unconstitutional, since, in a case where the bid exceeded the taxes, the surplus money of the owner would go into the state treasury without provision for its repayment. But this is a mere abstract contention, since the fact is that the sum bid at the tax sale in question was less than the amount of the taxes assessed against the property.

Dismissed for want of jurisdiction.

PENN MUTUAL LIFE INSURANCE CO. *v.* AUSTIN.

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

No. 44. Argued April 23, 1897. — Decided January 3, 1898.

The complainants in their bill predicated their right to relief upon the averment that certain ordinances adopted by the municipal authorities of Austin, and an act of the legislature of Texas referred to in their bill impaired the obligations of a contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State and the city ordinances were in contravention of the Constitution of the United States. *Held*, that these allegations plainly brought the case within the provision in the act of March 3, 1891, c. 517, 26 Stat. 826, conferring upon this court jurisdiction to review by direct appeal any final judgment rendered by a Circuit Court in any case in which the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States.

The reason upon which the rule that the mere assertion of a claim, unaccompanied by any act to give effect to the asserted right, cannot avail to keep alive a right which would otherwise be precluded because of laches, is based not alone upon the lapse of time during which the neglect to

enforce the right has existed, but upon the change of condition which may have arisen during the period in which there has been neglect; and when a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.

The facts in this case bring it within that rule.

The court below sustained a demurrer to and dismissed for want of equity the bill of the complainants, by which, as citizens of the States of Pennsylvania, Maryland and New York, respectively, they impleaded the defendants, the one a municipal corporation created by a law of the State of Texas, and its Mayor and Board of Public Works, citizens of the State of Texas, and the other a corporation organized under the authority of the general laws of the State of Texas regulating the formation of corporations, also a citizen of that State.

The bill, which was filed on January 3, 1895, alleged in substance as follows: That the city of Austin was in 1892 a municipal corporation, and that for many years its inhabitants and the city itself for municipal purposes had been supplied with water by a corporation known as the City Water Company; that in 1882, in consequence of the growth of the city, both for the health of the people of the city, the safety of its property, and the development of its manufacturing industries, a larger supply of water was absolutely needed, and that the taxpayers presented a petition to the city authorities asking that an arrangement by contract or otherwise be at once made to afford the augmented water supply which was essential; that the municipality, being fully empowered by its charter to supply water and being authorized by the general laws of the State of Texas to make a contract for so doing, on the 13th day of April, 1882, did enter into a contract with the City Water Company to the end that a more copious supply of water should be furnished; that this contract gave to the company the right to furnish water for twenty years, with the privilege on the part of the city of buying at the end of ten years, or at any time on giving one year's notice, the

water works which the contract required the company to erect; that the contract fixed a reasonable price to be paid for the use of water to be furnished by the water company, provided for the establishment of a given number of hydrants for the use of the city, and stipulated a rental therefor; that it imposed upon the corporation obligations of the most onerous character, compelling it to erect a large and costly plant, to lay extensive mains and pipes, and to extend them at any time during the life of the contract wherever the city might direct, and exacted that the company should add new hydrants for municipal uses as the city might require, giving to the water company as compensation in addition to the rentals to be paid by the city for hydrants, as above stated, a commutation of municipal taxation.

The bill averred that the contract was in all respects advantageous to the city and beneficial to its inhabitants, and was indeed as to each and every obligation contained therein or resulting therefrom reasonable and just; that the city at the time the contract was entered into was not in a position to itself erect the works without inordinately increasing its burden of taxation, and that the contract contemplated that the water company should obtain the money to erect the works by issuing its negotiable bonds, since there was therein contained a stipulation that the money to become due for the rentals of the hydrants should be paid by the city to the trustee of any bonds which might be issued by the water company, so as to guarantee the prompt payment of the interest on any such bonds; that the water company, on the faith of the contract, issued to the Farmers' Loan and Trust Company its negotiable bonds for $250,000, secured them by mortgage upon all its property, present and prospective, and with the sum thus realized and other available resources, with integrity and fidelity and in complete compliance with every obligation resting on it, erected the desired water works plant, which afforded the desired supply of water; that of the bonds thus issued to the Farmers' Loan and Trust Company, $100,000 in amount were bought for more than their face value in open market by the Penn Mutual Life Insurance Company, one of

the complainants. The bill moreover alleged that, in March, 1883, after the plant had been constructed and many miles of mains had been laid, the city, by ordinance duly enacted, accepted the work, and declared that the water company had fully performed its obligations. That subsequent to this date, the city directed a very large extension of the mains and pipes to be made, which was promptly executed by the water company with money obtained from an additional issue of bonds to the Farmers' Loan and Trust Company amounting to $100,000, $10,000 of which Jacob Tome, another of the complainants, bought for full value in open market.

The bill then alleged that in 1884 the city of Austin contracted with a corporation known as the Austin Electric Light Company to build and carry on a plant required to light that city, and that this corporation issued its bonds to carry out its corporate purposes to the extent of $25,000. That in June, 1887, all the plant rights, privileges, franchises and obligations of this electric light company, as well as those of the water company, were, with the consent and approval of the city of Austin, transferred to a corporation known as the Austin Water, Light and Power Company, a Texas corporation having corporate capacity both to undertake the duty of supplying water and of furnishing light to the city of Austin; that, in consequence of its assumption of all the obligations of both the aforementioned companies, the Austin Water, Light and Power Company was required by the city to make considerable additions to its water mains, and, in order to obtain the capital to execute these directions of the city, that company issued to the Farmers' Loan and Trust Company of New York $750,000 of bonds, secured by mortgage upon all its property, $375,000 of these bonds being reserved to pay the outstanding bonds, (that is, the $250,000 first issue of the water company, the $100,000 second issue and the $25,000 issue by the Austin Electric Light Company,) and the remaining $375,000 being negotiated in open market for full value, the proceeds being expended in complying with the city's direction, and that $50,000 of these last bonds were purchased in open market for full value by Ogden and Robert Goelet,

the last named complainants. The bill averred that the water works thus originally established and extended were in every respect entirely adequate to supply every want, not only of all the inhabitants of the city of Austin, but of the municipality, and that in each and every particular the municipality was as advantageously placed with respect to a water supply as it could have been under any condition or circumstance whatever.

The bill then alleged that, despite the existence of the contract, and the entire justness and fairness of each and every obligation and stipulation therein contained, and without any just reason therefor, the city of Austin, on the 31st day of March, 1890, passed an ordinance entitled "An ordinance ordering an election to obtain the consent of the property tax paying qualified voters of the city of Austin, to the extension by the city council of the bonded indebtedness of the city of Austin for the purposes of constructing a system of water works and furnishing lights for the city of Austin." That this ordinance provided that an election should be held on the 5th day of May, 1890, to obtain the consent of the taxpayers for an increase of the bonded indebtedness of the city to the amount of $1,400,000 for the purpose of obtaining money to erect a system of water works and an electric light plant for lighting the city; that on the 5th of May, 1890, the election was held, as provided, and the taxpayers gave their assent to the proposition submitted by the ordinance, and that the city council thereafter declared the election to have been carried, and that the power to issue bonds had been sanctioned; that on July 21, 1890, the city passed an ordinance authorizing the increased issue of $1,400,000 of bonds, providing for the levy and collection each year, as long as the bonds should be outstanding, of a tax to aid in paying the same. This ordinance directed that the bonds on their face should not only contain a statement of the objects for which they were issued, but should also show that their payment was secured by all the sums to be collected for the use of the water to be furnished by the new plant, and the ordinance moreover contained a provision guaranteeing that the rates to be charged for the

water to be furnished should be so regulated that their product would equal the sum of the interest on the bonds, and a sinking fund to provide for the retirement of the principal thereof. The money to be realized from the sale of the bonds was required to be set apart in a distinct fund, to be warranted for from time to time in payment of the work as it progressed. The character of the work to be done was moreover fixed by an ordinance which empowered the board of public works to construct water works by means of a dam across the Colorado River at a designated point, in accordance with the plans of a civil engineer who was named therein.

It was alleged that as the purpose and necessary effect of the foregoing action of the city was to impair the contract rights of the Austin Water, Light and Power Company held by it as the assignee of the two original companies, the ordinances passed by the city and each and everything subsequently done thereunder was void because repugnant to the Constitution of the United States. The bill moreover averred that in April, 1891, the legislature of the State of Texas passed an act giving a new charter to the city of Austin, which contained an express grant of power to that city to construct for its own use a water works plant, and that the sole object of this new charter was to sanction the action of the municipality previously taken, and therefore the act in question was also void under the Constitution of the United States, because it impaired the previous contract rights of the Austin Water, Light and Power Company.

It was averred that the board of public works had "already expended a large sum of money in the construction of a dam across the Colorado River," and "are now actually laying water pipe in and along the streets of the city of Austin, and it is the avowed intention of the said city to press the construction of said rival system of water works to a speedy completion, and upon the completion of the same to discontinue the taking of water from the said water company, and to refuse to perform any obligation resting upon the said city as embraced in the said contract with the said city water company." It was alleged that the tax provided by the ordinance

which authorized the building of the new water works had been levied for the years 1893 and 1894, and that the property of the Austin Water, Light and Power Company had been assessed for this tax, and that the property of the company was thus being levied upon for a tax to be used for the purpose of erecting the new works which were intended to take the place of its plant, and thereby to destroy its contract rights. Although the bill was filed by the complainants in virtue of their rights as holders and owners of the bonds issued or assumed by the Austin Water, Light and Power Company as aforesaid, it contained no averment that either the bondholders, who were complainants, or any others, had at any previous time requested the trustee to take any action so as to prevent the accomplishment of the violation of the contract rights of the corporation and its bondholders, which it was alleged had inevitably arisen from the action of the city originating in 1890. The bill, however, contained the following averments:

"That as soon as the said city of Austin announced its intention of constructing a rival system of water works, and before anything was done in pursuance thereof, the said M. D. Mathers, president of the Austin Water, Light and Power Company, on behalf of the said water company and these bondholders, remonstrated with the said mayor and city council, and requested them and urged them not to violate the said contract, or to take any steps to depreciate the value of the property of the said water company, but to exercise the right which the said city has to purchase the said works at their appraised value; and the said bondholders have continued, ever since that time, to remonstrate with the said city of Austin and the officers thereof, but that the said city has entirely disregarded the said remonstrances and requests, and has openly repudiated all liability under the said contract."

And further the bill alleged:

"That your orators and the other bondholders of the said water company have repeatedly applied to the said Austin Water, Light and Power Company, and its president and board of directors, and requested them to institute proceedings

to protect the property of the said water company, and the rights therein of the said bondholders; but that the said water company has failed to comply with the request of your orators and said bondholders. But the said Austin Water, Light and Power Company, and the officers thereof, by reason of the contract relations existing between the said city of Austin and the said company, fear that the consequences of any such litigation instituted by the said Water Company, would be exceedingly disastrous and would precipitate adverse and hostile action by the said city of Austin."

The relief asked by the bill is thus stated in the prayer thereof:

"That your orators may have the decree of your honorable court, adjudging and decreeing that the said ordinance and contract, so accepted and acted upon by all the parties, are in full force and effect, and that the said contract is a valid and subsisting contract, binding upon the said city as well as upon the said water company and upon the said bondholders, and that the said city must abide by and perform the same, and that until its purchase of the said existing water works, in the manner and upon the terms set forth in the said contract, and that the said city of Austin, its mayor and city council and board of public works, have no right or power to construct a river water works system to, in any way, interfere with the rights of the said Austin Water, Light and Power Company, and that it is unlawful and inequitable for the said city of Austin to levy and collect the tax upon the property of the said Austin Water, Light and Power Company to be expended in the unlawful and inequitable manner hereinbefore alleged, in the construction of a rival system of water works; and that a writ of injunction may issue out of this honorable court restraining the said city of Austin, its mayor and city council and board of public works, and its other officers, servants, agents and employés, from taking a supply of water from any other source and from proceeding in constructing and maintaining a new and distinct system of water works, and from taking and appropriating to its own use, except in the manner provided in said contract, any portion of the

said works, so constructed at its instance and for its benefit with money furnished upon the faith of its obligation by the said Austin Water, Light and Power Company and the said bondholders, and that your orators may have such other and further relief as the case may, in equity, require and as to this honorable court may seem proper."

