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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1897

J. C. BANCROFT DAVIS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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

JOHN WILLIAM GRIGGS, Attorney General.
JOHN KELVEY RICHARDS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

NEW YORK INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 106. Argued March 2, 3, 1898. — Decided April 11, 1898.

The provision in the treaty of June 15, 1838, with the New York Indians, that the United States will set apart as a permanent home for them the tract therein described in what afterwards became the State of Kansas, was intended to invest a present legal title thereto in the Indians, which title has not been forfeited and has not been reinvested in the United States; and the Indians are not estopped from claiming the benefit of such reservation.

It appears by the records of the proceedings of the Senate that several amendments were there made to said treaty, including a new article; that the ratification was made subject to a proviso, the text of which is stated in the opinion of the court; and that in the official publication of the treaty, and in the President's proclamation announcing it, all the amendments except said proviso were published as part of the treaty, and it was certified that "the treaty, as so amended, is word for word as follows," omitting the proviso. *Held*, that it is difficult to see how the proviso can be regarded as part of the treaty, or as limiting at all the terms of the grant.

THIS was a petition by the Indians who were parties to the treaty of Buffalo Creek, New York, on January 15, 1838, 7 Stat. 550, to enforce an alleged liability of the United States for

the value of certain lands in Kansas, set apart for these Indians, and subsequently sold by the United States, as well as for certain amounts of money agreed to be paid upon their removal.

These claims were referred, under the act of March 3, 1883, known as the "Bowman Act," to the Court of Claims. That court reported its findings to the Senate, January 16, 1892, and thereupon, on January 28, 1893, Congress passed an act to authorize the Court of Claims to hear and determine these claims and to enter up judgment as if it had original jurisdiction of the case without regard to the statute of limitations. There was a further provision, that from any judgment rendered by that court, either party might appeal to the Supreme Court of the United States.

The petition, which was filed on February 10, 1893, set forth as the substance of the treaty that the claimants ceded and relinquished to the United States all their right, title and interest in and to certain lands of the claimants at Green Bay, State of Wisconsin, and in consideration of such cession and relinquishment the United States, in and by the said treaty, agreed and guaranteed as follows :

First. To set aside, as a permanent home for all of the claimants, a certain tract of country west of the Mississippi River, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in a certain schedule annexed to the said treaty, and designated as Schedule A, upon condition that such of the claimants as should not accept, and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest in the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

Thirdly. The United States agreed that the lands secured to the claimants by the treaty should never be included in any State or Territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal west, the following sums respectively, namely: To the St. Regis tribe, five thousand dollars ($5000); to the Seneca nation, the income annually of one hundred thousand dollars ($100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, twenty-five hundred dollars ($2500) in cash, and the annual income of twenty-five hundred dollars ($2500); to the Onondagas, two thousand dollars ($2000) in cash, and the annual income of twenty-five hundred dollars ($2500); to the Oneidas, six thousand dollars ($6000) in cash, and to the Tuscaroras, three thousand dollars ($3000).

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars, ($400,000) to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired, but were exempted from obligation so to do.

The treaty of Buffalo Creek having been duly assented to by all the parties thereto, was afterwards on, to wit, the 4th day of April, A.D. 1840, duly proclaimed; and certain disputes thereunder having arisen, it was afterwards modified in some particulars not having reference to the matter of this claim, and as so modified was again proclaimed on, to wit, the 26th day of August, 1842.

The petition further alleged that at the time of the making

of the treaty of Buffalo Creek aforesaid, and for many years prior thereto, the claimants owned and occupied valuable tracts of land in the State of New York, and had improved and cultivated the same and resided thereon, and from the products thereof chiefly sustained themselves.

That the President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo Creek, and no provision of any kind was ever made for the actual removal of more than about two hundred and sixty individuals of the claimant tribes, as contemplated by the said treaty; and of this number only thirty-two ever received patents or certificates of allotment of any of the lands mentioned in the first article of the said treaty, and the land allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

That after the conclusion of the said treaty of Buffalo Creek the United States surveyed and made part of the public domain the lands at Green Bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

That the lands west of the Mississippi River, secured to the claimants by the said treaty of Buffalo Creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation, and so remained until in, or about the year A.D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the State of Kansas. The said lands at the time the same were so appropriated by the United States were of great value, to wit, of the value of one dollar and twenty-five cents ($1.25) per acre and upwards.

That the action of the United States in appropriating the said lands as aforesaid was in pursuance of the proclamations of the President, of date December 3 and 17, 1860, and grew

out of an order of the Secretary of the Interior of the 21st day of March, A.D. 1859; and between the said last-mentioned date and the proclamation of the said lands aforesaid the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted said claim in the premises.

That of the sum of $400,000, agreed by the treaty of Buffalo Creek to be appropriated by the United States for the purposes aforesaid, only the sum of $20,477.50 was ever so appropriated, except as hereinafter stated, and of this sum only $9464.08 was actually expended.

The petition further alleged that the Tonawanda band had been paid $256,000 for their interest in the land; that settlement had also been had with the Senecas, and that a special act had been passed authorizing the Court of Claims to find the facts and enter up judgment, without interest, and that the statute of limitations should not be pleaded as a bar to any recovery.

The petition concluded with a demand for a judgment for the value of the lands and for the amounts that were to be paid in cash.

The Court of Claims found the facts stated in the margin,[1]

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[1] FINDINGS OF FACT.

1. In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas, Cayugas, Onondagas, Oneidas, Tuscaroras and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that State.

The court decide that the Indians described in the jurisdictional act sending this case to this court as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the State of New York, Tuscaroras, Tuscaroras residing in the State of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the

together with others which are not deemed material to the consideration of the case, and also found as a conclusion of law from these facts that the petition should be dismissed, whereupon the claimants appealed to this court.

Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the State of New York, Stockbridges, Munsees, Brothertowns.

2. Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their Western brethren with the privilege of removing to and occupying the same without changing their existing relations and treaties with the government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendants aided some ten Indians, representing plaintiffs, in exploring certain parts of Wisconsin with a view to making arrangements with the Indians residing there for a portion of their country to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas and Oneida nations of New York Indians.

August 18, 1821, the Menominees and Winnebago nations, in consideration of $2000, chiefly in goods, ceded, released and quitclaimed all their right, title and claim in certain lands near Green Bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

"The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge and Munsee nations, of the one part, and the Menominees and Winnebagoes of the other, is approved, with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge and Munsee nations are to be held by them in the same manner as they were previously held by the Menominees and Winnebagoes.

"JAMES MONROE.

"February 19, 1822."

The $2000 above mentioned was thus paid: In goods, $900 from the Stockbridges, $400 from the Oneidas, $200 from the Tuscaroras; in cash, $500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

3. Permission to secure an extension of the cession in the preceding

Counsel for Appellants.

Mr. Joseph H. Choate for appellants. *Mr. Henry E. Davis*, *Mr. Guion Miller*, *Mr. George Barker*, *Mr. James B. Jenkins* and *Mr. Jonas H. McGowan* were with him on the brief.

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finding recited was given by the Secretary of War, and thereafter, on September 23, 1822, the Menominees, in consideration of $3000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined, (adjoining the above,) to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee nations, the releasees promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

"The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon Bay, Green Bay, Fox River; that part of the former purchase made by said tribes or nations of Indians of the Menominee and Winnebago Indians on the 8th of August, 1821, which lies south of Fox River and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon Bay, and no farther, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the government has assented, are to be held by them in the same manner as they were held by the Menominees previous to concluding and signing the aforegoing instrument, and that the title which they have acquired is not to interfere in any manner whatever with the lands previously acquired or occupied by the government of the United States or its citizens."

October 27, 1823, the Secretary of War officially notified the releasees that the President distinctly wished them to understand that by this partial sanction he did not mean to interfere with, nor in any manner invalidate, their title to all the lands which they had thereby acquired, including those not confirmed by the government, but, on the contrary, he considered their title to every part of the country conveyed to them by the releasors as equally valid as against them; and that what they had done was with the full assent of the government.

Of the consideration above mentioned, $1000 were paid by the Stockbridges and Munsees, while $1000 were to be paid by the Oneidas, Tuscaroras and St. Regis in one year from September 23, 1822, and $1000 in two years from that date. Of the two latter amounts $1000 appears to have been paid by the United States out of the funds of the St. Regis about 1825, while $950 were paid by the Brothertown tribe September 18, 1824. In consideration of which the releasees, by an agreement with the Brothertowns, under date of January 8, 1825, ceded to them a small separate tract by metes and bounds, and, after reserving to themselves, for each tribe of the releasees,

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

Mr. Justice Brown delivered the opinion of the court.

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a similar tract from out the country purchased from the releasors, granted to the Brothertowns an equal, undivided part of all the remaining portion of said purchase. It does not appear whether the Oneidas and Tuscaroras paid any part of the above consideration.

4. The grants set forth in findings 2 and 3 include the lands subsequently ceded by the Menominees to the United States by the treaties of August 11, 1827, and February 8, 1831.

5. Thereafter some New York Indians, belonging to the Oneida, St. Regis, Stockbridge, Munsee and Brothertown tribes, removed to and took possession of the lands in Wisconsin.

Later, and after 1832, another small portion of the New York Indians removed to the Wisconsin or Green Bay lands.

March 14, 1840, the Senecas denied ownership of Wisconsin lands, stating that they determined to have no other home than that of their fathers where they then resided, and, in May and September following, in petitions to the President, the Senate and the House of Representatives, their council denied that they were parties to the treaty.

6. It does not appear that application was made by the tribes or bands, or any of them, to the government, for removal to the Kansas lands provided for in the Buffalo Creek treaty, except as hereafter appears in these findings.

It does not appear that any substantial number of Indians wished to go to Kansas other than those who made up the Hogeboom party (*infra*).

7. In the year 1838, at the time of the negotiation of the treaty of Buffalo Creek, the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras and the St. Regis each possessed a reservation of land in the State of New York on which members of the tribes resided, and the right of occupancy of which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the State of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca nation; this they did with the consent of the Senecas, and a portion of the Onondagas did the same.

(The eighth finding is immaterial.)

9. For many years prior to the treaty of Buffalo Creek (of 1838) these nations or tribes of Indians had improved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

The treaty of Buffalo Creek, as printed in the seventh volume of the Statutes at Large, contains a misprint on the third line of page 556. The word "Oneidas" is in the original treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation."

The facts in this case are somewhat complicated, but the real question involved is whether the cessions of the Kansas lands to these Indians ever took complete effect, or whether the failure, or rather the refusal, of the Indians to remove to

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10. *Extract from Executive Journal of June* 11, 1838.

The Senate resumed as in Committee of the Whole the consideration of the treaty with the New York Indians, and the article supplemental thereto.

On motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the Committee on Indian Affairs, and determined in the affirmative, yeas 33.

* * * * * * *

No further amendments having been made, the treaty was reported to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved, (*two-thirds of the Senators present concurring,*) That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo Creek, in the State of New York, the 15th day of January, in the year of our Lord 1838, by Ransom H. Gillett, a commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians, assembled in council, with the following amendments.

(Here follows a series of amendments striking out original articles 3, 4, 5, 6, 9 and 19, striking out particular words and clauses from other articles, inserting new article 15, and concluding as follows:)

Resolved, further, (*two-thirds of the Senators present concurring,*) That the Senate advise and consent to the ratification of the supplemental article to the treaty concluded at Buffalo Creek, in the State of New York, January 15, 1838, which was made at the council-house of St. Regis on the 13th day of February, 1838: *Provided*, The chiefs and headmen of the St. Regis Indians, residing in New York, will in general council accept of and adopt the aforesaid treaty, as modified by the preceding resolution of ratification.

Provided always, and be it further resolved, (*two-thirds of the Senate present concurring,*) That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others

the lands set apart for them within five years, worked *ipso facto*, under the third article of the treaty, a forfeiture of their interest.

1. So far as concerns the legal aspects of the case, it is

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of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided, further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

The Senate proceeded, by unanimous consent, to the consideration of said resolutions.

On the question to agree thereto,

It was determined in the affirmative, { Yeas ..... 33 / Nays 2

* * * * * * *

Ordered, that the secretary lay this resolution before the President of the United States.

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Proclamation of the Treaty of Buffalo Creek.

Martin Van Buren, President of the United States of America, to all and singular to whom these presents shall come, Greeting:

Whereas a treaty was made and concluded at Buffalo, in the State of New York, on the fifteenth day of January, one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, headmen and warriors of the several tribes of the New York Indians, assembled in council;

And whereas the Senate did, by a resolution of the eleventh of June, one thousand eight hundred and thirty-eight, advise and consent to the ratification of said treaty with certain amendments, which treaty so amended is word for word as follows, to wit. . . .

And whereas the Senate did, on the 25th of March, one thousand eight hundred and forty, resolve "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation:"

Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the eleventh of June, one thousand eight hundred and thirty-eight, and twenty-fifth day of March, one thousand eight hundred and forty, accept, ratify and confirm said treaty, and every article and clause thereof.

In testimony whereof I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

unnecessary to inquire whether the government received from the Indians an adequate consideration for its reservation to them of the lands in Kansas. The findings upon this point are in substance that some of the New York Indians, between

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Done at this city of Washington this fourth day of April, one thousand eight hundred and forty, and of the Independence of the United States the sixty-third. M. VAN BUREN.

By the President:

[SEAL.] JOHN FORSYTH,
Secretary of State.

11. The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo Creek further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to this subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with them, and the Tuscaroras, continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the following allegations: (*a*) That the treaty had been brought about by corrupt means operating upon Indians of influence in their tribes, and put in motion by an agent of the preëmption owners: (*b*) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified, the lands and improvements on the Buffalo Creek reservation in New York were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Alleghany reservations in New York.

12. Prior to November 24, 1845, some of the New York Indians had applied to the Indian Office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo

1810 and 1816, with the permission of the President and with some actual aid from the government in making explorations, bought of the Menominee and Winnebago nations all their right, title and claim to about 500,000 acres of land in Wis-

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Creek and as shown below. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the government to remove the said Indians to Kansas.

The sum of $9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

It does not appear that any of the thirty-two Indians to whom allotments were made settled permanently in Kansas.

13. A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian Commissioner, to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The commissioner also reported that he held an enrollment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as wishing to go.

14. The United States, after the conclusion of the treaty of Buffalo Creek, surveyed and made part of the public domain the lands at Green Bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor, except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green Bay, Wisconsin, contained 65,540 acres, all of which has been allotted in severalty and reserved for school purposes except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty. (9 Stat. L. 955; 11 Stat. L. 663, 679; 16 Stat. L. 404.) The United States never acquired any lands in the State of New York from the Indians of that State. The lands ceded in that State by the Indians thereof were ceded for consideration to the

consin in consideration of $2000, chiefly in goods. This purchase was made for the benefit of the Six Nations and the St. Regis, Stockbridge and Munsee tribes.

Under a similar permission given by the Secretary of War,

State or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

15. Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo Creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of the tract at Green Bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as those of the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo Creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the State of Kansas. The price realized by the United States for such of said lands as were sold at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

16. By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of certain releases of claims under the treaties of 1838 and 1842, agreed to pay and invest, and did pay and invest, for said band the sum of $256,000.

The sum of $256,000 was equivalent to $1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo Creek, and also to a part of the sum of $400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

17. After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas Territory known as the New York Indian reserve be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and

and on September 23, 1822, the Menominees, in consideration of $3000 in goods, made a similar cession of another tract, containing about 5,000,000 acres, to the Stockbridge, Oneida, Tuscarora, St. Regis and Munsee nations. Both of these cessions were approved by the President. Thereafter, some of the New York Indians removed to and took possession of the lands in Wisconsin.

It seems, however, that the Menominees were dissatisfied with and repudiated the arrangement, and thereupon entered into two treaties with the United States, by the first of which (August 11, 1827, 7 Stat. 303) they agreed to refer the matter to the President, and by the second of which (February 8, 1831, 7 Stat. 342) protesting that they were under no obligations to recognize any claim of the New York Indians to any portion of their country, they agreed to set apart as a home for the several tribes of the New York Indians about 500,000 acres of land, for which the United States agreed to pay them $20,000, to be applied to their use. By these treaties a large quantity of other lands was also ceded by the Menominees directly to the United States, three townships of which were set aside for the Stockbridges, Munsees and Brothertowns.

It sufficiently appears from this statement that the Indians were possessed of some sort of title or interest in a large quantity of lands in Wisconsin, which the government was desirous of acquiring, and for which it was willing to make a large cession in the then unnamed, almost unknown, and wholly unsettled Territory, which was subsequently admitted to the Union as the State of Kansas. The consideration was evidently treated as a valuable one, and whether adequate or not would have been sufficient to support a deed between pri-

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allotments were made to them. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860,) some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

(The remaining findings are deemed to be immaterial.)

vate parties. Probably, however, the main inducement to the cession was the agreement of the Indians to remove beyond the Mississippi, and whether the agreement of the government to set apart for them a permanent home in this Territory was supported by any other consideration which would be deemed a valuable one between private parties, is wholly immaterial so far as the treaty obligations of the Government are concerned.

2. The first and one of the most important questions in the case turns upon the nature of the title acquired by the Indians under the treaty. Was it a grant *in præsenti*, or merely an agreement to set apart for the Indians at some future time the lands in question, provided that they would remove thither within the five years fixed by the third article of the treaty?

By the first article "the several tribes of New York Indians . . . *hereby cede and relinquish* to the United States all their right, title and interest to the lands secured to them at Green Bay;" and by the second article "in consideration of the above cession and relinquishment, . . . the United States *agree to set apart*" a tract of country, containing 1,824,000 acres of land, described by metes and bounds, "as a permanent home for all the New York Indians, . . . to have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section" of the act of May 28, 1830, "with full power and authority in the said Indians to divide said lands among the different tribes, nations or bands in severalty, with the right to sell and convey to and from each other." By the third article "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years . . . shall forfeit all interest in the lands so set apart to the United States."

The proper construction to be placed upon similar clauses was the subject of consideration by this court in several cases before the railroad land grant cases, and the conclusion reached that if, from all the language of the statute or treaty,

it was apparent that Congress intended to convey an immediate interest, it will be construed as a grant *in præsenti*.

In the case of *Rutherford* v. *Greene*, 2 Wheat. 196, 198, the State of North Carolina passed an act in 1782 "for the relief of the officers and soldiers in the continental line," and in the fifth section enacted that 25,000 acres of land "*shall be allotted for, and given to*, Major General Nathanael Greene, his heirs or assigns, within the bounds of the land reserved for the use of the army, to be laid off by the aforesaid commissioners;" and a further section (seventh) provided that the commissioners should "grant certificates to such persons as shall appear to them to have a right to the same." It was contended on the part of the appellant that these words gave nothing; that they were in the future and not in the present tense, and indicated an intention to give in future, but created no present obligation on the State nor present interest in General Greene. But it was held that, as the act was to be performed in future, the words directing it were necessarily in the future tense, and that, although the land was undefined, the survey afterwards made in pursuance of the act gave precision to the title and attached it to the land surveyed.

In reply to the argument that to make this an operative gift the words "are hereby given" should have been used, Mr. Chief Justice Marshall observed: "Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms used in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

This case was followed in *United States* v. *Brooks*, 10 How. 442, in which a treaty with the Caddo Indians provided that certain persons "*shall have their right* to the said four leagues of land reserved for them, and their heirs and assigns forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles are supple-

mentary, and the four leagues of land *shall be laid off*," etc. It was held that these words gave to the reservees a fee simple to all rights which the Caddoes had in those lands, as fully as any patent from the government could make one.

Fremont v. *United States*, 17 How. 542, was a case of a Mexican grant of a tract of land known as "Las Mariposas," within certain undefined boundaries. The grant was of ten square leagues, subject to certain conditions, and was to be made definite by a future survey. The grant purported to convey a present and immediate interest, in consideration of previous public services, and it was decided to be *in præsenti* upon the authority of *Rutherford* v. *Greene*, 2 Wheat. 196 — that the conditions were conditions subsequent, but that non-compliance with them did not amount to a forfeiture of the grant. Two members of the court dissented, being of opinion that the case was controlled by those of *United States* v. *Boisderé*, 11 How. 63, 96; *Glenn* v. *United States*, 13 How. 250, 259, and *Vilemont* v. *United States*, 13 How. 261.

In the cases arising under the railroad land grants, of which *Schulenberg* v. *Harriman*, 21 Wall. 44, is a leading one, the language of the granting clause was in the present tense, "*there be, and hereby is, granted*," etc.; and it has always been held that these were grants *in præsenti*, although the lands could not be identified until the map of the definite location of the road was filed, when the title, which was previously imperfect, acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here. *Lessieur* v. *Price*, 12 How. 59; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Missouri, Kansas & Texas Railway Co.* v. *Kansas Pacific Railway*, 97 U. S. 491; *Railway Company* v. *Alling*, 99 U. S. 463, 475; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241.

The same doctrine has also been applied to grants of swamp and overflowed lands by the acts of September 28, 1850, and June 10, 1852. *Railroad Company* v. *Smith*, 9 Wall. 95; *Wright* v. *Roseberry*, 121 U. S. 488.

One or two cases, which apparently hold a contrary doctrine, are readily reconcilable. That of *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634, arose under the school land grant contained in the act of March 21, 1864, c. 36, enabling the people of Nevada to form a state government. 13 Stat. 30. The seventh section of the act provided "that sections numbered 16 and 36 in every township . . . *shall be, and are hereby, granted*, to said State." These words were held, under the peculiar language of the act, not to constitute a grant *in præsenti*, but an inchoate and incomplete grant until the premises were surveyed by the United States, and the survey properly approved. "We do not seek," said the court, "to depart from this sound rule;" (in *Schulenberg* v. *Harriman*,) "but, in this instance, words of qualification restrict the operation of those of present grant." "A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. . . . Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them."

In *Hall* v. *Russell*, 101 U. S. 503, the language of the grant was "that *there shall be, and hereby is*, granted to every white settler or occupant of the public lands," and it was held that, as the land was not identified and the grantee was not named, there could not be a present grant. "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time."

In the case of *Rice* v. *Railroad Co.*, 1 Black, 358, the granting clause of the act was in the present tense, but there was a further clause expressly declaring that no title should vest nor

any patent issue till certain portions of the road had been completed.

From this summary of cases it is evident that the language of the granting clause is not conclusive, but the intent of Congress must be gathered from the whole scope of the instrument, and the facts to which it was intended to apply. Applying the principle of the cases above cited to the one under consideration, we are of the opinion that the grant in question was intended to invest a present legal title in the Indians, for the following reasons:

First. There is no doubt that the cession by the Indians of their interest in the Wisconsin lands, in the first article of the treaty, was an absolute, unconditional and immediate grant, and it is improbable that the Indians would have consented, or that the United States would desire, that they should accept from the Government a mere promise to set apart for them in the future the tract in Kansas. If we are to adopt such a construction it would follow that the title of the Indians, not only to the tract in Kansas, but to the lands in Wisconsin, was made dependent upon their removal to their new home. While it might be reasonably contended that their failure to remove should result in a cancellation of the treaty and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain. The object of the treaty was evidently to effect an exchange of lands in pursuance of the act of May 28, 1830, c. 148, 4 Stat. 411, the third section of which provides "that in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guaranty to them and their heirs or successors the country so exchanged with them; and, *if they prefer it*, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

Second. The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. There was no uncertainty as to the lands granted, or as to the identity of the grantees, which, in the case of *Heydenfeldt* v. *Daney Mining Co.*, 93 U. S. 634, was held to turn it into a grant *in futuro*.

Third. While the granting clause is in the future tense, an agreement to set apart, the *habendum* clause is in the present tense: "To have and to hold the same in fee simple to the said tribes, or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations or bands, in severalty, with the right to sell and convey to and from each other." The object of the *habendum* clause is said to be "to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted, or demised, and to what use." Sheppard's Touchstone, 74. It may explain, enlarge or qualify, but cannot contradict, or defeat, the estate granted by the premises, and where the grant is uncertain, or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying or controlling it. Jones on Real Prop. § 563; Devlin on Deeds, § 215.

In this case if the *habendum* clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and *habendum* clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the *habendum* clause removes that doubt, and imports a present surrender of a defined tract. The addition of the words, "by a patent from the President of the United States," is immaterial, since it refers

to, and is intended to be construed in connection with the third section of the act of May 28, 1830, in which the issue of a patent is merely spoken of as an optional or preferential method of acquiring full title to the land.

Fourth. By Article X a special provision was made for the Senecas by which the easterly part of the tract was set apart for them, and a deed made by them of their New York lands to Ogden and Fellows was recognized and approved of by the Government, and the consideration invested for their use. And by Article XIV another special tract of the lands granted was set off for the Tuscaroras, who conveyed to the United States 5000 acres of land in New York to be held in trust for them, and another deed to Ogden and Fellows of lands in New York was assented to and sanctioned by the Government.

These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas.

3. There is, however, another consideration which must not be overlooked in this connection, and which raises the only difficult point in the interpretation of the treaty. It is found by the court below (finding 10) that, when the treaty was laid before the Senate for ratification, June 11, 1838, the third, fourth, fifth, sixth, ninth and nineteenth of the original articles were stricken out, several others were amended by eliminating particular clauses, a new article was added as Article XV, and the ratification made subject to the following condition:

"*Provided always, and be it further resolved, (two-thirds of the Senate present concurring,)* That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given

their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: *Provided further*, That if any portion or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only."

Now, if the above proviso (that if any portion or part of said Indians do not emigrate, the President shall . . . deduct from the quantity of land allowed west of the Mississippi such numbers of acres as will leave to each emigrant 320 acres only) be considered a part of the treaty and to be respected as such, it would be difficult to avoid the conclusion that the grant of Kansas lands was not intended to take immediate effect, since the power to *deduct* (differing in that respect from the power to *forfeit* contained in the third article) would show an intention that the grant as a whole should not take immediate effect, and would imply that it was extended only to 320 acres to each emigrant. If the allotment is to be treated as one of 320 acres for each emigrant and not of the entire tract as specified in article two, the residue, of course, belongs to the Government.

But did this resolution ever become operative? It is not found in the original nor in the published copy of the treaty, nor in the proclamation of the President, which recites that the Senate did, by a resolution of the 11th of June, 1838, "advise and consent to the ratification of said treaty with certain amendments; *which treaty, as so amended, is word for word as follows*, to wit:" (Here follows a copy of the treaty as published in 7 Stat. 550.) But no allusion is here made to the final resolution or its proviso. This is the more remarkable, as every other amendment made by the Senate appears in the treaty as published, while no reference what-

ever is made to this — the reason probably being that the resolution was mainly directory in its character, requiring that the treaty be fully and fairly explained by the commissioner to each of the tribes separately assembled in council, and that they should give their free and voluntary assent thereto. The proviso may also have been well considered as merely directory to the President, but in any event it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the grant.

The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did, on March 25, 1840, resolve that the treaty, "together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes," but, as the proclamation purported to set forth the treaty "word for word" as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation.

The case of *Doe* v. *Braden*, 16 How. 635, relied upon by the Government in this connection, is not in point. In this case, in the ratification by the King of Spain of the treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida were annulled

and declared to be void, and it was held that a written declaration, annexed to a treaty at the time of its ratification, was as obligatory as if the provision had been inserted in the body of the treaty itself. The question in the case was whether the king had power to annul the grant, which was considered a political and not a judicial question; but, as the annulling clause was inserted in the ratification and published in both countries as part of the treaty, there was no question whatever of concealment.

4. Assuming that the Indians took an immediate title to the lands reserved for them in Kansas, we are next to inquire whether such title has been legally forfeited. By the third article of the treaty it was further agreed "that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years or such other time as the President may from time to time appoint, shall forfeit all interest in the lands so set apart to the United States."

Acting in pursuance of the treaty and of the assumed right of forfeiture, the Government surveyed, and made part of the public domain, the lands at Green Bay ceded by the claimants and sold or otherwise disposed of, and conveyed the same and received the consideration therefor, except a reservation of about 65,000 acres to the Oneidas. The lands west of the Mississippi (the Kansas lands) were, after the treaty of Buffalo Creek, surveyed and made a part of the public domain, and sold or otherwise disposed of by the United States, which received the consideration therefor, and these lands were thereafter and now are included within the territorial limits of the State of Kansas.

In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by simple executive action to reënter, take possession of the lands and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may reënter in the case of the breach of a condition subsequent, and the Government, which can

only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States* v. *Repentigny*, 5 Wall. 211, 267, in which the court said: "We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government, without these preliminary proceedings." Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg* v. *Harriman*, 21 Wall. 44, 63; in *Farnsworth* v. *Minnesota & Pacific Railroad*, 92 U. S. 49; and in *Van Wyck* v. *Knevals*, 106 U. S. 360. In *St. Louis, Iron Mountain &c. Railway Co.* v. *Magee*, 115 U. S. 469, it was said that "legislation to be sufficient" (for that purpose) "must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." See, also, *Pacific Railway Co.* v. *United States*, 124 U. S. 124. As there is no pretence that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the Government.

5. But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evi-

dence offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture. Jones on Real Prop. §§ 678, 679.

It will be observed that the forfeiture is conditioned, not upon the actual removal of the Indians to the Kansas reservation, but upon their accepting and agreeing to removal within five years, or such other time as the President might from time to time appoint. The tribes for whom the Kansas lands were intended as a future home were the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns, residing in the State of New York.

Of these the Senecas and certain of the Cayugas and Onondagas residing among them expressly agreed in Article X "to remove from the State of New York to their new homes within five years, and to continue to reside there."

By Article XIII the Oneidas also agreed to remove as soon as they could make satisfactory arrangements for the purchase of their lands at Oneida.

By Article XIV the Tuscaroras also agreed to accept the country set apart for them, and to remove there within five years, and to continue to reside there.

In a supplemental treaty made with the St. Regis Indians on February 13, 1838, it was agreed that any of them who wished to do so should be at liberty to remove to Kansas at any time thereafter within the time specified in the treaty, but the Government should not compel them to remove.

It thus appears that, as to three of these tribes, there has been a technical performance so far as a forcible removal was concerned.

It further appears from the eleventh, twelfth and thirteenth findings that the President never fixed any time for their removal, as was contemplated in the third article; that many of the Indians protested against any removal; that the Onondagas officially declared they would not remove; that—

"After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with

them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo Creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do."

It further appeared that —

"No provision was made for the actual removal of more than about 260 individuals of the claimant tribes. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

"In 1845 Abram Hogeboom represented to the Government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the Government to remove the said Indians to Kansas.

"The sum of $9464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

"From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

"It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas."

It is further found that —

"A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian

Commissioner, to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained."

In these findings lie the main strength of the defence.

It thus appears that a part had accepted and agreed to remove ; that a few had actually removed ; that others had stipulated that they should not be compelled to remove, and still others protested against the treaty and refused to remove. If the acceptance and signing of the treaty is not to be considered in itself as an acceptance and agreement to remove, as to which we express no opinion, there was a technical compliance with the conditions of Article III by a part of the Indians, and a flat refusal upon the part of others. But, after all, a mere agreement to accept and remove, though probably sufficient to prevent a legal forfeiture, was of no practical value, and would have availed the Government nothing, except as it might have justified a forcible removal had the Government elected to take that course. No provision was made as to the manner in which the removal was to be effected, but from the dependent character of the Indians, and from the appropriation of $400,000, made for that purpose, it is evident that it was contemplated that the removal should be made by the Government itself. It was so held by this court in *Fellows* v. *Blacksmith*, 19 How. 366, and we see no reason to question the propriety of that ruling. Whether the Government could have removed them forcibly was not decided in that case, and is not in this.

The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them. This is the main defence in the case. Upon the other hand, no time was fixed by the President for their removal; no formal notice was ever given them to remove; but at various times, and particularly at the council held at Cattaraugus, June 2, 1846, called by the com-

missioners to learn the final wishes of the Indians as to emigration, the chiefs of the four tribes present were unanimous in the opinion that scarcely any Indians, who wished to emigrate, remained. This action constitutes practically the only claim of forfeiture. There is no finding that the other five tribes did refuse. The practical application which counsel seek to make of this partial refusal is to justify the Government, not only in appropriating the Kansas lands, but, inferentially, in failing to make any other compensation to the Indians for the seizure and sale of the Wisconsin lands. In view of this, it seems to us that, to justify a forfeiture, it should appear that the repudiation was as formal, as broad and as unequivocal as the acceptance; that the President should have fixed a time for the removal, and should at least have made a formal tender of performance. If it be said that, considering the number of the tribes and the character of the individuals he was dealing with, this was impracticable, it may also be said that the Government had undertaken to negotiate a treaty with them severally and collectively, and if it sought to enforce a forfeiture of rights originating in such treaty, it should have given formal notice to that effect, that the Indians might understand that they were risking the loss of all compensation for their Wisconsin lands by refusing to emigrate.

But however this may be, we think the fact that the Government never insisted upon this as an estoppel, and never treated the Indians as having lost their rights in the Kansas lands, is a sufficient answer to the claim of abandonment. After their refusal at the council in 1846, nothing appears to have been done until 1854, when Kansas had begun to feel the impress of a sudden and large immigration from the East, and an act (act of May 30, 1854, c. 59) known as the Kansas-Nebraska act was passed, creating the Territory of Kansas, in which Congress defined the limits of the new Territory, 10 Stat. 277, 284, and, after giving the boundary lines, which included the New York Indian lands —

"*Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now

pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any Territory, *which by treaty with any Indian tribe*, is not, without the consent of said tribes, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Kansas until said tribes shall signify their assent to the President of the United States to be included within the said Territory of Kansas."

The thirty-seventh section of the same act (p. 290) provides —

"That all treaties, laws and other engagements made by the Government of the United States with the Indian tribes inhabiting the Territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

Even if the first clause of this proviso be limited to the Indians, then "in said Territory," of whom only thirty-two were New York Indians, the second clause is subject to no such limitation, and applies to treaties "with any Indian tribe." The reference here is evidently to the treaty of Buffaloe Creek, and is a distinct recognition of the subsisting validity of such treaty, and a promise on the part of Congress that it shall be faithfully and rigidly observed, "notwithstanding anything contained in this act," and we may add, notwithstanding the refusal of the Indians to emigrate and the now claimed forfeiture of their rights.

Some steps were taken to effect a settlement with the Indians, and on November 5, 1857, a treaty was entered into with the Tonawandas in which, after reciting the treaty of 1838, the surrender of 500,000 acres of lands in Wisconsin, the agreement to set apart the lands in Kansas, the Tonawandas relinquished their interest in the Kansas lands, the United States agreeing to pay them therefor the sum of $256,000. 11 Stat. 735. But the Tonawandas were but one of the nine tribes which participated in the treaty, and there seems to have been no reason why their claim should have

been recognized in preference to others who stood upon the same footing. Upon the theory of the Government, there was no reason why this treaty should have been entered into at all. It was clearly a recognition of the fact that the Tonawandas had rights which, in the nineteen years which had elapsed since the treaty was made, they had not forfeited.

But this is not all: In the eleventh section of the sundry civil appropriation act of March 3, 1859, c. 82, 11 Stat. 425, a provision was made for the issue of patents to Indians who were entitled to separate selection of lands in Kansas, with a proviso that "nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made with them in 1838 at Buffalo Creek." If this was not a recognition of the fact that the Indians still had rights, it certainly shows that their alleged rights had been made the subject of consideration, and were not repudiated or denied.

But it seems that the matter did not rest here, for in the same month in which the last above act was passed, namely, March 21, 1859, the Secretary of the Interior directed the New York Indian reservation in Kansas to be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under the treaty, after which the residue was to become public domain, and in December, 1860, the President proclaimed the reservation to be a part of the public domain.

Notwithstanding this, however, in the act of January 29, 1861, c. 20, 12 Stat. 126, admitting Kansas to the Union as a State, it was provided that nothing should be so construed as to impair the rights of person or property pertaining to the Indians in said Territory so long as such rights should remain unextinguished by treaty. It may be said that the provisos in this act applied only to the Indians in said Territory, but even if it be so limited, the provision in the act of March 3, 1859, clearly applies only to the New York Indians, whose rights under the treaty were recognized. Up to the time these acts were passed certainly there had been no denial of the right of the Indians to these lands, and no action on the

part of the Government indicating an intent to insist upon the forfeiture of such right. Every legislative expression tended toward an acknowledgment of the fact that their claim was unimpaired.

Our attention has also been called to certain documents emanating from the executive and legislative departments of the Government, some of which tend to strengthen the idea that these departments never intended to treat the action of the Indians as a forfeiture of their grant, and acquiesced in the justice of the claims the Indians now make, and have already made under the treaty of Buffalo Creek. It is insisted by the Attorney General that, as these documents are not referred to in the findings of fact by the court below, this court cannot consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. *Jones* v. *United States*, 137 U. S. 202, 214.

While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

As indicating the views of the executive in regard to the justice of the Indians' claims, a treaty was concluded September 2, 1863, with the New York Indians who had moved to Kansas under the treaty of 1838, for the purpose of extinguishing their title to lands in that State. This treaty was based on the treaty of November 5, 1857, with the Tonawandas, and was sent to the Senate for ratification, but action was suspended upon it "until a treaty could be concluded with all the New York Indians to arrange all matters between them and the United States which required adjustment." Ex. Doc. Y, p. 2, 40th Cong. 3d sess.

In pursuance of this policy, the President, in May, 1864, directed a commissioner to proceed to the State of New York for the purpose of negotiating a treaty with the New York

Indians. These Indians had been previously notified on April 26, 1864, by the Secretary of the Interior that he deemed it proper to advise them, through their agent, "that it is the desire of the Government to extinguish their title to a tract of land in Kansas, ceded to them by the treaty of January 15, 1838;" and that a treaty had already been made for that purpose with the fragments of bands of these Indians residing in Kansas. Ex. Doc. No. 1, 38th Cong. 2d sess. p. 188.