The demurrer which the lower court sustained, besides asserting that the bill disclosed no cause for equitable relief, rested upon seven grounds, which may be reduced to six, substantially as follows: 1st. Because by the constitution of the State of Texas the contract made by the city of Austin with the water company was void. 2d. Because the contract was beyond the power of the corporation as defined in its charter and as limited by the general laws of the State of Texas. 3d. Because the commutation of taxation granted to the water company was in its essence but an exemption, and the city was without power, under the constitution of the State of Texas, to grant it. 4th. Because even if an exclusive right was given to the water company, such grant under the constitution and laws of the State of Texas was subject to alteration, amendment or repeal by the legislature which had exercised such reserved power. 5th. Because the granting of any exclusive rights was forbidden by the constitution which was in force at the time the alleged contract was made. 6th. Because even if the complainants had any contract rights, and if there had been an impairment thereof, full and adequate remedy was afforded by an action at law, and there was, hence, no reason for the interposition of a court of equity.

Mr. Skipwith Wilmer and *Mr. D. T. Watson* for appellants. *Mr. Samuel B. Huey* was on their brief.

Mr. S. R. Fisher for appellees.

Mr. Justice White, after making the foregoing statement of the case, delivered the opinion of the court.

The jurisdiction of this court to review the decree of the trial court is denied, the contention being that if an appeal

from the decision of the trial court was desired, it should have been had in the Circuit Court of Appeals, and cannot be here obtained.

By the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, creating the Circuit Courts of Appeals, jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the Circuit Court "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the State of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State of Texas and the city ordinances were in contravention of the Constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891.

Not only were the averments of the bill, as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the State, and were, therefore, in legal intendment the equivalent of laws enacted by the State itself. *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S. 557, and cases there cited. The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition, "That the constitution or a law of the State of Texas conflicts with appellant's contract, and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face of complainant's bill

that there was involved in this case a Federal question, the determination of which was essential to a correct decision of the case." But the words of the statute, which empower this court to review directly the action of the Circuit Court, are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the act of 1891, to review by direct appeal the final action of the Circuit Court where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States*, 143 U. S. 570.

Conceding, without deciding, the legality and binding force of the contract as averred in the bill, and that the obligations which it created were materially impaired, not only by a law of the State of Texas, but also by the ordinances passed by the city, and the execution of such ordinances, all as alleged; conceding, moreover, without so deciding, that the Austin Water, Light and Power Company was the successor in law of the original corporations, and hence responsible for all

their obligations and entitled to all their rights; and, further, conceding that the complainants as bondholders have the capacity to assert the impairment of the contract made by the city of Austin with the City Water Company, it yet becomes at the outset necessary to decide whether granting, *arguendo*, all these propositions, the complainants are entitled to the relief which they seek, that is to say, whether they can be heard to invoke the interposition of a court of equity. As a prerequisite to the solution of this question, it is necessary to determine precisely the remedy which it is the purpose of the bill to obtain in order to redress the wrongs which it alleged to exist. Whilst the prayer of the bill asks that the validity of the contract be recognized, and whilst it also prays that the legality of the commutation of taxation created by the city ordinance be decreed, these prayers are made but the foundation or premise for the real relief which the bill invokes; that is, the exercise of the power to enjoin in order thereby to perpetually restrain the city of Austin from completing the water works, by it commenced, and from levying on the property of the Austin Water, Light and Power Company any taxation to be used to complete the new water works. The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the water works.

In *Speidel* v. *Henrici*, 120 U. S. 377, 387, the court said, speaking through Mr. Justice Gray:

"Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.'"

In *Galliher* v. *Cadwell*, 145 U. S. 368, 371, speaking through Mr. Justice Brewer, it was said:

"The question of laches turns not simply upon the number of years which have elasped between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. The cases are many in which this defence has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all."

In *Hammond* v. *Hopkins*, 143 U. S. 224, 250, through Mr. Chief Justice Fuller, the court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In *Willard* v. *Woods*, 164 U. S. 502, 524, the court said:

"But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806, 811; *Lansdale* v. *Smith*, 106 U. S. 391, 394; *Badger* v. *Badger*, 2 Wall. 87, 95."

In *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, and *Mackall* v. *Cassilear*, 137 U. S. 556, it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary. *Whitney* v. *Fox*, 166 U. S.

637, 647, 648; *Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573, 582; *Abraham* v. *Ordway*, 158 U. S. 416, 423; *Ware* v. *Galveston City Co.*, 146 U. S. 102, 116; *Foster* v. *Mansfield, Cold Water etc. Railroad*, 146 U. S. 88, 102; *Galliher* v. *Cadwell*, *supra*, where the earlier cases are fully reviewed; *Hoyt* v. *Latham*, 143 U. S. 553; *Hanner* v. *Moulton*, 138 U. S. 486, 495; *Richards* v. *Mackall*, 124 U. S. 183, 189.

The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Galliher* v. *Cadwell*, *supra*, 372, "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches. The equitable doctrine in this regard is somewhat analogous to the legal rule which holds that where one who has the title in fee to real estate, although he has not been compensated, "remains inactive and permits them (a railway company) to go on and expend large sums in the work, he will be

estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein and be restricted to a suit for damages." *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 11, and authorities there cited. As said in *Galliher* v. *Cadwell*, *supra*, 373: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties."

Do the facts in the case before us bring it within the rule of laches as expounded in the foregoing authorities? The rights of the water company, under its contract, were created long prior to the year 1890. Before that year the water works plant was constructed, and from it the inhabitants of the city of Austin were being supplied with water. The violation of the contract relied upon as impairing its obligations originated in 1890. The first step was the passage of an ordinance submitting to the voters of the city of Austin the proposition whether the bonded debt of the municipality should be increased by the issue of $1,400,000 of negotiable bonds, the proceeds arising from the sale of such bonds to be used in erecting the new water works. There was nothing clandestine in the conduct of the municipality, since its action was dependent on a municipal election. The holding of the municipal election followed, and, after it had taken place, occurred the passage of the ordinance, directing the issue of the new bonds, and providing that they were to be secured by the water rates to be collected from the new water works which were to be constructed. From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which the bill alleges was necessarily to result from the action of the municipal authorities. During all this period it does not appear from the bill that the trustee representing the bond-

holders was ever called upon by them to take any steps whatever to protect their interest. It cannot be said that the bondholders were ignorant of the action and purposes of the city of Austin, since the bill avers that, conscious of the fact that their rights were to be impaired by the action of the city, they repeatedly called upon the Austin Water, Light and Power Company to take action on the subject, but that that corporation refused so to do, and that the bondholders continued to object to the proposed action of the city without doing anything whatever to protect their legal rights. The bill alleges the issue by the municipal authorities of the series of bonds provided for, since it says, in referring to the tax levied upon the property of the Austin Water, Light and Power Company, that for the purpose "of providing for the interest and sinking fund on the bonds of the said city of Austin, issued for said purpose," (that is, the new water works,) "the said city of Austin has levied a tax. . . ." The exact amount of the new bonds which have been issued is not specifically set out in the bill, but it is inferable from the allegations, to which we have just referred, that the whole series have been issued by the city, since the bill alleges that the taxation has been levied for the purpose of paying the bonds provided by the ordinance. Moreover, that either the whole or a large portion of the bonds have been issued is plainly deducible from other averments in the bill. The ordinance, which is an exhibit to the bill, provides that to pay for the work proposed the bonds should be discounted from time to time as required by the necessities of the situation, that the proceeds arising from their sale should be put to a special fund, and be warranted against by the proper city officer to pay for the work. And the bill avers that the city at great expense has nearly completed a costly dam across the Colorado River as a part of the work provided. The bill therefore presents a case where there has arisen during the existence of the delay a material change in the situation of the parties, and besides is one where rights of third parties have intervened. It cannot be said, under the case made by the bill, that the power of a court of equity can be exerted to

forbid the finishing of the water works structure, which the bill alleges has been largely completed, without seriously impairing the rights of the bondholders under the ordinances in question. One of the methods of payment stipulated, as we have seen, for these bonds was the revenue to be derived from the new water works, and of course no such revenues can ever result if the water works are never to be finished. It is certain, then, that if the completion of the new water works be restrained by an injunction, that the interest of the new bondholders will be seriously affected, and that this result will be brought about by a decree of a court of equity rendered in the enforcement of asserted rights of complainants, who, if they had taken timely action, could have adequately protected themselves from injury without resulting wrong to the rights of many other persons.

It being clear under such circumstances that the complainants were not entitled to the relief which they sought, it of course follows that

The court below did not err in sustaining the demurrer and dismissing the bill for want of equity. We think, however, that the dismissal should have been without prejudice, and the decree below is therefore modified in that particular, and as so modified, it is affirmed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 13. VALK *v.* UNITED STATES. Appeal from the Court of Claims. Submitted October 12, 1897. Decided October 18, 1897. *Per Curiam.* Judgment affirmed on the authority of *Marks* v. *United States*, 161 U. S. 297, and *Leighton* v. *United States*, 161 U. S. 291. *Mr. John C. Chaney* for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Thompson* for appellee.

No. 270. THORP *v.* BONNIFIELD. Certificate from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted May 24, 1897. Decided October 18, 1897. *Per Curiam.* The question whether the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this case answered in the negative on the authority of *Aztec Mining Company* v. *Ripley*, 151 U. S. 79, and *Steamer Coquitlam* v. *United States*, 163 U. S. 346. *Mr. John M. Thurston* for plaintiff in error. *Mr. E. S. Pillsbury* for defendants in error.

No. 58. KETTENRING *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. Submitted October 20, 1897. Decided October 25, 1897. Judgment reversed upon confession of error by counsel for the defendant in error and cause remanded for further proceedings in conformity to law. *Mr. William M. Cravens* for plaintiffs in error. *Mr. Attorney General* and *Mr. Assistant Attorney General Boyd* for defendant in error.

No. 52. DEFER *v.* DE MAY. Error to the Supreme Court of the State of Michigan. Argued and submitted October

20, 1897. Decided October 25, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Burlington, Cedar Rapids &c. Railway* v. *Simmons*, 123 U. S. 52; *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536, and cases cited. *Mr. George William Moore* for plaintiff in error. *Mr. George Gartner* for defendants in error.

No. 148. GRAFTON, EXECUTRIX, *v.* PAINE. Appeal from the Court of Appeals of the District of Columbia. Submitted October 25, 1897. Decided November 1, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Davis* v. *Crouch*, 94 U. S. 514; *Lodge* v. *Twell*, 135 U. S. 232; and *McGourkey* v. *Toledo and Ohio Central Railway*, 146 U. S. 536. *Mr. Walter D. Davidge* and *Mr. C. A. Brandenburg* for motion to dismiss. *Mr. J. M. Wilson* and *Mr. L. E. Payson* opposing.

No. 253. CHARLESTON & SOUTH SIDE BRIDGE COMPANY *v.* STATE OF WEST VIRGINIA. Error to the Supreme Court of Appeals of the State of West Virginia. Submitted October 25, 1897. Decided November 1, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Morrison* v. *Watson*, 154 U. S. 111; *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131, and cases cited. *Mr. W. S. Laidley* for motion to dismiss. *Mr. Malcolm Jackson* opposing.