The treaty with the Indians living in New York was not concluded, but in his annual report to Congress the Secretary of the Interior on December 6, 1864, spoke of the efforts to extinguish the title of these Indians to the Kansas lands, and considered their claims as "being undeniable and just." *Ibid.*

This opinion was reiterated by the Commissioner of Indian Affairs on December 5, 1866, in his annual report. (p. 61.)

In November, 1868, the President again attempted to negotiate a treaty or treaties with the Senecas and other New York Indians with reference to "their claims arising under the treaties of 1838 and 1842." Ex. Doc. Y, p. 10, 40th Cong. 3d sess. And thereafter a treaty was concluded December 4, 1868, according to the instructions issued to the commissioner appointed to negotiate it, by which the United States agreed to pay the sum of $320 to each Indian, including half-breeds, of the Six Nations in New York and Wisconsin. *Ibid.* p. 1.

The commissioner appointed to negotiate this treaty reported to the Indians in council that "the reason why the New York Indians had not been removed to their Kansas reservation was because squatters had obtained possession of their lands, and the United States was unable to drive them off, and keep them off." *Ibid.* p. 10.

This treaty, however, was not ratified by Congress, owing presumably to the passage of a general law which denied the right of any Indian tribe or nation to be recognized as an independent nation for treaty-making purposes. Act of March 3, 1871, c. 120, 16 Stat. 544, 566.

In a communication dated January 29, 1884, addressed to

the Secretary of the Interior for transmission to the Senate, the Commissioner of Indian Affairs reviewed the claims of the New York Indians under the treaty of 1838, and adhered to the opinions of his predecessors, in that there was a failure on the part of the Government to provide homes for those who went to Kansas, and that no consideration had been given the New York Indians for the cession of the 500,000 acres of Wisconsin lands. He referred to the settlement with the Tonawandas, and stated that he saw "no reason why the other tribes should not receive the same relief."

While none of these documents are of great importance in themselves, they serve to indicate very clearly that in the mind of the Executive and departmental officers the rights of the Indians, under the treaty of Buffalo Creek, were continuously recognized as just claims against the Government.

We are at a loss to understand upon what theory this can be considered an abandoned claim. If the evidence pointed in that direction the argument would come with better grace if the Government had not itself received the full consideration stipulated by the treaty (so far as such consideration was a valuable one) for the Kansas lands, and had neglected to render any account of the same. Of course, if the legal title passed to these Indians, something else than a failure to assert such title is necessary to divest it. But however this may be, the court finds (finding 17) that after the order of the Secretary of the Interior of 1859, and before the proclamation of the President of said lands as part of the public domain in December, 1860, "some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims." How long, or how frequently, or in what manner the Indians continued to assert their claims, does not appear; but it seems that on June 21, 1884, their claims, together with the vouchers, papers, proofs and documents appertaining thereto, were referred to the

Court of Claims for an investigation and finding of facts. To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case. Indeed, it is not altogether clear that the Government did not waive this point in the act of 1893, conferring jurisdiction upon the Court of Claims to enter judgment, when it declared that the statute of limitations should not be pleaded as a bar to recovery.

The appropriation of these lands by the Government is probably explicable by the fact that an enormous emigration to Kansas was at that time in progress for the avowed purpose of preventing the establishment of slavery in the Territory; that the pressure of population for land was very great; that the Territory was almost in the throes of civil war; that the negotiation of a new treaty with nine different tribes would be attended with considerable delay; that but few of the Indians had actually removed and resided in Kansas, and that the Secretary of the Interior assumed, what undoubtedly the facts had some tendency to show, that the grant had lapsed by the failure of the Indians to emigrate, and therefore considered himself fully justified in taking possession of the lands, and settling with the Indians in a future treaty. The claim of the Tonawandas was actually settled. Congress, in the act of 1861 admitting Kansas, provided for the subsequent extinguishment of Indian titles; but a great civil war then intervened, and for several years absorbed the attention of Congress, and the matter does not seem to have been resuscitated until after the lapse of about twenty years, when Congress referred the case to the Court of Claims, with an express waiver of the statute of limitations. We do not perceive in all this an intention on the part of the Indians to abandon their claims, or any indication on the part of Congress that it considered it abandoned.

6. But little need be said considering the cash payments to be made under the ninth, twelfth, thirteenth and fourteenth articles of this treaty. Most, if not all, of these payments were to be made upon the actual removal of these Indians to the West, and as this contingency never happened, the

amounts never became due. The same ruling applies to the appropriation of $400,000 in the fifteenth article, which was made to aid in removing the Indians to their new homes, supporting them the first year after their removal, and for other incidental purposes contingent upon their removal.

The judgment of the Court of Claims is therefore reversed, and the case remanded with instructions to enter a new judgment for the net amount actually received by the Government for the Kansas lands, without interest, less the amount of lands upon the basis of which settlement was made with the Tonawandas, and other just deductions, and for such other proceedings as may be necessary, and in conformity with this opinion.

The Chief Justice, Mr. Justice Harlan and Mr. Justice Brewer dissented.

LEYSON *v.* DAVIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 517. Submitted March 14, 1898. — Decided April 11, 1898.

In a suit commenced in a court of the State of Montana by the administrator of the donor of national bank stock, no written assignment having been made, against the donee to compel the delivery of the certificates to the plaintiff, and against the bank to require it to make a transfer of the stock to the plaintiff, the donee set up that the gift was voluntarily made to him by his father in his lifetime, *causa mortis*, and on trial it was decided that he was the owner of such stock and of the certificates, and was entitled to have new certificates therefor issued to him by the bank; and a decree having been entered accordingly, it was sustained by the Supreme Court of the State upon appeal. *Held*, that these matters raised no Federal question; that no title, right, privilege or immunity was specially set up or claimed by the administrator under a law of the United States, and denied by the highest tribunal of the States; and that the controversy was merely as to which of the claimants had the superior equity to those shares of stock, and the national banking act was only collaterally involved.

Statement of the Case.

THIS was an action commenced by the special administrator of the estate of Andrew J. Davis, deceased, and continued in the name of his successor, Leyson, administrator with the will annexed, against Andrew J. Davis, Jr., and the First National Bank of Butte, in the District Court of the State of Montana for the county of Silver Bow, to recover nine hundred and fifty shares of the capital stock of the defendant bank, alleged by the administrator to belong to the estate of the deceased, and claimed by the defendant Davis, Jr., under a *donatio causa mortis*. The prayer of the complaint was that the claim of defendant Davis, Jr., to the stock be declared void; that he be compelled to deliver up the certificates; and that the bank be required to transfer the same on its books and issue new certificates to plaintiff as administrator.

The answer of Davis, Jr., in addition to his defence, set up affirmative matter, and prayed that he be adjudged the owner of the stock; that plaintiff as administrator and the estate be decreed to have no right or interest therein; and that the bank be required to make the proper transfers upon its books to him. The bank answered that it was ready and willing to transfer the shares of stock to the party determined by the court entitled to the same.

The trial court found as facts, in substance, that in the latter part of December, 1889, Andrew J. Davis was, and had been for some months, seriously and dangerously ill, suffering from an ailment of which he died in the month of March following; that being so ill, and in view and expectation of death, but being of sound and disposing mind, he gave to defendant Andrew J. Davis, as a gift, the shares of stock and certificates thereof described in the complaint, and at the same time delivered the certificates to said Andrew J., who then and there received and accepted the same, and who has ever since said gift and delivery retained and held the shares of stock and certificates in his possession, and claimed them as his own; that the deceased had great affection for and confidence in defendant Andrew J., and at the time of the gift of the stock and certificates, and for several years prior thereto, it was and had been the intention of the deceased to give the stock and

Counsel for Parties.

certificates to said Andrew J.; that there was no written assignment of the stock or certificates, or power of attorney executed by deceased in connection with the gift, nor any written authority empowering Andrew J., or any other person for him, to transfer the stock and certificates on the books of the bank during the lifetime of the donor, and that there was no transfer made on the books of the bank to Andrew J.; that no other gift than the gift of the stock was made, or attempted to be made, by the deceased to Andrew J.; that the gift of the stock was an absolute gift, and was a valid gift *mortis causa;* and that defendant Andrew J. had ever since held possession and exercised control and dominion over the stock, with the knowledge of the donor to the time of his death, arising and resulting only from the fact of the gift and the donee's possession. It was, therefore, concluded that defendant Andrew J. Davis was the owner of the stock and certificates described in the complaint, and entitled to have the shares transferred to him on the books of the bank, and to have new certificates issued to him therefor; that the donor was divested of his possession, dominion and control of said shares of stock by the gift; that the plaintiff, as administrator, had not, nor had the estate of the deceased, any right, title or claim in or to the shares of stock or certificates, and that defendant Andrew J. was entitled to a decree in accordance with the prayer of his answer.

The decree was accordingly so entered. On appeal the Supreme Court of Montana reviewed the facts and the law at length, and elaborately discussed the authorities both in England and in this country; sustained the claim of defendant Davis to the stock; and affirmed the decree. 17 Montana, 220.

A writ of error from this court was thereafter allowed and motions made to dismiss or affirm.

Mr. A. T. Britton, *Mr. W. W. Dixon*, *Mr. A. B. Browne*, *Mr. B. Platt Carpenter* and *Mr. James W. Forbis* for the motions.

Mr. Robert G. Ingersoll, *Mr. Walter S. Logan*, *Mr. Charles M. Demond*, *Mr. Henry A. Root* and *Mr. E. W. Toole* opposing.

Opinion of the Court.

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

The Supreme Court of Montana held that as between donor and donee a valid gift of the stock was made by the delivery thereof, without a transfer of the shares on the books of the bank or indorsement on the back of the certificates themselves, which carried the equitable title and entitled the donee to call for the legal title as against the representative of the donor's estate. This conclusion was arrived at solely on principles of general law, and in itself involved the disposition of no Federal question.

It is true that by section 5139 of the Revised Statutes shares of the capital stock of national banks are declared to be personal property, "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association;" and it is conceded by defendant in error that by one of the by-laws of defendant bank it was prescribed that its stock should be "assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the banking laws, and transfer books shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable, either as principal debtor or otherwise;" and that the certificates in question contained the provision: "Transferable only by him or his attorney on the books of this bank on the surrender of this certificate."

But these matters raised no Federal question. The rights of third parties, or of creditors, or of the bank, were not in issue or determined here, but simply the equities as between the particular parties. The representative of the donor was manifestly bound by the donor's valid acts, and could assert no right superior to his. His right to make the gift was the right to dispose of his own property, and whether as between him and his donee the equitable title passed was a question of general or local law. The administrator's claim that he was entitled to receive the stock as representing the estate or for

the benefit of the next of kin rested on that law as administered by the courts of the State.

So far as the act of Congress is concerned, we understand the doctrine to be, as stated in *Johnston* v. *Laflin*, 103 U. S. 800, 804, that: "The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies."

In *Black* v. *Zacharie*, 3 How. 483, 513, it was said: "It is true that the charters of the Carrollton Bank and of the Gaslight and Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of the *Union Bank of Georgetown* v. *Laird*, 2 Wheat. 390, this court took notice of the distinction between the legal and equitable title in cases of bank stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charters of other banks containing similar provisions as to the transfer of their stock, is, that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice; and that as between vendor and vendee a transfer, not in conformity to such provisions, is good to pass the equitable title and divest the vendor of all interest in the stock. Such are the decisions in the cases of the *Bank of Utica* v. *Smalley*, 2 Cowen, 770, 777, 778; *Gilbert* v. *Manchester Iron Co.*, 11 Wend. 628; *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend. 348, 362; *Quiner* v. *Marblehead Insurance Co.*, 10 Mass. 476, and *Sergeant* v. *Franklin Ins. Co.*, 8 Pick. 90."

We cannot perceive that any title, right, privilege or immunity was specially set up or claimed by the administrator under a law of the United States and denied by the highest

tribunal of the State, which is the ground of jurisdiction relied on. The controversy was merely as to which of the claimants had the superior equity to these shares of stock, and the national banking act was only collaterally involved. *Conde* v. *York*, 168 U. S. 642; *Union National Bank* v. *Louisville &c., Railway*, 163 U. S. 325; *Eustis* v. *Bolles*, 150 U. S. 361.

Writ of error dismissed.

Mr. Justice Harlan was of opinion that this court had jurisdiction and that the judgment should be affirmed.

BUDZISZ *v.* ILLINOIS STEEL COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 560. Submitted February 21, 1898. — Decided April 11, 1898.

No question is presented which brings this case within the supervisory power of this court, as the alleged invalidities of the entries and of the patents do not arise out of any alleged misconstruction or breach of any treaty, but out of the alleged misconduct of the officers of the Land Office; to correct which errors, if they exist, the proper course of the defendants was to have gone to the Circuit Court of Appeals.

This was an action of ejectment brought in the Circuit Court of the United States for the Eastern District of Wisconsin, in February, 1896, by the Illinois Steel Company, a corporation of the State of Illinois, against John Budzisz and August Budzisz, citizens of the State of Wisconsin, to recover certain lots or parcels of land in the fifth ward of the city of Milwaukee. The case was so proceeded in that, on November 20, 1897, a final judgment was entered in favor of the plaintiff for possession of the premises, and for costs. A writ of error was then sued out from this court, which the defendant in error moved to dismiss.

Mr. William E. Carter and *Mr. Elbert H. Gary* for the motion.

Mr. Rublee A. Cole opposing.

Mr. Justice Shiras delivered the opinion of the court.

This cause is now before us on a motion to dismiss the writ of error, on the ground that there is not involved any question that brings the case within any of those provisions of the act of March 3, 1891, establishing Circuit Courts of Appeals, which give this court jurisdiction to review the judgment of the Circuit Court. Neither the petition, containing, as it did, only the allegations usual in an action of ejectment, nor the answer, first filed, raised any question which, however disposed of in the Circuit Court, would have enabled either party to have brought the case directly to this court.

Subsequently, however, the defendants filed an amended answer, in which they averred that the title to the land in dispute was still in the United States; that the Indian title to said land had not been extinguished at the time of the inception of plaintiff's title; that any patent or purported patent granted by the United States while the Indian title was still existing was null and void. After, on motion of the plaintiff, certain portions of these answers had been stricken out, the defendants filed a second amended answer, the main allegations of which were as follows:

That the Indian title to the lands in dispute had not been extinguished when Increase Claflin and Daniel Darnell made their entry; that the Indian title was conveyed to the United States under and by virtue of several treaties with the Menominee Indians, to wit: The treaty of February 8, 1831; of February 17, 1831; of October 27, 1832; of October 18, 1848; that by reason of the aforesaid treaties the lands were not subject to entry under the laws of the United States, and that therefore the entry of Claflin and Darnell was null and void; that said lands were first offered for sale by the proclamation of the President on May 6, 1835; that the patent of the United

States dated September 1, 1838, to Alexander J. Irwin, assignee of Increase Claflin and Daniel Darnell, was and is null and void; that the patent of the United States dated April 16, 1838, to Albert G. Ellis, assignee of Daniel Darnell, was and is null and void, and in no way extinguished the title of the Government of the United States to the lands in dispute.

On July 30, 1897, the court, on motion of the plaintiff, struck out those portions of the amended answers which have just been enumerated; and on August 3, 1897, the defendants filed exceptions to the orders of the court striking out those portions of the answers, which exceptions were allowed and signed by the judge.

With the record in that condition the case came on for trial, and resulted in a verdict and judgment in favor of the plaintiff.

The record shows no exceptions taken or allowed during the course of the trial, either to the admission or rejection of evidence, or to the charge of the judge. The only bill of exceptions to be found in the record is the one allowed and signed by the judge relating to striking out portions of the answers.

The course most favorable to the plaintiffs in error will be to treat the orders of the court striking out portions of the answers as if they were rejections of offers made at the trial, to prove the allegations contained in the portions stricken out.

The reasons given by the court for striking out those portions of the answers were that a patent of the United States is the highest evidence of title, where the grant originates out of the public domain; that the defendants were mistaken in the inference that the ownership of these lands was at any time, in view of the law, vested in the Indians, or derived through the treaties referred to; that there is no recognition by any of the authorities of a fee vested in the Indians; that as to the land in Wisconsin, the treaty with Great Britain and the cessions of Massachusetts and Virginia are the legal sources of title in the general government; that the treaties with the Indians are regarded only for rights of occupancy and for reservations from sale; that therefore the doctrine is established that the patent issued by the government is "an

invaluable muniment of title and a source of peace and quiet to its possessor;" that even if it be allowed, for the purposes of the motion, that there was no right of entry at the time of original entry alleged, the answer concedes that these lands were offered for sale by the President's proclamation of May 6, 1835, upon the survey of 1834, and that the patents were issued, respectively, April 16 and September 1, 1838; that it is not asserted that their validity has ever been since questioned, either by the United States, or by any person in its right, under equities preëxisting or otherwise; that these lands became patentable after the survey and proclamation, and were clearly within the jurisdiction of the land department when the patents were issued in 1838; that all questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, even if they were voidable at the instance of proper parties; that the special matters alleged in the answers and included in the motion to strike out state no grounds which are available to these defendants by way of defence; that under the act of Congress of March 3, 1891, c. 559, 26 Stat. 1093, any action by the United States is now barred, and that even if the defendants were possessed of paramount equities, or were in any manner entitled to avail themselves of rights existing in the United States, they are equally barred by that limitation. *Illinois Steel Co.* v. *Budzisz*, 82 Fed. Rep. 160.

The correctness of these views is not before us on this motion to dismiss for want of jurisdiction, and we only state them to show that no question is really presented which brings this case within our supervisory power. It is not claimed that the construction or application of the Constitution was involved, and we think it is quite clear that, in fact, neither the construction nor the validity of any treaty of the United States or made under its authority is in any way involved, or arises, or is drawn in question in this case. Mere allegations to that effect, not based upon the facts of the case, do not create a case which we are authorized to review. The alleged invalidity of the entries and of the patents did not arise out of any alleged misconstruction or breach of any treaty,

but out of the alleged misconduct of the officers of the Land Office in permitting the entries and in issuing the patents; and if any error was committed by the Circuit Court in dealing with that question, which we do not intimate, the proper course for the defendants was to have gone to the Circuit Court of Appeals.

Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under said treaties, or under any of the parties to them. In no true sense, therefore, can it be said that this is a case in which the validity or construction of any treaty made under the authority of the United States is drawn in question by a party having a rightful interest in such question.

The motion of the defendant in error must be allowed, and the writ of error is, accordingly,

Dismissed.

PARSONS v. DISTRICT OF COLUMBIA.

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

No. 177. Submitted December 20, 1897. — Decided April 11, 1898.

Although the matter in dispute in this case is not sufficient to give this court jurisdiction, it plainly appears that the validity of statutes of the United States, and of an authority exercised under the United States was drawn into question in the court below, and is presented for the consideration of this court.

The enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, is conclusive alike of the necessity of the work and of its benefit as against abutting property.

The power of Congress to exercise exclusive jurisdiction in all cases within the District includes the power of taxation.

If the assessment for laying such water mains exceeds the cost of the work it is not thereby invalidated.

On October 5, 1895, Hosmer B. Parsons, the plaintiff in error, filed in the Supreme Court of the District of Columbia

his petition against the District of Columbia and John W. Ross, Charles F. Powell and George Truesdell, Commissioners of the District, complaining, as illegal, of a certain charge or special assessment against land belonging to the petitioner, as a water-main tax, or assessment for laying a water main in the street on which said land abuts. The petition avers that the charge or assessment in question was made in accordance with the act of the legislative assembly of the District of Columbia approved June 23, 1873, c. 5, and the acts of Congress approved respectively June 10, 1879, c. 16, 21 Stat. 9; June 17, 1890, c. 428, 26 Stat. 159; and August 11, 1894, c. 253, 28 Stat. 275. The petition alleged the following grounds of objection to the assessment:

1. That the petitioner was not one of the property holders who requested that the work and improvements for which said parcel of land was assessed should be done and made, and that said charge was made against property whose owner had not requested the doing of said work or the making of said improvements.

2. That the petitioner was not consulted as to advisability of making said improvements, and was given no opportunity to be heard upon the questions of cost or utility or benefit of the work, or of the apportionment of the tax, and was not notified of the amount charged until after the work was concluded, and after the assessment had been made and had gone into effect as a lien upon said land, which was not a reasonable time.

3. Said assessment was not made and was not authenticated by any officer or person authorized to make or authenticate the same.

4. The assessment was made without any estimate of the cost of the work to be done, and without regard to the cost of the work or the value of the improvement, and not upon the basis of benefits to the property assessed, and said assessment is in excess of the cost of the work.

5. The assessment was made without authority of law, and the respondents had no jurisdiction or right to make the same.

6. The description of the parcel of land assessed is insufficient.

7. The said tax was not assessed within thirty days after the said water main had been laid and erected.

8. All of the said land assessed does not abut upon the street in which said water main was laid.

The petition proceeded to allege that the said charge remained unpaid, and that the Commissioners were threatening to sell and convey said land in order to pay and satisfy said illegal charge, whereby the petitioner's title to his land was clouded, and that he was thereby injured and has no appeal.

The petitioner prayed that a writ of certiorari should issue, commanding the respondents to certify to the court a copy of each and every record and part of record relating in any manner to the laying of said water main and said assessment, and that, upon the coming in of the return of the respondent, the said charge complained of should be quashed and annulled, etc.

The writ of certiorari was issued and a return made thereto. The principal facts appearing therein are that the petitioner's land was assessed with the sum of $872.50, being at the rate of $1.25 for each linear foot abutting on the street; that the land abutting on the opposite side of the street was charged with an equal sum, making a total assessment of $2.50 per foot; and that the cost of the main was $1.50 per foot.

On January 6, 1896, after a hearing upon the petition and return, the petition was dismissed. An appeal was thereupon taken to the Court of Appeals of the District of Columbia, where, after argument, the judgment of the Supreme Court of the District was, on April 16, 1896, affirmed; and on May 5, 1896, the cause was by a writ of error brought to this court.

The principal enactments of Congress pertaining to the water system of the District of Columbia are found in the Revised Statutes relating to the District in chapter 8, sections 195 to 221.

Thereby the legislative assembly, then in existence, was

authorized to supply the inhabitants of Washington and Georgetown with Potomac water from the aqueduct, mains or pipes laid in the streets and avenues by the United States, and to make all laws and regulations for the proper distribution of the same; to establish a scale of annual rates for the supply and use of the water, and generally to enact such laws as might be necessary to supply the inhabitants of Washington and Georgetown with pure and wholesome water, and to carry into full effect the provisions of said chapter 8 of the Revised Statutes. It is further provided that a water tax may be levied and collected on all real property within the limits of the city of Washington, which binds or touches on any avenue, street or alley in which a main water pipe may be laid by the United States or by the District; that the water tax may be levied on lots in proportion to their frontage or their area, as may be determined by law, and may be collected in not less than three nor more than five annual assessments; and that the water tax so authorized to be levied and collected shall constitute a fund to be used exclusively to defray the cost of distribution of the water, including all necessary fixtures and machines connected with such distribution.

In pursuance of the authority thus delegated, the legislative assembly, by act approved June 23, 1873, provided as follows:

"That hereafter in order to defray the expenses of laying water mains and the erection of fire plugs, there be, and is hereby, levied a special tax of one and a quarter cents per square foot on every lot or part of lot which binds in or touches on any avenue, street or alley in which a main water pipe may hereafter be laid and fire plugs erected, which tax shall be assessed by the water registrar within thirty days after such water mains and fire plugs shall have been laid and erected; of which assessments the water registrar shall immediately notify the owner or agent of the property chargeable therewith, setting forth in said notice the number of the square in which is situated the property on which said tax is assessed, and the street, avenue or alley on which it fronts; and the said tax shall be due and payable in four

equal instalments, the first of which shall be payable within thirty days from the date of the notice," etc.

By the act of March 3, 1863, § 204, Rev. Stat. D. C., it was provided that, "on petition of the owners of the majority of real estate on any square or line of squares in the city of Washington, water pipes may be laid and fire plugs and hydrants erected whenever the same may be requisite and necessary for public convenience, security from fire or for health." But this provision was replaced by the act of June 17, 1890, c. 428, 26 Stat. 159, which enacted that "the Commissioners shall have the power to lay water mains and water pipes and erect fire plugs and hydrants whenever the same shall be, in their judgment, necessary for the public safety, comfort or health."

By the act of August 11, 1894, c. 253, 28 Stat. 275, it was provided "that hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid." The defendants in error moved to dismiss the writ of error.

Mr. Arthur A. Birney for plaintiff in error.

Mr. S. T. Thomas and *Mr. A. B. Duvall* for defendants in error.

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

The defendants in error have moved to dismiss the writ of error, because the sum or value of the matter in dispute is less than five thousand dollars, and because the judgment of the court below does not involve the validity of a statute of the United States or of an authority exercised under the United States.

It is true that the amount or value of the matter in dispute is not sufficient to enable this court to exercise its revisory power

over the judgment of the Court of Appeals, but we think it plainly appears that the validity of statutes of the United States and of an authority exercised under the United States was drawn into question in the court below, and is presented, by the assignment of error, for the consideration of this court.

It is stated in the opinion of the Court of Appeals that the questions raised in that court were three: 1st, whether the act of the legislative assembly of the District of Columbia, approved June 23, 1873, in reference to the construction of water mains, and providing the mode of assessment therefor, and also the act of Congress of August 11, 1894, "to regulate water main assessments in the District of Columbia," are constitutional and valid enactments; 2d, whether in the assessment there was a sufficient description of the appellant's property; 3d, whether there was sufficient notice of the assessment given to the appellant. Those questions are clearly within the terms of the statute authorizing this court to review the final judgments or decrees of the Court of Appeals.

The proposition chiefly urged on our consideration is that, in all cases where proceedings are to be had for the taking of property, or to impose a burden upon it, the statute itself must provide for notice to the property owner; otherwise it is unconstitutional; and that the statutes under which the present proceeding was had did not provide for notice to the owner of land to be assessed, nor give him an opportunity to be heard.

Before we reach a particular examination of the reasoning advanced and of the authorities cited on behalf of the plaintiff in error, certain principles, so well settled by the authorities, Federal and state, and by views expressed by esteemed authors, as to form safe materials from which to reason, may well be briefly adverted to.

In every modern civilized community or state there are some matters of which every citizen and property owner must be indisputably visited with notice. In the eye of the law, he knows that his personal service is due to maintain public order and to protect his country from hostile invasion. He is bound to know that, in view of the protection he and his

property receive, it is his duty to contribute his due share to the establishment and maintenance of stable government. No person, in any country governed by laws, least of all in a country where the laws are passed and administered by legally constituted authorities, can be heard to say that he was ignorant of the fact that such was his duty, and that, if he neglected or failed to make such due contribution, lawful compulsory methods might be resorted to.

So, too, when he elects to become a member of a municipal community, and seeks to enjoy the social benefits thereby afforded, he is supposed to have notice of the necessary obligations he thus incurs. Streets must be graded, paved and lighted. A police force to enforce peace and order must be provided. Particularly, in the line of our present investigation, there is the obvious necessity for a system to supply the inhabitants with a constant and unfailing supply of water, an essential for health, comfort and safety, next in importance to air. He cannot be heard to contend that he is entitled to gratuitously receive such advantages, nor that the laws and ordinances under which they are created and regulated are invalid, unless his individual and personal views have been formally obtained and considered.

On the other hand, it is equally well settled that the exercise of the power to assess and collect the public burdens should not be purely arbitrary and unregulated.

In each case, therefore, where the party, whose property is subjected to the charge of a public burden, challenges the validity of the law under which it was imposed, it becomes the duty of the courts to closely consider the special nature of the tax and legislation complained of.

It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict, than that which deals with the taxing and police powers.

There is a wide difference between a tax or assessment pre-

scribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation, acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment, and the action of mere functionaries, whose authority is derived from municipal ordinances.

The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia. *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Gibbons* v. *District of Columbia*, 116 U. S. 404; *Shoemaker* v. *United States*, 147 U. S. 282; *Bauman* v. *Ross*, 167 U. S. 548.

By this legislation a comprehensive system, regulating the supply of water and the erection and maintenance of reservoirs and of water mains, was established, and of this legislation every property owner in the District must be presumed to have notice. And accordingly when by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property. To open such questions for review by the courts, on the petition of any or every property holder, would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard.

This distinction was clearly brought out in the noted case of *Stuart* v. *Palmer*, 74 N. Y. 183. There an act of the State of New York empowered a commission composed of three persons to open and pave an avenue, and for that purpose

"to take such land as was requisite, estimate the value thereof and assess the amount on the lands benefited by the opening of the avenue in proportion to the benefits," but which provided for no notice to the property owner; and the Court of Appeals held that notice of the proceeding was essential, and that, accordingly, the proceedings were invalid. Subsequently the legislature passed a validating act, directing a sum equal to so much of the first assessment as had not been paid, with interest, and a proportionate part of the expenses of that assessment, should be assessed upon and apportioned among the lots upon which the former assessment had not been paid. The Court of Appeals sustained the act. 100 N. Y. 585. In delivering the opinion of that court, Judge Finch said:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. . . . The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and

when the legislature determines it in a case within its general power, its decision must of course be final. . . . The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation, the legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action."

The case was brought to this court, and, under the style of *Spencer* v. *Merchant*, is reported in 125 U. S. 345. The reasoning of the Court of Appeals was quoted and approved, and its judgment, sustaining the constitutionality of the act in question, was affirmed.

In *Hagar* v. *Reclamation District*, 111 U. S. 701, the distinction between a tax or assessment imposed by a direct exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and notice and an opportunity to be heard are necessary. In giving the opinion of the court it was said by Mr. Justice Field (p. 709): "Of the different kinds of taxes which the

State may impose, there is a vast number of which, from their nature no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes, . . . and generally specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

Similar views have prevailed in most of the state courts, but, instead of citing the cases, we shall content ourselves with referring to the conclusions reached by two text writers of high authority.

In Cooley on Taxation, 447, the following conclusions, from many cases, are stated:

"1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"3. The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view, either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule."

In Dillon's Municipal Corporations, vol. 2, § 752, 4th ed., the conclusions reached are thus expressed:

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

It is well settled, by repeated decisions of this court, that the power of Congress to exercise exclusive jurisdiction in all cases whatever within the District includes the power of taxation. *Loughborough* v. *Blake*, 5 Wheat. 317; *Willard* v. *Presbury*, 14 Wall. 676; *Shoemaker* v. *United States*, 147 U. S. 282; *Bauman* v. *Ross*, 167 U. S. 548; *Wilson* v. *Lambert*, 168 U. S. 611.

Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters.

The power conferred upon the Commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such a power cannot be reviewed by the courts.

Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the assessment.

But this objection overlooks the fact that the laying of this main was part of the water system, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.

A similar objection was disposed of by the Supreme Judicial Court of Massachusetts in the case of *Leominster* v. *Conant*, 139 Mass. 384. In that case the validity of an assessment for a sewer was denied because the amount of the assessment exceeded the cost of the sewer; but the court held that the legislation in question had created a sewer system, and that it was lawful to make assessments by a uniform rate which had been determined upon for the sewerage territory.

In *Hyde Park* v. *Spencer*, 118 Illinois, 446, and other cases, the Supreme Court of Illinois held that a statutory assessment to defray the cost, maintenance and keeping in repair of a drainage system was valid.

The other contentions made on behalf of the plaintiff in error are covered by the observations already made.

The judgment of the Court of Appeals is accordingly

Affirmed.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* NEBRASKA, *ex rel.* OMAHA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 178. Argued January 10, 11, 1898. — Decided April 11, 1898.

A Federal question was specifically presented in the trial of this case both in the trial court and at the hearing in error before the Supreme Court of the State, and the motion to dismiss cannot be allowed.

This court, when reviewing the final judgment of a state court, upholding a state law alleged to be in violation of the contract clause of the Con-

stitution, must determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state law.

The contract between the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company of February 1, 1886, (founded upon the act of Nebraska of March 4, 1885, relating to viaducts, bridges and tunnels in cities,) providing for the building of a viaduct along Eleventh street in Omaha, at the expense of the two railroad companies, was a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged; but it was not a contract whose continuance and operation could not be affected or controlled by subsequent legislation.

When the subject-matter of such a contract is one which affects the safety and welfare of the public, the contract is within the supervising power and control of the legislature, when exercised to protect the public safety, health and morals, and the clause of the Federal Constitution which protects contracts from legislative action cannot, in every case, be successfully invoked.

In view of the paramount duty of a state legislature to secure the safety of the community at an important railroad crossing within a populous city, it was and is within its power to supervise, control and change agreements from time to time entered into between the city and the railroad company as to a viaduct over such crossing, saving any rights previously vested.

It is competent for the legislature of the State to put the burden of the repairs of such a viaduct crossing several railroads upon one of the companies, or to apportion it among all, as it sees fit; and an apportionment may be made through the instrumentality of the City Council.

The State of Nebraska, on the relation of the city of Omaha, filed its petition in the district court of the fourth judicial district of Nebraska on January 19, 1895, asking judgment for the issuing of a writ of mandamus requiring the Chicago, Burlington and Quincy Railroad Company to repair, in accordance with the directions of a city ordinance enacted under certain statutes of the state legislature, the south one-third of the viaduct at Eleventh street in the city of Omaha, a structure forming a part of that street, and spanning a number of railroad tracks, one of which was owned and used by the said company, the others being owned by the Union Pacific Railway Company and used by it and two other companies. The defendant filed its answer on March 6, 1895, alleging therein, amongst other things, that the legislature of Nebraska had no

power to impose upon the defendant the duty of maintaining or repairing the viaduct, for the reason that to do so would be in violation of the obligations of the contract, hereinafter described, under which the viaduct was constructed, and contrary to the provisions of the Constitution of the United States. At the trial of the case evidence was adduced by both parties, but there was substantially no dispute respecting the facts, the controversy having relation only to the validity, interpretation and effect of legislative enactments and to the validity of city ordinances. On May 1, 1895, the court entered judgment in favor of the city, and directed that a peremptory writ of mandamus issue to the defendant company, commanding and requiring it to make the repairs in question, the same to be commenced immediately and carried forward without unnecessary delay. The defendant, having been denied a new trial, took the case on writ of error to the Supreme Court of the State, and upon the affirmance by that court of the judgment of the said district court, sued out a writ of error bringing the case here, alleging in its assignment of errors that the statutes of Nebraska, which were held by the Supreme Court of that State to be valid, and to require the company to make the said repairs, were repugnant to the Constitution of the United States because they impaired the obligation of contracts, abridged the company's privileges and immunities, deprived it of its property without due process of law, and denied to it the equal protection of the laws, and that the judgment enforcing those statutes was therefore erroneous.

The facts presented are substantially as follows:

The defendant company is a corporation of the State of Illinois, has complied with the laws of the State of Nebraska so as to be authorized to do business as a railroad company in that State, and maintains a general office therein, and is the grantee of and successor to the Burlington and Missouri River Railroad Company in Nebraska, a corporation of the State of Nebraska, which company was the lessee of the Omaha and Southwestern Railroad Company, a corporation organized in the year 1869 under chapter 25, Revised Statutes of Nebraska

of 1866. That chapter contains, among other provisions, the following:

"SEC. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter. . . . Sec. 86. Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or watercourse, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not unnecessarily to impede the travel, transportation or navigation upon the road, railroad, canal, stream or watercourse so crossed. . . . Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

On May 14, 1884, an ordinance of the city of Omaha was approved, granting to the Omaha and Southwestern Railroad Company the right of way through portions of certain streets and alleys, including Eleventh street, in that city. The ordinance was in part as follows:

"Said Omaha and Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portions of said streets and alleys as a part of its line; Provided, that said

railroad track and tracks are constructed so as to conform to the grade of said street as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated."

On March 4, 1885, an act of the legislature of Nebraska was approved, entitled "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class;" whereby it was provided that the mayor and city council of any city of the first class should have power, whenever they deemed any such improvement necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over or tunnel under any railroad track or tracks, switch or switches, in such cities, when such track or switches crossed or occupied any street, alley or highway thereof, in the manner and extent provided for in the act; and should have the power to pass any and all ordinances, not in conflict with the act, that might be necessary or proper for the construction, maintenance and protection of the said works.

By virtue of this act the city of Omaha, which was then a city of the first class, and the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company, the lessor of the defendant company, executed an agreement in writing February 1, 1886, providing, amongst other things, for the construction of a viaduct on Eleventh street across the tracks of those companies. The agreement was in part as follows:

"That the said parties of the second part, [the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company,] in pursuance of the provisions of an act

of the legislature of the State of Nebraska, entitled 'An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class,' do hereby assume and agree to pay as may be required by the mayor and city council of said city three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars, ($90,000) the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha and Southwestern Railroad Company. . . . The plans and specifications for said viaducts before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of said increased cost and damages, in the same manner and according to the same division as hereinbefore agreed."

Under the provisions of this agreement the viaduct was built, and in 1887 it was opened to the use of the public. On March 30 of that year, a short time before the viaduct was completed, an act of the legislature was approved, entitled "An act to incorporate metropolitan cities, defining, regulating and prescribing their duties, powers and government." The act, which took effect from its passage, declared that all cities in the State of Nebraska then having a population of 60,000 inhabitants or more according to the state census of 1885, and all cities in the State which should thereafter have a population of 60,000 inhabitants or more, should be considered and known as cities of the metropolitan class, and should be governed by the provisions of the act. Laws of

Statement of the Case.

Nebraska, 1887, c. 10. At that time the city of Omaha, according to the state census of 1885, had a population in excess of the said number, and under the act was incorporated a city of the metropolitan class. Section 48 of this act, as amended by an act approved in 1893, Laws of Nebraska, 1893, c. 3, is as follows:

"SEC. 48. The mayor and council shall have power to require any railroad company or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing and determining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches.

"The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the grading of a street, and such damages shall be paid by the city, and may be assessed by the city council against property benefited.

"The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of the construction thereof, shall be as required by the board of public works, as may be approved by the mayor and council.

"When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

"It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, re-

construct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offence, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct, or repair any viaduct or viaducts, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

In May, 1890, the Union Pacific Railway Company, which now owns twenty-one tracks crossing Eleventh street beneath the said viaduct, entered into agreements with the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, by the terms of which agreements it granted to those companies the right to possess and use, in common with itself, its main and passing tracks between certain points, which tracks are among the said twenty-one tracks, for the period of 999 years. Subsequently, in that year, the said companies entered into posses-

sion of the interests granted them, and have since continued to use the said tracks in common with their grantor.

By a concurrent resolution of the city council of Omaha, adopted July 21, 1892, it was provided that the city engineer and the committee on viaducts and railways should examine the roadbed of the said viaduct and report whether or not it was necessary to repave it. Acting under this resolution the committee made an examination, and on the 23d of the following month reported in writing that both the roadway and sidewalk of the viaduct were in a dangerous condition. By authority of the city, the viaduct was closed to general public travel some time in 1892, but continued to be used by a street railway company, whose tracks were laid across it, until the autumn of 1894, since which time the city has not permitted it to be used for any travel.

By an ordinance approved December 12, 1893, the city declared the necessity of repairing the viaduct, and empowered and directed the board of public works to prepare plans and specifications for the repairs. Such plans and specifications were thereafter prepared, and were submitted to the council December 15, 1893, by the board of public works and the city engineer, and on January 30, 1894, the council passed an ordinance, No. 3752, approved February 3, 1894, which is as follows:

"An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct be repaired as herein required; and

"Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

"*Be it ordained by the City Council of the City of Omaha:* Section 1. That the plans and specifications submitted by the board of public works of the city of Omaha, December 15,

1893, for the repairs of the Eleventh street viaduct over the railroad tracks, upon and across Eleventh street, from a point near Jackson street to a point near Mason street, in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

"SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington and Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha and Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications, and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed, as herein required, within ninety days from the passage and approval of this ordinance.

"SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington and Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance, without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

"SEC. 4. That this ordinance shall take effect and be in force from and after its passage."

Certified copies of this ordinance and of the said plans and specifications were furnished to the defendant company, but it refused to make the said repairs, or to take any action with reference to making the same. Wherefore the present proceeding was instituted as aforesaid.

Mr. Charles J. Greene for plaintiff in error. *Mr. Ralph W. Breckenridge* was on his brief.

Mr. W. J. Connell for defendant in error.

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

The motion to dismiss the writ of error, on the ground that the rights and immunities of the plaintiff in error under the Constitution of the United States were not set up or claimed in the state courts at the proper time and in the proper way, cannot be allowed.

This subject has been so frequently and so recently discussed by this court that it is unnecessary for us to further consider it at large. It is sufficient to say that this record discloses that the plaintiff in error, in its answer to the writ of mandamus issued out of the district court of Douglas County, State of Nebraska, claimed that by reason of certain provisions of its charter, of general laws of the State, and of ordinances of the city of Omaha, all of which were specifically set forth, a contract was created between the plaintiff in error and said city in respect to the viaduct in question, the obligations whereof would be violated by the proposed enforcement of the subsequent act of 1887, contrary to the provisions of the Constitution of the United States; that the district court held that the laws and ordinances so pleaded did not create a contract between the State and city on the one side and the plaintiff in error on the other; that the plaintiff in error, in its petition in error to the Supreme Court of the State, specifically assigned as error the holding of the trial court that the said laws, charter and ordinances did not constitute a contract within the meaning and protection of the Constitution of the United States, guaranteeing the inviolability of contracts; and that the Supreme Court of the State, in its opinion disposing of the case, states that "the most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs

in question contemplates the taking of its property without due process of law within the meaning of the state and Federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed."

We think it is plain, from this recital, that a Federal question was specifically presented in both the trial and Supreme courts of the State.

As the record further discloses that the state Supreme Court overruled the railroad company's contention that it held an existing contract whose obligation would be violated by the enforcement of the provisions of a subsequent law of the State, it becomes the duty of this court to inquire whether there was error in that judgment of the Supreme Court of the State.

We have often had occasion to say 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 the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Railroad Co.* v. *Rock*, 4 Wall. 177; *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492.

We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract within the protection of the Constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder.

The contract, which the plaintiff in error sets up as constitutionally protected from subsequent legislation, is alleged to be found in the act of March 4, 1885, and the agreement in compliance with the provisions of that act between the city of Omaha, the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company on the first day of February, 1886.

By the provisions of the act the mayor and city council in any city of the first class were authorized, whenever they deemed it necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches, in such cities, when such track or switches cross or occupy any street, alley or highway thereof; to adopt and secure plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths of all damages to abutting property on account of the construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require; and when the payment of the further sum of one-fifth of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donations or by execution of such good and sufficient bonds as will protect said city from the payment of said one-fifth, then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth by special tax on property benefited. It was further provided that the city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company; and that the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel; and it was further provided that the mayor and council of any such city should have the power to pass any and all ordi-

nances, not in conflict with the act, that might be necessary or proper for the construction, maintenance and protection of the works provided for.

The agreement made, in pursuance of the said act, between the city of Omaha, as party of the first part, and the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company, as parties of the second part, provided that the parties of the second part assumed and agreed to pay, as should be required by the mayor and city council, three fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of the said second parties, and three fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars; and that the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, was to be apportioned between the railroad companies, so that three fourths thereof should be paid by the Union Pacific Railway Company and one fourth by the Omaha and Southwestern Railroad Company.

Under this agreement the viaduct was built and formally opened to the use of the public early in the year 1887.

By an act approved March 30, 1887, c. 10, Laws of Nebraska, 1887, 105, entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," it was, among other things, provided as follows: "The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the

proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city."

In 1893 another act was passed, c. 3, Laws of Nebraska, 1893, 70, amending the act of 1887, and making it the duty of any railroad company or companies to erect, construct or repair any viaduct in the manner required by the mayor and council, providing a penalty for neglect or refusal to perform such duty, and prescribing a proceeding by mandamus to compel the companies to erect or repair any viaduct as may be required by ordinance, and empowering the city, in case of failure or refusal by the railroad companies, itself to do the necessary work, the cost thereof to be a charge and lien upon the property of the railroad companies, and also to be a legal indebtedness of the companies, collectible by suit in the proper court. On January 30, 1894, the city council passed an ordinance requiring the Union Pacific Railway Company to repair that portion of the said Eleventh street viaduct for a distance of two thirds of the entire length of the viaduct, and the Chicago, Burlington and Quincy Railroad Company, as grantee and successor of the Omaha and Southwestern Railroad Company, to repair the other one third portion of said viaduct, said repairs to be made in accordance with plans furnished by the city and under the supervision of the city engineer, and to be completed within ninety days. And upon the refusal of the companies to comply with said ordinance separate proceedings in mandamus were brought against them.

No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its provisions defined the rights and duties

of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the State. It is argued that "while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the State to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction unless adopted under the compulsion of state necessity; that while it is not questioned that the

maintenance of the viaduct is essential to the safety of the community, yet if existing contract obligations devolve this burden upon the city, the legislature of the State cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the Federal Constitution."

Before considering this proposition it is proper to observe that it proceeds upon the assumption that, by the agreement between the parties in the present case, the duty of repairing and maintaining the viaduct was put upon the city. But an examination of the terms of the contract fails to show that this assumption is well founded. Certainly there is therein no express provision or stipulation that, after the viaduct had been constructed, its future repair and maintenance should be at the cost of the city. It is, however, contended that, as the viaduct when constructed became a part of Eleventh street, and as the law implies a duty on the city to keep its streets in a safe condition, such a duty entered into this contract as a part thereof, and therefore the city by the execution of the contract became bound to keep the viaduct in repair. On the other side, however, it was equally made the duty of the railroad company by the statute of Nebraska under which this agreement was made "to maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

While, therefore, it is the equal duty of the city and of the railroad company to guard the safety of the public by the erection and maintenance of a proper crossing or viaduct, it does not follow that, in the absence of an express agreement to that effect, such a duty is, by implication of law, devolved upon one party to the relief of the other. Indeed, the contract in question shows that, in consideration of their mutual duty to the public, the parties participated in the expense of the construction of the viaduct; and it would seem to be a reasonable implication that there should be a common obligation to keep it in repair.

However this may be, we think that, in view of the para-

mount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Mugler* v. *Kansas*, 123 U. S. 623.

In *New York & New England Railroad* v. *Bristol*, 151 U. S. 556, the subject was elaborately considered, and it was there held that an act of the State of Connecticut relating to railway crossings, being directed to the extinction of grade crossings as a menace to public safety, was a proper exercise of the police power of the State; that there is no unjust discrimination and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike; and that the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing is no violation of the Constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case. It is true that in that case there was a provision in the charter of the railroad company, reserving a right to the legislature to alter and amend the same; but this court based its reasoning and conclusion entirely upon the police power of the State. The following language of the Supreme Court of Connecticut was quoted with approval: "The act, in scope and purpose, concerns protection of life. Neither in intent nor in fact does it increase or diminish the assets of either the city or of the

railroad companies. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment."

Wabash Railroad Company v. *Defiance*, 167 U. S. 88, was a case much like the present one. It was there held, affirming the Supreme Court of Ohio, that the legislative power of a city may control the question of grades and crossings of its streets, and a power to that effect, when duly exercised by ordinances, will override any license or consent previously given, by which the control of a certain street had been surrendered; that such matters cannot, from their public nature, be made the subject of a final and irrevocable contract.

Another ground of complaint is that the act in question delegates to the municipality authority, in cases where two or more railway companies owning or operating tracks across public streets to impose the cost and expense of constructing and maintaining viaducts over the same upon either or any of such companies, and that the city ordinance, in execution of such authority, imposes upon two of the four companies named in the record the entire expense of the repairs in question, and this is said to deny the plaintiff in error the equal protection of the law.

It is true that, by virtue of agreements between the Union Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railroad Company and the Chicago, Rock Island and Pacific Railroad Company, the two latter companies were using certain tracks belonging to the former which were under said viaduct. But it is not easy to see why the

plaintiff in error can complain that the city omitted to bring those companies in as parties. The nature and extent of their rights under the agreements with the Union Pacific Railway Company do not appear, and, for aught that is disclosed in this record, it may have been a feature of those agreements that the Union Pacific should protect them from any charge or exaction of the kind in question.

Again it is said that the apportionment made by the ordinance of the extent of the repairs, one third to the plaintiff in error and two thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality.

But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion.

In *State* v. *Missouri Pacific Railway*, 33 Kansas, 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation similar to that herein involved, and referring to the subject of notice, the court, per Judge Valentine, said: "We do not think that it is necessary that the city should have given the railroad companies notice before passing the ordinance requiring them to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient."

Health Department v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board.

Opinion of the Court.

In the opinion of the court, per Peckham, J., it was said: "The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case. . . . The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, . . . would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. . . . Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.

The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the State, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances.

The judgment of the Supreme Court of Nebraska is, accordingly,

Affirmed.

The Chief Justice took no part in the hearing and decision of the case.

MISSOURI, *ex rel.* LACLEDE GAS LIGHT COMPANY *v.* MURPHY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 47. Argued March 1, 2, 1898. — Decided April 11, 1898.

The Supreme Court of Missouri having held that the act of the legislature of that State incorporating the Laclede Gas Light Company and conferring upon it the sole and exclusive privilege of lighting the streets in parts of St. Louis, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use, and that the power to regulate had been delegated to the city of St. Louis, and that under its general public power the city had the right to require compliance with reasonable regulations as a condition to using its streets for electric wires, this court concurs with the conclusion of the Supreme Court that the company was subject to reasonable regulations in the exercise of the police powers of the city, and holds that, so far as that involved any Federal question, such question was correctly decided.

If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them.

If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do.

The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose; and until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it.

The Supreme Court of Missouri did not feel called on to define in advance what might, or might not, be lawful requirements; and there is nothing in this record compelling this court to do so.

On a writ of error to a state court this court cannot revise the judgment of its highest tribunal unless a Federal question has been erroneously disposed of.

THE Laclede Gas Light Company filed its petition for mandamus in the name of the State of Missouri, on its relation,

against Michael J. Murphy, street commissioner of the city of St. Louis, on November 26, 1894, in the Supreme Court of that State.

This petition stated that the relator was incorporated by an act of the general assembly of Missouri, approved March 2, 1857, which was amended by an act approved March 3, 1857, and by an act approved March 26, 1868; and set forth the three acts *in extenso*.

The fifth section of the act of March 2, 1857, read as follows:

"§ 5. The said company, its successors and assigns, shall, within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city, as established by the act entitled 'An act to incorporate the city of St. Louis,' approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down, in said portion of said corporate limits, all pipes, fixtures or other thing properly required, in order to do the same, (the same to be done with as much dispatch and as little inconvenience to the public as possible,) and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

The words "sole and exclusive" in the fifth section were stricken out by the act of March 3, 1857. Laws Missouri, 1856–57, pp. 598, 599.

Section one of the act of March 26, 1868, (amending the act of March 2, 1857,) was as follows:

"Section 1. The said Laclede Gas Light Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever all the rights, privileges and franchises granted to it by the fifth section of the act to which this act is amendatory, and may, at any time, lease, sell or dispose of any portion of said rights, privileges and

franchises to individuals, associations or corporations intending or desiring to exercise the same within any portion of the limits aforesaid." Laws Missouri, 1868, p. 187.

The petition then averred that the act of March 2, 1857, as amended by the subsequent acts, constituted relator's charter, by which relator was granted the privilege and right of lighting the city of St. Louis as in the acts set forth; "and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible."

It was further stated that by a certain agreement, executed February 28, 1873, relator had "abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege or right of lighting any part of the city of St. Louis with gas, or making or vending gas, gas lights or gas fixtures, and also all exclusive right whatsoever under its said charter."

The petition went on to say that in pursuance of its charter relator had been for a long time engaged in the lighting business, both by gas and electricity; that under a contract with the city it was lighting a part of the public streets and alleys by electricity, and would be obliged to do so for some years to come; that it was furnishing light by means of gas or electricity to a large part of the inhabitants of the city; that in order to fulfil its obligations to the city and the public the company had erected and was maintaining "extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents;" that for distributing gas it had constructed a system of pipes laid under ground, without objection; that for the distribution of electricity it had "hitherto used overhead wire strung upon poles along the streets and alleys of said city," which poles and electric wires had been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish

light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service relator has made arrangements to lay its wires underground along and under the streets of said city according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

It was then stated that Murphy was street commissioner, to whom was committed, under the city charter, "the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto." And relator averred that, having completed its preparation to carry out the work above indicated, and having given notice to the street commissioner of its intention to do so, the company proceeded, on the 30th day of October, 1894, to begin the work of excavating at a point on the east side of Broadway street in St. Louis, near the corner of Mound street, that point being adjacent to its generating plants, which work was proper and necessary for placing wires under ground, when the street commissioner caused the work to be stopped, and notified relator "that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit previously obtained from him for that purpose, as provided by ordinance; and relator states that by section 568, article I, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that 'no person shall make or cause to be made any excavation on any public street, highway or alley without written permission of the street commissioner so to do, excepting public work under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same.'"

That upon being so notified the company applied to the street commissioner for a permit to make the necessary excavation on Broadway, so that it might place its wires under the street for the purposes indicated. That the officer refused to give the permit asked, whereby, it was alleged, the company, in the exercise of its vested rights, was prevented from laying down in the streets of the city the pipes and fixtures required in the conduct of its business.

That it was the duty of the street commissioner to grant the permit; and, being without other remedy, relator prayed a mandamus against that officer, commanding him to issue a permit to the company to make an excavation along the east side of Broadway street, as near the curb as practicable, and extending from the southeast corner of Mound street to the southeast corner of Olive street and Broadway, in so far as was necessary for the laying of the company's electric wires under ground, "the same to be done with as much dispatch and as little inconvenience to the public as possible."

An alternative writ of mandamus having been issued, the street commissioner filed his return thereto, alleging therein that the act of March 26, 1868, was in conflict with paragraph 2 of section 1 of article VIII of the constitution of Missouri of 1865, because the company did not, within one year from the time the act of March 2, 1857, took effect, organize or commence the transaction of its business; and not until 1873; and that said act was in conflict with Sec. 25, Art. 4, of the constitution of Missouri, because it did not set forth the act or part of act amended at length as if it were an original act or provision.

That relator had never by any act been granted the franchise to make and vend electricity for any purpose whatever; and that lighting by electricity was wholly unknown March 2, 1857, and March 26, 1868.

"That the relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway, from Mound street to Olive street, and at divers and sundry other places beneath the surface of the streets of the city of St. Louis, for the purpose of transmitting and

vending and supplying gas to consumers in the city of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the city of St. Louis any right to place such wires above or beneath the streets of said city.

"That it is provided by sec. 2721 of art. 5 of chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

"And that it is provided by art. 2, chap. 15, Rev. Ordinance of the city of St. Louis, 1887, as the same has been amended by Ordinance No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with Ordinance No. 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so authorized by ordinance, before placing its wires, tubes and cables under ground, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes and cables, and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for placing such wires, tubes or cables, the same shall be placed in or under alleys and not

along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said Ordinance No. 16,894, nor has it ever been authorized by the municipal assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

"Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the city of St. Louis had the right to adopt and enact under par. 2 of sec. 26 of art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys and so forth in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has or may heretofore have had, by virtue of any act of the general assembly of the State of Missouri.

"Respondent further shows unto the court that relator has never made application to the board of public improvements for a permit to place its wires, tubes and cables under ground in said city, nor has it complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case."

The relator moved to strike out certain portions of the return, and demurred to certain other portions thereof, assigning, among other grounds, that its "charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension or repeal except with the consent of said corporation, and that any constitutional provision, law or municipal ordinance adopted or enacted after said date, by or by authority of said State or by any municipality thereof, inconsistent with any right, privilege or franchise granted by said charter to relator or the effect of which would be to deny to relator any such right, privilege or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter, would be in contravention of section fifteen of article II of the constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of contracts, and

also of section 10 of Article I of the Constitution of the United States, forbidding any State to pass any such law."

That "the provisions of said ordinance of said city of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri, contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it certain conditions and requirements not prescribed by said charter, and which it does not appear nor is by respondent averred that the relator has ever consented to or accepted."

On the issues thus presented, the Supreme Court heard the cause and denied the peremptory writ.

Subsequently on the application of relator the judgment was set aside; the demurrer to the return and motion to strike out parts thereof were overruled; and leave was given to plead over.

Relator thereupon filed a traverse to the return, setting forth at length the grounds on which relator denied that the averments in the return in respect of the organization of the company and of the time when it commenced the transaction of business, and of the invalidity of the act of March 26, 1868, constituted defences to the proceeding.

The traverse further stated that if electricity was not a substance or material as averred by respondent, which relator denied, that constituted no defence. That relator was incorporated to carry on the business of lighting the city of St. Louis, and the right and privilege of doing so was granted, as before set forth and reiterated. The traverse explained the process of lighting by gas, and also by electricity, which relator asserted was included in the grant; admitted that the company had theretofore exercised its corporate franchise of lighting the city with gas through pipes laid beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and in other places; that to furnish light by means of electricity it was necessary to use wires "either on poles above the surface of the street, as relator is

now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface;" and that "its purpose in making the excavation on Broadway mentioned in the petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light;" and set forth that the conduit and wires so intended to be laid down were of the most approved description, offering no obstruction, and avoiding the danger to life and property attending the use of overhead electric wires.

The traverse denied that relator had not acquired the right to place such wires above or beneath the streets; and denied that section 2721 of article V, chapter 42, Revised Statutes of Missouri, 1889, applied to relator, but averred that if it did, its provisions would be invalid as impairing the obligation of the contract contained in its charter.

The traverse admitted that by article two, chapter fifteen, Revised Ordinance of St. Louis of 1887, as amended by Ordinance No. 16,894, the municipal authorities undertook to prescribe certain conditions for placing wires, tubes or cables conveying electricity along, across or under the streets and alleys of the city; and averred that said ordinance and the amendatory Ordinance No. 16,894 are the same ordinances revised and reënacted in article II of chapter 15 of the Revised Ordinance of 1892, by an Ordinance No. 17,188, approved April 7, 1893, and that sections 603 to 614 are the only provisions prescribing regulations or conditions in respect of placing along, across or under any of the streets, alleys and public places of wires, tubes or cables conveying electricity for the production of light, heat or power, and are the provisions insisted on by respondent. These sections were set out in the traverse and are printed in the margin.[1]

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[1] § 603. That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred and twenty-three, now amended, or shall be duly

The traverse then proceeded:

"Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter

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authorized by the municipal assembly, and then only as hereinafter provided.

§ 604. All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis, shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements.

§ 605. That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis, and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables.

§ 606. The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

§ 607. That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall, with the application and plat heretofore provided for, file in the office of the board of public improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the city of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public places named in such application, the board of public improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

§ 608. That whenever an alley is available for the placing of poles for the support of such wires, tubes or cables, the board of public improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the board of public improvements are of the opinion

were or are concerned, and denies that as against this relator said city of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article III of the charter of said

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that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such a manner as not to incommode the public or the adjoining proprietors or residents.

§ 609. The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the board of public improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected.

§ 610. Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public improvements, and to the satisfaction of the street commissioners.

§ 611. The right is hereby reserved to the board of public improvements at any time to direct any alterations in the location of said poles, and also in the height at which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practical thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided.

§ 612. No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before

city, as by respondent alleged, or under any other provision of the charter of said city.

"Relator further shows to the court that by reason of the exemption contained as aforesaid in section 8 of said act of March 2, 1857, relator's charter as granted in and by said act of 1857 and as subsequently amended by the act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator, which was not nor is subject to alteration, suspension or repeal by the State of Missouri

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availing himself or itself of any of the rights or privileges granted by this article shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing said statement with the comptroller, pay into the city treasury two and one half per cent on the amount of such gross receipts up to the year eighteen hundred ninety, and five per cent on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article.

§ 613. Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than fifty dollars, nor more than five hundred dollars.

§ 614. The city reserves the right to alter, amend or repeal this article at any time.

or by any municipality thereof; that said city of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinances of said city of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid, and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended, and would be in contravention of section 15 of article II of the constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of contracts, and also section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

"Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures or other thing properly required in order to carry on relator's said lighting business, is that the same shall be done with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every condition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal, nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

Statement of the Case.

"Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal or binding enactments, nor constitute any defence to this proceeding:

"Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not, nor has the municipal assembly thereof, any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the municipal assembly, thereby impairing the obligation of the contract contained in relator's charter as amended.

"Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under control of its charter powers to compel relator to enter into the obligations and to pay to said city, from time to time, the tax of five per cent upon the gross annual receipts from relator's business prescribed by section 590, article II, chapter 15, of the Revised Ordinance 1887, reënacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article II, chapter 15, of the Revised Ordinance 1887, reënacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association, shall be entitled to any of the privileges conferred by said article II, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

"Because among the conditions prescribed by said section 590, reënacted as section 612, relator would be compelled, before availing itself of any of the rights or privileges mentioned in said article II, chapter 15, Revised Ordinance 1887,

reënacted as article II, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that relator will comply with all the conditions of said article II, or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the board of public improvements having reference to the subject-matter embraced in said article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

"Because said article II, chapter 15, Revised Ordinance 1887, reënacted as article II, chapter 15, Revised Ordinance 1892, purports to authorize the board of public improvements of said city, in granting a permit for the use or occupation of the streets, alleys and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article II, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted — clause 2, section 26, of article III, of its charter — is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them, by ordinance, or otherwise, to delegate to the board of public improvements of said city the power to make regulations for the use of said streets. Wherefore, relator says, that said requirements and said condition are unlawful and void.

"And relator says that the several conditions and requirements prescribed in said article II, chapter 15, Revised Ordinance 1887, as amended and reënacted in article II, chapter 15, Revised Ordinance 1892, are not independent of each other, but are so framed as to subject relator, its officers and

agents, to the penalties prescribed in section 591 of Revised Ordinance 1887, reënacted as section 613 of Revised Ordinance 1892, unless, before placing along, across or under any street of the city of St. Louis, any wires, such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the city of St. Louis, but shall also have filed in the office of the board of public improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance 1887, reenacted as section 605, Revised Ordinance 1892, and shall have obtained a permit therefor from said board with such restrictions, regulations and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article II, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, reënacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business, and to pay to the city treasurer a tax of five per cent upon the amount of such gross receipts, and shall also have filed with the city register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, reënacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid."

To this traverse respondent filed a general demurrer, assigning also special grounds.

Subsequently the city of St. Louis was made a party; entered its appearance; and adopted as its own the return of the street commissioner and his demurrer to the traverse.

The demurrer was then sustained by the Supreme Court, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as a part of this judgment," and judgment was again entered denying the peremptory writ.

A writ of error from this court was allowed by the Chief Justice of Missouri. The opinion of the state court forms part of the record and is reported in 130 Missouri, 10.

The court in that opinion stated that on the pleadings the following issues of law were fairly framed:

"*First.* Is the act of March 26, 1868, unconstitutional as being in conflict with section 2, article VIII, of the constitution of Missouri of 1865?

"*Second.* Is said act void as being in conflict with section 25 of article IV of said constitution?

"*Third.* Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2, 1857?

"*Fourth.* Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

"*Fifth.* Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?"

But the court declined to express an opinion on "any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the acts of the general assembly mentioned in the statement;" or "to inquire whether the right to use electricity for making light was included under the terms 'substance or material' as used in the charter," and confined itself "to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city."

And this question, for reasons given, the Supreme Court determined in the negative, and held that "respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force."

Mr. Henry Hitchcock for plaintiff in error.

Mr. W. C. Marshall for defendants in error.

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

Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act. *Brownsville* v. *Loague*, 129 U. S. 493, 501.

On the facts disclosed by the record, was it the duty of the street commissioner to issue a permit to the company to make excavations on Broadway so that it might place electric wires under the surface of the street?

The Supreme Court of the State held that it was not the duty of the street commissioner to do so. Did that court in so holding give effect to ordinances impairing the obligations of the contract created by the company's charter?

Assuming the charter to be in force, as contended, the company was authorized to light the city, and to lay down pipes for that purpose, "with as much dispatch and as little inconvenience to the public as possible." It originally furnished light by means of gas through underground pipes, and when electricity came into use it furnished electric light through overhead wires. It now sought to put these electric wires under the surface; and it insisted that it had a vested right to do this without being controlled by the municipal authorities.

Subsequently to the passage of the acts of 1857 and 1868, a city charter had been adopted, whereby the State vested the city with the power to regulate the use of the streets, and pass ordinances deemed expedient "in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures."

The board of public improvements of the city of St. Louis, consisting of a president, the street commissioner, the sewer commissioner, the water commissioner, the harbor and wharf commissioner and the park commissioner, has existed for many years under the charter and ordinances of that city. Each of these commissioners is the head of the department indicated by the title of the office, and has special charge thereof, but subject to the general control of the board, and the board is charged with the duty, among other things, of furnishing data and information to the municipal assembly of the city in respect of matters with which it is called upon

to deal; preparing and recommending ordinances for the improvement and lighting of the streets; and establishing regulations for excavations and the laying of gas pipes in the streets, etc., etc., chap. 33, Rev. Ord. 1892, p. 976; chap. 32, Rev. Ord. 1887, p. 893; chap. 32, Rev. Ord. 1881, p. 716.

The street commissioner had primary jurisdiction over streets and highways, and § 568, Article I of chap. 15 of the Revised Ordinance of 1887, which article treated of excavations in streets and public places, for various purposes, provided that "No person shall make or cause to be made any excavation on any public street, highway or alley, without written permission of the street commissioner so to do, except public work done under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

By §§ 581, 582, 583, *et seq.*, Article II of the same chapter, wires, tubes or cables carrying electricity for the production of light or power were to be placed above or below the surface of the ground of streets, alleys or public places, and secured in such manner as prescribed by the board of public improvements, and that board, on the filing of an application stating the streets, alleys and public places desired to be occupied and the manner in which the wires, tubes or cables were to be secured, were authorized to grant a permit for such occupancy, with such restrictions, regulations and qualifications as the board might designate, etc., etc. These were sections of Ordinance No. 12,723. (See Revised Ordinance 1887, p. 652.)

Section 590, Article I, chap. 15 of the Revised Ordinance of 1892, was the same as § 568 of Revised Ordinance of 1887, and §§ 603, 604, *et seq.*, of Art. II of that chapter, quoted *ante*, corresponded substantially with sections 581, etc., of the Ordinance of 1887. (Revised Ordinance 1892, p. 660.)

Section 2721, chap. 42 of the Revised Statutes of Missouri of 1889, (vol. 1, p. 693,) provided: "Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public

roads, streets and waters of this State, in such manner as not to incommode the public in the use of such roads, streets and waters; *Provided*, Any telegraph or telephone company desiring to place their wires and other fixtures under ground, in any city, shall first obtain consent from said city through the municipal authorities thereof."

The company asserted by its pleadings that it had never accepted the provisions of Ordinance 12,723, and the subsequent ordinances, and had never obtained the consent of the municipal assembly to occupy the streets with electric wires laid under their surface.

Nor had the company ever applied to the board of public improvements for a permit to occupy Broadway with electric wires laid under the surface of that street.

But the company asserted that the only limitation on its power to so occupy the streets was that the work should be done "with as much dispatch and as little inconvenience to the public as possible."

And, admitting that it sought to excavate with the view to occupy the street with electric wires laid under the surface, the company demanded the writ of mandamus to compel the street commissioner to issue a permit allowing it to excavate for that purpose.

The Supreme Court held that the grant of the State to the company, "though construed to include the right to use electricity for illuminating purposes in respect to such right was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general public power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires."

In view of the want of knowledge of the art of producing light by electricity when the franchise was granted, the court thought that "it would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights

of the public to the use of the streets. The power delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use."

Considering the danger to life and property from electric wires when charged, it seemed to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised, and especially when more than one method was open, and the rights and safety of the public were more or less affected by either.

Again, many companies used electric wires for various purposes, and to accommodate them all and prevent monopolies in the use of the streets it appeared absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed under ground.

The court was of opinion that it would be time enough for the company to complain when its rights were distinctly infringed, and held that the street commissioner "properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force."

Obviously the Supreme Court declined to enter on a discussion as to what were and what were not valid ordinances, as respected the company, because the record showed that the company denied that it was subject to any control by the municipal authorities, and claimed that all that was required of it by its charter was to do the work with as much dispatch and as little inconvenience as possible.

It had made no application to the municipal assembly, directly or through the board of public improvements, for authority to proceed.

It had not filed any application with the board of public improvements giving details of the streets it wished to occupy, and the manner in which the wires, etc., were to be secured, supported and insulated, and a plat of the route; nor asked that board for a permit for the occupancy it desired.

Whatever objections the company may have been entitled

to raise to particular provisions of the ordinances, in denial of their applicability or validity, it took no action whatever, so far as this record shows, calculated to bring such matters to a distinct issue.

The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform.

Judgment to that effect in itself involved no Federal question, for confessedly there was no contract right that leave to excavate should be given by a particular officer; but we concur with the conclusion of the Supreme Court that the company was subject to reasonable regulations in the exercise of the police powers of the city, and so far as that involved any Federal question, such question was correctly decided. *New York* v. *Squire*, 145 U. S. 175; *St. Louis* v. *Western Union Telegraph Company*, 148 U. S. 92; 149 U. S. 465.

We are unable to accede to the contention that the company was entitled by contract with the State to lay electric wires under ground without reference to the directions or regulations of the city on that subject; or that the street commissioner was obliged to permit it to excavate the streets for that purpose without the assent of the board of public improvements or of the municipal assembly, or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements from which it insists it was exempted by the terms of its charter.

If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them.

If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do.

The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it had complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it.

The Supreme Court of Missouri did not feel called on to define in advance what might, or might not, be lawful requirements; and there is certainly nothing in this record compelling us to do so.

It must be remembered that the case does not come before us from the Circuit Court. This is a writ of error to revise the judgment of the highest tribunal of a State, and this we cannot do unless Federal questions have been erroneously disposed of.

Judgment affirmed.

BARROW STEAMSHIP COMPANY *v.* KANE.

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

No. 353. Argued October 22, 1897. — Decided April 11, 1898.

The Circuit Court of the United States, held within one State, has jurisdiction of an action brought, by a citizen and resident of another State, against a foreign corporation doing business in the first State through its regularly appointed agents, upon whom the summons is there served, for a cause of action arising in a foreign country; although the statutes of the State confer no authority upon any court to issue process against a foreign corporation, at the suit of a person not residing within the State, and for a cause of action not arising therein.

This was an action brought November 1, 1894, in the Circuit Court of the United States for the Southern District of New York, by Michael Kane against the Barrow Steamship Company (Limited).

Statement of the Case.

The complaint alleged that the plaintiff was a citizen of New Jersey, and resided at Newark in that State; and that "the defendant is a corporation organized and incorporated under the laws of the Kingdom of Great Britain, and is the owner of a certain steamship known as the Devonia, and is and was at the time hereinafter mentioned a common carrier of passengers, and engaged in the business of transportation of freight and passengers upon said steamship Devonia and other steamers, among other places, from Londonderry, Ireland, to the city of New York, and has offices and property in the said city of New York, and its general agents therein, managing the affairs of the said company within said city, and is a resident and inhabitant of the city of New York and the Southern District of New York, within the meaning of the statute in such case made and provided;" that "the said defendant operates its business, or part thereof, in and under the name and as part of the Anchor Line, and its said business is in whole or in part done under that name, and its steamers, including the said Devonia, belong to what is known as the Anchor Line steamships; that the general managers of said business in the city of New York are the firm of Henderson Brothers, who are the general agents of said defendant, and the officers of said defendant company and said agents are at No. 7 Bowling Green and pier 54 North River in said city; that on or about September 13, 1893, the plaintiff purchased and paid for a ticket as a passenger for transportation by defendant from Londonderry, in Ireland, Kingdom of Great Britain, to the city of New York, on the steamship Devonia, belonging to said defendant; and the said defendant received the said plaintiff as a passenger, and undertook and promised to transport the said plaintiff from said Londonderry to New York with due care, and to do all those things necessary and required for the safe transportation of the said plaintiff to and from said points; and it became and was its duty and it became bound to protect and save harmless the said plaintiff from any injury or harm from its agents or servants employed in its business;" and that "for the purpose of transporting passengers over part of the voyage, viz., from Londonderry to

the steamship Devonia, lying in the harbor, the said defendant used a certain tender; that said plaintiff, being a passenger on said tender, in pursuance of the obligation and promise aforesaid, the same being part of the transportation to New York, was violently, on or about September 14, 1893, assaulted and maltreated, without just cause or excuse and wrongfully and unlawfully, by servants or agents of said defendant on said tender," as particularly stated in the complaint; and thereby suffered damages to the extent of $20,000.

To this complaint the defendant filed the following appearance and demurrer: "The defendant above named, appearing specially by Henry T. Wing and Harrington Putnam as its attorneys, specially, only for the purposes hereof, as stated in its special appearance noted herein, demurs to the complaint herein, for the special purpose, and no other, until the questions herein raised have been decided, of objecting to the jurisdiction of this court, demurring and excepting to the complaint, because it appears upon the face thereof that the court has not jurisdiction of the person of the defendant, nor of the subject-matter of the action, for the reason that neither the defendant nor the plaintiff is an inhabitant or resident of the Southern District of New York, and the action therefore cannot be maintained therein, and that the defendant is a foreign corporation, and the cause of action did not arise within the State of New York. Wherefore defendant prays judgment whether this court has jurisdiction, and asks that the complaint be dismissed, with costs; but should the court overrule this demurrer and exception, the defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

The court overruled the demurrer, with liberty to answer the complaint. The defendant thereupon answered, and the case went to trial.

When the plaintiff's counsel had opened the case to the jury, the defendant's counsel moved to dismiss the suit, upon the ground "that it appeared upon the face of the complaint that the court had not jurisdiction thereof; that it had no

jurisdiction of the person of the defendant; and that it had no jurisdiction of the subject-matter of the action;" and presented as grounds of the motion the same reasons that had been urged at the hearing on the demurrer. The court denied the motion, and the defendant duly excepted to the denial.

At the close of the testimony, the defendant again moved the court to dismiss the proceedings on the ground of want of jurisdiction, both of the subject-matter and of the person of the defendant. The motion was denied and an exception reserved.

The trial resulted in a verdict for the plaintiff for $7500, upon which judgment was rendered.

The defendant took the case by writ of error to the Circuit Court of Appeals, which requested the instruction of this court upon a question of law; and embodied in its certificate the provisions of the New York Code of Civil Procedure which are copied in the margin,[1] the foregoing pleadings and proceedings in the case, and this statement of facts:

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[1] SEC. 432. (Amended 1877, c. 416.) *How personal service of summons made upon a foreign corporation.* Personal service of a summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, treasurer or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the State, as the office or residence of the person designated; and, if it is within a city, the street, and the street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent executed in like manner; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a

"The cause of action is for damages alleged to have been sustained in consequence of an assault upon the plaintiff, a passenger by the defendant's steamship, while the plaintiff was in transit under a contract of transportation, by a person for whose acts it is alleged the defendant was responsible. The alleged assault took place in the port of Londonderry, Ireland. The plaintiff is a citizen and resident of the State of New Jersey. The defendant is a corporation organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland. It is a common carrier operating a line of steamships from ports in that kingdom to the port of New York. It does business in the State of New York through the firm of Henderson Brothers, its regularly appointed agents, and has property therein. There is no proof of any written designation by the defendant of any one within the State of New York upon whom service of process may be made. Service of the summons was made on a member of the firm of Henderson Brothers as agents for the defendant."