No. 60. REAVES *v.* OLIVER. Error to and appeal from the Supreme Court of the Territory of Oklahoma. Submitted October 27, 1897. Decided November 1, 1897. *Per Curiam.* The order or decree sought to be reviewed was not final but interlocutory, and the writ of error and the appeal must be dismissed. Acts September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat. §§ 691, 692; Act March 3, 1891, c. 517, 26 Stat. 826; *Forgay* v. *Conrad*, 6 How. 201, 205; *McLish* v. *Roff*, 141 U. S. 661; *American Construction Co.* v. *Jacksonville, Tampa &c. Railway*, 148

U. S. 372, 378; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524. *Mr. Frank B. Crosthwaite* for plaintiff in error and appellant.

No. 61. SOUTHERN EXPRESS COMPANY *v.* VIRGINIA EX REL. BUFORD; No. 62. SOUTHERN EXPRESS COMPANY *v.* VIRGINIA EX REL. PENDLETON; No. 63. SOUTHERN EXPRESS COMPANY *v.* VIRGINIA EX REL. MCCOLGAN; No. 64. SOUTHERN EXPRESS COMPANY *v.* VIRGINIA EX REL. MCGAVOCK; and No. 65. SOUTHERN EXPRESS COMPANY *v.* VIRGINIA EX REL. WALKER. Error to the Supreme Court of Appeals of the State of Virginia. Argued October 27, 1897. Decided November 1, 1897. *Per Curiam.* Judgments affirmed with costs and interest on the authority of *Chicago and Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339. *Mr. F. S. Blair* for plaintiffs in error. *Mr. James A. Walker* for defendants in error and *Mr. J. J. A. Powell* for defendants in error in Nos. 63 and 64.

No. 370. BALDWIN, GUARDIAN, *v.* COUNTY COMMISSIONERS OF WASHINGTON COUNTY. Error to the Court of Appeals of the State of Maryland. Submitted November 1, 1897. Decided November 8, 1897. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Eustis* v. *Bolles*, 150 U. S. 361, and cases cited. *Mr. Henry Kyd Douglas* for motion to dismiss. *Mr. Charles A. Boston* opposing.

No. 429. DURRANT *v.* HALE, WARDEN. Appeal from the Circuit Court of the United States for the Northern District of California. Submitted November 1, 1897. Decided November 8, 1897. *Per Curiam.* Final order affirmed, with costs, on the authority of *Hurtado* v. *California*, 110 U. S. 516; *Nordstrom* v. *Washington*, 164 U. S. 705; *Craemer* v. *Washington*, 168 U. S. 124. *Mr. William F. Fitzgerald* and *Mr. T. C. Catchings* for motions to dismiss or affirm. *Mr. A. L. Hart* and *Mr. F. P. Dewees* opposing.

Decisions announced without Opinions.

No. 92. HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY *v.* BOWLES, and No. 284. HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY *v.* STRYCHARSKI. Error to the Supreme Court of the State of Texas. Argued and submitted November 4, 1897. Decided November 8, 1897. *Per Curiam.* Judgments affirmed with costs and interest on the authority of *Pennsylvania Railroad* v. *Jones*, 155 U. S. 333, 350; *Railroad Company* v. *Brown*, 17 Wall. 445, 450; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81; *Texas & Pacific Railway* v. *Bloom's Administrator*, 164 U. S. 636. *Mr. R. S. Lovett* and *Mr. Maxwell Evarts* for plaintiffs in error. *Mr. H. M. Garwood* for defendants in error in No. 92. *Mr. Presley K. Ewing* and *Mr. H. F. Ring* for defendants in error in No. 284.

No. 111. SCHOFIELD, RECEIVER, *v.* FOLSOM. Error to the Supreme Court of the Territory of New Mexico. Argued November 9, 1897. Decided November 15, 1897. Dismissed for the want of jurisdiction on the authority of *Gregory Consolidated Mining Company* v. *Starr*, 141 U. S. 222. *Mr. W. B. Childers* for plaintiff in error. *Mr. Neill B. Field* and *Mr. Frank W. Clancy* for defendant in error.

No. 96. BEARDSLEY *v.* BROOM, ADMINISTRATRIX. Appeal from the Supreme Court of the Territory of Utah. Argued November 8, 1897. Decided November 29, 1897. Decree affirmed with costs by a divided court and cause remanded to the Supreme Court of the State of Utah. *Mr. Charles C. Dey* and *Mr. Ogden Hiles* for the appellant. *Mr. E. M. Allison, Jr.*, and *Mr. James N. Kimball* for the appellee.

No. 467. UNION STREET RAILWAY COMPANY OF SAGINAW, MICHIGAN, *v.* SNOW. Error to the Supreme Court of the State of Michigan. Motions to dismiss or affirm submitted November 15, 1897. Decided December 6, 1897. *Per Curiam.* Dismissed for want of jurisdiction on the authority of *Hen-*

derson Bridge Company v. *Henderson City*, 141 U. S. 679; *Lehigh Water Company* v. *Easton*, 121 U. S. 388; *Sioux City Street Railway Company* v. *Sioux City*, 138 U. S. 98; *New Orleans City and Lake Railroad Company* v. *Louisiana*, 157 U. S. 219. *Mr. George W. Weadock* in support of motions.

No. 128. Noyes *v.* Silver Queen Mining Company. Certificate from the United States Circuit Court of Appeals for the Ninth Circuit. Submitted December 1, 1897. Decided December 6, 1897. Question answered in the negative on the authority of *Thorp* v. *Bonnifield*, 168 U. S. 703, and cases cited. *Mr. W. H. Doolittle* for Noyes. *Mr. John H. Miller* for the Mining Company.

No. 95. Bacon *v.* Steamer Poconoket. Certiorari to the United States Circuit Court of Appeals for the Third Circuit. Argued November 3 and 4, 1897. Decided December 13, 1897. Decree affirmed with costs by a divided court and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania. *Mr. Theodore Bacon* for the appellant. *Mr. Henry Flanders* and *Mr. E. F. Pugh* for the appellees.

No. 501. Ebanks *v.* Hale, Warden. Appeal from the District Court of the United States for the Northern District of California. Motions to dismiss or affirm submitted December 13, 1897. Decided December 20, 1897. *Per Curiam.* Order affirmed with costs on the authority of *Durrant* v. *Hale, &c., Warden*, 168 U. S. 705. *Mr. T. C. Catchings*, *Mr. W. F. Fitzgerald* and *Mr. W. H. Anderson* in support of motions.

No. 146. Missouri, Kansas and Texas Railway Company *v.* Fuller, Assignee. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Argued December 8, 1897. Decided January 3, 1898. Judgment affirmed with

costs by a divided court and cause remanded to the United States Court in the Indian Territory. *Mr. George P. B. Jackson* and *Mr. James Hagerman* for the plaintiff in error. *Mr. Harrison O. Shepard* for the defendant in error.

Decisions on Petitions for Writs of Certiorari.

No. 371. PICKHAM *v.* WHEELER–BLISS MANUFACTURING COMPANY. Seventh Circuit. Denied October 18, 1897. *Mr. Allan C. Story* for petitioner. *Mr. James M. Flower*, *Mr. Frank J. Smith* and *Mr. Harrison Musgrave* opposing.

No. 374. KING *v.* WILLIAMSON. Fourth Circuit. Granted October 18, 1897. *Mr. Maynard F. Stiles* for petitioner.

No. 380. AMERICAN GROCERY COMPANY *v.* GODILLOT. Third Circuit. Denied October 18, 1897. *Mr. W. H. Van Steenbergh* for petitioner. *Mr. H. Aplington* opposing.

No. 382. NATIONAL ACCIDENT SOCIETY *v.* SPIRO. Sixth Circuit. Denied October 18, 1897. *Mr. H. D. McBurney* for petitioner. *Mr. Henry H. Ingersoll* opposing.

No. 408. CONTINENTAL TRUST COMPANY OF NEW YORK, TRUSTEE, *v.* AMERICAN SURETY COMPANY. Seventh Circuit. Denied October 18, 1897. *Mr. Willard Parker Butler* and *Mr. A. H. Snow* for petitioner. *Mr. Bluford Wilson* opposing.

No. 468. NEELY *v.* NEWMAN. Fifth Circuit. Denied October 18, 1897. *Mr. W. A. Gunter* and *Mr. Thomas H. Clark* for petitioner. *Mr. J. D. Rouse* and *Mr. William Grant* opposing.

Decisions announced without Opinions.

No. 469. PIERCE *v.* TENNESSEE COAL, IRON AND RAILROAD COMPANY. Fifth Circuit. Granted October 18, 1897. *Mr. W. A. Gunter* and *Mr. Thomas H. Clark* for petitioner. *Mr. William I. Grubb* opposing.

No. 473. AULTMAN AND TAYLOR COMPANY *v.* SYME. Second Circuit. Denied October 18, 1897. *Mr. William H. Blymyer* for petitioner. *Mr. Edward F. Brown* opposing.

No. 474. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *v.* DUDLEY, and

No. 475. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO, *v.* ROLLINS & SONS. Eighth Circuit. Granted October 18, 1897. *Mr. C. S. Thomas* and *Mr. W. H. Bryant* for petitioners. *Mr. Edmund F. Richardson* opposing.

No. 381. ADAMS ET AL., ADMINISTRATORS, *v.* COWEN ET AL., TRUSTEES. Sixth Circuit. Granted October 25, 1897. *Mr. Lawrence Maxwell, Jr.*, for petitioner. *Mr. Judson Harmon*, *Mr. John Little* and *Mr. J. J. Glidden* opposing.

No. 460. RONDOT *v.* TOWNSHIP OF ROGERS. Sixth Circuit. Denied October 25, 1897. *Mr. James T. Keena* for petitioner. *Mr. Henry M. Duffield* opposing.

No. 451. LACKAWANNA IRON AND COAL COMPANY *v.* FARMERS' LOAN AND TRUST COMPANY. Fifth Circuit. Granted October 25, 1897. *Mr. J. Hubley Ashton*, *Mr. E. B. Kruttschnitt*, *Mr. E. H. Farrar* and *Mr. B. F. Jonas* for petitioner. *Mr. L. W. Campbell* and *Mr. H. B. Turner* opposing.

No. 477. ROCKER SPRING COMPANY *v.* THOMAS. Sixth Circuit. Denied October 25, 1897. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for petitioner.

Decisions announced without Opinions.

No. 481. J. J. WARREN COMPANY *v.* ROSENBLATT. Seventh Circuit. Denied October 25, 1897. *Mr. Samuel T. Fisher* for petitioner.

No. 482. WHITMAN *v.* NATIONAL BANK OF OXFORD. Second Circuit. Granted October 25, 1897. *Mr. William G. Wilson* and *Mr. Joseph H. Choate* for petitioner. *Mr. William B. Hornblower* and *Mr. Howard A. Taylor* opposing.

No. 485. ROEMER *v.* PEDDIE & COMPANY. Third Circuit. Denied October 25, 1897. *Mr. William Roemer pro se.*

No. 483. CROSSLEY, MASTER &c., *v.* TAYLOR, MASTER &c. Fourth Circuit. Denied November 1, 1897. *Mr. Floyd Hughes* for petitioner. *Mr. Robert M. Hughes* opposing.

No. 492. HALL, OWNER &c., *v.* STEAMSHIP ALENE &c. Second Circuit. Denied November 1, 1897. *Mr. George Bethune Adams* for petitioner. *Mr. Everett P. Wheeler* opposing.

No. 489. RITCHIE *v.* MCMULLEN. Sixth Circuit. Denied November 4, 1897. *Mr. Benjamin Butterworth* and *Mr. J. M. Wilson* for petitioner.

No. 493. MERCANTILE TRUST COMPANY *v.* FARMERS' LOAN AND TRUST COMPANY, TRUSTEE. Eighth Circuit. Denied November 8, 1897. *Mr. L. F. Parker*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioner. *Mr. John W. Noble*, *Mr. George H. Shields* and *Mr. George Zabriskie* opposing.

No. 494. WESTERN ASSURANCE COMPANY OF TORONTO *v.* J. H. MOHLMAN COMPANY. Second Circuit. Denied Novem-

ber 8, 1897. *Mr. Michael H. Cardozo* for petitioner. *Mr. Treadwell Cleveland* opposing.

No. 496. PULLMAN'S PALACE CAR COMPANY *v.* CENTRAL TRANSPORTATION COMPANY. Third Circuit. Granted November 8, 1897. *Mr. A. H. Wintersteen*, *Mr. Edward S. Isham* and *Mr. Joseph H. Choate* for petitioner. *Mr. John G. Johnson* and *Mr. Frank P. Prichard* opposing.

No. 486. STEWART *v.* COFFIN. First Circuit. Denied November 29, 1897. *Mr. Eugene P. Carver* and *Mr. E. E. Blodgett* for petitioner. *Mr. Edward S. Dodge* opposing.

No. 504. SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY *v.* TRUST COMPANY OF NORTH AMERICA. Eighth Circuit. Granted December 6, 1897. *Mr. John C. Coombs* and *Mr. Henry J. Taylor* for petitioner. *Mr. Joseph H. Call* opposing.

No. 507. KNOTT *v.* BOTANY WORSTED MILLS. Second Circuit. Granted December 6, 1897. *Mr. J. Parker Kirlin* for petitioner. *Mr. Wilhelmus Mynderse* opposing.

No. 518. BURKE *v.* PIERCE. Third Circuit. Denied December 6, 1897. *Mr. Samuel S. Mehard* for petitioner. *Mr. A. M. Imbrie* and *Mr. Q. A. Gordon* opposing.

No. 511. DICKERMAN, TRUSTEE, *v.* NORTHERN TRUST COMPANY. Seventh Circuit. Granted December 13, 1897. *Mr. Otto Gresham* for petitioner. *Mr. Monroe L. Willard* opposing.

No. 524. CHEW HING LUNG & COMPANY *v.* WISE, COLLECTOR.

Ninth Circuit. Granted December 20, 1897. *Mr. Charles Page*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioners.

No. 534. BAKER *v.* BAKER & Co. (LIMITED). Fourth Circuit. Denied January 3, 1898. *Mr. Holmes Conrad* and *Mr. R. T. Barton* for petitioner. *Mr. George Putnam* opposing.

APPENDIX.

I.

CORRESPONDENCE BETWEEN MR. JUSTICE FIELD AND THE OTHER MEMBERS OF THE COURT WITH REGARD TO HIS RETIRING FROM THE BENCH.

1. *Mr. Justice Field to the Chief Justice and the Associate Justices.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, October 12, 1897.

DEAR MR. CHIEF JUSTICE AND BRETHREN: Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the President, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:

"EXECUTIVE MANSION, WASHINGTON,
October 9th, 1897.

"HON. STEPHEN J. FIELD, *Associate Justice of the Supreme Court of the United States, Washington, D. C.*

"MY DEAR SIR: In April last Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as Associate Justice of the Supreme Court of the United States, to take effect December 1st, 1897.

"In hereby accepting your resignation, I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

"Entering upon your great office in May, 1863, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months — a term longer than that of any member of the court since its creation and throughout a period of special importance in the history of the country, occupied with as grave public questions as have ever confronted that tribunal for decision.

"I congratulate you therefore most heartily upon a service of such exceptional duration, fidelity and distinction. Nor can I overlook the fact that you received your commission from Abraham Lincoln, and, graciously spared by a kind Providence, have survived all the members of the court of his appointment.

"Upon your retirement both the bench and the country will sustain a great loss, but the high character and great ability of your work will live and long be remembered, not only by your colleagues, but by your grateful fellow countrymen.

"With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir,

"Very truly yours,

"William McKinley."

My judicial career covers many years of service.

Having been elected a member of the Supreme Court of California, I assumed that office, October 13, 1857, holding it for five years, seven months and five days, the latter part of the time being Chief Justice.

On the tenth of March, 1863, I was commissioned by President Lincoln a Justice of the Supreme Court of the United States, taking the oath of office on the twentieth day of the following May.

When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years.

I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in the retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare in every case coming before me for decision the conclusions, which my deliberate convictions compelled me to arrive at, by the conscientious exercise of such abilities and acquirements as I possessed.

It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor.

Up to that time there had been no representative here of the Pacific coast. A new empire had risen in the West, whose laws were those of another country. The land titles were from Spanish and Mexican grants, both of which were often overlaid by the claims of the first settlers. To bring order out of this confusion, Congress passed an act providing for another seat on this bench, with the intention that it should be filled by some one familiar with these conflicting titles and with the mining laws of the coast, and as it so happened that I had framed the principal of these laws, and was, moreover, Chief Justice of California, it was the wish of the Senators and Representatives of that State, as well as those from Oregon, that I should succeed to the new position. At their request Mr. Lincoln sent my name to the Senate, and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office for the reason that as Chief Justice of California I had heard arguments in many cases, in the disposition of which and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench; and I fixed the twentieth of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the Associate Justices was Mr. Justice Wayne, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity nearly an entire century of the life of this court.

During my incumbency three Chief Justices and sixteen Associate Justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

When I came here the country was in the midst of war. Washington was one great camp, and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say *inter arma silent leges.* This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation here as elsewhere. But the war ended in a couple of years, and then came the great period of reconstruction and the last amendments to the Federal Constitution. In the effort to reëstablish the nation, to adjust all things to the changed political, social and economic conditions, questions of far-reaching

import were developed, — questions of personal liberty, of constitutional right, which, after ofttimes heated discussions before the people and in the halls of Congress, came to us for decision. I do not exaggerate when I say that no more difficult and momentous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

As we all know, the period of the war was followed by one, continuing even to the present time, of marvellous material development. Wealth accumulated such as never before was dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessing of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these were added 57 opinions in the Circuit Court and 365 prepared while I was on the Supreme Court of California, it will be seen that I have voiced the decision in 1042 cases.

If it may be said that all of our decisions have not met with the universal approval of the American people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions, and demonstrates that the people of these United States are capable of self government.

As I look back over the more than a third of a century that I

have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most Democratic of all. Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people, and for the people." It has indeed no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

With this I give place to my successor. But I can never cease to linger on the memories of the past. Among the compensations for all the hard work that a seat on this bench imposes, have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not affect our mutual regard and respect. These many years have indeed been years of labor and of toil, but they have brought their own reward; and we can all join in thanksgiving to the Author of our being that we have been permitted to spend so much of our lives in the service of our country.

With profound respect and regard, I am, my dear brethren,

Very sincerely and always yours,

STEPHEN J. FIELD.

---

2. *The Chief Justice and the Associate Justices to Mr. Justice Field.*

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, October 13, 1897.

DEAR BROTHER FIELD: We are profoundly moved by the letter in which you announce to us your retirement from the bench.

The termination of a judicial career of such length and distinction cannot fail to inspire among all your countrymen, and, indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of

work so constant, so exacting and of such vital importance as ours, inevitably draws us together by ties of the closest character which cannot be dissolved without emotions of deep sadness and regret. We feel that our parting involves not simply the deprivation of the assistance afforded by your learning, your vast experience and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up, and may safely be committed to the judgment of posterity.

But we cannot part with you as an active member of the court without the fervent expression of the hope that you may be spared for many years to enjoy the repose you have so thoroughly earned, and the commendation bestowed on good and faithful service.

We are, dear brother Field,

Your affectionate brethren,

MELVILLE W. FULLER,
JOHN M. HARLAN,
HORACE GRAY,
DAVID J. BREWER,
HENRY B. BROWN,
GEORGE SHIRAS, JR.,
E. D. WHITE,
R. W. PECKHAM.

II.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ORDER.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.
For the Second Circuit, RUFUS W. PECKHAM, Associate Justice.
For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.
For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.
For the Fifth Circuit, EDWARD D. WHITE, Associate Justice.
For the Sixth Circuit, JOHN M. HARLAN, Associate Justice.
For the Seventh Circuit, HENRY B. BROWN, Associate Justice.
For the Eighth Circuit, DAVID J. BREWER, Associate Justice.
For the Ninth Circuit, DAVID J. BREWER, Associate Justice.

December 13, 1897.

III.

COSTS IN CIRCUIT COURTS OF APPEALS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ORDER.

Ordered, in pursuance of the act of Congress of February 19, 1897, 29 Stat. 536, c. 263, that the following table of fees and costs in the Circuit Courts of Appeals be, and the same is, hereby established, to take effect on the first day of March, A.D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	$5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00
Receiving, keeping and paying money, in pursuance of any statute or order of court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing same, supervising the printing and distributing the copies, for each printed page of the record and index	15
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee	20 00

January 10, 1898.

INDEX.

ADMIRALTY.

1. The Johnson, an American ship, was chartered at Valparaiso to carry a cargo of nitrate of soda, of 1938 tons, from Caleta to Hamburg consigned to a London firm. On the way she sprang a leak, and put into Callao. There 1200 tons of the cargo were transferred to the Leslie, a British bark, and the Johnson was repaired, the master executing a bottomry bond to meet the expenses of the repairs. That bond bound the Johnson, cargo and freight, hypothecated the portion of the cargo transhipped to the bark and further provided that "if during the said voyage an utter loss of the said vessel" [*in the singular*] "by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty shall unavoidably happen," "then and in either of the said cases this obligation shall be void." Both vessels sailed for Hamburg. The Johnson collided at sea with the Thirlmere, a British vessel, and was sunk with a total loss. The bark reached Hamburg safely. The consignees, in order to obtain the cargo, agreed to refer to arbitration by German lawyers the question of its liability for the whole amount of the bond. They decided that it was so liable, and the consignees paid the amount of the bond and received the cargo. The owners of the Johnson libelled the Thirlmere and its owners. The latter were held not to be personally liable, and judgment was rendered only for the value of the Thirlmere. The insurers of the Johnson also paid to its owners the amount of the policies of insurance, and the latter, after receiving the amount of the judgment against the Thirlmere, paid to the insurers their proportionate part of it. This suit was then instituted by the consignors and the consignees of the cargo of the bark to recover from the owners of the Johnson their share of the sum paid on the bottomry bond. *Held*, (1) That the terms of the bottomry bond included not only the Andrew Johnson and her cargo, but the cargo transhipped to the Leslie; (2) That the owners of the Johnson, to the extent of the damages paid on account of the collision, were liable to the libellants, as creditors of the ship. *O'Brien* v. *Miller*, 287.
2. In interpreting a contract the whole contract must be brought into view, and it must be interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them: and this rule is especially applicable to the interpretation of contracts of bottomry and respondentia. *Ib.*

3. In an action to recover on a bottomry bond from the shipowner for advances made for his benefit and charged upon the property of the cargo owners by the master, if he questions the power of the master to execute the instrument of hypothecation, it is his duty to plead it in defence. *Ib.*
4. The action of the district judge in refusing to permit the respondent to amend his answer by setting up the plea of laches and *res judicata* was not error. *Ib.*
5. On the facts, which are detailed in the statement of the case, respecting the navigation and the conduct of the Victory and the Plymothian just previous to the collision which caused the injuries and damage herein complained of, *Held;* (1) That as a general rule, vessels approaching each other in narrow channels, or where their courses diverge as much as one and one half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel; (2) That the Victory was grossly in fault, and that the collision was the direct consequence of her disregard of that rule of the road, and of her reckless navigation; (3) That the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment; the burden of proof being upon each vessel to establish fault on the part of the other; (4) That as the damage was occasioned by collision and was within the exceptions in the bills of lading, it rested upon the underwriters to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her, if sued alone; (5) That the Plymothian was on her proper course, that she was not bound to anticipate the conduct of the Victory, and that she took all proper precautions as soon as chargeable with notice of risk of collision. *The Victory & The Plymothian*, 410.

ADVERSE POSSESSION.