The question of law certified was: "Had the Circuit Court

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certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

Sec. 1780. *When foreign corporations may be sued.* An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

jurisdiction to try the action and render judgment therein against the defendant?"

Mr. Esek Cowen for plaintiff in error.

Mr. F. K. Pendleton for defendant in error.

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

This action was brought in the Circuit Court of the United States for the Southern District of New York against the Barrow Steamship Company, by a passenger on one of its steamships on a voyage from Londonderry in Ireland to the city of New York, for an assault upon him by its agents in the port of Londonderry. The certificate of the Circuit Court of Appeals shows that the plaintiff is a citizen and resident of the State of New Jersey; that the defendant is a corporation, organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and a common carrier running a line of steamships from ports in that kingdom to the port of New York, and does business in the State of New York, through a mercantile firm, its regularly appointed agents, and upon whom the summons in this action was served.

It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit could be maintained against it *in personam* in this country without its consent, express or implied; that by doing business in the State of New York it consented to be sued only as authorized by the statutes of the State; that the jurisdiction of the courts of the United States held within the State depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the State; and therefore that the Circuit Court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.

By the Constitution of the United States, the judicial power, so far as depending upon citizenship of parties, was declared to extend to controversies "between citizens of different States," and to those between "citizens" of a State and foreign "citizens or subjects." And Congress, by the Judiciary Act of 1789, in defining the original jurisdiction of the Circuit Courts of the United States, described each party to such a controversy, either as "a citizen" of a State, or as "an alien." Act of September 24, 1789, c. 20, § 11; 1 Stat. 78; Rev. Stat. § 629. Yet the words "citizens" and "aliens," in these provisions of the Constitution and of the Judiciary Act, have always been held by this court to include corporations.

The jurisdiction of the Circuit Courts over suits between a citizen of one State and a corporation of another State was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the State by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. *Bank of United States* v. *Deveaux*, 5 Cranch, 61, 87, 88; *Hope Ins. Co.* v. *Boardman*, 5 Cranch, 57; *Commercial Bank* v. *Slocomb*, 14 Pet. 60.

But the earlier cases were afterwards overruled; and it has become the settled law of this court that, for the purposes of suing and being sued in the courts of the United States, a corporation created by and doing business in a State is, although an artificial person, to be considered as a citizen of the State, as much as a natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation. *Louisville &c. Railroad* v. *Letson*, 2 How. 497, 558; *Marshall* v. *Baltimore & Ohio Railroad*, 16 How. 314, 329; *Muller* v. *Dows*, 94 U. S. 444; *Steamship Co.* v. *Tugman*, 106 U. S. 118;

St. Louis & San Francisco Railway v. *James*, 161 U. S. 545, 555–559.

In *Bank of Augusta* v. *Earle*, 13 Pet. 519, decided before the case of *United States* v. *Deveaux*, above cited, had been overruled, and while that case was still recognized as authority for the principle that in a question of jurisdiction the court might look to the character of the persons composing a corporation, Chief Justice Taney, in delivering judgment, said that the principle had "never been supposed to extend to contracts made by a corporation, especially in another sovereignty;" but that "whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." 13 Pet. 586, 587.

In *Bank of Augusta* v. *Earle*, it was adjudged that a corporation created by one State, and acting within the scope of its charter, might do business and make contracts in another State when permitted to do so by the laws thereof, and might sue upon such contracts in the courts of that State. As was said in the opinion: "It is sufficient that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed." 13 Pet. 589. And it was declared to be well settled that by the law of comity among nations, prevailing among the several States of the Union, "a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts," except as to contracts repugnant to its own policy. 13 Pet. 592.

The manifest injustice which would ensue, if a foreign corporation, permitted by a State to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the State, has induced many States to provide by statute that a foreign corporation making contracts within the State shall appoint an agent residing therein, upon whom process may be served in actions upon such contracts. This

court has often held that wherever such a statute exists service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the State, or, when consistent with the acts of Congress, in the courts of the United States held within the State; but it has never held the existence of such a statute to be essential to the jurisdiction of the Circuit Courts of the United States. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 452.

In *Lafayette Ins. Co.* v. *French*, the court said: "We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents." But it was cautiously added: "The case of natural persons, or of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion." 18 How. 408, 409.

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

Accordingly, in *Railroad Co.* v. *Harris*, 12 Wall. 65, the Baltimore and Ohio Railroad Company, a corporation chartered by the State of Maryland, and authorized by the statutes of the State of Virginia to extend its railroad into that State, and also by the act of Congress of March 2, 1831, c. 85, 4 Stat. 476, to extend, construct and use a lateral branch of its railroad into and within the District of Columbia, and to exercise the same powers, rights and privileges, and be subject to the same restrictions in regard thereto, as provided in its charter, was held, by reason of the act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the State of Virginia; although the railroad company was a corporation of the State of Maryland only,

and neither the act of Congress authorizing it to construct and use a branch railroad in the District of Columbia, nor any other act of Congress, had made any provision for bringing suits against foreign corporations, the action having been brought before the passage of the act of February 22, 1867, c. 64, § 11; 14 Stat. 404; Rev. Stat. D. C. § 790. Mr. Justice Swayne, in delivering judgment, said: "If the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results. But turning our attention from this view of the subject, and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality." 12 Wall. 83, 84.

In that case, it is to be observed, the cause of action arose, neither in the State of Maryland, where the defendant was incorporated, nor in the District of Columbia, where the action was brought, but in the State of Virginia. The decision, in principle and in effect, recognizes that a corporation of one State, lawfully doing business in another State, and summoned in an action in the latter State by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought.

In England, the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized; and its liability to be subjected to suit in those courts, by service made upon one of its principal officers residing and representing it within the realm, has been fully established by recent decisions. *Newby* v. *Von Oppen*, L. R.

7 Q. B. 293; *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q. B. D. 519.

In the courts of several States of the Union, the like view has prevailed. *Libbey* v. *Hodgdon*, 9 N. H. 394; *March* v. *Eastern Railroad Co.*, 40 N. H. 548, 579; *Day* v. *Essex County Bank*, 13 Vermont, 97; *Moulin* v. *Trenton Ins. Co.*, 1 Dutcher (25 N. J. Law), 57; *Bushel* v. *Commonwealth Ins. Co.*, 15 S. & R. 173; *North Missouri Railroad* v. *Akers*, 4 Kansas, 453, 469; *Council Bluffs Co.* v. *Omaha Co.*, 49 Nebraska, 537. The courts of New York and Massachusetts, indeed, have declined to take jurisdiction of suits against foreign corporations, except so far as it has been expressly conferred by statutes of the State. *McQueen* v. *Middletown Manuf. Co.*, 16 Johns. 5; *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315; *Desper* v. *Continental Water Meter Co.*, 137 Mass. 252. But the jurisdiction of the Circuit Courts of the United States is not created by, and does not depend upon, the statutes of the several States.

In the Circuit Courts of the United States, there have been conflicting opinions, but the most satisfactory ones are those of Judge Drummond and Judge Lowell in favor of the liability of foreign corporations to be sued. *Wilson Packing Co.* v. *Hunter*, 8 Bissell, 429; *Hayden* v. *Androscoggin Mills*, 1 Fed. Rep. 93.

In *Lafayette Ins. Co.* v. *French*, above cited, this court, speaking by Mr. Justice Curtis, after saying that a corporation created by one State could transact business in another State, only with the consent, express or implied, of the latter State, and that this consent might be accompanied by such conditions as the latter State might think fit to impose, defined the limits of its power in this respect by adding, "and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 407.

Opinion of the Court.

The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States of the Union, or between citizens of one of the States and aliens, was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.

The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a State. *Hyde* v. *Stone*, 20 How. 170, 175; *Smyth* v. *Ames*, 169 U. S. 466, 516. It has therefore been decided that a statute, which requires all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action; Chief Justice Chase saying that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Cowles* v. *Mercer County*, 7 Wall. 118, 122; *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529. So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void. *Home Ins. Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one State, brought in a court of the United States held within another State, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employés found within the State will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the State. *St. Clair* v. *Cox*, 106 U. S. 350; *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98, 106; *Goldey* v. *Morning News*, 156 U. S. 518. See also *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194.

By the existing act of Congress defining the general juris-

diction of the Circuit Courts of the United States, those courts "shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," "in which there shall be a controversy between citizens of different States," "or a controversy between citizens of a State and foreign States, citizens or subjects;" and, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant. Act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, § 1; 24 Stat. 552; 25 Stat. 434; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453; *In re Hohorst*, 150 U. S. 653; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496, 503; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229, 230.

The present action was brought by a citizen and resident of the State of New Jersey, in a Circuit Court of the United States held within the State of New York, against a foreign corporation doing business in the latter State. It was for a personal tort committed abroad, such as would have been actionable if committed in the State of New York or elsewhere in this country, and an action for which might be maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant. *Railroad Co.* v. *Harris*, above cited; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Huntington* v. *Attrill*, 146 U. S. 657, 670, 675; *Stewart* v. *Baltimore & Ohio Railroad*, 168 U. S. 445. The summons was duly served upon the regularly appointed agents of the corporation in New York. *In re Hohorst*, above cited. The action was within the general jurisdiction conferred by Congress upon the Circuit Courts of the United States. The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other States cannot deprive such citizens

of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States.

The necessary conclusion is that the Circuit Court had jurisdiction to try the action and to render judgment therein against the defendant, and that the

Question certified must be answered in the affirmative.

THE JOHN G. STEVENS.

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

No. 25. Argued January 27, 1897. — Decided April 18, 1898.

A collision between two vessels by the fault of one of them creates a maritime lien upon her for the damages to the other, which is to be preferred, in admiralty, to a lien for previous supplies.

A lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a lien for supplies previously furnished to the tug in her home port.

In a pending appeal in admiralty by Edward H. Loud and others, owners of the schooner C. R. Flint, from a decree of the District Court of the United States for the Eastern District of New York in favor of Frederick H. Gladwish and others, coal merchants under the name Gladwish, Moquin & Company, the Circuit Court of Appeals for the Second Circuit certified to this court a question of the priority of maritime lines on the steamtug John G. Stevens, arising, as the certificate stated, upon the following facts:

"The home port of the tug was New York. Between December 7, 1885, and March 7, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York of 1862, chapter 482, thereby creating statutory liens on her. On March 8, 1886, the tug John G. Stevens was employed in the port of New York to tow the schooner C. R.

Flint through the waters of said port, and, while towing, negligently allowed the C. R. Flint to collide with the bark Doris Eckhoff in tow of the tug R. S. Carter.

"On March 16, 1886, Loud and others, owners of the C. R. Flint, libelled the John G. Stevens and the R. S. Carter in admiralty, in the District Court of the United States for the Eastern District of New York, for the collision damage. On March 16, 1886, Gladwish and others libelled the John G. Stevens, in the same court, to enforce their supply lien under the state law. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000. The Gladwish libel resulted in a decree condemning the John G. Stevens for the coal supplied, and costs, in all $218.07.

"The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the John G. Stevens, leaving the Loud decree unsatisfied." 58 Fed. Rep. 792.

Upon these facts, the Circuit Court of Appeals desired the instruction of this court upon this question of law: "Is the lien for the damages occasioned by negligent towage, which arose on March 8, 1886, to be preferred to the previous state lien for supplies, the libel for supplies being filed last?"

Mr. Harrington Putnam for appellants.

Mr. Mark Ash and *Mr. J. Parker Kirlin* for appellees. *Mr. J. H. Lichliter* was on *Mr. Ash's* brief.

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

The question presented by this record is whether a lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.

This question may be conveniently divided, in its consideration by the court, as it was in the arguments at the bar, into

two parts: First. Is a claim in tort for damages by a collision entitled to priority over a claim in contract for previous supplies? Second. Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage, a claim in tort?

In the case of *The Bold Buccleugh*, 7 Moore P. C. 267, decided in 1852 by the Judicial Committee of the Privy Council, upon appeal from the English High Court of Admiralty, and ever since considered a leading case, both in England and in America, it was adjudged that a collision between two ships by the negligence of one of them created a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attached at the time of the collision, and might be enforced in admiralty by proceedings *in rem* against the offending ship, even in the hands of a *bona fide* purchaser; and Chief Justice Jervis, in delivering judgment, said: "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession." "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." And, after observing that this rule could not be better illustrated than by the circumstances of *The Aline*, (1839) 1 W. Rob. 111 — in which Dr. Lushington had expressed the opinion that, in a proceeding *in rem*, the claim for damages must be preferred to a bottomry bond given before the collision; but was not entitled, as against the holder of a like bond given after the collision, to the increased value of the vessel by reason of repairs effected at his cost — Chief Justice Jervis summed up the matter as follows: "The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the colli-

sion, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So, by the collision, the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases." 7 Moore P. C. 284, 285.

The decision in *The Bold Buccleugh* has never been departed from in England, but has been constantly recognized as sound law in the courts exercising admiralty jurisdiction. *The Europa*, Brown. & Lush. 89, 91, 97; *S.C.* 2 Moore P. C. (N. S.) 1, 20; *The Charles Amelia*, L. R. 2 Ad & Ec. 330, 333; *The City of Mecca*, 6 P. D. 106, 113, 119; *The Rio Tinto*, 9 App. Cas. 356, 360; *The Dictator*, (1892) P. D. 304, 320. And in a very recent case in the House of Lords, that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. *Currie* v. *McKnight*, (1897) App. Cas. 97.

It has been generally laid down in the English text books that a maritime lien for damages by a collision takes precedence of all earlier maritime liens founded in contract. Abbott on Shipping, (Shee's ed.) pt. 6, c. 4, § 2; Coote's Admiralty Practice, 118; Maclachlan on Shipping, c. 15; Foard on Shipping, 217; Marsden on Collisions, (3d ed.) 82. And the English and Irish courts have even held that a claim for damages from a collision by the negligence of a foreign ship creates a lien upon the whole value of the ship and freight, without deduction for seamen's wages, because, it has been said, the owner of the ship, being personally liable to the seamen for their wages, should not be permitted to deduct expenses for which he is liable, and thus benefit the wrongdoer at the expense of him to whom the wrong has been done. *The Elin*, 8 P. D. 39, 129, and cases there cited.

That a claim for supplies furnished to a vessel should be

preferred to a claim for damages for a subsequent collision appears never to have been even suggested in England, probably because, by the law of England, material-men, without possession, have no maritime lien for supplies, even to a foreign ship, but a mere right to seize the ship by process in admiralty, in the nature of an attachment. *The Rio Tinto*, 9 App. Cas. 356; *The Henrich Björn*, 10 P. D. 44, and 11 App. Cas. 270. "Claims for necessaries," said Dr. Lushington, "do not possess, *ab origine*, a lien; but carry only a statutory remedy against the *res*, which is essentially different." *The Gustaf*, Lush. 506, 508.

There can be no doubt, therefore, that in the English admiralty courts the lien for damages by collision would take precedence of an earlier claim for supplies.

In this country, the principle, applied in the case of *The Bold Buccleugh* to a claim for damages by collision, that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. *General Ins. Co.* v. *Sherwood*, 14 How. 351, 363; *The Creole*, 2 Wall. Jr. 485, 518; *The Mayurka*, 2 Curtis, 72, 77; *The Young Mechanic*, 2 Curtis, 404; *The Kiersage*, 2 Curtis, 421; *The Yankee Blade*, 19 How. 82, 89; *The Rock Island Bridge*, 6 Wall. 213, 215; *The China*, 7 Wall. 53, 68; *The Siren*, 7 Wall. 152, 155; *The Lottawanna*, 21 Wall. 558, 579; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20; *The Glide*, 167 U. S. 606.

Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises, not only from a collision and for the damages caused thereby; *General Ins. Co.* v. *Sherwood*, *The Rock Island Bridge*, *The Siren* and *The China*, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. *The Young Mechanic*, *The Kiersage*, *The Lottawanna*, *The J. E. Rumbell* and *The Glide*, above cited.

Some years before the decision in *The Bold Buccleugh*, Mr. Justice Story had clearly recognized the existence of a maritime lien, as well for damages by collision; *The Malek Adhel*, 2 How. 210, 234; as for supplies in a foreign port, regarding which he observed: "A material-man, who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the security for his advances; in which case, he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage. But if he is content with receiving the amount of his advances and common interest, he may rely on that tacit lien or claim, which the maritime law gives him upon the ship itself, in addition to the personal security of the owners. Wherever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by a proceeding *in rem;* and, indeed, it is the only court competent to enforce it." *The Nestor*, 1 Sumner, 73, 78. And it is worthy of note that the last part of this observation was quoted and relied on in the judgment in *The Bold Buccleugh*. 7 Moore P. C. 284.

By our law, then, a claim for damages by collision, and a claim for supplies, are both maritime liens. The question of their comparative rank is now for the first time presented to this court for adjudication; and it has been the subject of conflicting decisions in other courts of the United States, and especially in those held within the State of New York.

In *The America*, (1853) Judge Hall, in the Northern District of New York, appears to have held liens for collisions and those for supplies to be of equal rank, without regard to the date when they attached to the ship. 16 Law Reporter, 264. A claim for damages by collision has been postponed to an earlier claim for supplies, by Judge Brown, in the Southern District of New York, in *The Amos D. Carver*, 35 Fed. Rep. 665; but has been preferred to such a claim, by Judge Benedict, in the Eastern District of New York, and by Mr. Justice Blatchford on appeal, in *The R. S. Carter & The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331. And, in an

earlier case, a claim for collision had been allowed by Judge Benedict a like preference over a previous bottomry bond. *The Pride of the Ocean*, 3 Fed. Rep. 162.

The preference due to the lien for damages from collision, over earlier claims founded on contract, has been carried so far as to allow the lien for damages to prevail over the claim of seamen for wages earned before the collision, by Judge Lowell, in the District of Massachusetts, in *The Enterprise*, 1 Lowell, 455; by Judge Nixon, in the District of New Jersey, in *The Maria & Elizabeth*, 12 Fed. Rep. 627; by Judges Gresham and Jenkins, in the Circuit Court of Appeals for the Seventh Circuit, in *The F. H. Stanwood*, 9 U. S. App. 15; and by Judge Swan, in the Eastern District of Michigan, in *The Nettie Woodward*, 50 Fed. Rep. 224. The opposite view has been maintained, in the Southern District of New York, by Judge Choate, in *The Orient*, 10 Benedict, 620, as well as by Judge Brown, in *The Amos D. Carver*, 35 Fed. Rep. 665, above cited; and in the Eastern District of New York, by Judge Benedict, in *The Samuel J. Christian*, 16 Fed. Rep. 796; and in the Western District of Michigan, by Judge Severens, in *The Daisy Day*, 40 Fed. Rep. 538.

The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. *The Madonna D'Idra*, 1 Dodson, 37, 40; *The Sydney Cove*, 2 Dodson, 11, 13; *The Neptune*, 1 Hagg. Adm. 227, 239; *Sheppard* v. *Taylor*, 5 Pet. 675, 710; *Brown* v. *Lull*, 2 Sumner, 443, 452; *Pitman* v. *Hooper*, 3 Sumner, 50, 58; Abbott on Shipping, pt. 4, c. 4, § 8; 3 Kent Com. 197. Yet see *Norwich Co.* v. *Wright*, 13 Wall. 104, 122.

Nor does this case present any question between successive liens for repairs or supplies, the general rule as to which is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated. Abbott on Shipping, pt. 2,

c. 3, § 32; *The St. Jago de Cuba*, 9 Wheat. 409, 416; *The J. E. Rumbell*, 148 U. S. 1, 9; *The Fanny*, 2 Lowell, 508, 510.

Nor does it present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate, in the District Court, giving the preference to the later claim, upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the ordinary marine perils, including the second collision; and Mr. Justice Blatchford, in the Circuit Court, reversing the decree, because the vessel libelled had not been benefited, but had been injured, by the second collision. *The Frank G. Fowler*, 8 Fed. Rep. 331, and 17 Fed. Rep. 653.

Nor yet does it present the question whether a lien for repairs made after the collision, so far as they increase the value of the vessel, may be preferred to the lien for the damages by the collision, in accordance with the English cases of *The Aline* and *The Bold Buccleugh*, cited at the beginning of this opinion.

But the question we have to deal with is whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, § 75, note; Marsden on Collisions, (3d ed.) 93.

The act of Congress of December 22, 1807, c. 5, laid an embargo on all ships and vessels, within the limits and jurisdiction of the United States, bound to any foreign port or place; and the supplemental act of January 9, 1808, § 3, provided that any ship or vessel proceeding, contrary to the provi-

sions of the act, to a foreign port or place, should be forfeited. 2 Stat. 451, 453. Upon the trial of a libel in the Circuit Court of the United States to enforce the forfeiture of a vessel under those acts, Chief Justice Marshall said: "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." *The Little Charles*, 1 Brock. 347, 354.

Upon a libel of information for the condemnation of a piratical vessel, under the act of Congress of March 3, 1819, c. 77, continued in force by the act of May 15, 1820, c. 113, (3 Stat. 510, 600,) Mr. Justice Story, delivering the opinion of this court, and referring to seizures in revenue causes, said: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty." *The Palmyra*, 12 Wheat. 1, 14.

In *The Malek Adhel*, 2 How. 210, 233, 234, Mr. Justice Story, in delivering judgment, stated the principle more fully, saying: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." And, after quoting the passages above cited from the opinions in *The Little Charles* and in *The Palmyra*, he added: "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the

means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

In *The China*, 7 Wall. 53, 68, by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors." "According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

The same principle has been recognized in other cases. *The John Fraser*, 21 How. 184, 194; *The Merrimac*, 14 Wall. 199; *The Clarita & The Clara*, 23 Wall. 1; *Ralli* v. *Troop*, 157 U. S. 386, 402, 403.

That the maritime lien upon a vessel, for damages caused by her fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compen-

sation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh*, before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim." 7 Moore P. C. 285.

We are then brought to the question, whether a claim by a tow against her tug, for damages from coming into collision with a third vessel because of negligent towage, is a claim in tort, standing upon the same ground as a claim of the third vessel for damages against the tug.

Upon this question, again, there have been conflicting opinions in the District Courts of the United States.

On the one hand, it has been held by Judge Benedict, in the Eastern District of New York, in several cases, including the case at bar, that a claim by a tow against her tug for damages caused by the negligence of the latter is founded on a voluntary contract between the owner of the tow and the owner of the tug, and should be postponed to a claim against the tug for necessary supplies or repairs furnished before the contract of towage was made. *The Samuel J. Christian*, 16 Fed. Rep. 796; *The John G. Stevens*, 58 Fed. Rep. 792; *The Glen Iris*, 78 Fed. Rep. 511. The same conclusion has been

reached by Judge Brown, in the Southern District of New York, proceeding upon the hypothesis that the security for the maritime obligation created by the contract of towage is subject to all liens already existing upon the vessel, and upon the theory that, by the general maritime law, liens *ex delicto*, including all liens for damage by collision, are inferior in the rank of privilege to liens *ex contractu*. *The Grapeshot*, 22 Fed. Rep. 123; *The Young America*, 30 Fed. Rep. 789; *The Gratitude*, 42 Fed. Rep. 299.

On the other hand, the claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid, for the towage, by Mr. Justice Blatchford, when District Judge, in *The Brooklyn*, 2 Benedict, 547, and in *The Deer*, 4 Benedict, 352; by Judge Lowell, in *The Arturo*, 6 Fed. Rep. 308; and by Judge Swing, in the Southern District of Ohio, in *The Liberty*, 7 Fed. Rep. 226, 230. In *The Arturo*, Judge Lowell said: "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision." 6 Fed. Rep. 312. And it has accordingly been held, by Judge Nixon, and by Judge Severens, that such a claim by a tow against her tug is entitled to priority of payment over liens on the tug for previous repairs or supplies. *The M. Vandercook*, 24 Fed. Rep. 472, 478; *The Daisy Day*, 40 Fed. Rep. 538.

The decisions of this court are in accordance with the latter view, and are inconsistent with any other.

It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a

duty imposed by the law, independently of contract or of consideration, and is therefore founded in tort. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 485; *Atlantic & Pacific Railroad* v. *Laird*, 164 U. S. 393.

In *Norwich Co.* v. *Wright*, 13 Wall. 104, 122, Mr. Justice Bradley, referring to Maclachlan on Shipping, (1st ed.) 598, laid down these general propositions: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause." Although these propositions went beyond what was required for the decision of that case, which was one of a collision between two vessels, owing to the fault of one of them, causing the loss of her cargo, as well as of the other vessel and her cargo, yet the very point adjudged was that the lien on the offending vessel for the loss of her own cargo was a lien for reparation of damage, and therefore was upon an equality with the lien upon her for the loss of the other vessel and her cargo.

This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*.

In *The Quickstep*, 9 Wall. 665, 670, a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained, because the contract alleged was not proved, was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

Again, in *The Syracuse*, 12 Wall. 167, 171, which was a libel by a tug against her tow for negligently bringing her into collision with a vessel at anchor, the court, speaking by the same justice, said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal boat suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." And see *The J. P. Donaldson*, 167 U. S. 599, 603.

The essential likeness between the ordinary case of a collision between two ships, and the liability of a tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty, (followed in the very proceeding in which the question now before us arose,) which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing. *The Alabama & The Gamecock*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The L. P. Dayton*, 120 U. S. 337; *The R. S. Carter & The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331.

The result of applying to the case at bar the principles of the maritime law of the United States, as heretofore declared by this court, is that the lien for the damages occasioned by negligent towage must be preferred to the previous lien for supplies.

In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the comparative rank of various maritime liens, and because the general maritime law is in force in this country,

or in any other, so far only as administered in its courts, or adopted by its own laws and usages. *The Lottawanna*, 21 Wall. 558, 572; *The Belgenland*, 114 U. S. 355, 369; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 444; *Ralli* v. *Troop*, 157 U. S. 386, 407.

Question certified answered in the affirmative.

LOUISVILLE WATER COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 179. Argued January 11, 1898. — Decided April 11, 1898.

On the authority of *Louisville Water Company* v. *Clark*, 143 U. S. 1, which is affirmed, it is held that the exemption from taxation acquired by the Louisville Water Company under the act of Kentucky of April 22, 1882, c. 1349, was not withdrawn except from the day on which the act of May 17, 1886, known as the Hewitt Act, took effect; and the company cannot be held for taxes which were assessed and became due prior to September 14, 1886, when that act took effect.

THE case is stated in the opinion.

Mr. T. L. Burnett for plaintiff in error.

Mr. James P. Helm for defendant in error. *Mr. Helm Bruce* was with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the Commonwealth of Kentucky to enforce a lien in its favor upon certain real and personal property of the Louisville Water Company, a Kentucky corporation; which lien, it was alleged, was for taxes amounting to $12,875 for the year 1886. The property upon which the State claimed this lien included the pipes, mains, buildings, reservoirs, engines, pumping stations, etc., belonging to the Water Company.

The company denied its liability to state taxation for the year 1886 or for any year subsequent to the 22d day of April,

1882, the date of the passage of an act to which we will presently refer.

In the court of original jurisdiction a judgment was rendered for the Commonwealth, and that judgment was affirmed in the Court of Appeals of Kentucky.

The history of the legislation in Kentucky in reference to this company appears in *Louisville Water Company* v. *Clark*, 143 U. S. 1, a suit involving the question of the liability of the company for state and county taxes for the year 1887.

The Water Company was incorporated in 1854 without any exemption of its property from taxation. But, as stated in that case, it was made its duty to furnish water to the city for the extinguishment of fires and the cleansing of streets, upon such terms "as might be agreed between itself and the municipal authorities;" and, the latter assenting, "the Water Company was to have the exclusive right to furnish water to the inhabitants of Louisville, by means of pipes and aqueducts, upon such terms and for such time as might be stipulated between it and the city." Act of March 6, 1854, c. 507, Sess. Acts, 1853–4, vol. 2, p. 121.

By an act approved February 14, 1856, it was provided that "all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." 2 Rev. Stats. Kentucky, 1860, 121.

Subsequently, by an act approved April 22, 1882, which took effect from its passage, it was made "the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, *free of charge*." But the same act provided: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of

whatever character, state, municipal or special." Sess. Acts, 1882, vol. 2, p. 915, c. 1349.

On the 17th of May, 1886, the general assembly of Kentucky passed a general revenue statute — commonly known as the Hewitt statute — which did not take effect until September 14, 1886, after taxes were assessed for 1886. It was conceded in the case of *Louisville Water Company* v. *Clark*, above cited, that the property of the Water Company was subject to taxation under that statute, unless it was exempted from taxation by the above act of April 22, 1882.

The contention of the Water Company was that the exemption from taxation given by the act of 1882 could not be withdrawn by subsequent legislation without violating the contract clause of the Constitution of the United States. This contention made it necessary to inquire whether that exemption was in fact withdrawn, and if so, whether the statute withdrawing it impaired the obligation of any contract the company had with the State by the act of 1882.

This court held that the exemption allowed by the act of 1882 was withdrawn by the revenue statute of 1886; and that, as the Water Company's exemption was acquired in 1882 subject to the power of amendment or repeal reserved by the above act of 1856 — which saved, whenever that power was exerted, all rights previously vested — the State could, as it did by the revenue statute of 1886, withdraw the exemption given in 1882.

But the question remained whether the withdrawal of the exemption could take effect while the company was under an obligation imposed upon it by the act of 1882, to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, "free of charge." The court was of opinion that the contention of the Water Company, that the general statute of 1886 impaired the obligation of its alleged contract, could not be fully disposed of without determining the question just stated. It therefore said:

"It is, however, contended that the exemption from taxation could not be withdrawn while the Water Company

remained under the obligation imposed by the first section of the act of 1882 to furnish water to the city for fire protection, free of charge. But no such obligation remained after the passage of the act of 1886, which, as we have seen, had the effect to withdraw the immunity from taxation granted by the second section of the act of 1882. In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purposes, free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was in before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs or hydrants." 143 U. S. 15.

It was thus adjudged that the statute of 1886 did not affect the company's exemption from taxation so long as the act of 1882 was in operation; in other words, the exemption, by force of the act of 1882, continued until the statute of 1886 took effect, but no longer. Under this view, the company was held liable to pay taxes assessed for 1887, although not liable for taxes accruing before the statute of 1886 took effect.

But it is contended that this court should accept the views expressed by the Court of Appeals of Kentucky in the former case as to the scope and effect of the act of 1882. *Clark* v. *Louisville Water Co.*, 90 Kentucky, 515, 519, 523. In that case two questions were raised in the state court: first, that if it were true that the legislature was moved to the passage of the act of 1882 upon the idea of the rendition of a public service, the company rendered no such public service as the constitution of Kentucky contemplated, when it declared, in its Bill of Rights, that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services;" second, that this was not the reason for the passage of that act, and that the exemption from taxation was unsupported by any valid consideration, or such as the constitution recognized. The court waived any consideration of the first question — stating that there was a difference of opinion upon it — and held that the sole consideration which moved the legislature to pass the act of 1882 was the fact that the city of Louisville owned the stock of the Water Company. Touching that question the Court of Appeals of Kentucky said in the former case: "The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State will not support the exemption. The privilege was not conferred, as the legislature declared, and, as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and pecuniary advantage of the city, and in which the State at large had no interest." Again: "If it be said that the exemption should be upheld if it be, in fact, supported by any valid consideration, although the recited one be invalid, we reply that the real consideration, and the one which moved the parties to the transaction, is to be regarded. The one acted upon by the legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the Water Company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings does

not aid the matter. The so-called contract was, therefore, void at its inception. Instead of being impaired in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the privilege. A statute exempting one is certainly open to the objection of impolicy, if, indeed, it be not such unequal and partial legislation as is forbidden by law."

The grounds upon which the state court overruled the contention of the Water Company in the former case were not overlooked. And it was, in effect, there adjudged, as the above extract from the opinion of this court shows, that the exemption given by the act of 1882 was, partly at least, in consideration of the agreement of the company to furnish water to the public fire cisterns, plugs and hydrants "free of charge," and not as provided in the company's charter, upon such terms as might be agreed upon between it and the city; that this obligation of the company continued while its exemption from taxation continued; and, consequently, that such exemption, being a vested right under the act of 1882, to be withdrawn only by statute having a prospective operation, could not be withdrawn except as to taxes accruing after the statute of 1886 took effect.

It is to be observed that the Court of Appeals in its opinion in the present case states that the authority for reporting to the county court clerk the tax list for 1886 of property omitted to be listed with the auditor, was to be found in the Hewitt bill which was passed, as we have seen, after the enactment of the act of 1882.

The argument in behalf of the Commonwealth in the present case, in effect, calls for a reconsideration of what was said in the former case. We do not regard such reconsideration as necessary; and upon the authority of the decision in the former case, we adjudge that the exemption from taxation acquired by the Water Company under the act of 1882 was not withdrawn except from the day on which the statute of 1886 took effect. It results that the company cannot be held

for taxes which were assessed and became due prior to September 14, 1886, when the Hewitt act took effect. The petition of the Commonwealth of Kentucky should have been dismissed.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Gray dissented.

AMERICAN SURETY COMPANY *v.* PAULY (No. 1).

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

No. 168. Argued January 6, 7, 1898. — Decided April 18, 1898.

In an action against the maker of a bond, given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the former, if consistent with the objects for which the bond was given, must be adopted.

Under the condition of the bond in this case, requiring notice of acts of fraud or dishonesty, the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge; and it is not sufficient to defeat the plaintiff's right of action upon the policy to show that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant: though he may have had suspicions of irregularities or fraud, he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act that might involve the defendant in liability for the misconduct.

When the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier; but within the meaning of the bond, he did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification. *Held*, that the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which

his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named.

The making of a statement as to the honesty and fidelity of an employé of a bank for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

The presumption that an agent informs his principal of that which his duty and the interests of his principal require him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal; and in such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

When an agent has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.

THE case is stated in the opinion.

Mr. Henry C. Willcox and *Mr. Walter D. Davidge* for plaintiff in error. *Mr. Walter D. Davidge, Jr.*, was on their brief.

Mr. Edward Winslow Paige for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The defendant in error as receiver of the California National Bank of San Diego, California, brought this action against the plaintiff in error, a corporation of New York, upon a bond of the latter for $15,000 guaranteeing or insuring the bank, subject to certain conditions, against any act of fraud or dishonesty committed by George N. O'Brien in his position as cashier of that institution.

This bond was based upon an application by O'Brien to the Surety Company accompanied by written declarations and

answers to questions relating to his age, history, habits, financial condition, etc. He presented with the application the following certificate, signed by J. W. Collins as president of the bank: "I have read the foregoing declarations and answers made by George N. O'Brien, and believe them to be true. He has been in the employ of this bank during three years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not to my knowledge, at present, in arrears or in default. I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him."

The bond was executed July 1, 1891. After reciting that the employé, O'Brien, had been appointed in the service of the employer, the bank, had been assigned to the office or position of cashier, and had applied to the American Surety Company of New York for a bond, it provided:

"Now, therefore, in consideration of the sum of seventy-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed that, subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the employé, from the service of

the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof. Provided always, that the company shall not be liable, by virtue of this bond, for any mere error of judgment or injudicious exercise of discretion on the part of the employé, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may accrue to the employer by reason of any act or thing done, or left undone, by the employé, in obedience to, or in pursuance of, any direction, instruction or authorization conveyed to and received by him from the employer or its duly authorized officer in that behalf; and it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss, by robbery or otherwise, that the employer may sustain, except by the direct act or connivance of the employé.

"The following provisions are to be observed and binding as a part of this bond:

"That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employé, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid. And upon the making of such claim, this bond shall wholly cease and determine as regards any liability for any act or omission of the employé committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim."

"That if the company shall so elect, this bond may be cancelled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employé, up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for.

"That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employé to justice, or for aiding the company in suing for and making effort to obtain reimbursement by the employé or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

"That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the company."

"It is further agreed that this bond may at the option of the employer be continued in force from year to year at the same premium rate as long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employé occurring between the original date of this bond and the time to which it shall have been continued."

On the application of Collins, a bond, with like conditions, was made the same day by the Surety Company in the penalty of $25,000 guaranteeing the bank against loss by any act of fraud or dishonesty on his part as its president.

The complaint set out certain acts of fraud and dishonesty by O'Brien in his office of cashier whereby, it was alleged, the bank lost an amount in excess of that named in the bond. All the material allegations of the complaint were denied by the answer. The result of the trial was a judgment in favor of the plaintiff for $16,847.50, which was the amount of the

bond with interest; also for $385.73 costs and $202.16 interest on the verdict; in all, $17,435.39. That judgment was affirmed in the Circuit Court of Appeals. 38 U. S. App. 254.

Upon certain issues in the case there was a decided conflict in the evidence, particularly as to the time when the receiver first discovered that O'Brien as cashier had committed an act that might involve a loss for which the Surety Company would be liable and of which it was entitled to be notified in writing as soon as practicable after the occurrence of such act came to the knowledge of the bank.

In view, however, of the verdict, and assuming that the jury had due regard to the instructions of the court, the following facts may be regarded as established by the evidence:

On the 13th and 14th days of October, 1891, O'Brien, being cashier, fraudulently and dishonestly placed to the credit of Collins, the president of the bank, two sums, $20,000 and $24,500.

The bank suspended business on the 12th day of November, 1891, at which time Collins had to his credit on its books only $11,420.90. Of the above sums aggregating $44,500 falsely credited to him, he drew out, on his own checks, $33,029.10, which was wholly lost to the bank.

Immediately upon the suspension of the bank an examiner appointed by the Comptroller of the Currency, Rev. Stat. § 5240, entered upon an investigation of its affairs.