This was an action of ejectment. The plaintiff claimed under one Hall, former owner of the land. The defendants claimed under one Douglas, who bought it at a tax sale in 1865. The defendants set up adverse possession in defence. The court instructed the jury that to defeat the claim of the plaintiffs upon the defence of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises; and, on the request of the defendants, that "if the jury find from the evidence that William Douglas, the ancestor

of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid for it by him at such sale and received from the corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington, and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangements with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover." *Held*, that the instructions as given were substantially correct, and there was evidence in the case upon which to found the one given at defendants' request. *Holtzman* v. *Douglas*, 278.

APPEAL.

See JURISDICTION, A, 17; B.

ATTORNEYS' FEES.

1. Attorneys and counsellors specially employed to render legal services for the United States cannot, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by Rev. Stat. § 365; and if he fails or refuses to give such certificate, Congress alone can provide for compensation. *United States* v. *Crosthwaite*, 375.
2. One who receives a commission as special assistant to a District Attorney for particular cases, or for a single term of court, or for a limited time, is not an Assistant District Attorney within the meaning of Rev. Stat. § 365, and therefore the certificate of the Attorney General prescribed therein is a prerequisite to the allowance of compensation. *Ib.*

See PRACTICE, 1.

CASES AFFIRMED AND FOLLOWED.

See ESTOPPEL; INTERSTATE COMMERCE COMMISSION, 1; JURISDICTION, A, 6, 19; D, 3; RAILROAD, 6.

CASES EXPLAINED.

See INTERSTATE COMMERCE COMMISSION, 3, 4; PUBLIC LAND, 12.

CERTIORARI.

See JURISDICTION, A, 16.

CHINESE EXCLUSION ACTS.

See CRIMINAL LAW, 1 to 7.

CLAIMS AGAINST THE UNITED STATES.

1. To entitle a supervisor of elections to a valid claim against the Government, he must make it appear that the services performed were required by the letter of Rev. Stat. § 2020 and § 2026, or were such as were actually and necessarily performed in the proper execution of the duties therein prescribed, and that his charges therefor are covered by Rev. Stat. § 2031, or, if not fixed in the very words of that section, that by analogy to some other service, he is entitled to make a corresponding charge. *Dennison* v. *United States*, 241.
2. If the services were only performed for his own convenience, or were manifestly unnecessary or useless, even if they be such as he judges proper himself, they cannot be made the basis of a claim against the Government. *Ib.*
3. It is *held* that the applicant, a chief supervisor, should have been allowed for drawing instructions to supervisors, and, in the absence of proof to the contrary, for the full amount of his claim for auditing claims of and drawing pay rolls of supervisors, and certifying the same to the marshal; and all the other claims, enumerated in the opinion of the court, are disallowed. *Ib.*
4. When a consul of the United States, in his regular accounts and settlements with the Treasury, charges himself with fees received by him as consul for which he is not obliged to account, and pays the same into the Treasury with each settlement, and retires, and makes his final settlement with the Treasury on the same basis, he cannot, in an action commenced in the Court of Claims three years after his retirement, recover back such payments, but they will be regarded as wholly voluntary payments. *United States* v. *Wilson*, 273.

See ATTORNEYS' FEES.

CONSTITUTIONAL LAW.

1. The statute of New York of 1885, c. 448, providing that deeds from the comptroller of the State of lands in the forest preserve sold for non-payment of taxes shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitations, and does not deprive the former owner of such lands of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. *Turner* v. *New York*, 90.
2. In this case, which was an indictment for murder, the verdict being "guilty as charged;" and judgment of condemnation to death thereon being affirmed by the Supreme Court of the State; and this court having determined, on a former petition by the petitioner, that it had no jurisdiction to review that judgment, *Craemer* v. *Washington State*, 164 U. S. 704; and the time appointed for execution having passed, pending all these proceedings, it was within the power of the state court to make a subsequent appointment of another day therefor, and to issue a death warrant accordingly, and a judgment to that effect involved no violation of the Constitution of the United States. *Craemer* v. *Washington State*, 124.
3. The State's attorney of Vermont, under the statutes of that State, filed an information in the proper court against H., charging that on a day and at a place named he "did, at divers times, sell, furnish and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." At the same time he filed specifications as follows: "In said case the State's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say," giving the names without the residences. "And the undersigned State's attorney states that he has also specified the offences against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the State's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute. And the State's attorney further specifies and relies upon the selling, furnishing and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the State's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit." This specification is not required by any statute, and forms no part of the

information. It is, however, provided by statute that "when a specification is required, it shall be sufficient to specify the offences with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale, furnishing or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person, whether named in the specification, or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to a postponement of the trial, for this cause, as the court may think reasonable." It did not appear from the record that the specification was asked for by the respondent, nor whether the offences of which he was convicted were for selling, furnishing or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. *Held*, that this was due process of law, within the meaning of the Fourteenth Amendment to the Constitution. *Hodgson* v. *Vermont*, 262.

4. The words "due process of law" do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. The Amendment undoubtedly forbids arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offences, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. *Ib.*

5. The grants made to the plaintiffs in error by the acts of February 26, 1856, and February 27, 1856, of the legislature of the Territory of Minnesota, to maintain dams and sluices in the Mississippi River, etc., etc., were subject at all times to the paramount right of the public to divert a portion of the waters for public uses, and to the rights in regard to navigation and commerce existing in the General Government, under the Constitution of the United States; and under those grants the plaintiff in error took no contract rights which have been impaired in any degree by the acts of the legislature of Minnesota respecting the public waterworks of the city of St. Paul. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 349.

6. If, after a regular conviction and sentence in that State, a suggestion of a then existing insanity is made, it is not necessary, in order to constitute "due process of law," that the question so presented should be tried by a jury. *Nobles* v. *Georgia*, 398.

7. By the constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this

act by proper penalties. All lottery privileges or charters heretofore granted are revoked." *Held*, (1) That the provision when applied to a previously existing lottery grant in the State of Kentucky was not inconsistent with the contract clause of the Constitution of the United States; (2) That a lottery grant is not, in any sense, a contract within the meaning of the Constitution, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the faith of or by agreement with the grantee, can be exercised after the revocation of the grant and the forbidding of the lottery, if its exercise involves a continuance of such lottery; (3) That all rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the State to the extent just indicated; nevertheless, rights acquired under a lottery grant, consistently with existing law, and which may be exercised and enjoyed without conducting a lottery forbidden by the State are, of course, not affected, and could not be affected, by the revocation of such grant; (4) That this court when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Douglas* v. *Kentucky*, 488.

8. The sixth section of the act of September 27, 1890, c. 1001, 26 Stat. 492, authorizing the establishment of Rock Creek Park in the District of Columbia, does not violate the provisions of the Constitution of the United States, and is valid. *Wilson* v. *Lambert*, 611.
9. It is not necessary to decide whether the act of 1883 conflicts with the Constitution in that it lays taxes upon earnings arising from transportation of persons and property between different States. *McHenry* v. *Alford*, 651.
10. The objection that the act of 1883 violates the Fourteenth Amendment is untenable. *Ib.*

See JURISDICTION, A, 3, 4, 5;
STATUTE, A, 2.

CONSUL.

See CLAIMS AGAINST THE UNITED STATES, 4.

CONTRACT.

1. A contract, made at New York to carry cattle on the deck of a steamship from New York to Liverpool, contained these provisions: "On deck at owner's risk, steamer not to be held accountable for accident

to, or mortality of, the animals, from whatever cause arising." "The carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" "by barratry of the master or crew;" "by collisions, stranding or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner." *Held*, that by the terms of this contract, whether governed by the law of this country or by the law of England, the carrier was not exempted from responsibility for the loss of sound cattle, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea. *Compania la Flecha* v. *Brauer*, 104.

2. A. & S. owned a tract of land in a township numbered 5 which was within the limits of the Union Pacific Railroad grants and was acquired from that company after the execution of its mortgages, its deed reserving to the company the exclusive right to prospect for coal and other minerals on the lands. A. & S. contracted to sell this tract to R. & H., representing that they had a good and indefeasible estate in fee simple in it, and agreeing to furnish an abstract of title. R. & H. agreed to buy the tract for a sum named, to be paid partly in cash and partly by notes secured by mortgage on the property. The deed, mortgage, notes and money payments were accordingly made and exchanged in supposed compliance with the agreement, but no abstract of title was furnished. In the deed and mortgage the land was by mistake of the scrivener described as township No. 6 instead of township No. 5. A. & S. had no interest in or title to land in township No. 6. No patent was ever issued by the Government for land in township No. 5. R. & H., on learning the facts, demanded the return of the money paid, and of the notes, claiming to rescind the contract of sale. A. & S. tendered a deed of the land in township No. 5. Subsequent to the tender, the Union Pacific Company released the land from claim under the coal reservation, but not as to other minerals. *Held*, that R. & H. were not bound to accept the deed tendered, and were entitled to have the contract rescinded, and to receive back the money paid by them. *Adams* v. *Henderson*, 573.

See ADMIRALTY, 2;
EQUITY, 1.

CORPORATION.

See MASTER AND SERVANT.

COSTS.

See PRACTICE, 4.

COURT AND JURY.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determining the matter is for the jury. *Warner* v. *Baltimore & Ohio Railroad Co.*, 339.

CRIMINAL LAW.

1. The illegal acts described in subdivisions 1 and 2 of Rev. Stat. § 3169, for the alleged violation of which the plaintiff in error was prosecuted, refer to offences committed by officers or agents acting under authority of revenue laws. *Williams* v. *United States*, 382.
2. The Chinese Exclusion Acts have no reference to the subject of revenue, but are designed to exclude persons of a particular race from the United States, and an officer employed in their execution has no connection with the Government revenue system. *Ib.*
3. When an indictment properly charges an offence under laws of the United States, that is sufficient to sustain it, although the prosecuting representative of the United States may have supposed that the offence charged was covered by a different statute. *Ib.*
4. The transactions referred to in the two indictments were of the same class of crimes or offences, and there was no error in consolidating them at the trial. *Ib.*
5. The affidavit and the bank book referred to in the opinion of the court, were not admissible in evidence against the accused, as, on the face of the transactions, there was no necessary connection between them and the charges against him. *Ib.*
6. The estimate placed upon the character of a government employé by the community cannot be shown by proof only of the estimate in which he is held by his coemployés. *Ib.*
7. It was highly improper for the prosecuting officer to say in open court in the presence of the jury, under circumstances described in the opinion of the court, that while Mr. Williams was investigating the Chinese female cases, there were more females sent back to China than were ever sent back, before or after. *Ib.*
8. This was an indictment for murder alleged to have been committed on an American vessel on the high seas. After the crime was discovered, Brown, a sailor, was put in irons and the vessel was headed for Halifax. Before it reached there Brown charged Bram with the commission of the crime, saying that he had seen him do it. Bram was then also put in irons. On the arrival at Halifax, Power, a policeman and detective in the government service at that place, had a conversation with Bram. Bram was indicted at Boston for

the commission of the crime, and on his trial Power was offered as a witness for the Government. He testified that he made an examination of Bram, in his own office, in the city hall at Halifax, when no one was present besides Bram and himself; and that no threats were made in any way to Bram, nor any inducements held out to him. The witness was then asked: "What did you say to him and he to you?" To this defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, or that the defendant was held for the United States — for the consul general of the United States. The witness answered questions by the court as follows: "You say there was no inducement to him in the way of promise or expectation of advantage?" "A. Not any, your honor." "Q. Held out?" "A. Not any, your honor." "Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?" "A. No, sir, not any." "Q. So far as you were concerned, it was entirely voluntary?" "A. Voluntary, indeed." "Q. No influence on your part exerted to persuade him one way or the other?" "A. None whatever, sir; none whatever." The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring defendant as a prisoner to his office and there stripped him; that defendant understood that he was a prisoner, and obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent. The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed. The witness answered as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your posi-

tion is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." "Q. Anything further said by either of you?" "A. No; there was nothing further said on that occasion." The direct examination of this witness was limited to the interview between the witness and the defendant Bram. *Held*, (1) That this statement made by the accused to a police officer, was evidently not a voluntary confession and was not admissible in evidence against him; (2) That the objection to its admission, having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness. *Bram* v. *United States*, 532.

9. The objection that the indictment recited that it was presented upon the oath of the jurors when the fact was that it was presented upon the oath and affirmation of the jurors is without merit. *Ib.*

10. The objection that neither in the indictment, nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was shown to have possessed conscientious scruples against taking an oath is also without merit. *Ib.*

11. As the evidence against Bram was purely circumstantial, it was clearly proper for the Government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime. *Ib.*

12. The objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled. *Ib.*

13. The defendant, who was employed as a postal clerk at station F in the city of New York, was indicted under Rev. Stat. § 5467. The indictment contained three counts; the first two under the first part of § 5467; the third count under the last clause of that section. The evidence showed that the Government detectives prepared a special delivery letter, designed as a test or decoy letter, containing marked bills, and delivered it, bearing a special delivery stamp, to the night

clerk in charge of branch station F of the post office in that city. The defendant was not a letter carrier, but a clerk employed at that office, whose duty it was to take charge of special delivery letters, enter them in a book kept for that purpose and then place them in course of transmission. The letter in question was addressed to Mrs. Susan Metcalf, a fictitious person, 346 E. 24th street, New York city, fictitious number. The letter was placed by the night clerk with other letters upon the table where such letters were usually placed, and the defendant, entering the office not long after, took this letter, along with the others on the same table, removed them to his desk, and properly entered the other letters, but did not enter this letter. On leaving the office not long after, the omission to enter the letter having been observed, he was arrested, and the money contents of the letter, marked and identified by the officers, were found upon his person. The officers testified upon cross-examination that the address was a fictitious one; that the letter was designed as a test letter, and that they did not intend that the letter should be delivered to Mrs. Susan Metcalf or to that address and that it could not be delivered to that person at that address. *Held*, that the evidence was sufficient to sustain a conviction under the third count of the indictment. *Hall* v. *United States*, 632.

See JURISDICTION, E.

CUSTOMS DUTIES.

Where imported foreign goods are entered at a custom house for consumption, the payment by the importer of the full amount of duties ascertained to be due upon the liquidation of the entry of the merchandise, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, is not necessary in order to enable a protesting importer to have the exaction and classification reviewed by a board of general appraisers and by the courts, under the provision in section 14 of the act of June 10, 1890, c. 407, 26 Stat. 131, 137, "that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objection thereto,

and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon." *United States* v. *Goldenberg*, 95.

EJECTMENT.

See ADVERSE POSSESSION.

EQUITY.

1. Hyer and Shield were engaged separately, each on behalf of himself and his associates, in seeking from the city government of Richmond a concession for a street railway with collateral lines. Hyer's organization was to be called the Richmond Conduit Company, and Shield's the Richmond Traction Company. Hyer made a deposit of money in a bank in Richmond to aid in his projects. Hyer and Shield then contracted in writing as follows, each being fully authorized thereto by his associates: "We hereby bind ourselves, in our own behalf and for our associates, mutually to coöperate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise. The deposit already made with the State Bank of Richmond, by Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system." A full statement of the action of the two companies was made to the Richmond authorities. Hyer fully performed his agreements. He was unable to go to Richmond when the matter was settled, and Shield secured the concession for himself and his associates, and refused to permit Hyer and his associates to participate in it. By bill in equity, amended bill and supplemental bill, Hyer sought to be declared owner of one half interest in the Traction Company's franchise, property and stock, and for a decree securing the possession and enjoyment thereof. *Held*, that, without deciding whether the contract sued on was, under the facts and circumstances disclosed, void as against public policy, the case presented was not one which called for the interposition of a court of equity; but that the plaintiff's remedy was by an action at law. *Hyer* v. *Richmond Traction Co.*, 471.

2. Courts of equity have jurisdiction to hear the complaints of those who

assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which, it is claimed, is unconstitutional, and therefore does not avail to confer the powers sought to be exercised. *Wilson* v. *Lambert*, 611.

EQUITY PLEADING.

1. The 45th Rule of Equity, providing that "no special replication to any answer shall be filed," and that "if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct," means, at most, that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill; and such an amendment is not required in order to set out that which may be used simply as evidence to establish any fact or facts put in issue by the pleadings. *Southern Pacific Railroad Co.* v. *United States*, 1.
2. When the defendant's answer in a chancery suit sets up matters which are impertinent, and he also files a cross bill making allegations of the same nature, a demurrer to the cross bill on that ground should be sustained. *Harrison* v. *Perea*, 311.

ESTOPPEL.

The ruling in *Cromwell* v. *Sac County*, 94 U. S. 351, that when a 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, affirmed and applied. *Dennison* v. *United States*, 241.

See RES JUDICATA.

EVIDENCE.

See CRIMINAL LAW, 5, 6, 7, 8, 12.

HABEAS CORPUS.

1. In the case of a petition for *habeas corpus* for relief from a detention under process alleged to be illegal, by reason of the invalidity of the process or proceedings under which the petitioner is held in custody, copies of such process or proceedings must be annexed to, or the essential parts thereof set out in the petition, mere averments of conclusions of law being necessarily inadequate. *Craemer* v. *Washington State*, 124.

2. A writ of *habeas corpus* cannot be made use of as a writ of error. *Crossley* v. *California*, 640.

INDIAN.

1. A right of citizenship in an Indian Nation, conferred by an act of its legislature, can be withdrawn by a subsequent act; and this rule applies to citizenship created by marriage with such a citizen. *Roff* v. *Burney*, 218.
2. Whether any rights of property could be taken away by such subsequent act, is not considered or decided. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 3, 4, 9, 10.

INFANT.

1. An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age; and a decree made in a suit in which an infant is a party, by consent of counsel, without fraud or collusion, is binding upon the infant and cannot be set aside by rehearing, appeal or review. *Thompson* v. *Maxwell Land Grant & Railway Co.*, 451.
2. A compromise made in a pending suit which appears to the court to be for the benefit of an infant, party to the suit, will be confirmed without reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Ib.*

INTEREST.

It being found that the defendant converted the entire assets which are the subject of this controversy, there was no error in charging him with interest on the amount so converted, without regard to whether he did or did not make profits. *Harrison* v. *Perea*, 311.

INTERNATIONAL LAW.

See JURISDICTION, C, 1, 2.

INTERSTATE COMMERCE COMMISSION.

1. *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, and *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S. 479, adhered to, to the points that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, 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, after having determined what, in reference to the past, were reasonable and just rates, 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. *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, 144.

2. Competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce. This is no longer an open question in this court. *Ib.*
3. The conclusion which the court reached in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, and *Wight* v. *United States*, 167 U. S. 512, that in applying the provisions of §§ 3, 4, of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, making it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act. *Ib.*
4. The purpose of the second section of that act is to enforce equality between shippers over the same line, and to prohibit 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, and it was held in *Wight* v. *United States*, 167 U. S. 512, that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes. *Ib.*
5. This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation — among which is the fact of competition when it affects rates. *Ib.*
6. The mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraints of the third and fourth sections; but these sections are not so stringent and imperative as to exclude in all cases the matter of competition from con-

sideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such, as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration. *Ib.*

7. The conclusions of the court on this branch of the case are: (1) that competition between rival routes is one of the matters which may lawfully be considered in making rates for interstate commerce; and (2) that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, in such commerce. *Ib.*
8. Whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. *Ib.*
9. The Circuit Court had jurisdiction to review the finding of the Interstate Commerce Commission on these questions of fact, giving effect to those findings as *prima facie* evidence of the matters therein stated; and this court is not convinced that the courts below erred in their estimate of the evidence, and perceives no error in the principles of law on which they proceeded in its application. *Ib.*

JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. Under Rev. Stat. § 709, if the ground on which the jurisdiction of this court is invoked to review a judgment of a state court is, that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court is in favor of its validity, this must appear on the face of the record before the decision below can be reëxamined here. *Miller* v. *Cornwall Railroad Co.*, 131.
2. A suggestion of such appearance, made on application for reargument, after the judgment of the trial court is affirmed by the Supreme Court of the State, comes too late. *Ib.*
3. This court has no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with the state constitution. *Ib.*
4. An objection in the trial of an action in a state court that an act of the State was "unconstitutional and void," when construed in those courts as raising the question whether the state legislature had power, under the state constitution, to pass the act, and not as having refer-

ence to any repugnance to the Constitution of the United States, is properly construed. *Ib.*

5. The report of this case in the Supreme Court of Pennsylvania shows that it assumed that it was dealing, under the assignments of error, only with the state constitution. *Ib.*
6. An examination of the record discloses that none of the complainants, save one, was assessed with a sufficient amount of taxes, to enable him to bring the case here on appeal, and accordingly, under the doctrine of *Russell* v. *Stansell*, 105 U. S. 303, and *Gibson* v. *Shufeldt*, 122 U. S. 27, the appeal is dismissed as to such parties. *Ogden City* v. *Armstrong*, 224.
7. The findings of fact in an appeal from the Supreme Court of a Territory are conclusive upon this court, whose jurisdiction on such appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Harrison* v. *Perea*, 311.
8. A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. *Muse* v. *Arlington Hotel Co.*, 430.
9. The same rule being applicable in respect of the validity or construction of a treaty, some right, title, privilege or immunity, dependent on the treaty, must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted. *Ib.*
10. In respect of the plaintiffs' case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution, or the validity or construction of the treaty, and this court is without jurisdiction to review the action of that court. *Ib.*
11. That which has been decided on one appeal or writ of error, cannot be reëxamined on a second appeal or writ of error, brought in the same suit. *Thompson* v. *Maxwell Land Grant Co.*, 451.
12. Whenever a case comes from the highest court of a State for review, and, by statute or settled practice in that State the opinion of the court is a part of the record, this court may examine such opinion for the purpose of ascertaining the grounds of the judgment. *Ib.*
13. Although the judgment and the mandate in a given case in this court express its decision, it may examine the opinion for the purpose of determining what matters were considered, upon what grounds the judgment was entered, and what has become settled, for the future disposition of the case. *Ib.*
14. In the former decision of this case, 95 U. S. 391, the decree was re-

versed on the ground that the bill, as it stood, was technically a bill of review; but it was further decided that certain matters then in issue were sufficiently and effectually determined by the proofs already in, and the reversal did not throw open the case for additional proofs upon such matters. *Ib.*

15. The questions propounded in the certificate in this case do not present distinct points or propositions of law, clearly stated, so that each can be distinctly answered, without regard to the other issues of law involved, and they obviously bring the whole case up for consideration; and as to answer them would require this court to consider the several matters thus pressed upon its attention, to pass upon questions of law not specifically propounded, and to dispose of the whole case, it is held, referring to previous decisions, that the certificate is insufficient under the statute. *United States* v. *Union Pacific Railway Co.*, 505.
16. A writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise. *In re Tampa Suburban Railroad Co.*, 583.
17. Where, as in this case, an order is made by a Circuit Court, appointing a receiver, and granting an injunction against interfering with his management of the property confided to him, an appeal may be taken to the Circuit Court of Appeals, carrying up the entire order. *Ib.*
18. In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not of a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it. *Conde* v. *York*, 642.
19. The ruling in *United States* v. *Union Pacific Railroad*, 168 U. S. 505, that each question certified to this court from a Circuit Court of Appeals "had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case, and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions," is affirmed and followed; and, being applied to the questions certified in this case, makes it necessary for the court to decline to answer the first, second and sixth questions. *McHenry* v. *Alford*, 651.
20. This action was brought and prosecuted to final judgment in the state courts of Louisiana. Its object was to recover land in New Orleans which had been sold for nonpayment of taxes and had passed from the

purchaser at the tax sale by sundry mesne conveyances to the defendant. The grounds on which it was sought to avoid the sale were alleged defects in the statement of the name and of the sex of the owner in the advertisements of sale. The judgment of the trial court was in favor of the defendant, and that judgment was affirmed by the Supreme Court of the State. Touching the objections made to the proceedings the latter court said: "The act of 1884 makes the deed conclusive of the sufficiency of the assessment of the property sold under it. The question of the competency of this legislation in this respect has been before this court on repeated occasions. The argument now addressed to us against the constitutionality and interpretation of the act must be viewed as directed against a series of decisions of this court. To those decisions we must adhere." It was claimed in argument here that though no Federal question was directly raised in the trial in the state court, one was necessarily involved in the decision. *Held*, that this court had no jurisdiction to review the decision of the Supreme Court of the State. *Castillo* v. *McConnico*, 674.