On the 18th day of December, 1891, Pauly was appointed receiver, Rev. Stat. §§ 5205, 5234, and having qualified as such, took possession on the 29th day of December, 1891, of the books, papers and assets of the bank — continuing its employés in his service for a short time.

O'Brien remained in service under the receiver until about March 2, 1892, when he left, because the receiver declined to pay his salary — the latter saying that he would regard it as credited or paid on any indebtedness of O'Brien's to the bank.

During January, February and March, 1892, there was a general examination of the books of the bank under the direction of the receiver. And about April 1, 1892, one Bloodgood, an expert bookkeeper, in connection with another

bookkeeper, entered upon a particular examination of such books, with a view of ascertaining the transactions of Collins while he was president. Collins died March 3, 1892. Towards the end of May these experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the receiver. The facts thus discovered related to the false credits which, as above stated, O'Brien as cashier had given to Collins on the books of the bank.

It is to be taken upon this record, after the verdict of the jury, that although the general examination of the bank's books in January, February and March, 1892, indicated that there were probably irregularities in the conduct of the bank's business, the receiver was not aware of "the amounts and special conditions" of such irregularities nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert bookkeepers had completed their examination of the books of the bank about May 23, 1892, on which day the receiver wrote to the Surety Company, giving notice of the discovery of fraud that entitled him as receiver to look to that company upon its bonds for the fidelity and integrity of Collins and O'Brien. That letter was as follows: "I write to notify you that the California National Bank held a bond to the amount of $20,000 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by George N. O'Brien, its cashier, for $15,000. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank. I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form."

This letter appears to be undated, but the time is shown by the following letter, dated May 31, and addressed by the vice president of the Surety Company to the receiver: "We are this morning in receipt of your letter of the 23d inst., stating that you have discovered fraud on the part of J. W. Collins, late president of the California National Bank, and on the

part of George N. O'Brien, late cashier of said bank, sufficient to require payment by this company under bonds heretofore issued upon the parties named in favor of the said California National Bank. I transmit herewith two claim blanks with three continuation sheets with each, upon which please itemize any claim you may have to present under the bond of J. W. Collins; also upon the bonds of George N. O'Brien; showing the precise dates of alleged embezzlements on the part of said John W. Collins and said George N. O'Brien; and the amounts thereof; after which please attest the same under oath and transmit to this office, furnishing to our inspector, Mr. Bradbury Williams, who will call upon you, a duplicate statement of the items, with the dates thereto attached, so that he may be able to verify the account. Will you also please inform me where George N. O'Brien is at present, and whether you have made a formal demand upon him for the amount alleged to be due and whether he has refused to pay the same; also the date of said demand; and if made in writing will you please send us a copy of said demand and furnish a copy to our inspector, Mr. Bradbury Williams. We desire to have you perfect your claims with the utmost expedition, and when received they will be duly considered."

Under date of June 24, 1892, the receiver wrote to the vice president of the Surety Company: "In reply to yours of the 31st ult., I hand you herewith two affidavits in regard to the embezzlement of the late J. W. Collins and George N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me in your favor of above date. Mr. G. N. O'Brien is still living in San Diego City. A formal demand was made upon him in writing for the amounts embezzled by his aid and assistance from the California National Bank, to which he has as yet made no reply. The affidavit herein relative to J. W. Collins includes an item of $10,000 discovered after making the affidavit sent you before. Duplicate affidavits and copy of the demand made upon G. N. O'Brien will be furnished your Mr. Bradbury Williams when he calls.

Trusting you will find this statement explicit enough for your purpose, and that we may in the near future receive payment as required under the bonds that should guarantee the California National Bank against loss on the part of the hereinbefore mentioned J. W. Collins and George N. O'Brien."

The questions of law presented for consideration will be better understood if the following additional facts be stated:

With the above letter of June 24, 1892, was an affidavit of the receiver called in the record "Proof of Claim." That document stated among other things that on the 13th and 14th days of October, 1891, O'Brien, as cashier, made entries of the deposit tags, and caused to be entered in the books of the bank credits in favor of Collins amounting to forty-five thousand dollars without Collins paying any consideration therefor, and without being entitled thereto, as O'Brien well knew; that the nature, extent, amount and circumstances connected with these wrongful acts of O'Brien had come to the knowledge of the receiver and of the bank since the first day of February, 1892; that O'Brien was not entitled to any credits, and the bank was not indebted to him in any sum; that at the date of the suspension of the bank his account was overdrawn, and he was at that date indebted to the bank; that the above statements as to his wrongful, unlawful and fraudulent acts as cashier of the bank between the first of July, 1891, and the 12th day of November, 1891, the last date being the date of the suspension of the bank, included all the money misappropriated, wrongful and improper entries and fraudulent and wrongful conduct upon the part of O'Brien that had come to the knowledge of the receiver, and constituted a true and correct statement of the account between him and the bank.

On the same day, June 24, 1892, the receiver mailed to the Surety Company a written notice containing substantially the same statements as were contained in the above affidavit, and concluding: "That in pursuance of a certain bond numbered 85,565, heretofore issued by your company, in which you agree to make good and reimburse the said California National Bank of San Diego all and any pecuniary loss sustained during the

continuance of the bond on account of the fraud or dishonesty of the said G. N. O'Brien, after a written statement of said loss is presented, this notice is given by the undersigned, Frederick N. Pauly, receiver of the California National Bank of San Diego, appointed such receiver December 18, 1891, by the Comptroller of the Currency of the United States, and attached hereto is a statement of the loss, duly certified by the said receiver, now representative of said employer named in said bond; that said George N. O'Brien is insolvent; that demand in writing has been made upon him that he reimburse and repay to said bank the amounts hereinbefore dishonestly and fraudulently obtained of said bank, which he has refused to do. This notice is given you as soon as practicable after the occurrence of the wrongful acts hereinbefore referred to and demand is hereby made upon you by the undersigned, as representative of said bank and as such receiver, for the sum of fifteen thousand dollars ($15,000), the amount in said bond stipulated."

On the 8th day of July, 1892, the Surety Company addressed to the receiver the following letter: "We are in receipt of your two letters of the 24th ultimo, transmitting two affidavits relative to the claim under the bonds of this company to the California National Bank for J. W. Collins and George N. O'Brien in the respective positions of president and cashier of said bank. We have respectfully to request that you will make a statement of each on the claim forms which we use for that purpose, two of which are herewith enclosed. We desire full information in regard to the shortages and credits, of every kind whatever, whether on account of salary due, money paid or assignments made by either of said persons to the California National Bank. If there has been any action brought against Mr. George N. O'Brien, or any correspondence between the bank or you with either of the persons in regard to the matter, we should be pleased to have copies thereof."

To this letter the receiver, under date of July 18, 1892, made the following reply: "In reply to yours of 8th instant relative to my claim under the bonds of your company to the

California National Bank for J. W. Collins and G. N. O'Brien, I beg to herewith send you a statement of account of J. W. Collins, showing the amount of his deficiency to be $374,978.22. A list of the property assigned by J. W. Collins to the California National Bank with the estimation of the value thereof. J. W. Collins under the name of Dare & Collins is a defaulter to the bank in the sum of $348,703.52 in addition to the amount above stated. An itemized statement of the account can also be forwarded you if desired. With regard to G. N. O'Brien, no action has been brought against him, because he is execution proof. In reply to my demand for payment for the amounts embezzled by J. W. Collins during the term covered by these bonds, he replied as per copy of his letter herewith enclosed. In compliance with the request of the U. S. Attorney I appeared before the grand jury and testified as to the state of facts that existed implicating G. N. O'Brien in the defalcations with J. W. Collins. What action the grand jury will take has not yet transpired. Trusting that these statements will meet your requirements, I am, etc."

Other letters passed between the receiver and the company, in respect to which it is only necessary to observe that the company retained the proofs of loss sent to it without objecting that they did not sufficiently indicate the nature and extent of the claim made by the receiver. Finally, the receiver, writing to the vice president of the company, under date of September 21, 1892, said: "There has been so much delay in this matter that I have placed it, under the direction of the Comptroller, in the hands of the U. S. Attorney in New York, Edward Mitchell, Esq., with instructions to collect the same." The company in reply expressed their gratification that when taking up the matter finally it could deal with the United States in New York on the merits of the case.

In the light of the facts, as above stated, we come to the consideration of the controlling questions of law presented for determination. These questions depend largely upon the interpretation to be given to the provisions of the bond in suit.

If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company. This is a well established rule in the law of insurance. *National Bank* v. *Insurance Co.*, 95 U. S. 673; *Western Ins. Co.* v. *Cropper*, 32 Penn. St. 351, 355; *Reynolds* v. *Commerce Fire Ins. Co.*, 47 N. Y. 597, 604; *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 666; *Fowkes* v. *Manchester &c. Life Ass'n*, 3 Best & Smith, 917, 925. As said by Lord St. Leonards in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. *484, *507, "it [a life policy] is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it." There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.

It was contended in the court below, as it is here, that the receiver did not comply with that provision of the bond requiring written notice to be given to the company, at its office in New York, of any act on the part of O'Brien "which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The company insists that the receiver in January, February, March and April, 1892, had such information in respect of the acts of O'Brien as cashier, as made it his duty, long before

his letter of May 23, 1892, to give the required notice to the company. Upon this part of the case Judge Wallace, referring to the clause of the policy requiring notice of acts that might involve loss to the defendant, said to the jury: "Under that condition of the policy the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty under the policy, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant. Now, the written notice, the first written notice, was given on the 23d day of May, 1892. And in considering this issue you are to inquire first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct. Now, when was it he acquired such knowledge? A good deal of testimony has been introduced here upon that issue. After acquiring it, it was his duty, not as soon as possible, to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day or the next, necessarily, to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did within a reasonable time after acquiring such knowledge, send the letter of May 23d. It might be reasonable under one state of facts; it might be unreasonable under another. What might be very great diligence under one set of circumstances might be very dilatory

under another. Now, first, you are to determine when he really acquired the knowledge. I am not going to recapitulate the testimony. It is claimed upon his part that he did not acquire the knowledge until the close of the examination by the expert, and that was only within a day or two of the time of mailing the notice ; and so testimony has been given to show that such examination commenced on the first of April and was continued until the latter part of May. On the other hand it is claimed that he must have acquired knowledge much earlier than this. Now, there is a circumstance of some significance. It is hardly to be supposed that this receiver, holding an official trust, would retain in his employ a cashier after he had become satisfied that by the dishonesty or the fraud of that cashier the bank had sustained serious loss. He did retain him until the 2d day of March. And it may be that while he and those associated with him were entirely satisfied that there had been irregularities, and even perhaps that there had been frauds on the part of the president, they were not aware of any specific acts which could be designated as fraudulent or dishonest on the part of the cashier until the investigation had progressed for a considerable length of time. On the other hand, you have heard the plaintiff's testimony as given in depositions taken in the west. Various extracts have been read, and it is insisted upon the part of the defendant that he must have known of these acts as early as the early part of February, 1892. Now, I charge you, as a matter of law, that if the facts were, as they were assumed to be, at the outset of the trial, that is, that the discovery was made early in February and notice was not given until July, that was not notice with reasonable promptness. And I do not know but that I should charge you, as a matter of law, that if the fact were discovered in the early part of February, and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But if you come to the conclusion that the discovery was not made until the middle or latter part of May, then, in view of the situation of the plaintiff you may reasonably come to the conclusion that he exercised proper diligence in sending the notice."

Opinion of the Court.

We perceive no error in these instructions. They are entirely consistent with the terms of the contract. Much stress was laid, in argument, upon the words "which may involve loss" in the above extract from the bond. But when those words are taken with the words in the same sentence, "as soon as practicable after such act shall have come to the knowledge of the employer," it may well be held that the Surety Company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond. It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the expert bookkeepers made about or a few days before May 23, 1892. The trial court went far enough when it said in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2d — the day on which O'Brien left the receiver — was not as soon as practicable after the receiver acquired knowledge of the facts.

We have seen that by the terms of the bond in suit the company agreed to make good and reimburse a loss to the bank caused by any act of fraud or dishonesty on the part of O'Brien in connection not only with his duties as cashier, but in connection with "the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during such continuance or within six months thereafter *and* within six months from the death or dismissal or retirement of the employé from the service of the employer."

The frauds to which the verdict of the jury referred occurred in October, 1891, during the continuance of the bond.

The bank suspended November 12, 1891. The company insists that, within the meaning of the bond, O'Brien's "retirement" occurred when the bank ceased to do business and closed its doors and the bank examiner entered upon an investigation of its affairs; consequently, it was argued, the discovery of the fraud was not within six months from the "retirement of the employé from the service of the employer."

Undoubtedly the company did not agree to be liable for any fraudulent or dishonest act of the cashier not discovered until after six months from his retirement from the service of the bank. But is it true that, within the meaning of the bond, O'Brien retired from the service of the bank when it suspended business on November 12, 1891? We think not. The bank was in existence under its articles of association while the examiner, under the order of the Comptroller of the Currency, was engaged in the investigation of its affairs. Such investigation did not of itself have the effect to discharge O'Brien from its service. It is true that when the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier. But within the meaning of the bond, O'Brien did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification on the 29th day of December, 1891. Certainly, the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named. The bond prescribed at least three limitations of time: First, the company was entitled to written notice of any act of fraud or dishonesty on the part of the employé which might involve loss to it, as soon as practicable after the occurrence of such act should come to the knowledge of the employer; second, it was to be liable only for an act of fraud or dishonesty oc-

curring and discovered during the continuance of the bond and within six months thereafter; third, it was not liable, in any event, for any act of fraud or dishonesty, even if committed during the continuance of the bond, unless it was discovered within six months from the death, dismissal or retirement of the employé from the service of the employer. Of course, O'Brien's death would have terminated his employment as cashier. But he was never dismissed, for his dismissal could only have occurred by the act of the bank or of some one who represented it before or after it suspended business. His "retirement," which would arise from his voluntary act, occurred either when he took service under the receiver, or when he voluntarily left that service on the 2d day of March, 1892. Whether within the meaning of the bond O'Brien was in "the service of the employer" while he was in the service of the receiver, we need not say. It is sufficient for this case to hold that he was in the service of the employer at least up to the time of the receiver's appointment and qualification, which occurred within six months prior to the discovery of his fraud and dishonesty and the giving of notice thereof. We, therefore, hold that the acts of fraud or dishonesty here involved were discovered during the continuance of the bond and within six months after the retirement of the employé from the service of the employer.

In its charge to the jury the trial court called attention to another defence made by the company, namely, that the bond was void by reason of fraudulent misrepresentations and concealments of Collins acting as the president of the bank. The court said: "It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made, was the knowledge of Collins

himself. Ordinarily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins, and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defence melts away and there is nothing of it whatever."

The company insists that in obtaining the bond in suit Collins acted for the bank, and as a corporation can only speak by agents, the bank is responsible for any false or fraudulent statements in the certificate given by Collins to the Surety Company, and which he signed as president of the bank.

In support of its contention the company cites *Franklin Bank* v. *Cooper*, 36 Maine, 179, 197; *Graves* v. *Lebanon Nat. Bank*, 10 Bush, 23, 29; *Veazie* v. *Williams*, 8 How. 134, 156; *Bennett* v. *Judson*, 21 N. Y. 239; *Nat. Life Ins. Co.* v. *Minch*, 53 N. Y. 144, 149; *Holden* v. *New York & Erie Bank*, 72 N. Y. 286, 292; *Elwell* v. *Chamberlin*, 31 N. Y. 611, 619. What were those cases?

Franklin Bank v. *Cooper* was the case of a suit against the executor of one of the sureties in a cashier's bond. Prior to the acceptance of the bond by the directors of the bank a deficiency or defalcation existed in the cashier's accounts, of which the president and some of the directors had knowledge when the bond was taken, but which fact was not communicated to the surety. After observing that knowledge by the surety of the existing deficiency in the cashier's accounts might have had an important influence on his conduct, the court said: "One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he

becomes a surety must be presumed to know that such will be his understanding and that he will act upon it, unless he is informed that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

Graves v. *Lebanon Nat. Bank* was a suit upon the bond of a cashier of the bank. The court stated the case to be one in which the directors of a bank "held out" to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence by the directors. The grounds upon which the surety was held discharged were thus stated by the court: "There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills and other valuables are entrusted have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented."

Veazie v. *Williams* was the case of a purchaser at an auction sale, seeking to be relieved from his purchase because of fraud practised at the sale by the auctioneer, who was the general agent of the owners, and the benefits of which sale the owners received. After a reference to many authorities, the court placed the liability of the owners upon these grounds: "What the vendor may not do in person or may not employ others to do in his absence — that is, make by-bids to enhance the price — his agent, the auctioneer, cannot rightfully do. But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it

afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled and the parties placed *in statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury. . . . But the test here is, Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Ad. & Ell. (N. S.) 68. The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *Bennett* v. *Judson* — which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal — the court said: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain, without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity, on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial."

In *National Life Ins. Co.* v. *Minch* — which was an action to recover back money paid on a policy fraudulently obtained by a husband on the life of his wife, the fraud not having been discovered until after the money was paid — the court said: "Again, if the husband, as the agent of the wife, procured the policy by fraud, she cannot retain the benefit of it and be relieved from the consequences of the fraudulent means by

which it was obtained. It is established that an innocent principal cannot take an advantage resulting from the fraud of an agent without rendering himself civilly liable to the injured party. 10 N. Y. 34; *Graves* v. *Spier*, 58 Barb. 349. If the husband obtained the policy by a fraud, acting as the agent of his wife, he occupies the position of claiming to keep money, as her legal representative, which he fraudulently obtained as her agent. He is defending this action upon her title to the policy, which, if procured by his fraud, is invalid."

Holden v. *New York & Erie Bank* was an action grounded on the fraud of a cashier in certain matters with which he was connected not only as cashier but individually and as executor of an estate. The court said: "As matter of fact, whatever knowledge, information or notice he had in either of these capacities, he carried with him into his exercise of the other. As agent of the bank, he owed it a duty in every transaction in which the bank took a part, under his observation. Hence, as matter of law, whatever notice of facts he had in any capacity, which were material in the performance by him of the part of the bank in any transaction, became notice to the bank, his principal; as it was his duty to give it notice thereof in that matter. It is the rule that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows. This rule is sometimes stated so as to limit it to notice arising from, or at the time connected with, the subject-matter of his agency. Such notice must have come to the agent, it is said, while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is shortlived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series

of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material. . . . That Ganson held triple relations to the matter did not alter his relation to the bank, his principal, nor did it hinder his knowledge acquired as an agent from affecting his principal in the part he took as an agent. The subject-matter of his agency was the conduct and direction of the affairs of this bank. He represented the bank in all these transactions. He was every time of them engaged in the business of the bank. Notice to him while so engaged, though no otherwise received than by the possession of knowledge acquired by him while acting in another capacity, was notice to the bank. That is a necessary result of his triple character."

Elwell v. *Chamberlin* related to the exchange of a note, in respect of which fraud was charged. The court said: "It is not material that the plaintiffs authorized or knew of the alleged fraud committed by their agent Mills in negotiating the sale of the note. They cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. They have ratified the sale by seeking to enforce payment of the check given for the thing sold. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity, on the ground that the fraud was committed by his agent and not by himself."

These cases, so far as they relate to sureties, rest upon the principle that, "if a *party* taking a guaranty from a surety conceal from him facts which go to increase his risk and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to

a fraud, because the party is bound to make the disclosures, and the omission to make them under such circumstances is equivalent to an affirmation that the facts do not exist." 1 Story's Equity Jurisprudence, § 215. And the cases of *Veazie* v. *Williams*, *Bennett* v. *Judson*, *National Life Ins. Co.* v. *Minch*, *Holden* v. *New York & Erie Bank*, and *Elwell* v. *Chamberlin*, rest upon the presumption, which the law indulges, that an agent will inform his principal of what it is his duty to communicate to the latter. *The Distilled Spirits*, 11 Wall. 356, 367; *Davis Imp. Wrought Iron Wagon Wheel Co.* v. *Davis Wrought Iron Wagon Co.*, 20 Fed. Rep. 699, 701. This rule is fully stated in Story on Agency, § 140, in which the author says that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party."

Without stopping to consider whether each of the above cases was correctly decided, it may be observed that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented *by their boards of directors or by some of their officers acting within the authority conferred upon them;* and that those relating to the liability of a principal by reason of the acts or representations of his agent, arose out of the agent's acts or declarations *in the course of the business entrusted to him.*

None of the cases cited embrace the present one. In the first place, the procuring of a bond for O'Brien, in order that he might become qualified to act as cashier, was no part of the business of the bank nor within the scope of any duty imposed upon Collins as president of the bank. It was the

business of O'Brien to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity or integrity of O'Brien. No relations existed between the bank and the Surety Company until O'Brien presented to the former the bond in suit. What therefore Collins assumed in his capacity as president to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. The Circuit Court of Appeals, speaking by Judge Lacombe, well said that there were many acts which the president of a bank may do without express authority of the board of directors, in some cases because the usage of the particular bank impliedly authorized them, in other cases because such acts were fairly within the ordinary routine of his business as president; but that the making of a statement, as to the honesty and fidelity of an employé for the benefit of the employé, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he as president gave the certificate in question.

The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or

having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry* v. *Allen*, 151 N. Y. 1, 10, the court recognized the general rule. But after observing that it rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was "engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose."

To the same effect are *Benedict* v. *Arnoux*, 154 N. Y. 715, and *Kettlewell* v. *Watson*, 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal "may be repelled by showing that, whilst he was acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character."

In *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 276, which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, "especially as he was a party to all these contracts, whose interests might be opposed to that of the corporation." This principle is reaffirmed in *Innerarity* v. *Merchants' National Bank*, 139 Mass. 332, 333, in which the court said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily

prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating" — citing *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. App. 358; *In re Marseilles Extension Railway*, L. R. 7 Ch. App. 161; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *Loring* v. *Brodie*, 134 Mass. 453.

In *Terrell* v. *Branch Bank of Mobile*, 12 Alabama, 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum, and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law a notice to the other directors of the facts. The Supreme Court of Alabama said: "It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended — he was contracting with the bank through his associates in the directory — he was borrowing, not lending its money — though a member of the board and present too, it cannot be supposed that he coöperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan."

In his treatise on Equity Jurisprudence, Pomeroy says: "It is now settled by a series of decisions possessing the highest

authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed." Vol. 2, § 675.

Further citation of authorities would seem to be unnecessary to support the proposition that if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our judgment the Circuit Court of Appeals correctly held that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's honesty; and that when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, "in pursuance of which scheme it becomes necessary to make false representations to a third person ostensibly for the bank, but in reality to consummate such scheme and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers and without express authority, the corporation being ignorant of the fraud, the officers are not in thus consummating such theft the agents of the corporation."

It is contended that admitting in evidence Collins' ledger account and the letter book was error to the prejudice of the substantial rights of the defendant. We cannot assent to this view, and as the matter was satisfactorily disposed of by the Circuit Court of Appeals, it is sufficient to refer to the opinion of that court for our views on this point.

It is said the claim or proof of loss mailed to the company on June 24, 1892, and the receipt of which was acknowledged July 8, 1892, was not served as soon as practicable

after the discovery of a loss for which the company was liable, nor within six months after the expiration or cancellation of the bond. We cannot assent to these propositions. It must be assumed from the verdict that, within the meaning of the bond, the loss was discovered the latter part of May, and that written notice of it was given as soon thereafter as was practicable. As, for the reasons heretofore stated, O'Brien did not retire from the service of the bank prior at least to December 29, 1891, it is clear that the objection under consideration is not well taken. Under the facts found, it must be held that proper notice of the loss was given as soon as practicable after the discovery of the fraud of O'Brien and within six months after his retirement from the service of his employer, and that the claim was made in such form as to reasonably inform the company of its nature. When received, no objection was made that notice of it was not served in time, nor that it was not sufficiently full to indicate the grounds upon which the receiver would proceed against the company upon its bond.

Having considered all the questions which, in our judgment, need to be examined, and perceiving no error of law in the record to the prejudice of the substantial rights of the Surety Company, the judgments of the Circuit Court and the Circuit Court of Appeals are

Affirmed.

AMERICAN SURETY COMPANY *v.* PAULY (No. 2).

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

No. 169. Argued January 7, 1898. — Decided April 18, 1898.

This was an action upon a bond guaranteeing a national bank against loss by any act of fraud or dishonesty by its president. The bond was similar in its provisions to the one referred to in the case preceding this, and contained among other provisions the following: "Now, therefore, in consideration," etc., . . . "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within

three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employé, shall be *prima facie* evidence thereof." *Held*,

(1) That this language was susceptible of two constructions, equally reasonable, and that the one most favorable to the insured should be accepted, namely, that the required written statement of loss arising from the fraud or dishonesty of the president of the bank, based upon its accounts, was admissible in evidence, if suit was brought, and was *prima facie* sufficient to establish the loss.

(2) That within the meaning of the bond in suit, the president of the bank remained in its service at least up to the day on which the receiver took possession of books, papers and assets.

THE case is stated in the opinion.

Mr. Henry C. Willcox and *Mr. Walter D. Davidge* for plaintiff in error. *Mr. Walter D. Davidge, Jr.*, was on their brief.

Mr. Edward Winslow Paige for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is an action by the receiver of the California National Bank of San Diego, California, upon a bond given July 1, 1891, by the American Surety Company of New York, to indemnify that banking association against loss by any act of fraud or dishonesty on the part of John W. Collins in connection with the duties of the office or position of president of the above bank, or the duties to which in the employer's (the bank's) service he might be subsequently appointed, and occurring during the continuance of the bond, "and dis-

covered during said continuance or within six months thereafter and within six months from the death or dismissal or retirement of the employé [Collins] from the service of the employer."

The bond in this case is similar to the bond of the Surety Company, of like date, insuring the fidelity and integrity of George N. O'Brien, as cashier of the bank, and which was involved in the preceding case of *American Surety Co.* v. *Pauly* (No. 1), *ante*, 133. With a few exceptions the questions of law raised by the assignments of error in the present case are concluded by what was determined in that case.

1. It is contended that the receiver did not comply with the provision in the bond requiring written notice to the company "of any act on the part of the employé, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The import of this provision was considered in the former case. The material inquiry here is whether notice was given to the company of the acts of fraud and dishonesty on the part of Collins of which complaint is made as soon as practicable after the occurrence of such acts came to the knowledge of the receiver.

The evidence was very conflicting as to the time when the receiver first became aware of the fraudulent acts of Collins as president of the bank. The first written notice by the receiver to the company of any claim under Collins' bond arising out of fraudulent or dishonest acts on his part was given May 23, 1892. The terms of that notice appear in the opinion in the former case. There was evidence tending to show that, although the receiver had reason in the months of January, February, March or April, 1892, to believe that there were irregularities on the part of Collins, as president of the bank, he did not become aware of any specific acts of fraud or dishonesty by him until the expert bookkeeper employed to examine the bank's books informed him a few days prior to May 23, 1892, that he had discovered false entries showing fraud and dishonesty on the part of both Collins and

O'Brien. The conflict in the evidence upon the issue as to the time when the receiver first acquired knowledge of the frauds in question was submitted to the jury under instructions to which in our judgment no objection can properly be made. The court instructed the jury that it was incumbent upon the receiver to satisfy them by a fair preponderance of evidence that he notified the company of any act on the part of Collins "likely to involve a loss for which the company might become responsible as soon as practicable after the act came to his knowledge." It said: "Now, it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty when he became satisfied that the president had committed some specific act of fraud or dishonesty which was likely to involve the defendant in loss to give notice in writing. This provision does not require that the notice shall be given immediately, but it requires that it shall be given with reasonable promptness after the discovery, and it is a question of fact for the jury to say upon the evidence, in view of the particular circumstances of the case, whether such a notice has been given with reasonable promptness. The notice in this case was given on the 23d day of May, 1892, and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff, when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty likely to render the defendant liable upon its bond."

Again: "The testimony of Mr. Bloodgood, you will recall, which, if I remember it correctly, is to the effect that he entered upon the investigation of the facts in reference to the president's accounts and the misapplication of funds by him about the first of April, and completed that investigation some time in May, and as soon as he completed it, he then informed the plaintiff of the result. Now, I will charge you, as matter of law in this case, that if the plaintiff had made discovery of any specific act which he believed might render the defendant liable for loss prior to the first day of May,

1892, the notice was not given with reasonable promptness; but if a discovery was not made until after that time, then you can say and decide as a question of fact, whether or not it was given with reasonable promptness, having been given on the 23d day of May."

These instructions were rather more favorable to the Surety Company than were those on the same point in the suit on the bond guaranteeing the fidelity and integrity of the cashier of the bank.

In our judgment, for the reasons stated in the opinion in the former case, it was proper to instruct the jury that the receiver need not have given the required notice on mere suspicion as to acts by Collins involving fraud or dishonesty on his part as president of the bank, but was bound to do so only when satisfied that he had committed some specific act of fraud or dishonesty likely to involve loss to the company. Nor was it error to leave it to the jury to say whether under the proof, and looking at all the circumstances, a notice given May 23d of a loss discovered after May 1st was given with reasonable promptness.

2. It is insisted that the instructions of the trial court in reference to the effect to be given to the written statement of loss made by the receiver were erroneous. The provision in the bond, upon which this contention rests, is in these words: "Now, therefore, in consideration," etc., . . . "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continu-

ance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employé, shall be *prima facie* evidence thereof."

The court said to the jury: "Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer, shall be *prima facie* evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based. Nevertheless, the plaintiff has offered additional evidence. He might have rested his case upon the proof that he had complied with this condition of the policy which I have read to you and insisted then that it was incumbent upon the defendant to show that the bank had not sustained a loss within the terms of the policy. But the plaintiff has seen fit to produce further evidence. I am not going to call your attention to that evidence in any detail. Suffice it to say that it tends to prove that on or about the 13th of October the president of the bank procured a discount of certain notes of the bank with the customers' notes belonging to the bank as collateral, to the amount altogether of about $45,000; that about that time he sent telegrams in cipher to the cashier of the bank at San Diego; that about that time the cashier caused a credit to be given in the president's personal account for items amounting to about $45,000; that when the bank failed the apparent balance to the credit of the president in his private account was about $11,000, showing that he had drawn out about $34,000 of the $45,000 which had been placed to his credit on the 13th or 14th of October. It is insisted that this evidence authorizes and requires you to find that the president obtained

an improper credit, and by means thereof appropriated more than $25,000 of the funds of the bank.

"I shall not allude to the evidence which has been given of other improper credits which it is alleged were given to the president in his personal account with the bank. They are only important as tending to characterize the nature of the transactions of October 13th and 14th, and as tending to show the total loss sustained by the bank through its president. But the question for you to determine is, whether by reason of these improper credits of the 13th and 14th of October the defendant became liable for a loss within the meaning of the terms of the policy. Was that a fraudulent or dishonest transaction on the part of the president? If it was not, the plaintiff is not entitled to recover. If it was a mere irregularity on his part, an honest irregularity, or if he was not aware of the fact that these credit items were passed to his account, the plaintiff is not entitled to recover. You must find that when he drew this money out he knew, or had reason to believe, that these items had been credited to his account; and you must find that in drawing out the money on those credits he was actuated by a fraudulent or dishonest mind. If, upon the evidence in this case, you can come to the conclusion that he believed that if the directors of the bank had known of these transactions they would have acquiesced and regarded them as entirely satisfactory, why, then it is your duty to find that he was not actuated by a dishonest motive, and therefore his acts in appropriating this money were not fraudulent and dishonest. The burden is upon the plaintiff to satisfy you by a fair preponderance of evidence of the truth of this issue. Fraud is not to be legally presumed, and the law presumes that every man acts honestly until the contrary is shown. On the other hand, fraud or dishonesty is a condition of the mind. It is incapable of direct evidence. It must always be found from circumstance. There is no way in which the plaintiff could show in what state of mind Mr. Collins was while these transactions were taking place, unless he could produce him as a witness on the stand and elicit the truth.

Opinion of the Court.

"Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The Surety Company insists that the provisions of the bond referring to the written statement of loss relate exclusively to the presentation of the claim to the company and its acceptance or rejection thereof, and not to the use of such statement as independent evidence in any suit brought for the recovery of such loss; in other words, it is argued, the company was willing in its consideration of the claim of loss to accept as *prima facie* proof of the claim the statement of loss, duly certified and based upon the accounts of the employer, but did not waive its right, if sued, to demand such proof as was necessary in law to sustain it. The bond may be susceptible of this construction. But is it not also susceptible of the construction placed upon it by the trial court? If the Surety Company intended that the written statement of loss certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, should be *prima facie* evidence only of the right of the employer to bring suit on the bond if its claim of loss was not paid, it should have so expressly declared. But that was not done. The company agreed to pay any loss covered by the bond within three months next after notice, accompanied by "satisfactory proof of a loss." But that no doubt might arise as to what was satisfactory proof of loss, and that the obligee might be assured of the prompt settlement of any claim it might make under the bond, if accompanied by proper proof of loss,

care was taken to express the understanding that a written statement of such loss, duly certified, "and based upon the accounts of the employer," should be *prima facie* evidence "thereof," that is, *evidence* of "such *loss*." In our judgment, the Circuit Court of Appeals correctly held that the interpretation placed upon the bond by the trial court was the natural one. The company might well have agreed that, in the event of suit, a written statement of loss arising from the fraud or dishonesty of the employé, and "based upon the accounts of the employer," should be sufficient, *nothing appearing to the contrary*, to establish the loss; and this for the reason that such accounts if the claim was disputed and made the subject of suit, would be open to examination by the company. The employer could not base its statement of loss on its own accounts, and then withhold such accounts from inspection by the obligor on the bond.

If the latter construction of the bond be not clearly right, it cannot be said to be inconsistent with its provisions. And it would be going very far to say that the construction given to it by the company was so clearly right that a different construction would be unreasonable or entirely inadmissible. We have then a contract so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank and most likely to subserve the purposes for which the bond was given. In such a case, the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed. It has been so held in the case just decided.

3. We have seen that the company agreed to reimburse the bank for loss "by any act of fraud or dishonesty" on the part of Collins as president of the bank in connection with the duties of his office, occurring during the continuance of the bond, and discovered during said continuance or within six months thereafter, *and* within six months from the death or dismissal or retirement of the employé from the service of the employer.

As evidence of the dismissal or retirement of Collins from his position as president of the bank, the company refers to paragraph VI of the original bill of particulars filed by the receiver:

"VI. The following is the date of the dismissal or retirement of said John W. Collins and of the discovery of the acts of fraud or dishonesty referred to as alleged in the ninth paragraph of said complaint:

"'The said J. W. Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into the possession of the Comptroller of the Currency of the United States, which took place December 12, 1891; that on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as the receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892.'"

Paragraphs 9, 10 and 11 of the complaint were as follows: "IX. That on or about June 18, 1892, and as soon as practicable after the occurrence of the aforesaid wrongful acts of the said Collins, this plaintiff duly mailed at San Diego, California, in an envelope addressed to the said defendant at its office in the city of New York, a notice, in writing, of the acts of fraud and dishonesty of said Collins, and a written statement of the loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, certified by the plaintiff and based upon the accounts of said Collins, and presented satisfactory proofs of the loss sustained by said bank by reason of the acts of said Collins during the continuance of said bond, and duly demanded from this defendant that this defendant make good and reimburse to this plaintiff the sum of twenty-five thousand dollars, the amount of pecuniary loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, being the amount conditioned to be paid by the terms of the said guarantee bond heretofore mentioned. X. That the said defendant received each and all of the papers mentioned in paragraph nine of this complaint within at least

ten days after the date of mailing thereof, as alleged in paragraph nine of this complaint. XI. That the said defendant has retained in its possession each and all of the papers mentioned in paragraph nine of this complaint since the receipt thereof by said defendant, and has never up to the time of the commencement of this action objected thereto, either to this plaintiff or to said bank, as not being sufficient as a notice or statement of loss or proof of loss, as provided by the said bond heretofore mentioned, nor has said defendant raised any objection of any kind or nature whatsoever thereto, either to this plaintiff or to the said bank." The following entry appears in the record: "Plaintiff amends his bill of particulars by omitting all of sixth after first paragraph and inserting in lieu thereof, that the date of dismissal or retirement was the first of March, 1892; that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered between the 1st and 23d of May, 1892; and amends his complaint by striking out paragraphs 10 and 11 and inserting in lieu thereof, that between the 22d day of May, 1892, and the 18th of June, 1892, and again on the 24th of June, 1892, and as soon as practicable after the discovery of the aforesaid wrongful acts of the said Collins, this plaintiff duly notified the defendant in writing at his office in the city of New York, and on the 24th of June, 1892, and as soon as practicable after the discovery of said acts, presented to the defendant a claim in writing for the losses occasioned by such acts of the said J. W. Collins. And the plaintiff has duly performed all the acts and things which the employer in and by said bond was obligated to do; all of which notices and claims were received and accepted by the defendant as in all things sufficient and in time. Plaintiff thereupon duly demanded from defendant that it make good and reimburse to plaintiff the sum of $25,000 and interest towards the amount of pecuniary loss sustained by said plaintiff by said acts."