21. The complainants in their bill predicated their right to relief upon the averment that certain ordinances adopted by the municipal authorities of Austin, and an act of the legislature of Texas referred to in their bill impaired the obligations of a contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the State and the city ordinances were in contravention of the Constitution of the United States. *Held*, that these allegations plainly brought the case within the provision in the act of March 3, 1861, c. 517, 26 Stat. 826, conferring upon this court jurisdiction to review by direct appeal any final judgment rendered by a Circuit Court in any case in which the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States. *Penn Mutual Life Insurance Co.* v. *Austin*, 685.

See PRACTICE, 2, 5.

B. JURISDICTION OF CIRCUIT COURTS OF APPEAL.

An interlocutory order appointing a receiver is not appealable from the Circuit Court of the United States to the Circuit Court of Appeals, and does not become so by the incorporation into it of a direction to the defendant, his agents and employés, to turn over and deliver to the receiver the property in his or their hands. *Highland Avenue & Belt Railroad Co.* v. *Columbia Equipment Co.*, 627.

C. JURISDICTION OF CIRCUIT COURTS.

1. Hernandez was in command of a revolutionary army in Venezuela when an engagement took place with the government forces which resulted in the defeat of the latter, and the occupation of Bolivar by

the former. Underhill was living in Bolivar, where he had constructed a waterworks system for the city under a contract with the government, and carried on a machinery repair business. He applied for a passport to leave the city, which was refused by Hernandez with a view to coerce him to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces. Subsequently a passport was given him. The revolutionary government under which Hernandez was acting was recognized by the United States as the legitimate government of Venezuela. Subsequently Underhill sued Hernandez in the Circuit Court for the Second Circuit to recover damages caused by the refusal to grant the passport, for alleged confinement of him to his own house, and for alleged assaults and affronts by Hernandez's soldiers. Judgment being rendered for defendant the case was taken to the Circuit Court of Appeals, where the judgment was affirmed, the court holding "that the acts of the defendant were the acts of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." *Held* that the Circuit Court of Appeals was justified in that conclusion. *Underhill* v. *Hernandez*, 250.

2. Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. *Ib.*

3. By denying the application in this case for a certiorari, the Court must not be understood as intimating an opinion that a Circuit Judge has power to grant injunctions, appoint receivers, or enter orders or decrees, *in invitum*, outside of his circuit. *In re Tampa Suburban Railroad Co.*, 583.

4. In a trial before a state court for murder charged to have been committed within the State, it is for the state court to decide whether the question of whether the evidence tended to show that the accused was guilty of murder only in the second degree shall or shall not be submitted to the jury, and its decision is not subject to revision in the Circuit Court of the United States, nor here. *Crossley* v. *California*, 640.

See INTERSTATE COMMERCE COMMISSION, 9;
PATENT FOR INVENTION;
PRACTICE, 6.

D. JURISDICTION OF DISTRICT COURTS.

1. A District Court of the United States has jurisdiction of a libel of a vessel for seamen's wages, which accrued while the vessel was in the custody of a receiver appointed by a state court upon the foreclosure of a mortgage upon the property of a railroad company, owner of the vessel, the vessel having been sold and passed into the purchaser's

hands, and the receiver discharged when the warrant of arrest was served. *The Resolute*, 437.

2. The remedy against the decree of the District Court was an appeal to the Circuit Courts of Appeals. *Ib.*
3. These cases are affirmed as to the jurisdiction of the District Court on the authority of *The Resolute*, *ante*, 437. *The William M. Hoag*, 443.

E. Jurisdiction of State Courts.

While the derailment of a train carrying the mails of the United States is a crime which may be punished through the courts of the United States under the provisions of the statutes in that behalf, the death of the engineer thereof, produced thereby, is a crime against the laws of the State in which the derailment takes place, for which the person causing it may be proceeded against in the state court through an indictment for murder. *Crossley* v. *California*, 640.

F. Jurisdiction of the Supreme Court of the District of Columbia.

See Railroad, 10, 12.

LACHES.

The reason upon which the rule that the mere assertion of a claim, unaccompanied by any act to give effect to the asserted right, cannot avail to keep alive a right which would otherwise be precluded because of laches, is based not alone upon the lapse of time during which the neglect to enforce the right has existed, but upon the change of condition which may have arisen during the period in which there has been neglect; and when a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The facts in this case bring it within that rule. *Penn Mutual Life Insurance Co.* v. *Austin*, 685.

LOTTERY.

See Constitutional Law, 7.

MASTER AND SERVANT.

Where the business of a mining corporation is under the control of a general manager, and is divided into three departments of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of work-

men, the foreman of one of these gangs, whether he has or has not authority to engage and discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men. *Alaska Mining Co.* v. *Whelan*, 86.

MECHANICS' LIEN.

1. Section 1524 of the Compiled Laws of New Mexico providing for the creation of mechanics' liens for work done on land, required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials." The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners;" and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said the Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract;" and it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." *Held* that this claim of lien was sufficient under the statute in respect of all these particulars. *Springer Land Association* v. *Ford*, 513.
2. As between the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, does not vitiate the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance. *Ib.*
3. The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that

Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8000 for land never conveyed to him. *Ib.*

4. To limit the land upon which the lien was given to the strip of land sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would be to unreasonably circumscribe the meaning of the statute. *Ib.*
5. As the Supreme Court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs and were under said ditch and to be irrigated thereby," it cannot now be urged that the description was void for uncertainty or that the decree included more land than was connected with the ditch. *Ib.*

MEXICAN GRANT.

See PUBLIC LAND, 5, 6.

MUNICIPAL CORPORATION.

See TAX AND TAXATION, 1, 2, 3, 4.

NAVIGABLE WATERS.

See RIPARIAN OWNERS.

PARTNERSHIP.

A partner who, within the term stipulated in the articles of partnership for its continuance, undertakes, of his own will, and without the consent of his copartner, to dissolve the partnership, takes exclusive possession of its property and business, profitably carries on the business with the property for his own benefit, and excludes his copartner from any participation in the business or the profits, is liable (whether the partnership should or should not be considered as having been dissolved by his acts) to account to the copartner for his share of the property and of the profits of the partnership, according to the partnership agreement. *Karrick* v. *Hannaman*, 328.

PATENT FOR INVENTION.

1. To constitute an action one arising under the patent-right laws of the United States, the plaintiff must set up some right, title or interest under the patent laws, or, at least, make it appear that some right

or privilege under those laws will be defeated by one construction, or sustained by the opposite construction of these laws. *Pratt* v. *Paris Gas Light and Coke Co.*, 255.

2. When a state court has jurisdiction both of the parties and the subject matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defence, the defendant claims the invalidity of a certain patent. *Ib.*

POST OFFICE.

See CRIMINAL LAW, 13.

PRACTICE.

1. The solicitor was properly allowed a fee from the fund. *Harrison* v. *Perea*, 311.
2. An item in the decree below which was not appealed from by the complainant is not before this court for consideration. *Ib.*
3. A clerical error in the decree of the court below caused by the omission of the name of one of the distributees, can be corrected, on application, by the court below after the case is sent down. *Ib.*
4. The costs in this court must be paid by Harrison personally. *Ib.*
5. When the court below has not acquired jurisdiction over a defendant by a valid service of process upon him, a judgment against him can be reviewed here through a writ of error directly sued out to this court. *Shepard* v. *Adams*, 618.
6. While it was the undoubted purpose of Congress in enacting in the act of June 1, 1872, c. 255, § 5, embodied in Rev. Stat. § 914, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record in the States within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding," to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet it was also the intention to reach that uniformity largely through the discretion of Federal courts, exercised in the form of rules, adopted from time to time, so regulating their own practice as might be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. *Ib.*
7. The summons in this case was issued under a general rule adopted to make proceedings in the District Court conform to those existing at that time under the state statutes; and if the court has not changed its rules to make its proceedings conform to subsequent statutes changing the

state proceedings, it is to be presumed that its discretion was legitimately exercised both in adopting and in maintaining the rule. *Ib.*

See ADMIRALTY, 3, 4.

PUBLIC LAND.

1. The cases of *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, and *United States* v. *Colton Marble and Lime Co.* and *United States* v. *Southern Pacific Railroad*, 146 U. S. 615, held to have adjudged, as between the United States and the Southern Pacific Railroad Company: (1) That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of Congress of July 27, 1866, c. 278, 14 Stat. 292; (2) That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of that act; and, (3) That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the act of July 6, 1886, c. 637, 24 Stat. 123, forfeiting the lands granted to the Atlantic and Pacific Railroad Company, the property of the United States and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the ownership of the United States. *Southern Pacific Railroad Co.* v. *United States*, 1.

2. On a petition to the governor of the province of New Mexico, in 1819, for a grant of public land, made by a resident in that province, the governor directed possession to be given by the alcalde, and the expediente to be transmitted by that officer to the office of the governor, so that, if approved by him, the proper testimonio might be ordered to be given to the petitioner. *Held*, (1) That no grant was made until return should be made by the alcalde, and that, until his action should be approved by the governor, it was without effect; (2) That as there was no evidence in this case, either in the papers presented in support of the petitioner's claim, or in the facts and circumstances proved, from which an approval could properly be presumed, the petitioner must be held to have failed in a material part of her case; (3) That in consequence of such failure, the petitioner was not entitled to judgment for eleven square leagues of the land claimed, under the 7th subdivision of § 13 of the act of March 3, 1891, c. 539, 26 Stat. 854, creating the Court of Private Land Claims. *Bergere* v. *United States*, 66.

3. By the Spanish law in force at the time of the alleged grant of 1788, set up in this case, lots and lands were distributed to those who were intending to settle, and it was provided that, "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said

term, to sell the same, and freely to dispose of them, at their will, as their own property," but confirmation after the four years had elapsed was required in completion of the legal title; and it was further provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence, and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." On the facts in this case it is *Held*, that the granting papers in this record, taken together, do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon, but that the contrary is to be inferred from the testimony in respect of possession; that Armenta's certificate of 1798 and the correspondence of 1808 conduct to no other result; and that, in the light of all the evidence, the conclusion of the court below was correct. *Chaves* v. *United States*, 177.