Independently of the statement in the receiver's original bill of particulars, (which, after being filed, was modified as just stated,) there is no direct evidence in the record that Collins ceased to be president of the bank by any formal act

on his part. He died March 3, 1892. It is true that he does not appear to have performed, or that he attempted to perform, any distinct act as president after the suspension of the bank on November 12, 1891. We have held, in the other case, that the mere suspension of the bank on November 12, 1891, followed by an investigation of its affairs by a national bank examiner, did not have the effect to retire O'Brien from his position as cashier. The same rule must be applied in the case of the president of the bank, whose functions were only suspended while the affairs of the bank were being investigated by a national bank examiner. The Circuit Court of Appeals well said, in support of this view, that if at any time before the receiver took possession on the 29th of December, 1891, the parties interested in the bank had made good its deficit and the bank examiner had restored its assets, no new appointment as president would have been necessary. In the former case there was evidence showing that O'Brien was, in fact, continued in the service of the receiver until about March 2, 1892, and that he claimed compensation for his services. On the day last named he left or retired from that service. There is no evidence in this case that Collins was formally retained by the receiver in his service. But even if, for that reason it were held that he retired from the service of the employer, when the receiver qualified on December 29, 1892, still the six months from the "retirement of the employé from the service of the employer" would not have expired until June 29, 1892. It is sufficient in this case to adjudge that Collins, within the meaning of the bond, was in the service of the bank up at least to the date on which the receiver took possession, and that his fraudulent acts were discovered and notice thereof given within six months after that date. The acts of fraud and dishonesty complained of were discovered a few days prior to May 23, 1892, and notice thereof to the company was given on that day, and was followed by a claim or proof of loss mailed June 24, 1892, and received by the company July 1, 1892. Such are the facts which the verdict of the jury must be taken to have established. And if it be further true, as the verdict imports, that

the notice of May 23, 1892, was given as soon as practicable after the occurrence of the alleged fraudulent acts came to the knowledge of the receiver, then the loss was discovered during the continuance of the bond and "within six months from the . . . retirement of the employé from the service of the employer." And if the bond is to be regarded as having expired upon the death of Collins, it also results that the claim of loss was made within the time required.

The objection that error was committed in admitting in evidence Collins' ledger account, and proof of alleged prior frauds, as well as evidence showing the extent of Collins' indebtedness to the bank, is not well taken. The case was fairly tried, and there is no ground for supposing that any error of law was committed by the trial court.

The judgments of the Circuit Court and of the Circuit Court of Appeals are

Affirmed.

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice Peckham, dissenting.

The plaintiff in error was surety on a bond guaranteeing the faithful discharge by Collins of his duties as president of the bank. The object of the suit is to enforce the penalty of the bond, on the ground that the president, whose conduct is guaranteed, had been unfaithful, and hence that the surety had become liable.

On the trial of the cause the court instructed the jury that by the terms of the bond the burden of proof was shifted from the plaintiff (the receiver of the bank) to the defendant (the Surety Company), and that the former was entitled to recover against the latter without making any proof whatever of its claim if it had been shown that a proof of loss made in accordance with certain requisites specified in the bond had been transmitted to the Surety Company; that is to say, the jury were instructed that in case a proof of loss in a particular form had been made, its legal effect was to create a rule of evidence to govern in any litigation as to the

bond which might thereafter arise between the parties. The result of this conclusion was to hold that the normal rule by which, in judicial proceedings, the burden is cast on a plaintiff to establish his case was dispensed with, and therefore that the Surety Company, when sued under the contract, was called upon to establish the negative fact that it did not owe, and if it did not do so, a verdict was to be rendered against it. These conclusions of the trial court were affirmed by the Court of Appeals, and upon their correctness the validity of the judgment rendered below necessarily depends.

That there may be no mistake as to what was held by the trial court in its charge to the jury and what was decided by the Court of Appeals in affirming that charge, I excerpt passages from the charge of the trial court and the opinion of the appellate court.

In its charge to the jury the trial court said:

"Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer shall be *prima facie* evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.

* * * * *

"Well, as I have said before, the plaintiff has made a *prima facie* case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be *prima facie* evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the

president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The reasoning of the Court of Appeals, in affirming these instructions, was as follows:

"III. The court charged the jury that the 'plaintiff has established a *prima facie* case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.' To this and to its repetition, in other words, defendant duly excepted.

"This part of the charge was based upon a provision of the bond which reads as follows: 'It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof.'

"It is contended that this does not mean that such statement shall be *prima facie* evidence in an action upon the bond; that 'no such contingency was in the minds of the parties;' that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company; but neither the phraseology of the clause, nor its collocation with the rest of the bond, thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge; such construction is a most natural one; nor is there anything extraordinary or startling in an agreement by the company that it pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous, and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of."

The opinion of this court just announced affirms the correct-

ness of the foregoing propositions; and, because it does so, I am unable to give my assent to it.

The necessary effect of the construction given to the contract is to decide that by its terms the receiver of the bank was entitled to recover on the contract of suretyship for an alleged default of the president, whose fidelity the contract guaranteed, *without making any legal proof whatever of the fact of a loss.* This consequence inevitably results from holding that, on its being made to appear that the bank had furnished a formal proof of loss under the contract, it was consequently entitled to recover without any proof of its right to do so. The contract did not require the bank in making the particular form of proof referred to in the bond as acceptable for the consideration of the Surety Company to verify it under oath, nor did it exact that it should be supported by any legal evidence whatever. Hence, by the contract, the bank could fulfil all the requirements referred to in that instrument as to the particular formal proof alluded to by simply making an unsworn statement to the guarantee company of what it claimed to be due, accompanying that statement with excerpts from the books of the bank. But as this mere unsworn statement of claim is now held by the court to constitute, in an action which might thereafter be brought to recover upon the bond, affirmative evidence of the liability of the Surety Company, which casts upon the latter the burden of showing that it did not owe, I submit that the ruling now made is exactly what I understand it to be — that is, a decision that under this contract the regular course of judicial proceedings between parties litigant is overthrown and a new rule is introduced, by which, when demand is made against the Surety Company, the person making the demand is relieved from proving the justice of his claim; and, on the contrary, the person against whom it is made, though called in as a defendant, is compelled as such to affirmatively establish the negative fact that it is not liable. So novel, so extreme, and, as it seems to me, so unjust a result, should not, in my opinion, be maintained unless the terms of the contract unmistakably make that construction necessary. Instead of

this being the case, I think that not only the letter but the manifest purpose of the contract, as shown by its context, refutes the extreme construction now affixed to it. The provisions of the bond, which are pertinent to the question under consideration, are as follows:

After reciting the parties to the contract, that is, the American Surety Company of New York as party of the first part, Collins, as president of the bank, as party of the second part, and the bank as party of the third part, the bond states the employment of Collins in the capacity of president of the bank, and the application made to the Surety Company to guarantee the faithful performance of his duties. The bond then stipulates as follows:

"Now, therefore, in consideration of the sum of one hundred and twenty-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed, that subject to the provisions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal, or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof."

It is, I submit, plainly shown by the foregoing language that the Surety Company reserved the right to decline to admit the validity of and to pay without suit any claim made upon the bond, unless notice of the loss was given accompanied by "satisfactory proof" thereof. The words, "satisfactory proof," must have some meaning. But, in reason, the only effect now given to them is that the proof of loss must have been satisfactory to the one who made it; that is, that the parties to the contract meant to say that, whenever the bank was satisfied it had a claim, the fact of its being so satisfied was sufficient to relieve it of all obligation to prove such claim, and to cast upon the Surety Company the duty of showing that the bank was not warranted in asserting a right to recover. The deduction to which the construction thus referred to leads is a conclusive demonstration of its unsoundness. Indeed, if it were the true one, the words "satisfactory proof" have no place in the contract, for it follows that, if the bank preferred a claim under the bond, it would do so because it was satisfied it had a claim, and, therefore, satisfactory proof of a loss under the construction given to it, if it means anything, means only this, that the bank was to be the sole judge of whether a claim existed in its favor, and that this judgment of the bank in advance in its own favor was to be the determinative rule, controlling not only the mind of the guaranty company, but regulating any judicial proceeding which might thereafter arise concerning the obligations created by the contract. But, manifestly, the words, "after notice, accompanied by satisfactory proof, of loss," referred not to the bank by whom the claim was to be made as the person to whom the proof should be satisfactory, but to the Surety Company against whom the claim might be asserted. In other words, the contract plainly declares that the Surety Company only agrees to pay within three months next after notice accompanied by satisfactory proof of loss, that is, by a proof of loss with which it was satisfied. But it is said that, whatever may be the meaning of the particular clause in the contract to which I have just referred, it is controlled by the concluding sentence found in the excerpt which has been made

from the bond. Between the sentences relating to the satisfactory proof of a loss and that relied upon, the contract contains an enumeration of the character of acts which the bond is intended to guarantee against, and affixes certain limitations of time within which the acts therein referred to must have been discovered. These stipulations intervening between the one as to satisfactory proof and the one relied upon as modifying or controlling the former, bear no relation to the matter under consideration, and, therefore, may be omitted from view for the purposes of the question in hand. To test, then, the correctness of the construction now upheld I eliminate these intervening stipulations and bring into juxtaposition the provision as to satisfactory proof and the subsequent language which it is claimed destroys the legal effect of the prior clause. The contract thus arranged would then read as follows:

"The company shall within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer. . . . It being understood that written statement of such loss certified by the duly authorized officer or representative of the employer and based upon the accounts of the employer shall be *prima facie* evidence thereof."

Construing the whole of this clause, it strikes me that its purport is free from real difficulty. The first provision reserves a full right to the company to reject a claim provided the proof is not satisfactory to it of the fact of the loss; the second provision stipulates that the company is bound to treat a statement made in a particular form as being presumptive evidence which must be considered by it in arriving at a conclusion as to whether the loss itself was established to its satisfaction. In other words, the one provision, that of satisfactory proof of a loss, refers to the state of mind of the corporation which is to result from the proof in order that it may admit the validity of the claim without suit; the second relates merely to the form in which a claim may be preferred, and provides that if it is preferred in that form the company

shall be put to a decision as to whether its substantive effect as evidence is satisfactory to it. Consider also the object of the stipulation. The ninety days for voluntary payment of the claim could only begin to run after the furnishing of the proof of loss. The company, however, had a right to pass upon the sufficiency of such proof, not merely as to form, but as to its probative effect, whether it constituted satisfactory evidence of the liability of the Surety Company or not; and in order to exclude all question as to the period when this time should commence, a stipulation was inserted that proof presented in a particular form would be accepted as *prima facie* or presumptive evidence of the fact of a loss. The stipulation, therefore, that a particular form of proof when furnished to the company should be *prima facie* evidence, did not amount to a declaration by the company that it would also be "satisfactory proof" within the meaning of the previous clause. To say that it did would be to give to the words "*prima facie*" the meaning of "conclusive." Can it be doubted that under the contract the company would have had a right to call upon the bank to make a sworn statement or comply with other reasonable requirements, although the bank had made the formal statement referred to? Clearly not, I submit. In other words, then, the Surety Company, despite the receipt of the written statement referred to, retained the right to determine whether it satisfactorily proved or established the fact of a loss. The difference between the two clauses is that which must ever exist between form and substance, and the failure to appreciate this fact is exemplified in the reasoning of the Court of Appeals, where it was declared that the provision as to "satisfactory proof" amounted to an agreement by the Surety Company that it would pay "upon proof in a prescribed form being made to it," and that the stipulation as to the furnishing of a written statement based upon the accounts of the bank was an agreement "to accept such proof as *prima facie* sufficient to entitle the insured to a recovery in case of default." And the necessary consequence of this ruling was to hold that the right to judge whether there had been a loss under the contract was taken

away from the company, and that it was bound to make a voluntary payment upon the mere unsworn statement of the party making the claim based upon the accounts of the bank, even though, upon investigation, it developed that the accounts of the bank were utterly unreliable and manifestly insufficient as the foundation of a claim.

It being in reason unquestionable that the company only agreed to pay without suit in case the evidence presented to it was satisfactory *as proof*, can it be held that its agreement that a certain form of proof should be treated by it in its consideration of the claim as *prima facie* evidence of the loss, constituted a contract to accept the designated form as proof, having the effect to overthrow the previous express stipulation and as denying the right of the Surety Company to decline to pay without suit if the proof in its opinion did not satisfactorily establish the loss? In other words, that the implied stipulation, that a certain class of proof when tendered to the company for the exercise of its judgment should be treated as sufficient in form, should be construed as meaning that it should be regarded as adequate in substance, and as establishing a right to payment of the loss.

As I have said, it seems to me the two provisions of the bond are harmonious, and are susceptible of a construction which will give a fair and reasonable effect to both. They ought not, therefore, to be so construed as not only to make the one destroy the other, but so as to give a significance to the contract never intended by the parties, and thereby to overthrow the elementary rule governing all judicial proceedings, that is, that upon the one who makes a claim there rests the burden of establishing it.

That the parties did not intend by the contract to create a rule of evidence to govern any suit which might arise on the bond is in addition shown by another and subsequent provision of the contract, wherein it is stated that an action or suit to recover upon the bond shall be barred if not brought within a year from the presentation of the claim. If the purpose of the contracting parties had been to regulate and control subsequent proceedings in the courts growing out of the

contract, the natural place to have expressed that purpose would have been in the clause of the contract treating of actions upon the bond. But no such stipulation is therein found.

It is, of course, unquestioned that many authorities hold that where there is an ambiguity in a contract of insurance a reasonable doubt as to its construction will be resolved in favor of the insured, because the policy is presumed to have been drawn by the officers or agents of the insurer. But granting *arguendo* that this rule applies to a contract of suretyship of the character of that under consideration, I know of no case which pushes the principle to the extent of holding that the express provisions of a contract must be destroyed and thereby a liability be enforced against the insurer, not in harmony with the contract, in conflict with its spirit, in violation of the manifest intention of the parties and productive of great injustice. In other words, that where by the express terms of a contract the insurer agrees to pay without litigation only where the proof of the validity of the claim is satisfactory to him, that it is to be held that because he has declared that in making up his judgment as to whether the evidence is satisfactory he will treat a statement of the loss certified by the claimant as *prima facie* evidence, he thereby renounces his right to form a judgment as to the satisfactory nature of that evidence. Indeed, the doctrine goes not only to the extent of depriving the insurer of his right to pass judgment upon the evidence submitted, but it causes the contract to operate beyond the minds of the contracting parties and to control the judgment of any judicial tribunal subsequently called to pass upon a controversy arising upon the bond. Does not this follow from the fact that it is declared that the stipulation that a statement made by the claimant in a particular form shall be *prima facie* evidence, not only nullifies the provision that the whole proof must be satisfactory to the person against whom the claim is made, but also compels a court to say that although no legal proof whatever under the rules of evidence has been offered at the trial on behalf of the claimant, yet that the liability of

the defendant has been established, and there must be a judgment against him, unless he conclusively shows that no loss had been sustained by the plaintiffs.

KIPLEY *v.* ILLINOIS.

KIPLEY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 586, 601. Submitted March 14, 1898. — Decided April 18, 1898.

When the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was specially "set up or claimed" under such Constitution or laws; as the jurisdiction of this court cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right.

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

Mr. Edward C. Akin, attorney general of the State of Illinois, *Mr. George W. Smith*, *Mr. Frank P. Blair* and *Mr. Murry Nelson, Jr.*, for the motion.

Mr. Charles S. Thornton opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

The attorney general of Illinois filed in the Supreme Court of Illinois, at its June term 1897, an original petition against Joseph Kipley, superintendent of police of the city of Chicago, and Adolph Kraus, Dudley Winston and Hempstead Washburne, commissioners appointed under the act of the legislature of Illinois in force on and after March 20, 1895, entitled "An act to regulate the civil service of cities."

The application for leave to file the petition was accompanied by a suggestion upon the part of the attorney general that the case involved an interpretation of the above act.

The prayer of the petition was that a writ of mandamus issue commanding Kipley, as superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in the city of Chicago, and commanding the civil service commissioners to submit to Kipley, as superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, and that the petitioner have such other or further relief as the nature of the case required.

Kipley filed a separate answer, in which he insisted that he had acted, in all respects, in conformity with law. He also averred that although the act regulating the civil service of cities was passed and approved substantially as stated in the petition, and was afterwards submitted to a vote of the electors of Chicago and adopted by a large majority of votes, it was "unconstitutional and void," in that it purported to confer judicial powers and authority to make and enforce judgments and decisions of a nonjudicial body, described and set forth in the act as the civil service commission.

Subsequently, June 28, 1897, the city council of Chicago passed an ordinance designating certain public officers who should be selected by the mayor with the concurrence of the council. Kipley, July 10, 1897, filed a plea, setting forth this ordinance, and alleging, in relation to the appointment by the civil service commissioners of certain subordinate police officers of the city, that they "have been, if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction and power of the said civil service commissioners, so that such matters are now expressly excepted by its very terms from the force and effect of said Civil Service Act."

On the 7th day of October, 1897, Kipley asked leave of the

court to withdraw his plea, and also to amend his answer so as to embody therein averments to the effect that the relator was not entitled to a writ of mandamus and that the court had no jurisdiction or power to grant the same, because the said Civil Service Act of March 20, 1895, was null and void and contrary to the constitution of the State of Illinois and the Constitution of the United States in that —

"1. It abridges the privileges and immunities of the citizens of the United States, because it operates to exclude from the classified service of such city as therein specified all such citizens as do not apply for office or for place of employment.

"2. The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges and immunities belonging and guaranteed by the said constitutions, respectively, to every citizen thereof.

"3. The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

"4. The said act of March 20, 1895, purports to prescribe for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of penalties therefor, of deprivation of office, of fine, of imprisonment, and incapacity to hold office thereafter by nonjudicial body, and in such manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed; and without informing the accused of the nature and cause of the accusation; and without confronting the accused with the witnesses against him; and without permitting the accused to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defence.

"5. That the said act denies to the citizens the freedom of political action, making it highly penal for the citizen to take part in party politics.

"6. That said act of March 20, 1895, provides for the creation and maintenance of an office-holding class, at the expense of the people who are excluded therefrom by the operation of the said act.

"7. And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution which prescribes that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws.'

"8. And further, the said act of March 20, 1895, generally denominated the Civil Service Act, is absolutely null and void because the same purports to require the civil officers of the city of Chicago to undergo tests as to qualification for office and public employment in addition to the requirement of section 25 of article 5 of said constitution of the State of Illinois, and because it provides for a political test for the said commissioners respectively therein named, and because further the same is in contravention of section 22 of article 4 of said constitution as well as many other provisions of said state constitution."

Kipley also asked leave to file "a supplemental answer," averring that since the filing of his original answer the city council had passed the above ordinance of June 28, 1897.

The motions for leave to withdraw the plea, to amend the answer and to file a supplemental answer were severally denied.

On a subsequent day of the term Kipley entered a motion to discharge the rule requiring the respondents to answer the petition, and to quash all the proceedings that had been taken, assigning as reason therefor that the Civil Service Act of March 20, 1895, was contrary to the constitution of Illinois and the Constitution of the United States upon certain specified grounds. They were the same as those specified in the

above motion for leave to amend the answer. That motion was also denied.

On the 22d day of December, 1897, the Supreme Court of Illinois rendered its final judgment, granting the relief asked in the petition for mandamus.

The final order of the court was that a writ of mandamus issue, commanding Kipley, superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in that city, and the civil service commissioners to submit to him, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the next grade below that in which such vacancy or vacancies existed.

Kipley, having given previous notice thereof, filed a petition for rehearing on the 8th day of January, 1898, but before that petition was disposed of he sued out a writ of error to this court. That constitutes case No. 586. The rehearing having been denied, he sued out another writ of error, and that constitutes case No. 601. The citation in each case was signed by the Chief Justice of the state court. The cases on motion were consolidated in this court, and are before us on a motion to dismiss each writ of error for want of jurisdiction.

We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois Civil Service Act was "unconstitutional and void." But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was "specially set up or claimed" under such Constitution or laws. Rev. Stat. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing

the case up intended to assert a Federal right. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648; *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175, 177. The averment in the answer, that the statute of Illinois was unconstitutional and void, must be taken as intended to apply to the constitution of that State, and not to the Constitution of the United States. In *Miller* v. *Cornwall Railroad*, 168 U. S. 131, 134, this court, speaking by the Chief Justice, said: "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."

It is manifest that, when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a Federal nature. We cannot suppose that it occurred to either of them at that time that the Civil Service Act of Illinois was repugnant to the Constitution of the United States.

Nor was any question of a Federal character raised or intended to be raised by the plea which brought before the court the city ordinance of June 28, 1897.

It is, however, said that the motion for leave to amend the answer did specially set up and claim that the Illinois Civil Service Act violated certain rights, privileges and immunities belonging to the plaintiff in error under the Constitution of the United States. But as the Supreme Court of Illinois did not allow the proposed amendment of the answer the questions suggested by the amendment did not arise for determination. To the action of the court in disallowing the amendment, no exception was taken. The grounds upon which these motions were denied appear from the opinion of the court as follows: "By this motion respondent Kipley asks, first, for leave to withdraw his plea; second, to file an amended answer; and

third, to file a supplemental answer. Nothing more is before us than the bare motion. No showing has been made nor reasons filed in support of the motion, and we are unable to say whether the motion should be allowed or not, and it must therefore be overruled." *People* v. *Kipley*, 167 Illinois, 638. This action of the state court does not raise a Federal question which this court can examine. The suggestion that the Federal questions which would have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment. It was in the discretion of the court to deny the motion to amend, when no reasons were assigned for its allowance, and to hold the parties to the issues made by the original petition and answer; and there is nothing in the record justifying the conclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the Constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity.

It may be observed that the opinion of the state court delivered upon final hearing contains nothing to show that any Federal question was considered or determined. The general subject to which the attention of the court was directed is shown by the following extract from its opinion delivered by Mr. Justice Magruder: "The evils sought to be remedied by legislation of this character are well known and well understood. These evils are such as grow out of what is generally called the 'spoils system.' . . . The foundation principles of the act are that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit." *People* v. *Kipley*, 171 Illinois, 60. The validity of the enactment in question was considered by that court with reference only to the state constitution.

Statement of the Case.

In respect of the motion to discharge the rule and all proceedings against the respondents it need only be said that it could have been denied upon the ground that the questions sought to be raised by it might more properly arise upon demurrer, plea or answer. Its denial did not have the effect to bring any Federal question into the record to be determined. It may also be observed that no exception was taken to the action of the state court in relation to this motion.

This court having no jurisdiction to reëxamine the final judgments of the state court in these cases, the motion to dismiss the writs of error is sustained.

Dismissed.

Mr. Justice White dissented.

HAWKER *v.* NEW YORK.

ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE CITY AND COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 415. Argued March 9, 1898. — Decided April 18, 1898.

The provision in the act of the legislature of New York of May 9, 1893, c. 661, relating to the public health, as amended by the act of April 25, 1895, c. 398, that "any person who, . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars, or imprisonment for six months for the first offence, and on conviction of any subsequent offence, by a fine of not more than five hundred dollars, or imprisonment for not less than one year, or by both fine and imprisonment," does not conflict with Article I, section 10, of the Constitution of the United States which provides that "No State shall . . . pass any Bill of Attainder, *ex post facto* Law or law impairing the Obligation of Contracts," when applied to a person who had been convicted of a felony prior to its enactment.

In 1878 the plaintiff in error, defendant below, was tried and convicted in the Court of Sessions of Kings County, New York, of the crime of abortion, and sentenced to imprison-

ment in the penitentiary for the term of ten years. On May 9, 1893, the legislature of the State of New York passed an act entitled "The Public Health Law," Laws 1893, c. 661, which, as amended by the law of April 25, 1895, c. 398, provides, among other things, as follows:

"SECTION 153. Any person who, . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars, or imprisonment for six months for the first offence, and on conviction of any subsequent offence, by a fine of not more than five hundred dollars, or imprisonment for not less than one year, or by both fine and imprisonment."

Under this statute defendant was indicted in April, 1896, in the Court of General Sessions of the Peace for the city and county of New York. The indictment alleged the conviction in 1878, and charged that, having been so convicted of the crime and felony of abortion, defendant did, on the 22d day of February, 1896, in the city of New York, unlawfully practise medicine "by then and there unlawfully examining, treating and prescribing for one Dora Hoenig." To this indictment he demurred. The demurrer was overruled, and, upon a plea of not guilty, he was tried, convicted and sentenced to pay a fine of $250. That conviction having been sustained by the Court of Appeals of the State, 152 New York, 234, and a remittitur sent down, a final judgment was entered in the Court of General Sessions, whereupon he sued out this writ of error.

Mr. Hugh O. Pentecost for plaintiff in error.

Mr. Robert C. Taylor and *Mr. Asa Bird Gardiner* for defendant in error. *Mr. W. M. K. Olcott* and *Mr. John D. Lindsay* were on the brief for the defendant in error.

MR. JUSTICE BREWER, after making the above statement, delivered the opinion of the court.

The single question presented is as to the constitutionality

of this statute when applied to one who had been convicted of a felony prior to its enactment. Its unconstitutionality is alleged on the ground of an alleged conflict with article I, section 10, of the Constitution of the United States, which forbids a State to pass "any Bill of Attainder, *ex post facto* Law or law impairing the Obligation of Contracts." The arguments for and against this contention may be thus briefly stated.

On the one hand it is said that defendant was tried, convicted and sentenced for a criminal offence. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practise medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and after the defendant has once fully atoned for his offence a statute imposing this additional penalty is one simply increasing the punishment for the offence, and is *ex post facto*.

On the other, it is insisted that within the acknowledged reach of the police power, a State may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practise medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character. In support of this latter argument counsel for the State, besides referring to the legislation of many States prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. In the footnote[1] will be found his collection.

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[1] COLORADO — The board may refuse certificates to persons convicted of conduct of a criminal nature; and may revoke certificates for like cause. Mills Ann. Stat. 1891, c. 101, § 3556.

IOWA — May revoke a certificate to a person who has been convicted of felony committed in the practice of his profession, or in connection there-

We are of opinion that this argument is the more applicable and must control the answer to this question. No precise limits have been placed upon the police power of a State,

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with; or may revoke for like cause; . . . and such refusal or revocation prohibits such person from practising medicine, surgery or obstetrics. Laws 1889, c. 104, § 7.

Louisiana — The board is required to strike from the said list (of registered names) the names of persons convicted of any infamous crimes by any court . . . whether prior or posterior to registration. Act June 26, 1882, No. 31, § 5.

New Jersey — May refuse or revoke a license for chronic and permanent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure disease which, in the opinion of the board, it is impossible to cure (after hearing). Act May 12, 1890, c. 190, § 5.

North Dakota — Substantially the same. Act January 10, 1890, c. 93, § 3.

Vermont — May revoke or annul a certificate if in their judgment the holder has obtained it fraudulently or has forfeited his right to public confidence by the conviction of a crime. Rev. Laws 1880, c. 172, § 3915.

Washington — The board will refuse or revoke a license for unprofessional or dishonorable conduct, subject to the right of appeal. . . . "Unprofessional or dishonorable conduct" means procuring or aiding or abetting in a criminal abortion or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that any manifestly incurable disease can be permanently cured; or wilfully betraying a professional secret; or advertisements of medical business in which untruthful or improbable statements are made; or advertising any medicine or means whereby the monthly periods of women can be regulated, or the menses reëstablished if suppressed; or the conviction of any offence involving moral turpitude; or habitual intemperance. Act March 28, 1890, §§ 3 and 4.

Great Britain and Ireland — If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall be, after due inquiry, judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the register to erase the name of such medical practitioner from the register. Acts 21 and 22 Vict. c. 90, § 29.

New Brunswick — Substantially same. Act 1881, c. 19, § 22.

Northwest Territory — Substantially same. Ord. 5, 1888, § 37, as substituted by Ord. 24, 1892, § 1.

Nova Scotia — Substantially same. Rev. Stat. 5th ser. c. 24, § 19.

Manitoba — Any registered medical practitioner convicted of felony or misdemeanor, before or after the passage of this act or his registration, forfeits his rights to registration, and by direction of the council his name

and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power. Care for the public health is

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shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the register may refuse registration. If any person registered be judged after due inquiry . . . to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the register to erase his name. Rev. Stat. of Manitoba, 1891, c. 98, § 40.

British Columbia — Any registered practitioner convicted of any felony thereby forfeits his right to registration, and . . . his name is required to be erased from the register; or, in case a person known to be convicted of felony presents himself for registration, the register has the power to refuse such registration. Cons. Act, 1888, c. 81, § 32; substantially same as to Quebec; Rev. Stat. 1888, § 3996.

Ontario — A practitioner is liable to have his name erased from the register where he has been convicted, before or after registration, of an offence which, if committed in Canada, would be a felony or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct in a professional respect. Rev. Stat. 1887, c. 148, § 34.

Newfoundland — The . . . board may try and expel any member of the profession for acts of malpractice, misconduct or immoral habits. . . . Act, 1893, c. 12, § 32.

Prince Edward's Island — A medical practitioner guilty of infamous or disgraceful conduct in a professional respect is liable to have his name erased, and, if he apply for registration, the council may refuse it. Act 1892, c. 42, § 22.

New Zealand — If any registered person shall be or shall have been convicted of any felony or misdemeanor in Great Britain or Ireland, or in any of the British Dominions, the register general and register, respectively, shall erase the name of any such person from the register, and such erasure shall be notified by the register general in the New Zealand Gazette. Medical Practitioners Act, 1869, No. 51.

Hawaii — It shall not be lawful for any person to practise in this kingdom as a physician or surgeon for compensation or reward unless he shall have first presented to the board of health satisfactory evidence of his professional qualifications and good moral character. Act 1876, c. 11, § 3.

St. Lucia — If any registered medical practitioner is convicted of any felony, the register shall erase the name of such practitioner from the Medical Register. If any registered medical practitioner is convicted of any misdemeanor, a report shall be submitted . . . to the governor in council, who . . . shall determine whether (he) has been guilty of infamous conduct in any professional or other respect, and may thereupon, if he sees fit, direct the register to erase the name. . . . Medical Practitioner Ordinance No. 77 of 1885, § 11.

something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent* v. *West Virginia*, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

We note also these further declarations from state courts: In *State* v. *State Medical Examining Board*, 32 Minnesota, 324, 327, it was said: "But the legislature has surely the same power to require, as a condition of the right to practise this profession, that the practitioner shall be possessed of the qualification of honor and good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be entrusted with the discharge of its duties." In *Thompson* v. *Hazen*, 25 Maine, 104, 108: "Its authors were careful, that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. . . . It could not have been intended that persons destitute of the moral qualifications required should have full opportunity to enter professionally the families of the worthy but unsuspecting, be admitted to the secrets which the sick chamber must often entrust to them." In *State* v. *Hathaway*, 115 Missouri,

36, 47: "The legislature, then, in the interest of society and to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the State permits to practise medicine. . . . And the objection now made that because this law vests in this board the power to examine not only into the literary and technical acquirements of the applicant, but also into his moral character, it is a grant of judicial power, is without force." In *Eastman* v. *State*, 109 Indiana, 278, 279: "It is, no one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled and learned men." In *State* v. *Call*, (North Carolina,) 28 S. E. Rep. 517: "To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. The door stands open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike."

But if a State may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. *County Seat of Linn County*, 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity." *Dent* v. *West Virginia*, *supra*, p. 122.

It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule — one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offences is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the State should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the State, leaving the question of violation to be determined according

to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law one convicted of crime was incompetent as a witness, and this rule was in no manner affected by the lapse of time since the commission of the offence and could not be set aside by proof of a complete reformation. So in many States a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. *Washington* v. *State*, 75 Alabama, 582. In *Foster* v. *Police Commissioners*, 102 California, 483, 492, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before." In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given

state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U. S. 180, 183.

Defendant relies largely on *Cummings* v. *The State of Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333. In the first of these cases a test oath, containing some thirty distinct affirmations respecting past conduct, extending even to words, desires and sympathies, was prescribed by the State of Missouri upon all pursuing certain professions or avocations; and in the second a similar oath, though not so far reaching in its terms, was required by act of Congress of those who sought to appear as attorneys and counsellors in the courts of the United States. It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counsellor, the oaths should be considered not legitimate tests of qualification, but in the nature of penalties for past offences. These cases were called to our attention in *Dent* v. *West Virginia*, *supra*, in which the validity of a statute of West Virginia imposing new qualifications upon one already engaged in the practice of medicine was presented for consideration. After pointing out the distinguishing features of those cases, this court summed up the matter in these words, p. 128:

"There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practise the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right

to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State."

Ex parte Wall, 107 U. S. 265, is also worthy of notice. In that case the Circuit Court had stricken the petitioner's name from the roll of practising attorneys, on the ground that he had committed a crime, although not in the presence of the court, nor interfering with it in the discharge of its duties. The petitioner here insisted that the act which was charged against him was one for which he was, if guilty, liable to trial and conviction under the law of the State, and that the Federal court had no power on account of such act, one having no connection with his obligations to that court, to disbar him. In reply to this contention it was said, p. 273:

"It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll, as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession. . . . Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court in such cases exercise their discretion, whether a man

whom they have formerly admitted is a proper person to be continued on the roll or not.'"

The thought which runs through these cases, and others of similar import which might be cited, is that such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be and what is in fact appropriate evidence of such qualifications.

In *Gray* v. *Connecticut*, 159 U. S. 74, 77, this court considered the effect of a statute prescribing additional qualifications for one acting as a pharmacist who already had a license from the State therefor, and said: "Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful." See also *Foster* v. *Police Commissioners*, *supra*, and *State* v. *State Board of Medical Examiners*, 34 Minnesota, 387.

We find no error in the record, and, therefore, the judgment of the state court is

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Peckham and Mr. Justice McKenna, dissenting.

By an indictment in the Court of Sessions of Kings County, New York, the present plaintiff in error was charged with the crime of abortion, committed September 1, 1877. He was found guilty and sentenced, March 6, 1878, to imprisonment in the penitentiary for the term of ten years.

Chapter 661 of the laws of New York of 1893, as amended by the laws of 1895, provides that "any person who, after conviction of a felony, shall attempt to practise medicine, or shall so practise, shall be guilty of a misdemeanor," etc.

The present indictment charged the plaintiff in error with the commission of the offence last stated, in that having been convicted in 1878 of the above crime of abortion committed

in 1877, he unlawfully, on the 22d day of February, 1896, in the city of New York — nearly twenty years after the commission of the crime of abortion — practised medicine by "then and there unlawfully medically examining, treating and prescribing for Dora Hoenig."

If the statute in force when the offence of abortion was committed had provided that, *in addition* to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practise medicine, no one, I take it, would doubt that such prohibition was a part of the *punishment* prescribed for the offence. And yet it would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offence in 1877 and which, by its own force, made it a crime for the defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in 1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the Constitution of the United States declaring that no State shall pass an *ex post facto* law.

The scope and meaning of the *ex post facto* clause of the Constitution was determined in *Calder* v. *Bull*, 3 Dall. 386, the opinion being delivered by Mr. Justice Chase. The classification there made of cases embraced by that provision has been universally accepted in the courts of this country, although this court said in *Kring* v. *Missouri*, 107 U. S. 221, 228, that it was not to be supposed that the opinion in *Calder* v. *Bull* undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable. That classification was as follows: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime and makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offence in order to convict the offender."

In *United States* v. *Hall*, 2 Wash. C. C. 366, Mr. Justice Washington said "that an *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which *increases the punishment*, or, in short, which in relation to the offence, *or its consequences*, *alters* the situation of a party *to his disadvantage*." And so it was held in *Kring* v. *Missouri*, 107 U. S. 221, 228, and in *Medley*, *Petitioner*, 134 U. S. 160, 171.

If, long after the commission of a crime, and long after the offender has suffered all the punishment prescribed at the time for its commission, a statute should, by its own force, and *solely because of his conviction of that offence*, take from him the right to further pursue his profession, would not such a statute inflict upon him a greater punishment than was annexed to the crime when committed, and alter the situation to his disadvantage, "in relation to the offence or its consequences"? In my opinion, this question should receive an affirmative answer.

It was said in argument that the judgment below was sustained by *Dent* v. *West Virginia*, 129 U. S. 114. That case presented no question under the *ex post facto* clause of the Constitution. It only involved the question whether any one could, of right, pursue the practice of medicine without obtaining a license to do so, if the State required a license as a condition of exercising the privilege of pursuing that profession. This court held that such a statute was within the reserved police power of the State, and consistent with the due process of law enjoined by the Fourteenth Amendment. It said: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure, or tend to secure, them against the consequences of ignorance and incapacity, as well as of deception and fraud." It was not the case of a state enactment which, by its own force, made it a crime for any person, *lawfully engaged*, *when such act was passed*, in the practice of the medical profession, to continue to do so, if he had *at any time* in his past life committed a felony, although he may have suffered all the punishment prescribed for such felony when it

was committed. If the statute of West Virginia had been of that character, the same question would have been presented that arises under the statute of New York.

In *Cummings* v. *Missouri*, 4 Wall. 277, 321, this court said: "The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined." The court now holds that a legislative enactment does not inflict punishment for past conduct when it makes it a crime for any one lawfully engaged in the practice of medicine — as was the plaintiff in error — to continue in the pursuit of his chosen profession, if at any time in the past, and although a half century may have intervened, he was convicted of a felony of any character, notwithstanding he suffered the entire punishment prescribed for such felony when committed.

In *Ex parte Garland*, 4 Wall. 333, 377, which involved the validity of an act of Congress requiring, among other things, a certain oath to be taken as a condition of the right of one to appear and be heard as an attorney at law by virtue of any previous admission to the bar, this court, referring to certain clauses of the act relating to past conduct, said: "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary vocations of life for past conduct can be regarded in no other light than as punishment for past conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enact-

ments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts *it adds a new punishment* to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law."

The statute in question, it is to be observed, takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practise medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow-men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed. If the defendant had been pardoned of the offence committed by him in 1877, he would still, under the statute of 1895, have become a criminal if he continued in the practice of his profession.