4. An officer of the Pueblo of Zia and an officer of the Pueblos of Santa Aña and Jemez, in 1766, petitioned the Spanish governor and captain general, setting forth "that they, from their foundation, have considered as their pasture ground, in the vicinity of their said pueblos, a valley commonly called the Holy Ghost Spring, and that in some urgent cases, the same as is known, is used as a pasture ground for the horses of this royal garrison, and the said parties being aware that the said valley has had, in its vicinity, some applicants to acquire the same by grant, which will cause them very great injury, as they have considerable cattle, sheep, goats and horses for the royal service, and not having any other place in which to pasture them, particularly the people of the Pueblo of Zia, the greater part of whose fields are upland, and some of them in the glens of said valley, adjoining their said pueblo," and asking him to "be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos, directing that the boundaries thereof be designated to them, that is, on the east, the pueblos aforesaid, on the west, the summits of the Puerco River, on the north, a place called the Ventana, where some Navajo Apaches reside, and on the south, the lands of the citizen settlers of said Puerco River." On receipt of this petition the captain general ordered an examination to be made, and, upon the coming in of a favorable report, ordered the alcalde to give royal possession of the grant to the petitioners and the boundaries therein set forth. *Held*, that the language used in the documents indicated nothing more than a right to pasture their cattle upon the lands in question; that the grant did not vest the title to the lands in the petitioners, but was a mere license to use them for pasturage, which license, if not revoked

by subsequent grants, was revoked by the treaty of Guadalupe Hidalgo, ceding the entire territory to the United States; and that the title to the land was not one "lawfully and regularly derived from the government of Spain," nor "one that if not then complete and perfect at the date of the acquisition of the territory by the United States the claimant had a lawful right to make perfect, had the territory not been acquired by the United States," as provided for in the act of March 3, 1891, c. 539, creating the Court of Private Land Claims. *Zia* v. *United States*, 198.

5. The plaintiffs claimed as heirs and legal representatives of the original grantees under a grant alleged to have been made March 24, 1840, by "the prefect or superior political chief of the district of Bernalillo," in the Republic of Mexico. There was no evidence that the grant of the prefect ever received the sanction or approval of the governor, the ayuntamiento, or other superior authority of the Mexican Republic. *Held*, that it was beyond the power of the prefect alone to make the grant in question. *Crespin* v. *United States*, 208.
6. Possession of land so granted after the date of the treaty of Guadalupe Hidalgo, however exclusive and notorious, cannot be regarded as an element going to make up a perfect title. *Ib.*
7. The act of September 28, 1850, c. 84, granting swamp lands to the several States, was a grant *in præsenti*, passing title to all lands which at that date were swamp lands, but leaving to the Secretary of the Interior to determine and identify what lands were, and what lands were not, swamp lands. *Michigan Land & Lumber Co.* v. *Rust*, 589.
8. Whenever the granting act specifically provides for the issue of a patent, the legal title remains in the Government until its issue, with power to inquire into the extent and validity of rights claimed against the Government. *Ib.*
9. Although a survey had been made of the lands in controversy which indicated that they were swamp lands, it was within the power of the land office at any time prior to the issue of a patent to order a resurvey and to correct mistakes made in the prior survey. *Ib.*
10. The facts in this case clearly show an adjustment of the grant upon the basis of the resurveys, and their acceptance by the officer of the State charged by the act of Congress with the duty of so doing, and this makes such adjustment final and conclusive. *Ib.*
11. The act of March 3, 1857, c. 117, did not operate to confirm to the State of Michigan the title to all lands marked on the approved and certified list of January 13, 1854, as swamp and overflowed lands, and direct the issue of a patent or patents therefor, but it simply operated to accept the field notes finally approved as evidence of the lands passing under the grant, leaving to the land department to make any needed corrections in the surveys and field notes. *Ib.*
12. The decision in *Martin* v. *Marks*, 97 U. S. 345, does not conflict with this construction of the act of 1857. *Ib.*

13. The withdrawal from sale by the land department in March, 1866, of lands within the indemnity limits of the grants of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the construction of a railroad, exempted such lands from the operation of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864; though it may be that a different rule would obtain if the grant to the State had been of a later date than that to the Northern Pacific Company. *Northern Pacific Railroad* v. *Musser-Sauntry Land &c. Co.*, 604.

14. As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants, and not on the times of the filing of the maps of definite location. *Ib.*

15. It is not intended hereby to question the rule that the title to indemnity lands dates from selection, and not from the grant: but all here decided is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant. *Ib.*

See TAX AND TAXATION, 5, 6, 7, 8.

RAILROAD.

1. The plaintiff in error was a workman employed by the defendant in error at its workshop in Washington. Returning from his day's labor, he stopped at the intersection of South Capitol Street and Virginia Avenue, to enable a repair train to pass him. It was and for a long time had been the custom of the railroad company to allow its workmen, who went out on the repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing their pieces off the train while in motion, at the points nearest their own homes, being cautioned on the part of the company not to injure any one in doing it. As the train passed the plaintiff in error, such a piece of refuse wood was thrown from it by one of the men. It struck the ground, rebounded, struck the plaintiff in error, and injured him seriously and permanently. He sued the company to recover damages. After the plaintiff's evidence was in and he rested, the defendant moved for a verdict in its favor, which motion was granted. *Held*, that this was error; that the question whether the defendant was negligent should have been submitted to the jury; and that it was for the jury to say whether the custom on the part of the workmen was known to the company, whether if known it was acquiesced in, whether it was a dangerous custom from which injury should have been apprehended, and whether there was a failure, on the part of the defendant, to

exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act. *Fletcher* v. *Baltimore & Ohio Railroad Co.*, 135.

2. The duty to use ordinary care and caution is imposed upon a railroad company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by any one on the train, either a passenger, or an employé, acting outside of and beyond the scope of his employment. *Ib.*
3. A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could have been prevented by the exercise of reasonable diligence on the part of the company. *Ib.*
4. If, through and in consequence of its neglect of such duty, an act is perfor[illegible] a passenger or employé, which is one of a series of the sam[illegible]cts, and of which the company had knowledge and in whic[illegible]esced, and the act is in its nature dangerous, and a person[illegible]ily on the street is injured as a result of it, the railroad company is liable. *Ib.*
5. The fact that the custom had existed for some time without any injuries having been received by any one is not a legal bar to the liability of the company. *Ib.*
6. This was an action to recover for the death of plaintiff's testator, caused by a train striking him while crossing the track of defendant's road. The results of the evidence at the trial are condensed in the statement of the case, which cannot well be abridged. Upon them the court below ordered a verdict and judgment in defendant's favor. *Held*, that the peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury; but that apart from any question which might have arisen from the proof as an entirety, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, Milwaukee &c. Railway* v. *Lowell*, 151 U. S. 209, it is obvious there was no room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent. *Warner* v. *Baltimore & Ohio Railroad Co.*, 339.
7. The rule of the defendant company that "when one passenger train is standing at a station receiving or discharging passengers on double

track no other train, either passenger or freight, will attempt to run past until the passenger train at the station has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary," is a proper one, and applies to this case. *Ib.*

8. The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveller upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. *Ib.*
9. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. *Ib.*
10. The Supreme Court of the District of Columbia has jurisdiction of an action, sounding in tort, brought by the administrator of a deceased person against the Baltimore and Ohio Railroad Company, to recover damages for the benefit of the widow of the deceased by reason of his being killed by a collision which took place while he was travelling on that railroad in the State of Maryland. *Stewart* v. *Baltimore & Ohio Railroad Co.*, 445.
11. The purpose of the several statutes passed in the States in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is in its nature a tort, and where such a statute simply takes away a common law obstacle to a recovery for the tort, an action for that tort can be maintained in any State in which that common law obstacle has been removed, when the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced. *Ib.*
12. While, under the Maryland statute authorizing the survival of the right of action, the State is the proper plaintiff and the jury trying the cause is to apportion the damages recovered, and under the act of Congress in force in the District of Columbia, the proper plaintiff is the personal representative of the deceased, and the damages recovered are distributed by law, these differences are not sufficient to render the statutes of Maryland inconsistent with the act of Congress, or the public policy of the District of Columbia. *Ib.*

RECEIVER.

See JURISDICTION, B.

RES JUDICATA.

1. A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so so long as the judgment in the first suit remains unmodified. *Southern Pacific Railroad Co.* v. *United States*, 1.
2. Where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel. *Ib.*

See ESTOPPEL;
JURISDICTION, A, 11, 12, 13, 14.

RIPARIAN OWNERS ON NAVIGABLE WATERS.

1. The rights of riparian owners of land situated upon navigable rivers are to be measured by the rules and decisions of the courts of the State in which the land is situated, whether it be one of the original States or a State admitted after the adoption of the Constitution. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 349.
2. The Mississippi is a navigable river at all the points referred to in the records in these cases. *Ib.*

See CONSTITUTIONAL LAW, 5.

SPANISH GRANTS.

See PUBLIC LAND, 2, 3, 4.

STATUTE.

A. GENERALLY.

1. The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used; and the cases are few and exceptional in which the letter of the statute is not deemed controlling, and only arise when there are cogent reasons for believing that the letter does not fully justify and accurately disclose the intent. *United States* v. *Goldenberg*, 95.
2. The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is

fairly open to denial, and is denied. *Miller* v. *Cornwall Railroad Co.*, 131.

3. This court follows the construction given by the Supreme Court of the State of Georgia to the statutes of that State called in question in this case. *Nobles* v. *Georgia*, 398.

See INTERSTATE COMMERCE COMMISSION, 4, 5.

B. STATUTES OF THE UNITED STATES.

See ATTORNEYS' FEES, 1, 2; CLAIMS AGAINST THE UNITED STATES, 1; CONSTITUTIONAL LAW, 8; CRIMINAL LAW, 1, 2, 13; CUSTOMS DUTIES; INTERSTATE COMMERCE COMMISSION, 3, 4, 5; JURISDICTION, A, 1, 21; PRACTICE, 6; PUBLIC LAND, 1, 2, 4, 7, 11, 13; RAILROAD, 10, 12; TAX AND TAXATION, 6.

C. STATUTES OF STATES AND TERRITORIES.

Dakota. *See* CONSTITUTIONAL LAW, 9, 10; TAX AND TAXATION, 5.
Georgia. *See* STATUTE, A, 3.
Kentucky. *See* CONSTITUTIONAL LAW, 7.
Maryland. *See* RAILROAD, 12.
Minnesota. *See* CONSTITUTIONAL LAW, 5.
New Mexico. *See* MECHANICS' LIEN, 1.
New York. *See* CONSTITUTIONAL LAW, 1.
Vermont. *See* CONSTITUTIONAL LAW, 3.

SUPERVISORS OF ELECTIONS.

See CLAIMS AGAINST THE UNITED STATES, 1, 2, 3.

TAX AND TAXATION.

1. No jurisdiction vested in the appellant's city council to make an assessment and levy a tax for the improvements which are the subject of this controversy until the assent of the requisite proportion of the owners of the property to be affected had been obtained, and the action of the city council in regard to that question was not conclusive. *Ogden City* v. *Armstrong*, 224.
2. In order to justify a court of equity in restraining the collection of a tax, circumstances must exist bringing the case under some recognized head of equity jurisdiction; and this case seems plainly to be one of equitable jurisdiction, within that doctrine. *Ib.*
3. When the illegality or fatal defect in a tax does not appear on the face

of the record, courts of equity regard the case as coming within their jurisdiction. *Ib.*

4. When the authorities have jurisdiction to act, the statutory remedy is the taxpayer's exclusive remedy; but when the statute leaves open to judicial inquiry all questions of a jurisdictional character, a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies. *Ib.*
5. Chapter 99 of the Laws of the Territory of Dakota of 1883 provided for the taxation of the lands of the Northern Pacific Railroad Company granted to it by Congress, outside of its right of way and not used in its business, while owned by the company and not leased, through the payment of percentages on gross earnings as provided for therein; the plain meaning of that act being to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting to the amount and in the manner described in the act. *McHenry* v. *Alford*, 651.
6. That legislation was not in conflict with the provision in the act of March 2, 1861, c. 86, 12 Stat. 239, providing that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." *Ib.*
7. The railroad company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and the court answers the fourth question in the negative. *Ib.*
8. The next and fifth question is answered in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might be waived by the public authorities, and as the moneys were in fact paid to and received by the officers of the Territory and went into its treasury, and never have been returned or tendered back, there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time. *Ib.*

TORT, ACTIONS TO RECOVER DAMAGES FOR.

See CLAIMS AGAINST THE UNITED STATES, 1, 2, 3.