It will not do to say that the New York statute does nothing more than prescribe the qualifications which, after its passage, must be possessed by those who practise medicine. Upon this point, Mr. Justice Patterson of the Supreme Court of New York well said: "Assuming, for the purpose of the argument, that the legislature may require for the continuance in the practice of medicine that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the terms of the act. The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a

past offence, and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies — not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of practising at all. Clearly it acts directly upon and enhances the punishment of the antecedently committed offence by depriving the person of his property and right and preventing his earning his livelihood in his profession, only because of his past, and in this case expiated, offence against the criminal law. The prisoner has committed no new crime except that which the statute has created out of the old. He had absolutely the right to practise medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away his property in the right to earn his living on the expiration of his imprisonment, by engaging in the profession of which he was and is a member. His civil rights were not extinguished, but only suspended, during his imprisonment. 2 Rev. Stat. 701, § 19; Penal Code, § 710."

I concur entirely in these views, and must withhold my assent to the opinion of the majority.

KIRWAN *v.* MURPHY.

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

No. 550. Submitted March 28, 1898. — Decided April 25, 1898.

An interlocutory order of a Circuit Court for the issue of a temporary injunction, having been taken on appeal to the Circuit Court of Appeals, was there affirmed, and an order was issued for temporary injunction. An appeal from this was taken to this court. *Held*, that this court has no jurisdiction, and that the appeal must be dismissed.

Statement of the Case.

SIMON J. Murphy and others filed a bill against P. H. Kirwan, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, in the Circuit Court of the United States for the District of Minnesota, which alleged in substance that complainants were the owners of certain lands on the shores of Cedar Island Lake, in St. Louis County, Minnesota, specifically described in the bill; that the township in which the lands lie was surveyed in 1876, and the survey approved by the United States Surveyor General for Minnesota and by the Commissioner of the General Land Office; that prior to April 1, 1887, all the lands in the township were sold or otherwise disposed of by the United States according to the official plat of the survey, and patents therefor were issued to the various purchasers and entrymen; that Cedar Island Lake is in fact smaller than it is represented to be on the plat, and that several of the fractional lots owned by complainants about said lake contain more land than is represented, while as to some of the lots the waters of the lake extend upon the areas shown by the plat to be land; that the lands owned by complainants, lying between the meander line and the actual shore line of the lake now claimed by defendants to be unsurveyed, are of the value of two thousand dollars. The bill further averred that complainants became the owners of the lands described, with other lands, by virtue of mesne conveyances from the patentees; that they paid a valuable consideration for each parcel and purchased the same in good faith, believing the titles of their grantors extended to the lake, in reliance upon the government plat, and being in ignorance of any fraud or mistake in the survey. It was then stated that proceedings had been had to secure a resurvey of the lands between Cedar Island Lake and the old meander line, and that on October 31, 1893, the Commissioner of the General Land Office directed a resurvey, which order was affirmed by the Secretary of the Interior, and final instructions for such resurvey given to the Surveyor General, November 5, 1896; that Kirwan, Surveyor General of Minnesota, thereupon let the contract to make the survey to his co-defendant, Thomas H. Crosswell, a deputy surveyor, who

was about to commence such survey. All which orders were charged to be void, and it was prayed that defendant Kirwan be enjoined from entering into any contract for the survey of the lands described or from surveying the same, and that the boundaries of the lands be defined by decree and established, and complainants be protected in the use and enjoyment of such lands, extending to and including the shores of Cedar Island Lake, and to the centre of said lake; and that defendant Kirwan and his successors be perpetually enjoined from surveying the same, etc. Affidavits and exhibits were filed in support of the bill. A rule to show cause was issued and argument had on the application for a temporary injunction, and the matter taken under advisement, whereupon defendants, January 11, 1897, filed their joint answer to the bill. The answer set up that in 1876, under authority from the Commissioner of the General Land Office, a contract was made by the then Surveyor General of Minnesota with a deputy surveyor to make a survey of certain lands in the township in question; that thereafter, on certain pretended field notes of the survey returned by the deputy surveyor, a plat of the land was made by the Surveyor General and filed with the Commissioner; that no survey was in fact made; that the exterior boundaries of the land only were run; that no divisions into sections or smaller subdivisions were attempted; that no streams or bodies of water were meandered; that the field notes were false and fictitious, and the plat thereon based false and incorrect.

The answer alleged that about twelve hundred acres of the township were never sold, disposed of or patented, and were still unsurveyed land belonging to the government, and lying between the shore of Cedar Island Lake and certain enumerated government lots, a part of which lots had been patented and conveyed to complainants; that by the plat made from the deputy's field notes, all of said unsurveyed land is indicated as being a part of Cedar Island Lake. In 1893 an application of certain settlers upon this intervening tract for a survey thereof, so as to enable them to enter the lands as homesteads, was made, and the Secretary of the

Interior, after many hearings, complainants being represented, adjudged the former survey fraudulent, and in 1896 a resurvey of the tract was ordered, in accordance with which defendant Kirwan, as Surveyor General of the United States, entered into a contract with Crosswell, a deputy surveyor, on December 10, 1896, to survey and subdivide the lands.

On January 22, 1897, complainants filed a replication.

The Circuit Court, on April 3, 1897, granted complainants' prayer for a temporary injunction, and an injunction was ordered to issue, on bond being filed, restraining defendants "during the pendency of the above entitled action or until the further order of this court from entering into any contract or perfecting a contract partially entered into for the survey of the lands hereinbefore described, or any part thereof, or from surveying the same or causing the same to be surveyed." From this order defendants appealed to the Circuit Court of Appeals for the Eighth Circuit, and, after argument, that court ordered, adjudged and decreed "that the order and decree of the said Circuit Court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court September 27, 1897."

From this decree, appellants in that court, defendants below, prayed and were allowed an appeal to this court, which, having been docketed, appellees now move to dismiss.

Mr. Henry N. Copp and *Mr. S. D. Luckett* for the motion.

Mr. Solicitor General and *Mr. W. J. Hughes* opposing.

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

By the sixth section of the act of March 3, 1891, c. 517, 26 Stat. 826, the judgments or decrees of the Circuit Courts of Appeals are made final in that court in the classes of cases therein enumerated, of which the present is not one, and it is provided that in all cases not made final, there shall be of right, within one year, an appeal or writ of error or review of

the case by this court, where the matter in controversy exceeds one thousand dollars exclusive of costs.

But this applies only to final orders, judgments or decrees. *Young* v. *Grundy*, 6 Cranch, 51; *Keystone Iron Company* v. *Martin*, 132 U. S. 91; *McLish* v. *Roff*, 141 U. S. 661; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 378.

The order sought to be reviewed was simply an interlocutory order of the Circuit Court for the issue of a temporary injunction, which order was affirmed by the Circuit Court of Appeals without direction. If we should take jurisdiction, it is this order we should revise in also reviewing that of the Circuit Court of Appeals, and our mandate would go directly to the Circuit Court. *Louisville & Nashville Railroad* v. *Behlmer*, 169 U. S. 644.

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, it was held that the Circuit Courts of Appeals on an appeal from an interlocutory order or decree of the Circuit Courts granting an injunction and ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill; and this course might be pursued in other cases. *Mills* v. *Green*, 159 U. S. 651. Here, however, the Court of Appeals did not finally determine the case by its judgment, and whether the temporary injunction should be made permanent or not, was left to the Circuit Court to decide when the final decree was entered.

And we may add, that in concluding its opinion, the Circuit Court of Appeals said: "In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed." 49 U. S. App. 658.

Moreover, by section six, the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit Courts, except where cases are carried, under section five, directly to this court, but, by the seventh section, as amended by the act of February 19, 1895, 28 Stat. 666, c. 96, jurisdic-

tion is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. And it was under that section that the appeal was taken to the Court of Appeals in this case.

But there is no provision in the act of March 3, 1891, or any other act, authorizing an appeal to this court from interlocutory orders or decrees, and whether certiorari would lie is a question that does not arise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

Appeal dismissed.

HUMES *v.* UNITED STATES.

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

No. 150. Submitted February 21, 1898. — Decided April 25, 1898.

It is again decided that it is no ground for reversal that the court below omitted to give instructions which were not requested by the defendant.

The charge of the trial court was sufficiently full and elaborate.

It is again held that this court cannot consider an objection that the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict.

THE plaintiff in error was indicted for violating section 5486 of the Revised Statutes of the United States. The indictment contained nine counts. They, respectively, charged the withholding and detention of certain sums of money for pension fees in excess of the amount allowed by the statute to be charged, to wit, the first, third, fifth, seventh and ninth counts; that defendant withheld, respectively, from William Anderson, Isaac Bloodson, Ann Galloway and Whitfield Pryor the several sums of $486.40, $517.20, $120.13, $116 and $15.80; the second, fourth, sixth and eighth counts charged that he "did demand from said persons, respectively, the said several sums." The jury returned a verdict of guilty as to the first and third counts, a verdict of not guilty as to the second, fourth, seventh,

eighth and ninth counts, and a *nolle prosequi* was entered by the United States attorney as to the fifth and sixth counts.

There are eleven assignments of error. The first part of the eighth and eleventh assignments relate to a failure on the part of the court to give certain instructions. The record does not show that there was a request for such instructions. The second, fourth, fifth, sixth, seventh, part of the eighth, ninth and tenth assignments relate to alleged error in the instructions given by the court. No exception is shown by the record to have been taken. The twelfth and thirteenth assignments of error are based upon the alleged fact that the verdict was against the weight of evidence. The third assignment of error is based upon the refusal of the court to give an instruction which was requested.

The statement of the record is, "the defendant asked the following special instruction, which was refused: 'Unless you find from the evidence that the defendant was the attorney, agent or other person engaged in prosecuting the pension claims of Anderson, Haynes and Bloodson, the court instructs you to find for the defendant. I think I have given this instruction in the general charge, and believing the charge on this point is sufficiently full, further instruction is declined. Clark, J.' To which action and ruling of the court in so refusing to give said special instructions the defendant then and there excepted."

Mr. James M. Greer for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

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

We cannot regard as error the omission of the court to give instructions which were not asked. In *Isaacs* v. *United States*, 159 U. S. 487, 491, Mr. Justice Brown said: "It is no ground for reversal that the court omitted to give instructions,

where they were not requested by the defendant. It is sufficient that the court gave no erroneous instructions. *Pennock* v. *Dialogue*, 2 Pet. 1, 15; *Texas and Pacific R'y Co.* v. *Volk*, 151 U. S. 73, 78." Nor are instructions which were given but not excepted to subject to review. *Tucker* v. *United States*, 151 U. S. 164; *St. Clair* v. *United States*, 154 U. S. 134, 153.

We are confined, therefore, to the consideration of the second assignment of error. It is not well taken. As the court said in refusing it, the charge of the court was "sufficiently full." The court read to the jury section 5485 of the Revised Statutes, and stated that the indictment was predicated on it. The statute provides that "any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall wrongfully withhold or wrongfully demand from a pensioner or claimant any portion of the pension or claim allowed, shall be guilty of a high misdemeanor."

And then, after explaining the indictment and stating the rules of evidence, degrees of proof required, the court said: "Now, with these general observations that are applicable and will be kept in mind by you throughout the case, we come to the testimony in the case, and in respect to that it appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant (first) that he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute, and (secondly) he must withhold from the pensioner all or a part of what was due the pensioner claimant, so that two propositions are necessary to be established: The defendant was an agent or instrumental in the prosecution of the claim, and, secondly, that he withheld from the pensioner money that belonged to the pensioner, some part of the pension that was allowed."

The language of the court was explicit and unmistakable. It is fuller and more elaborate than the instruction requested.

The alleged fact that the verdict was against the weight of

evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict. *Crumpton* v. *United States*, 138 U. S. 361; *Moore* v. *United States*, 150 U. S. 57, 61.

In this case there was certainly evidence proper to go to the jury.

There is no error in the record, and the judgment of the Circuit Court is

Affirmed.

WILLIAMS *v.* MISSISSIPPI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 581. Argued and submitted March 18, 1898. — Decided April 25, 1898.

The provisions in section 241 of the constitution of Mississippi prescribing the qualifications for electors; in section 242, conferring upon the legislature power to enact laws to carry those provisions into effect; in section 244, making ability to read any section of the constitution, or to understand it when read, a necessary qualification to a legal voter; and of section 264, making it a necessary qualification for a grand or petit juror that he shall be able to read and write; and sections 2358, 3643 and 3644 of the Mississippi Code of 1892, with regard to elections, do not, on their face, discriminate between the white and negro races, and do not amount to a denial of the equal protection of the law, secured by the Fourteenth Amendment to the Constitution; and it has not been shown that their actual administration was evil, but only that evil was possible under them.

At June term 1896 of the Circuit Court of Washington County, Mississippi, the plaintiff in error was indicted by a grand jury composed entirely of white men for the crime of murder. On the 15th day of June he made a motion to quash the indictment, which was in substance as follows, omitting repetitions and retaining the language of the motion as nearly as possible:

Now comes the defendant in this cause, Henry Williams by name, and moves the Circuit Court of Washington County, Mississippi, to quash the indictment herein filed and upon

which it is proposed to try him for the alleged offence of murder: (1) Because the laws by which the grand jury was selected, organized, summoned and charged, which presented the said indictment, are unconstitutional and repugnant to the spirit and letter of the Constitution of the United States of America, Fourteenth Amendment thereof, in this, that the Constitution prescribes the qualifications of electors, and that to be a juror one must be an elector; that the Constitution also requires that those offering to vote shall produce to the election officers satisfactory evidence that they have paid their taxes; that the legislature is to provide means for enforcing the Constitution, and in the exercise of this authority enacted section 3643, also section 3644 of 1892, which respectively provide that the election commissioners shall appoint three election managers, and that the latter shall be judges of the qualifications of electors, and are required "to examine on oath any person duly registered and offering to vote touching his qualifications as an elector." And then the motion states that "the registration roll is not *prima facie* evidence of an elector's right to vote, but the list of those persons having been passed upon by the various district election managers of the county to compose the registration book of voters as named in section 2358 of said code of 1892, and that there was no registration books of voters prepared for the guidance of said officers of said county at the time said grand jury was drawn." It is further alleged that there is no statute of the State providing for the procurement of any registration books of voters of said county, and (it is alleged in detail) the terms of the constitution and the section of the code mentioned, and the discretion given to the officers, "is but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the State of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the constitution of the State and the statute of the State adopted under the said constitution, the use of said discretion can be and has been used in the said Washington County to the end complained of." After some detail to the

same effect, it is further alleged that the constitutional convention was composed of 134 members, only one of whom was a negro; that under prior laws there were 190,000 colored voters and 69,000 white voters; the makers of the new constitution arbitrarily refused to submit it to the voters of the State for approval, but ordered it adopted, and an election to be held immediately under it, which election was held under the election ordinances of the said constitution in November, 1891, and the legislature assembled in 1892 and enacted the statutes complained of, for the purpose to discriminate aforesaid, and but for that the "defendant's race would have been represented impartially on the grand jury which presented this indictment," and hence he is deprived of the equal protection of the laws of the State. It is further alleged that the State has not reduced its representation in Congress, and generally for the reasons aforesaid, and because the indictment should have been returned under the constitution of 1869 and statute of 1889 it is null and void. The motion concludes as follows: "Further, the defendant is a citizen of the United States, and for the many reasons herein named asks that the indictment be quashed, and he be recognized to appear at the next term of the court."

This motion was accompanied by four affidavits, subscribed and sworn to before the clerk of the court, on June 15, 1896, to wit:

1st. An affidavit of the defendant, "who, being duly sworn, deposes and says that the facts set forth in the foregoing motion are true to the best of his knowledge, of the language of the constitution and the statute of the State mentioned in said motion, and upon information and belief as to the other facts, and that the affiant verily believes the information to be reliable and true."

2d. Another affidavit of the defendant, "who, being first duly sworn, deposes and says: That he has heard the motion to quash the indictment herein read, and that he thoroughly understands the same, and that the facts therein stated are true, to the best of his knowledge and belief. As to the existence of the several sections of the state constitution, and the

several sections of the state statute, mentioned in said motion to quash, further affiant states: That the facts stated in said motion, touching the manner and method peculiar to the said election, by which the delegates to said constitutional convention were elected, and the purpose for which said objectionable provisions were enacted, and the fact that the said discretion complained of as aforesaid has abridged the suffrage of the number mentioned therein, for the purpose named therein; all such material allegations are true, to the best of the affiant's knowledge and belief, and the fact of the race and color of the prisoner in this cause, and the race and color of the voters of the State whose elective franchise is abridged as alleged therein, and the fact that they who are discriminated against, as aforesaid, are citizens of the United States, and that prior to the adoption of the said constitution and said statute the said State was represented in Congress by seven Representatives in the lower House, and two Senators, and that since the adoption of the said objectionable laws there has been no reduction of said representation in Congress. All allegations herein, as stated in said motion aforesaid, are true to the best of affiant's knowledge and belief."

3d. An affidavit of John H. Dixon, " who, being duly sworn, deposes and says that he had heard the motion to quash the indictment filed in the *Henry Williams case*, and thoroughly understands the same, and that he has also heard the affidavit sworn to by said Henry Williams, carefully read to him, and thoroughly understands the same. And in the same manner the facts are sworn to in the said affidavit, and the same facts alleged therein upon information and belief, are hereby adopted as in all things the sworn allegations of affiant, and the facts alleged therein, as upon knowledge and belief, are made hereby the allegations of affiant upon his knowledge and belief."

4th. An affidavit of C. J. Jones, " who, being duly sworn, deposes and says that he has read carefully the affidavit filed in the *John Dixon case* sworn to by him (said C. J. Jones), and that he, said affiant, thoroughly understands the same, and adopts the said allegations therein as his deposition in

this case upon hearing this motion to quash the indictment herein, and that said allegations are in all things correct and true as therein alleged."

The motion was denied and the defendant excepted. A motion was then made to remove the cause to the United States Circuit Court, based substantially on the same grounds as the motion to quash the indictment. This was also denied and an exception reserved.

The accused was tried by a jury composed entirely of white men and convicted. A motion for a new trial was denied, and the accused sentenced to be hanged. An appeal to the Supreme Court was taken and the judgment of the court below was affirmed.

The following are the assignments of error:

1. The trial court erred in denying motion to quash the indictment, and petition for removal.

2. The trial court erred in denying motion for new trial, and pronouncing death penalty under the verdict.

3. The Supreme Court erred in affirming the judgment of the trial court.

The sections of the constitution of Mississippi and the laws referred to in the motion of the plaintiff in error are printed in the margin.[1]

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[1] The three sections of article 12 of the constitution of the State of Mississippi above referred to read as follows:

Section 241. "Every male inhabitant of this State except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretences, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the 1st day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the Gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified."

Counsel for Parties.

Mr. Cornelius J. Jones for plaintiff in error.

Mr. C. B. Mitchell, for defendant in error, submitted on his brief.

Section 242. "The legislature shall provide by law for the registration of all persons entitled to vote at any election, and all persons offering to register shall take the following oath or affirmation: 'I, ———, do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this county) and that I will have resided in this State two years and ——— election district of ——— county for one year next preceding the ensuing election (or if it be stated in the oath that the person proposing to register is a minister of the Gospel in charge of an organized church, then it will be sufficient to aver therein two years' residence in the State and six months in said election district) and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the constitution of this State as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this district; that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So help me God.' In registering voters in cities and towns not wholly in one election district the name of such city or town may be substituted in the oath for the election district. Any wilful and corrupt false statement in said affidavit, or in answer to any material question propounded as herein authorized shall be perjury."

Section 244. "On after the first day of January, A.D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A.D. 1892."

Section 264 of article 14 of the constitution of the State of Mississippi, above referred to, reads as follows:

Section 264. "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the Circuit Court."

The three sections of the Code of 1892 of the State of Mississippi, above referred to, read as follows:

Section 2358. How list of jurors procured. — "The board of supervisors at the first meeting in each year, or a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the Circuit

Opinion of the Court.

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

The question presented is, are the provisions of the constitution of the State of Mississippi and the laws enacted to enforce the same repugnant to the Fourteenth Amendment of the Constitution of the United States? That amendment and its effect upon the rights of the colored race have been considered by this court in a number of cases, and it has been uniformly held that the Constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discriminations by the General Government, or by the States, against any citizen because of his race; but it has also been held, in a very recent case, to justify a removal from a state court to a Federal court of a cause in which such rights are alleged to be denied, that such denial must be the result of the constitution or laws of the State, not of the administration of them. Nor can the conduct of a criminal trial in a state court be reviewed by this court unless the trial is had under some statute repugnant to the Constitution of the United

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Court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration books of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment and fair character, and shall take them as nearly as it conveniently can from the several election districts in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors."

Section 3643. Managers of election appointed. — "Prior to every election the commissioners of election shall appoint three persons for each election district to be managers of the election, who shall not all be of the same political party, if suitable persons of different political parties can be had in the district, and if any person appointed shall fail to attend and serve, the managers present, if any, may designate one to fill his place, and if the commissioners of election fail to make the appointments, or in case of the failure of all those appointed to attend and serve, any three qualified electors present when the polls should be opened may act as managers."

Section 3644. Duties and powers of managers. — "The managers shall take care that the election is conducted fairly and agreeably to law, and they shall be judges of the qualifications of electors, and may examine on oath any person duly registered and offering to vote touching his qualifications as an elector, which oath any of the managers may administer."

States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Upon this general subject this court in *Gibson* v. *Mississippi*, 162 U. S. 566, 581, after referring to previous cases, said: "But those cases were held to have also decided that the Fourteenth Amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States rights secured by any law providing for the equal civil rights of citizens of the United States to which section 641 refers and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the constitution or laws of the State rather than a denial first made manifest at or during the trial of the case."

It is not asserted by plaintiff in error that either the constitution of the State or its laws discriminate in terms against the negro race, either as to the elective franchise or the privilege or duty of sitting on juries. These results, if we understand plaintiff in error, are alleged to be effected by the powers vested in certain administrative officers.

Plaintiff in error says:

"Section 241 of the constitution of 1890 prescribes the qualifications for electors; that residence in the State for two years, one year in the precinct of the applicant, must be effected; that he is twenty-one years or over of age, having paid all taxes legally due of him for two years prior to 1st day of February of the year he offers to vote. Not having

been convicted of theft, arson, rape, receiving money or goods under false pretences, bigamy, embezzlement.

"Section 242 of the constitution provides the mode of registration. That the legislature shall provide by law for registration of all persons entitled to vote at any election, and that all persons offering to register shall take the oath; that they are not disqualified for voting by reason of any of the crimes named in the constitution of this State; that they will truly answer all questions propounded to them concerning their antecedents so far as they relate to the applicant's right to vote, and also as to their residence before their citizenship in the district in which such application for registration is made. The court readily sees the scheme. If the applicant swears, as he must do, that he is not disqualified by reason of the crimes specified, and that he has effected the required residence, what right has he to answer all questions as to his former residence? Section 244 of the constitution requires that the applicant for registration after January, 1892, shall be able to read any section of the constitution, or he shall be able to understand the same (being any section of the organic law), or give a reasonable interpretation thereof. Now we submit that these provisions vest in the administrative officers the full power, under section 242, to ask all sorts of vain, impertinent questions, and it is with that officer to say whether the questions relate to the applicant's right to vote; this officer can reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the constitution with that power. Under section 244 it is left with the administrative officer to determine whether the applicant reads, understands or interprets the section of the constitution designated. The officer is the sole judge of the examination of the applicant, and even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration."

To make the possible dereliction of the officers the dereliction of the constitution and laws, the remarks of the Supreme Court of the State are quoted by plaintiff in error as to their intent. The constitution provides for the payment of a poll

tax, and by a section of the code its payment cannot be compelled by a seizure and sale of property. We gather from the brief of counsel that its payment is a condition of the right to vote, and in a case to test whether its payment was or was not optional, *Ratcliff* v. *Beale*, 20 So. Rep. 865, the Supreme Court of the State said: "Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race." And further the court said, speaking of the negro race: "By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites. A patient, docile people; but careless, landless, migratory within narrow limits, without forethought; and its criminal members given to furtive offences, rather than the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offences to which its criminal members are prone." But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done "within the field of permissible action under the limitations imposed by the Federal Constitution," and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the State. Besides, the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.

It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi, nor is there any sufficient allegation of an evil and discriminating administration of them. The only allegation is ". . . by granting a discretion to the said officers, as mentioned in the several sections of the con-

stitution of the State, and the statute of the State adopted under the said constitution, the use of which discretion can be and has been used by said officers in the said Washington County to the end here complained of, to wit, the abridgment of the elective franchise of the colored voters of Washington County, that such citizens are denied the right to be selected as jurors to serve in the Circuit Court of the county, and that this denial to them of the right to equal protection and benefits of the laws of the State of Mississippi on account of their color and race, resulting from the exercise of the discretion partial to the white citizens, is in accordance with and the purpose and intent of the framers of the present constitution of said State. . . ."

It will be observed that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them. If it is done in the latter way, how or by what means should be shown. We gather from the statements of the motion that certain officers are invested with discretion in making up lists of electors, and that this discretion can be and has been exercised against the colored race, and from these lists jurors are selected. The Supreme Court of Mississippi, however, decided, in a case presenting the same questions as the one at bar, "that jurors are not selected from or with reference to any lists furnished by such election officers." *Dixon* v. *The State*, Nov. 9, 1896, 20 So. Rep. 839.

We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins*, 118 U. S. 356. In that case the ordinances passed on discriminated against laundries conducted in wooden buildings. For the conduct of these the consent of the board of supervisors was required, and not for the conduct of laundries in brick or stone buildings. It was

admitted that there were about 320 laundries in the city and county of San Francisco, of which 240 were owned and conducted by subjects of China, and of the whole number 310 were constructed of wood, the same material that constitutes nine tenths of the houses of the city, and that the capital invested was not less than two hundred thousand dollars.

It was alleged that 150 Chinamen were arrested, and not one of the persons who were conducting the other eighty laundries and who were not Chinamen. It was also admitted "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

The ordinances were attacked as being void on their face, and as being within the prohibition of the Fourteenth Amendment, but even if not so, that they were void by reason of their administration. Both contentions were sustained.

Mr. Justice Matthews said that the ordinance drawn in question "does not describe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting all those in previous use, divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." The ordinances, therefore, were on their face repugnant to the Fourteenth Amendment. The court, however, went further and said: "This conclusion and the reasoning on which it is based are deductions from the face of the ordinance, as to its

necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703."

This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.

It follows, therefore, that the judgment must be

Affirmed.

Syllabus.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 421. Argued January 21, 24, 1898. — Decided April 25, 1898.

When it does not appear from the plaintiff's statement of his case, that the suit was one arising under the Constitution and laws of the United States, a petition to remove the cause into the Circuit Court of the United States should be overruled.

The provision in the constitution of Texas of 1869, that the legislature should not thereafter grant lands to any person or persons, as enforced against the Galveston, Harrisburg and San Antonio Railway Company, the successor of the Buffalo Bayou, Brazos and Colorado Railway Company, which had received grants of public land under previous legislation to encourage the construction of railroads in that State, involved no infraction of the Federal Constitution.

A clause in a charter of a railroad company, granting it power to consolidate with or become the owner of other railroads, is not such a vested right that cannot be rendered inoperative by subsequent legislation, passed before the company avails itself of the power thus granted.

The question in this case was as to whether the railroad company was entitled to the particular lands in controversy by virtue of the location thereon of certificates issued for building the road from Columbus to San Antonio. The ruling was that, as the law stood, no title was acquired thereby, and the State was entitled to recover. But it was also contended that no recovery could be had because the company had earned other lands of which it had been, as it alleged, unlawfully deprived. The Supreme Court of the State held that it was no defence to the suit, by way of set-off, counter-claim, or otherwise, that the company might have been entitled to land certificates for road constructed under the law of 1876, and said that it had "never been ruled that the claimant of land against the State under a location made by virtue of a void certificate has any equity in the premises by reason of being the possessor of another valid certificate." *Held*, that in arriving at this conclusion the state courts did not determine whether as to those other lands any vested right of the railway company had or had not been impaired or taken away; and that this court cannot hold that the company was denied by the judgment of those courts in this respect any title, right, privilege or immunity secured by the Constitution or laws of the United States.

Statement of the Case.

This was a suit commenced on behalf of the State of Texas against the Galveston, Harrisburg and San Antonio Railway Company, in the District Court of Brewster County, to recover 1383 tracts of land, containing in the aggregate eight hundred and seventy-nine thousand and seventy-eight acres, situated in various counties, and to cancel certificates and patents issued to the railway company therefor. The railway company filed a petition for the removal of the cause to the Circuit Court of the United States, which was overruled. The company then presented its defences by demurrer, plea and answer, relying on its charters, and the laws, general and special, of the State of Texas, by reason whereof and action thereunder, it asserted it had become entitled to the lands in question; also setting up that it had in 1880 mortgaged the land in controversy to Andrew Pierce and George F. Stone; that Pierce was dead, and that Stone was the sole surviving trustee and was a necessary party to the suit; and the grounds on which it insisted that the State was estopped from recovering the lands; and in its answer prayed for affirmative relief.

The cause was tried, and judgment entered therein in favor of the State of Texas, and was thereupon carried by appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, which court then certified the following statement and questions to the Supreme Court of the State for adjudication:

"The State of Texas instituted suit against appellant to cancel certain land certificates and patents issued by the State to appellant, for land, amounting to $879{,}078\frac{1}{2\,0}$ acres. It was alleged and proved that the certificates and patents were issued to the Galveston, Harrisburg and San Antonio Railway Company, for a portion of its railroad constructed between the Colorado River and Guadalupe River between the time of the adoption of the constitution of 1869 and the passage of the act of August 16, 1876 (arts. 4267 to 4277, Rev. Stats.). On July 27, 1870, by special act of the legislature, appellant was chartered and recognized as the successor of the Buffalo Bayou, Brazos and Colorado Railway Company. After the passage of the act of August 16, 1876, and before its repeal,

in 1882, appellant constructed about 163 miles of railroad, from San Antonio westward towards El Paso, for which the State refused to issue land certificates, the governor refusing the application for inspection on May 22, 1882, on the ground that the law granting certificates had been repealed.

"Question 1. Did section 6, article X, of the constitution of 1869 repeal all laws giving railroad companies the right to earn lands from the State by the construction of railroads; and, if so, would this repeal apply as well to the right to earn lands given through charters as through general laws?

"Question 2. If the above be answered in the negative, did appellant succeed to the rights of the Buffalo Bayou, Brazos and Colorado Railway Company by virtue of the special act of 1870, said Buffalo Bayou, Brazos and Colorado Railway Company being restricted by special act of February 11, 1854, to run its line to Austin?

"Question 3. If the laws as to land grants to railroads passed prior to 1869 were repealed by the constitution of that year, can appellant interpose and maintain in this suit the equitable defence that if the certificates issued for that portion of the road between the Colorado and the Guadalupe Rivers, from 1870 to 1876 were illegally obtained that the State is in no position to ask relief sought by reason of the fact that appellant has earned certificates for said 163 miles of road?

"Question 4. If the last question be affirmatively answered, would the fact that at the time the land for the 163 miles west of San Antonio was earned by appellant, the public lands were exhausted, affect the equities of the case?"

The Supreme Court was of opinion "that the Galveston, Harrisburg and San Antonio Railway Company did not by virtue of the act of July 27, 1870, acquire the right to earn lands by the construction of its line to San Antonio." This answered the second question and rendered an answer to the first unnecessary.

As to the third question, the Supreme Court was "of the opinion that it is no defence to an action of the State for the recovery of the lands involved in this suit, that the company may have been entitled to certificates for the one hundred and

sixty-three miles of additional road constructed under the law of 1876." The fourth question, therefore, required no answer.

The case is reported, 89 Texas, 340.

The opinion of the Supreme Court having been transmitted to the Court of Civil Appeals, that court proceeded to dispose of the case, and held that there was no error in the refusal to remove the cause; that Stone was not a necessary party to the suit; that the State of Texas was not estopped, by "the illegal acts of the land commissioner in granting the land certificates and of the governor in granting patents to the land," from recovering the lands sued for; and overruled the other assignments of error in view of the answers of the Supreme Court to the questions propounded. Thereupon the judgment of the District Court was affirmed. A motion for rehearing having been made and overruled, the company applied to the Supreme Court for a writ of error, which was denied, whereupon a writ of error from this court was allowed by the Chief Justice of the Court of Civil Appeals.

The Buffalo Bayou, Brazos and Colorado Railroad Company was incorporated by an act approved February 11, 1850, c. 156, and authorized to construct and maintain a railroad as therein described. Laws Tex. 1849–50, pp. 194, 198.

By an act approved January 29, 1853, the route was defined as follows: "Commencing at a suitable point on Buffalo Bayou in the county of Harris, thence running by such course and to such point or points at or near the Brazos and Colorado Rivers, or across the same as said company shall deem advisable, with the privilege of making, owning and maintaining such branches to said road as they may deem expedient." By the second section of this act there was "granted to said company eight sections of land, of six hundred and forty acres each, for every mile of railway actually completed and ready for use," for which the commissioner of the general land office of Texas was authorized to issue certificates under restrictions mentioned, and upon location and survey patents were to be issued as provided. Special Laws, 1853, p. 3.

On January 30, 1854, the legislature passed a general land grant act, entitled "An act to encourage the construction of

railroads in Texas by donations of lands." c. 15. Section 1 provided "that any railroad company chartered by the legislature of this State, heretofore or hereafter, constructing within the limits of Texas, a section of twenty-five miles or more of railroad, shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order." Railroad companies applying for land under this act were required by section 3 to cause the land to be surveyed into sections of 640 acres each, and in square blocks of not less than six miles, and the field notes of the survey and map or maps to be deposited with the Commissioner of the General Land Office. Section 6 related to patents, certificates, surveys, etc.

By section 11 all the alternate or even sections of lands surveyed in pursuance to the provisions of this act were "reserved to the use of the State, and not liable to locations, entries or preëmption privileges, until otherwise provided by law." Section 12 provided: "That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land, nor to any company for more than a single track road, with the necessary turnouts; and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, accepting the provisions of this act, shall not be entitled to receive any grant of land for any branch road; provided, this act shall not be so construed as to give to any company now entitled by law to receive eight sections of land, more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act;" etc., and that the act should continue in force for the term of ten years from the time it shall take effect and no longer. Laws, 1854, p. 11.

On the same day a supplemental act was approved providing that no railroad company benefited by the act should receive any donation of land under its charter, or under the

act of which this was a supplement, for any work not done within ten years after the passage of the act. Laws, 1854, p. 16.

By a special act of February 4, 1854, c. 45, the charter of the Buffalo Bayou, Brazos and Colorado Railroad Company was amended, and it was provided that the company should be "entitled to all the rights, privileges and benefits accruing from any general law or laws that have or may hereafter be passed by this State to encourage the constructing of railroads, in the same manner and to the same extent as if the gauge of said road was the same now fixed, or which may be hereafter fixed upon by this State." Spec. Laws, 1854, p. 69. On the same day another special act was passed providing "that if the Buffalo Bayou, Brazos and Colorado Railroad Company shall avail themselves of the act to which this is a supplement, or accept any donation of land from the State, they shall not be entitled to receive any such donation from the State under the provisions of this law or any law that has heretofore been passed for their benefit, for any portion of their road which shall not be completed and ready for use within ten years from and after the passage of this act. Provided, that said company shall restrict themselves to the following route; viz., to an extension of their existing road to Austin, in the county of Travis, crossing the Brazos River at any point between the town of Richmond, in Fort Bend County, and Hidalgo Falls, in Washington County, and with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific Ocean. Provided, such connections be made between the ninety-sixth and ninety-eighth parallels of longitude; and provided, further, that said company shall have no right to build branches from their main road." Spec. Laws, 1854, p. 70.

During the period of the civil war, two laws were passed which had the effect to relieve the existing railroad companies from the limitations as to time embraced in the act of January 30, 1854, until two years after the close of the war. Laws, 1862, p. 43, c. 62, Jan. 11, 1862; p. 46, c. 69, Jan. 11, 1862.

On November 13, 1866, an act, c. 174, was approved to this effect: "That the grant of sixteen sections of land to the mile to railroad companies, heretofore or hereafter constructing railroads in Texas, shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act." Laws, 1866, p. 212.

The state constitution of 1869 was adopted December 3, 1869, and accepted by Congress March 30, 1870, the sixth section of article X of which instrument read as follows: "The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

July 27, 1870, the legislature passed an act entitled "An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company, and to the other special acts relating to said company." The preamble recited:

"Whereas, on the seventh of July, 1868, 'the roadbed, track, franchise and chartered rights and privileges' of the Buffalo Bayou, Brazos and Colorado Railway Company were sold on executions issued on judgments against said company; and on the twenty-fourth January, 1870, the railroad of said company from Harrisburg to Alleyton, and its franchise, rights and other property appertaining thereto, were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record; and whereas, the act of December 19, 1857, 'supplementary to and amendatory of an act to regulate railroad companies,' provides that the purchasers at such sales, and their associates, 'shall be entitled to have and exercise all the powers, privileges and franchises granted to' the company sold out 'by its charter, or by virtue of the general laws of this State;' and 'shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof;' and whereas, the purchasers at said sales, and their associates, have formed a new company under said old name, and have expended large sums of money in the reconstruction of said railroad, in the

purchase and completion of the Columbus Tap Railroad, and the bridge of the Brazos Iron Bridge Company over the Brazos River at Richmond; and whereas, said new company desires to be distinguished by name from said 'sold-out' company, to consolidate its property, and to extend said line of railroad."

Section 1 provided:

"That the new company heretofore known as the Buffalo Bayou, Brazos and Colorado Railway Company, referred to in the preamble of this act, shall be hereafter known by the corporate name of 'The Galveston, Harrisburg and San Antonio Railway Company,' and may alter its seal to conform to its name; provided, that said new company shall be liable to the State of Texas for the debt of said 'sold-out' company for loans made to the latter company from the special school fund, in the same manner and to the same extent as said 'sold-out' company was liable; and that said change of name shall in no respect impair or affect said liability, or the existing lien or mortgage of the State upon the railroad of said company as security for said loans. Also, provided, that said change of name shall in no respect impair or affect any of the obligations of said new company to other parties, or the obligations of other parties to said new company; all of which may be enforced by or against said new company under said new name."

Section 3:

"That said new company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado County, to San Antonio, in the county of Bexar, within four years from the passage of this act; and thence to a terminus on the Rio Grande, by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfels, in Comal County, within four years from the passage of this act; or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of the latitude of the city of Austin and the Colorado River instead of building its own line beyond the point of such connection; and may build to and connect with any line of railroad that may be constructed, or

under construction, and designed to form part of any railroad line to the Pacific, south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct also, any part of the line up the Colorado Valley, formally designated by said 'sold-out' company as its route under the provisions of the eleventh section of the act of December 19, 1857; provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited."

Sections 11 and 12:

"SEC. 11. That said new company shall be entitled to the same or similar rights and relief, except state aid in bonds, or indorsement of, or guarantee of interest on bonds, granted to or provided for any other railroad company by the legislature, and upon the same or similar terms and conditions, so far as such rights and relief are, in their character, applicable to said new company or its line or lines of railroad.

"SEC. 12. That nothing in this act shall be so construed as to deprive any party interested, of the right to disprove any assumed fact stated in the preamble; provided, that nothing in this act contained shall be construed as reviving or renewing any land grant to said company for road hereafter to be completed, which it does not possess by existing law." Spec. Laws, 1870, p. 45.

Section 6 of Article X of the constitution of 1869 was subsequently amended, the amendment taking effect March 19, 1873. The section, as amended, read as follows:

"The legislature of the State of Texas shall not hereafter grant lands except for purposes of internal improvement, to any person or persons, nor shall any certificate for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres; provided, that the legislature shall not grant, out of the public domain, more than twenty sections of land for each mile of completed work, in aid of the construction of which land may be granted; and provided further, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment."

August 16, 1876, a general law was enacted entitled "An act to encourage the construction of railroads in Texas by donations of lands," whereby it was provided that any railroad company theretofore chartered or which might be thereafter organized under the general laws of the State should, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there was thereby granted to every such railroad from the State, sixteen sections of land for every mile of its road so completed and put in good running order. The act prescribed the usual formalities for ascertaining compliance on the part of railroad companies with the provisions of the act, the issue of certificates, etc. Laws, 1876, 153.

April 22, 1882, the legislature passed an act repealing all laws in force granting lands for the construction of railroads. Laws, 1882, 3.

Mr. Joseph Paxton Blair for plaintiffs in error. *Mr. James A. Baker* and *Mr. R. S. Lovett* were with him on his brief.

Mr. M. M. Crane, attorney general of the State of Texas, for defendant in error.

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

1. The State of Texas, as owner of the lands in question, sought by its petition the removal of the cloud cast upon its title by reason of certain certificates and patents. The petition averred that those certificates were issued to the railway company for the construction of its road from the town of Columbus to the Guadalupe bridge during a period of time when there was no law in existence authorizing the issue of land certificates and patents, and charged that the action of the Commissioner of the General Land Office of the State in issuing and delivering the certificates, and permitting them to be located and surveyed upon the lands and returned to and filed in the General Land Office, and in the issue of the patents, was had and done wholly without authority of law and in

violation of the constitution and laws of the State. It did not appear from the State's statement of its case that the suit was one arising under the Constitution or laws of the United States, and the Court of Civil Appeals properly held that the petition to remove the cause into the Circuit Court of the United States came within the rule laid down in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, and subsequent cases, and that there was no error in overruling the application.

2. The railroad, franchises, rights and property of the Buffalo Bayou, Brazos and Colorado Railroad Company had been sold on execution and under foreclosure, and the purchasers at the sales and their associates had formed a new company under the old name. By the act of July 27, 1870, this new company was given the name of "The Galveston, Harrisburg and San Antonio Railway Company," to distinguish it from the "'sold-out' company;" was endowed with various franchises; and, among other things, was authorized to extend the existing line of railroad owned and operated by the company from Columbus, in Colorado County, to San Antonio, in the county of Bexar, and thence to a terminus on the Rio Grande.

At this time the constitution of Texas provided: "The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

The certificates and patents in question in this suit were issued to the company for a portion of its railroad constructed between the Colorado and the Guadalupe Rivers, under the act of July 27, 1870, and before the act of August 16, 1876, took effect.

Plaintiff in error contends that by virtue of the charter of the old company and the amendments thereto, and the general laws, prior to 1869, it had a vested and contract right to receive and hold these lands, which was impaired or of which it was deprived, in violation of section ten of Article I of the Constitution of the United States, and section one of the Four-

teenth Amendment thereof, by section six of Article X of the state constitution of 1869, as given effect by the state courts.

The Supreme Court of Texas considered the legislation at length in replying to the questions propounded by the Court of Civil Appeals.

Conceding, for the purposes of argument, that the original company acquired a right to sixteen sections of land per mile of constructed railroad under the general law of January 30, 1854, and the special acts amendatory of its charter; that this right was preserved by the general law of November 13, 1866; and that section six of Article X of the constitution of 1869 did not operate to repeal either of those acts in respect of the right of existing companies to lands in aid of the construction of the lines of road specifically defined in their charters, the court was nevertheless unable to conclude that after the constitutional provision took effect an act of the legislature which authorized the company to change its former route and to construct a different line of road would carry with it the right to acquire land by the construction of the new line.

In its view the law of January 30, 1854, applied only to companies then chartered, and was intended to grant lands for the construction of those roads only which the companies were authorized by their charters to build. And while in the absence of any constitutional inhibition on granting lands in aid of railroads, it might be that legislative authority to a company to change its line could properly be treated as carrying with it the privilege of earning lands for the construction of the new line, this did not follow as to new routes authorized after such land grants had been forbidden by the fundamental law. And here the act of February 4, 1854, supplementary to the act of the same date which extended the privileges of the law of January 30, 1854, to the company, restricted those privileges to the line to Austin and to the extension of that line. If then the new company had succeeded to the right to acquire lands by the construction of the line fixed by the supplementary act, the construction of a different road in the exercise of the power given by the act of 1870 could not involve an obligation to furnish lands in aid of such construction.

And the court said: "The company, before the passage of the act of 1870, had no right to acquire lands by the building of a railroad to San Antonio; to complete that right, a new grant was requisite; but at that time the legislature was prohibited in the broadest terms from making any grant whatever. It matters not that the transaction may be looked upon as being somewhat in the nature of an exchange, and that the building of the new line may have involved a grant of no more, or even of less land, than may have been acquired by the construction of the old line. It involved a grant of land as to the new line and that the legislature had no right to make. Let us state the proposition in another form. If it were the right of the company, under the existing laws, to acquire lands by doing a specific thing, the legislature having no power under the constitution to make any grant of lands, could not confer upon it the right to earn lands by doing another — a different thing.

"So far we have discussed the question as if in passing the act of 1870 the legislature had intended to transfer the right of the company as to the lands to be acquired, from the old to the new line. But we find nothing in the act which manifests such an intention. On the contrary, the 12th section of the act as above quoted indicates, that it was not the purpose in any manner to extend the existing rights of the company with reference to the acquisition of lands from the State.

"It is to be noted that the 3d section of the act of 1870 not only authorized the company to change its route so as to run to San Antonio, instead of Austin, but in addition thereto reserved to it the right to build upon the route formerly designated by the sold-out company. It is evident, therefore, that to concede to the company the right to earn lands by the construction of the new line involves a new and additional grant — a grant which the legislature, under the constitution of 1869, could have made neither expressly nor by implication." *Railway Company* v. *State*, 89 Texas, 340, 354; *Quinlan* v. *Houston & Texas Central Railway*, 89 Texas, 356; *Galveston, Harrisburg & San Antonio Railway* v. *Texas*, 81 Texas, 572.

Opinion of the Court.

In our judgment the constitutional provision as thus enforced involved no infraction of the Federal Constitution.

The Galveston Company was not identical with the Buffalo Bayou Company, but a new company in succession to the old.

The Buffalo Bayou Company became entitled to the benefits of the general law of January 30, 1854, by the first of the special acts of February 4, 1854, but by the supplemental special act of that date was restricted to the route to Austin, "with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific Ocean; provided, such connections be made between the ninety-sixth and ninety-eighth parallels of longitude; and provided further, that said company shall have no right to build branches from their main road."

Construing these two acts together, as we must, the contract between the State and the Buffalo Bayou Company would appear to have been that the company would build a line of road to Austin and northerly to some line of road going west to the Pacific Ocean, and the State would give the company sixteen sections of land per mile, but the company was restricted to the particular line and had no right to build branches from the main line. The State did not contract with the old corporation to build the road from Columbus to San Antonio, and the new company could not claim to earn lands by building this road, by virtue of what the old company had been empowered to do. The old company did not possess the right by existing law to build the road in question or branch lines, and the authority to construct it was not given until July 27, 1870, at which time the constitution of Texas forbade the granting of lands to railroad companies. And if there were no contract prior to July 27, 1870, to give land for the construction of a line of road from Columbus to San Antonio and thence west, the constitution of 1869 could not operate to impair any such.

But it is said that the right to a land grant of sixteen sections per mile under the act of 1854 had become a corporate franchise of the Buffalo Bayou Company, exercisable on every mile of road it might construct under competent legislative

authority; that it was subject in the first instance to a restriction as to route, which the legislature could at any time remove, and did remove by the act of July 27, 1870; and that the privilege of earning lands for the construction of the new line was included in the grant of authority to construct it. This is to assert that the Buffalo Bayou Company acquired by the legislation of 1854 a vested right to lands for the construction of whatever line of road, other than that then authorized and defined, it might in the future be empowered to build, though in the meantime the power to grant lands had been withdrawn from the legislature.

It is impossible to assent to such an application of the doctrine of vested rights. That subject was much considered and the authorities cited in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, and it was there held that a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested right that it could not be rendered inoperative by a subsequent statute passed before the company had availed itself of the power granted. Provisions granting such rights or powers to a corporation, as observed in *Bank of Commerce* v. *Tennessee*, 163 U. S. 416, 425, "do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled by subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of a contract."

The Supreme Court of Texas did not hold that the right to construct the line defined in the second special act of February 4, 1854, and to earn lands by such construction, was affected by the constitutional provision; but held, in effect, that there could be no obligation, express or implied, to bestow lands for the construction of lines of road not authorized to be constructed until after the adoption of that provision.

The road from Columbus to San Antonio had not only not been constructed in 1869, but its construction had not been

authorized; and no principle of contract or vested rights intervened to defeat the power of the State in 1869 to modify or even repeal the general law of 1854.

Argument was earnestly made at the bar that by reason of the amendment of section six of article X of the constitution of 1869 in 1873, and the subsequent passage of numerous acts granting land in aid of railroad construction, this company was entitled under section eleven of the act of July 27, 1870, which gave it the same rights or relief granted to other companies, to receive the certificates in controversy even though it was not entitled to them under previous legislation. That section apparently refers to existing rights or relief, and not to such as might afterwards be acquired or obtained. But this was matter of construction for the state courts, and was disposed of by the decision of the Court of Civil Appeals, on whose attention the point was pressed, though no allusion is made to it in the opinion of that court.

3. The constitutional amendment of 1873 having relieved the legislature of the restriction imposed by the constitution of 1869, the act of August 16, 1876, granted to railroad companies, on the completion of ten miles or more of their roads, sixteen sections of land for every mile so completed and put in good running order. On April 22, 1882, an act was passed repealing "all laws or parts of laws now in force granting lands or land certificates to any person, firm, corporation or company for the construction of railroads, canals and ditches." This act stated that the exhaustion of the public domain subject to location created an imperative public necessity for the act to take effect on its passage; and the record shows that there was a deficiency in the public domain, August 31, 1882, of 6,136,615 acres.

After August 16, 1876, the railway company constructed its road between San Antonio and El Paso, amounting to 623.14 miles, much the largest portion thereof prior to April 22, 1882. No land certificates were issued or located for the construction of the road between these points. The company contended that by the construction of its road between San Antonio and El Paso it acquired under the act of August 16,

1876, a contract and vested right to sixteen sections of land for each mile of road so constructed; that the issue of certificates had been prevented by the passage of the act of April 22, 1882; and that, consequently, that act impaired the obligation of the contract created by the act of August 16, 1876, and divested the company of its right to lands in contravention of the Constitution of the United States. And further insisted that it was entitled to avail itself in this suit of this alleged unlawful deprivation not merely as a set-off or counter-claim against the State, but as an absolute defence.

The case in this aspect is briefly this: The railway company sought and obtained certificates for building the road from Columbus to San Antonio, and had them located on the lands in question. But at that time the state constitution forbade the granting of lands for railway construction and the issue of certificates therefor, and the State brought suit for the recovery of the lands and the cancellation of the illegally issued muniments of title, which went to a decree in its favor.

The question was as to whether the railroad company was entitled to the particular lands in controversy by virtue of the location thereon of certificates issued for building the road from Columbus to San Antonio. The ruling was that, as the law stood, no title was acquired thereby, and the State was entitled to recover. But it was also contended that no recovery could be had because the company had earned other lands of which it had been, as it alleged, unlawfully deprived.

The Supreme Court of the State held that it was no defence to the suit, by way of set-off, counter-claim, or otherwise, that the company might have been entitled to land certificates for road constructed under the law of 1876, and said that it had "never been ruled that the claimant of land against the State under a location made by virtue of a void certificate has any equity in the premises by reason of being the possessor of another valid certificate."

In arriving at this conclusion the state courts did not determine whether as to those other lands any vested right of the railway company had or had not been impaired or taken

away; and we cannot hold that the company was denied by the judgment of those courts in this respect any title, right, privilege or immunity secured by the Constitution or laws of the United States.

Judgment affirmed.

HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 406. Argued January 24, 25, 1898. — Decided April 25, 1898.

In *Galveston, Harrisburg & San Antonio Railway Co.* v. *Texas*, *ante*, 226, the grants of land repealed by the operation of Section 6 of Article X of the constitution of Texas of 1869, were grants to aid in the construction of lines of railway not authorized until after that provision took effect; whereas, in this case, the grants which are claimed to be affected by it were grants made prior to the adoption of that constitution, for the purpose of aiding in the construction of the road from Brenham to Austin. *Held*, that that constitutional provision, as thus enforced, impairs the obligation of the contract between the State and the railway company, and cannot be sustained.

Argument was urged on behalf of defendant in error that the particular lands sued for are situated in what is known as the Pacific reservation, being a reservation for the benefit of the Texas and Pacific Railway Company, created by a special act of May 2, 1873, and hence, that though the certificates were valid, they were not located, as the law required, on unappropriated public domain. This question was not determined by either of the appellate tribunals, but, on the contrary, their judgments rested distinctly on the invalidity of the certificates for reasons involving the disposition of Federal questions. This court therefore declines to enter on an examination of the controversy now suggested on this point.

This was a suit instituted by the State of Texas in the District Court of Nolan County, Texas, February 3, 1890, to recover of the Houston and Texas Central Railway Company and the purchaser under it, sixteen sections of land of 640 acres each, located in that county by virtue of certificates issued by the State to the railway company. It was alleged

that the certificates were issued by the commissioner of the general land office of Texas without authority of law, and that the action of the commissioner in issuing and delivering them and permitting them to be located and allowing the lands to be surveyed thereunder, and in receiving and filing the field notes in the general land office of the State, was without authority of law and in violation of the constitution and laws of the State at that time. And also that the certificates were located in territory reserved by an act passed May 2, 1873, for the location of certificates issued to the Texas and Pacific Railway Company. It appeared from the State's complaint that the certificates were a part of those issued for the construction and completion of about ninety-four miles of main track and about two and one half miles of side track of that part of the company's railway extending from Brenham to Austin.

The District Court gave judgment in favor of the State, which was affirmed by the Court of Civil Appeals. 36 S. W. Rep. 819. Application was made to the Supreme Court of the State for a writ of error, which was denied. 40 S. W. Rep. 402. This writ of error was then allowed.

The Galveston and Red River Railway Company was incorporated by a special act of the legislature of Texas, approved March 11, 1848. Special Laws, 1848, 370. By the second section of that act the company was "invested with the right of making, owning and maintaining a railway from such a point on Galveston Bay, or its contiguous waters, to such point upon the Red River, between the eastern boundary line of Texas and Coffee's station, as the said company may deem most suitable, with the privilege of making, owning and maintaining such branches to the railway as they may deem expedient."

A special act supplementary to that act was approved February 14, 1852, c. 148, by section 14 of which there was granted to the company "eight sections of land of six hundred and forty acres each, for every mile of railway actually completed by them and ready for use;" and provision was made for the inspection of the road from time to time by the state

engineer, or a commissioner to be appointed by the Governor, as any section of five miles thereof should be completed, on whose certificate that said section had been completed in a good and substantial manner and ready for use, the comptroller should give information of that fact to the commissioner of the general land office, whose duty it should be to issue land certificates for the lands thus granted, which should be located upon the public domain of the State, survey be made, the field notes returned, and patents issued. Special Laws, 1852, 142.

By another special act of February 7, 1853, the preliminary action of the incorporators in commencing the survey and grade of the railway at the city of Houston was confirmed; and by section two, the company was "further authorized and empowered to extend said railway to the city of Galveston, and also to make and construct simultaneously with the main railway, described in the original acts establishing said company, a branch thereof towards the city of Austin, under the same restrictions and stipulations provided in said original acts, etc." Special Laws, 1853, Extra Session, 36, 37.

January 30, 1854, the legislature passed a general law granting sixteen sections of land to the mile for constructed railroad, which is sufficiently set forth in the preceding case, as well as the supplementary act approved the same day. It was provided that companies accepting the provisions of the act and already entitled to eight sections per mile should not be entitled to receive any grant for branch roads.

January 23, 1856, the legislature passed a special act, c. 20, entitled "An act for the relief of the Galveston and Red River Railway Company, and supplementary to the several acts incorporating said company," by which, after providing that the company should have six months after January 30, 1856, to complete the first twenty-five miles of its road, commencing at the city of Houston, it was declared that "said company shall be entitled to the rights, benefits and privileges granted by an act approved January thirtieth, eighteen hundred and fifty-four, entitled 'An act to encourage the construction of railroads in Texas by donations of land,'

upon the completion of said twenty-five miles within said six months," etc., upon certain conditions, to wit: That the company should construct twenty-five miles of its road each year after the expiration of said time; that it should maintain its principal office and keep its records on the line of its road; that a majority of its directors should reside in the State; that it should build its main line to a certain point before commencing any branch road; that the act of February 7, 1853, to regulate railroads should apply to the charter; and that it should "yield all general branching privileges, except such as are expressly granted by the provisions of its charter to certain points, and shall be required to expend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed for any branch, and shall be required to complete its main trunk to the point on Red River contemplated in its charter, or to such point of intersection between said road and some other road running from the northern or eastern boundary of Texas towards El Paso, as shall be agreed upon between the directors of said company." It was provided that the company might assign certificates for lands granted it; that it might borrow money for the construction of the railway and secure the same by mortgage and the issue of bonds; and that it should have the right after location and survey of the lands granted it, or any part thereof, to mortgage or sell any part of the same. The sixth section read: "That nothing in this act shall be so construed as to affect the right of the State to repeal or modify the act of January 30, 1854, entitled 'An act to encourage the construction of railroads in Texas by donations of land;' provided, that the right to lands acquired before said repeal or modification shall in all cases be protected." Special Laws, 1856, 28, 30.

By another special act approved September 1, 1856, c. 351, the Galveston and Red River Railway Company was authorized to change its name to "The Houston and Texas Central Railway Company," and it was also provided that the failure of the company to build the second section of its road within

one year after the completion of the first section should not work a discontinuance as to said company of the benefits of the general act of January 30, 1854, or of any other general or special laws relative to railroads, "if said company shall have completed their second and third sections, amounting to at least fifty miles, at the expiration of two years after the construction of said first section." Special Laws, 1856, 259, 260.

By another special act passed February 4, 1858, c. 86, it was, among other things, provided that the failure of the company to complete the third section of its road by July 30, 1858, should not work a discontinuance as to the company of the benefits of the act of January 30, 1854, or any other general laws in reference to railroads, if the company should complete the third section by July 30, 1859, and that on the completion of subsequent sections of twenty-five miles annually after July 30, 1859, or fifty miles every two years, "said company shall be entitled to sixteen sections of land per mile, as contemplated in said last-mentioned act, for each section so completed;" and "that the benefits of the provisions in the general laws shall only inure to the said company while said laws shall remain in force." Special Laws, 1858, 94, 95.

By still another special act, approved February 8, 1861, c. 13, any failure to complete the fourth and fifth sections was condoned, and the company given until January 30, 1863, in which to complete those sections. Special Laws, 1861, 11, 12.

When the civil war began in 1861, the company had completed and had in operation its main line for about eighty miles from the terminus at Houston. January 11, 1862, the legislature passed two general acts, continuing in force all laws granting lands to railway companies and extending the time in which they were required to construct certain parts of their lines until two years after the close of the war. These acts provided that the president and directors of this railway company should, before the provisions of the acts might extend to the benefit of the company, pass a resolution restoring the original *bona fide* stockholders of the company to the rights, privileges and immunities to which they were entitled previous

to the sale of the road as mentioned in the acts, provided the stockholders should pay into the treasury of the company ten per cent upon their stock on or before the expiration of the extension of time provided, or otherwise should forfeit their rights, privileges and property interests as stockholders. Laws, 1862, c. 69, pp. 43, 44, 46, 47. The resolution required by these acts was duly passed by the company.

On September 21, 1866, a special act was passed, entitled "An act granting lands to the Houston and Texas Central Railway Company," by which a specific grant was made to that company "of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, 'in accordance with the provisions of the charter of said railroad company;'" provided that the lands theretofore received under the general act of January 30, 1854, should be deducted from the grant thus made, and that the certificates issued on the first three sections should "be included in the terms, benefits and conditions of this act as if issued by virtue of its provisions;" and that the company should construct and put in running order a section of twenty-five miles of additional road to that now built, within one year from January 1, 1867, or fifty miles within two years from that date; and that the road should be put in running order to Bryant's station by September 1, 1867. Provision was made for the inspection of the road from time to time as sections should be completed, and for the issue and location of certificates and the survey of the lands thereby granted. Special Laws, 1866, c. 10, pp. 33, 34.

November 13, 1866, a general law was passed whereby the grant of sixteen sections per mile under prior laws was continued for ten years from that date. Laws, 1866, c. 174, p. 212. This act also provided that "all tap roads over twenty-five miles long shall be entitled to the benefits of this act."

By the constitution of 1869, Art. 12, § 43, the statutes of limitation of civil suits were declared suspended by the act of secession of January 28, 1861, and to be considered as suspended until the acceptance of that constitution by Congress, which acceptance occurred March 30, 1870.

Statement of the Case.

The Washington County Railroad Company was incorporated by a special act approved February 2, 1856, and was invested "with the right of locating, constructing, owning and maintaining a railway commencing at such point on the trunk of the Galveston and Red River Railroad as said corporation shall deem most suitable, crossing the Brazos River within the limits of Washington County, and then running by the most suitable and direct line to Brenham in said county." Special Laws, 1856, 49. This railroad company was organized and thereafter constructed and put in running order from a junction with the Houston and Texas Central Railway Company at Hempstead, thence directly towards the city of Austin to Brenham, a distance of twenty-five miles.

Some time prior to August 29, 1868, the Houston and Texas Central Railway Company purchased the Washington County Railroad at foreclosure sale. On that day the convention which had assembled to frame a new constitution, and which did frame the constitution adopted in 1869, passed an ordinance, reciting that the Houston and Texas Central Railway Company had become the owner, by purchase, of the Washington County Railroad; that both of said companies were indebted to the State for sums borrowed from the special school fund; and that the Houston and Texas Central Railway Company desired to extend the Washington County branch to the city of Austin as soon as it could be done, and to extend its main line to Red River; and it was declared "that the Washington County Railroad is hereby made and declared to be a branch of the Houston and Texas Central Railroad, and shall henceforth be known and called the 'Western Branch of the Houston and Texas Central Railway,' and shall be controlled and managed by said Houston and Texas Central Railway Company, and the Houston and Texas Central Railway Company shall have the right to extend said western branch of their road from the town of Brenham, in Washington County, to the city of Austin, in Travis County, by the most eligible route as near an air line as may be practicable."

The same convention also passed, December 23, 1868, a

"declaration for the relief of the Houston and Texas Central Railway Company," which provided that the company should not suffer "any forfeiture of any rights secured to it by existing laws by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert, in Robertson County, by the first day of January, A.D. 1869, as required by the act of the 21st of September, A.D. 1866, provided said railway shall be constructed and put in good running order for the use of the public, to the said town of Calvert, by the first day of April, A.D. 1869."

The constitution framed by this convention was adopted by a vote of the people, at an election held November 30 to December 3, 1869, and was accepted by Congress March 30, 1870, 16 Stat. 80, c. 39. Section 6, article X, of that constitution, read as follows:

"The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

August 15, 1870, the legislature of Texas passed a special act entitled "An act for the relief of the Houston and Texas Central Railway Company," which recited substantially the same matters as were recited in the declaration of the convention, and provided in section 1 as follows:

"That the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Texas Central Railway, and shall be under the control and management of the Houston and Texas Central Railway Company in like manner as every other part of said railway, and the Houston and Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the 'Washington County Railroad' from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro County and striking Red River at such point as will

enable such railway company to make a connection with any railroad which may be built to said river from the northward; and the said Houston and Texas Central Railway Company, by reason of the construction of said railway from the town of Brenham to the city of Austin, and by reason of the construction of said branch from Navarro County to Red River, shall have and enjoy all the rights, privileges, grants and benefits that are now, or may at any time hereafter, be secured to any railroad company in the State of Texas by any general law of the State, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon the said Houston and Texas Central Railway Company by its charter and by other laws of the State."

Section 4 read thus:

"No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston and Texas Central Railway Company, by reason of its failure to comply with the conditions as to construction, imposed by the first section of the act of the twenty-first of September, A.D. 1866, entitled 'An act granting lands to the Houston and Texas Central Railway Company;' but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A.D. 1866, had been, in all respects, complied with; provided that the land grant to said company shall cease, unless the said company shall complete their main trunk, east of the Brazos River, to Richland Creek, in Navarro County, within twelve months from the first day of October, A.D. 1870, and shall also complete their road to the city of Austin within two years after the passage of this act." Special Laws, 1870, 325.

The company completed its road to the city of Austin December 25, 1871, and completed its main line to Richland Creek, September 26, 1871.

Section 6 of article X of the constitution of 1869 was amended as of March 19, 1873, so as to authorize the legislature to grant lands for purposes of internal improvement. Thereupon the legislature of Texas passed many special laws

granting lands to railroads, and, afterward, on August 16, 1876, the legislature passed another general law granting sixteen sections of land per mile in aid of the construction of railroads. Laws, 1876, 153.

It appeared "that the defendants paid taxes on the lands sued for continuously since they were located and up to the present time," and "that the defendants paid all the fees of locating and surveying the said lands sued for, as well as for the same number of alternate sections known as the even numbers for the public free-school fund." Application for the inspection of the Austin line, as well as for the main line to Corsicana, was made by the company to the Governor February 9, 1872, which was done, and report showing the completion of the road made February 21, 1872. The certificates were issued in July of that year. The lands were placed on the maps of the general land office and always recognized as the company's land. They were all mortgaged by the company and sold on foreclosure in September, 1888.

Mr. R. S. Lovett for plaintiff in error. *Mr. James A. Baker* and *Mr. J. P. Blair* were with him on the brief.

Mr. M. M. Crane, attorney general of the State of Texas, for defendant in error.

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

The Supreme Court of Texas held in *Galveston, Harrisburg & San Antonio Railway Company* v. *Texas*, 89 Texas, 340, that, conceding that section six of article ten of the constitution of 1869 did not repeal prior laws granting lands in aid of the defined lines of existing railroad companies, the section did operate to cut off the right to earn lands by the construction of lines not authorized until after the provision took effect. We have just considered that case, and expressed the opinion that the constitutional provision as thus enforced involved no infraction of the Constitution of the United States.

Opinion of the Court.

In the present case the state courts have decided that although the Houston and Texas Central Railway Company may have had the right under legislation prior to the adoption of the constitution of 1869 to construct a road from its main line to Austin and to earn lands by such construction, yet that the purchase by the company prior to 1869 of the Washington Railroad, running from Hempstead on the company's main line to Brenham in the direction of Austin, should not be treated as making that road part of the line the company was authorized to build; and that the extension from Brenham to Austin must be held to have been built as an independent line under the act of August 15, 1870, which, having been passed while the constitution of 1869 was in force, the company could not acquire any right to the land grant by the construction of road between the latter points. The question does not arise in respect of lands for the twenty-five miles from Hempstead to Brenham, but in respect of lands allowed as earned for the distance from Brenham to Austin, for which the certificates were duly issued, and were located; and which have always prior to this suit been recognized as lands of the company, and have been sold as such.

In other words, the state courts have applied to the road from Brenham to Austin the same rule laid down as to new lines authorized to be constructed, for the first time, after the constitution of 1869 was adopted. We cannot concur in this view, but, on the contrary, are of opinion that the constitutional provision as thus enforced impairs the obligation of the contract between the State and the company and cannot be sustained.

The Houston and Texas Central Railway Company, then styled the Galveston and Red River Railway Company, was authorized by its act of incorporation not only to construct the main line therein specified, but, by its second section, such branches as it should deem expedient; and by the fourteenth section of the special act of February 14, 1852, eight sections of land were granted to the company for every mile of railroad it should construct, no distinction being made between branch and main lines. By section 2 of the special act of

February 7, 1853, the company was empowered "to make and construct simultaneously with the main railway described in the original acts establishing said company, a branch thereof toward the city of Austin."

The general act of January 30, 1854, granted to all railroad companies constructing a section of twenty-five miles or more of railroad, sixteen sections of land for every mile of road so constructed and put in running order; though by section 12 it was provided that any company then entitled to a grant of eight sections of land per mile, which should accept the provisions of the act, should not be entitled to receive the grant thereby made for any branch road. This company was then entitled to eight sections per mile, but the special act of January 23, 1856, supplementary to the several acts incorporating the company, expressly extended the rights, benefits and privileges of the general act of January 30, 1854, to the company, subject to certain conditions not material to be enumerated, and with the limitation as to branch lines that the company should "yield all general branching privileges *except such as are expressly granted by the provisions of its charter to certain points*," and requiring it to spend on the branch only the money subscribed for the branch, and on the trunk only the money subscribed therefor.

By section two of the original act of incorporation general branching privileges had been conferred, and by section two of the special act of February 7, 1853, express authority to construct a branch to the city of Austin. It would seem plain then that section five of the act of January 23, 1856, distinctly referred to the right to construct this particular branch, and so preserved it that the benefits of the act of January 30, 1854, were extended to that branch and its construction, and no other. In other words, all branching privileges except for the Austin line were yielded in accepting the benefits of the act of 1854, but as to that expressly authorized branch the right to construct it was preserved with the benefits accorded to its construction. The act of February 4, 1858, repeated the assurance of the benefits of the act of 1854.

But it is said that by the sixth section of the act of 1856

the right to repeal or modify the act of 1854 was reserved, and that by the second section of the act of 1858 the benefits of any general law inured only so long as such law remained in force. Rights to lands acquired before such repeal or modification would not, however, be affected thereby, nor is it important to specially discuss the operation of the constitution of 1869 in this regard, as the special act of September 21, 1866, made a specific grant to the company of "sixteen sections of land of six hundred and forty acres each of every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said company." We think that this plainly applied to the construction of the Austin line as well as the main line of the company. It applied to all lines constructed by the company in accordance with the provisions of its charter. And the right to construct the Austin line had been specifically conferred by the special act of February 7, 1853. The general branching privileges which the company possessed under its original act of incorporation it had been required to surrender by the act of 1856, except such as were "expressly granted by the provisions of its charter to certain points," and Austin was a point to which the company was expressly authorized to build. So that the Austin branch was one of the lines covered by the charter when the act of September 21, 1866, was passed, and the grant thereby made applied to it. And there was no reservation of a right to repeal or modify the act.

This legislation secured the construction of the branch to Austin, the capital of the State, an obvious necessity, and especially as that important point was then without any line of railway whatever.

Counsel for the State contended that the act granted lands for the construction only of the main line and not of the Austin line. The last clause of the third section of the act was: "And said railroad company shall construct their road in the line heretofore prescribed by 'An act for the relief of the Houston and Texas Central Railway Company,' approved February the 8th, 1861."

The line defined in the act referred to was: "*Provided*, said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro County, and thence to the town of Dallas, or within one and a half miles of said town, and thence to the terminus of the Red River, within fifteen miles of Preston." Special Laws, 1861, 11.

This fixed the route of the main line by Dresden and Dallas to the vicinity of Preston instead of Coffee's station. The route of the Austin line had been provided for by the act of February 7, 1853, and there was evidently no occasion to change it.

But it does not follow that because of this definition of the main line in the third section the grant in the first section of the act of September 21, 1866, should be confined to that line.

The company already had a grant of sixteen sections per mile for its main line under the general act of January 30, 1854, and there was no controversy over that, nor any need of further legislation in that regard when this act was passed. As to the branch line there might be dispute, and, furthermore, the right to repeal the grant was reserved in the acts of January, 1856, and February, 1858; and it may well be assumed that the object of the act of September 21, 1866, was to remove any doubt on the subject of the grant for the Austin line and remove the danger of a possible repeal. We are the more constrained to this conclusion by the language of the subsequent general act of November 13, 1866, "that all tap roads over 25 miles long shall be entitled to the benefits of this act," which modified the policy as to branch roads indicated in the act of 1854.

We find then that the company was granted by the State prior to the adoption of the constitution of 1869, sixteen sections of land per mile for the construction of the Austin line by the special act of January 23, 1856, and by the special act of September 21, 1866. And the rights of the company to the lands granted were preserved by extensions of time, as occasion required, within which to comply with conditions respecting the rate of construction. By the act of September 1, 1856,

the failure of the company to complete the second section of its road within one year after the completion of the first section was waived; again by the act of February 4, 1858, the company was granted further time in which to complete construction; again by the act of February 8, 1861, it was given until January 30, 1863, to perform the work required of it; and during the war the laws of January 11, 1862, were passed extending the time until two years after the close of the war on the condition that the extension should inure to the benefit of the company only in the event that it should restore the rights of the stockholders which had been foreclosed, which condition was complied with by the company; after this further time was given by the act of September 21, 1866; again by the act of November 13, 1866; and again by the ordinance of December 23, 1868; and finally by section four of the special act of August 15, 1870.

Before the constitution of 1869 was adopted, the company had acquired the Washington County Railroad, and the convention which framed that instrument on August 29, 1868, ratified and confirmed the purchase of that road, and declared that the Washington County Railroad was thereby made and declared to be a branch of the Houston and Texas Central Railroad, to be controlled and managed by the Houston and Texas Central Railway Company, with the right to extend the road from Brenham to Austin by the most eligible route.

The company had completed and had in operation five sections of twenty-five miles each of its main line, and by the acquisition of the Washington County Railroad, had in operation that part of the Austin branch extending from the junction of the main line at Hempstead to Brenham directly toward Austin.

Thus it is seen that the company had been granted sixteen sections of land per mile for the construction of the Austin branch as well as the main line; that it had accepted the grant; and had commenced to earn it, and had actually acquired the right to earn it, by the construction of an important part of the line which the State by the grant intended to promote, before the adoption or acceptance of the constitution of

1869. The company had not merely organized and commenced the work it was incorporated to carry on, but had completed a large part of it. It had completed one hundred and twenty-five miles of main line prior to June 15, 1869, and manifestly had much more in process of construction, for it appears from the record that several additional sections were completed and put in operation soon after that date. It had also acquired and had in operation that part of the Austin branch extending from the junction at Hempstead to Brenham, a distance of twenty-five miles, originally constructed by the Washington County Railroad Company and afterwards purchased by this company.

We do not understand the state courts to have decided that the purchase of the Washington County road was *ultra vires*, but to have held that the construction of the line from Brenham to Austin was an independent enterprise authorized for the first time by the act of August 15, 1870, and being a new and additional line no land grant could be claimed for it because the constitutional provision was then in force.

In our opinion, however, if the Washington County road was lawfully acquired by the Houston and Texas Central Railway in 1868, it became as much a part of the Austin branch as if it had been constructed by the company, and its subsequent completion to Austin placed that part of the line from Brenham to Austin in the same situation as if the entire line from Hempstead to Austin had been in fact so constructed. And this would have been so if the company had built ninety-five miles from Hempstead towards Austin, and then lawfully obtained twenty-five miles of existing road to complete the branch. Of course the company was not entitled to a land grant for the twenty-five miles from Hempstead to Brenham, nor is any such claim made, but that twenty-five miles became by the purchase a part of the branch with like effect as if originally part of it, and to treat the completion of the branch as a new and independent enterprise we cannot but regard as inadmissible in view of the facts. For this twenty-five miles had been purchased; was controlled and operated; and existed as a part of the company's Austin branch in fact.

Opinion of the Court.

The Houston Company and the Washington Company were both endowed with the capacity to make contracts, and generally to do and perform all such acts as might be necessary and proper for or incident to the fulfilment of their obligations. Act, Mar. 11, 1848, § 1, Spec. Laws, 1848, 370; Act, Feb. 2, 1856, § 2, Spec. Laws, 1856, 49. They were both required to afford the public the advantages of a continuous line. Act of Feb. 14, 1852, § 9, Spec. Laws, 1852, 142; Act of Feb. 2, 1856, § 12, Spec. Laws, 1856, 49. The acquisition of the Washington road was in accomplishment of the object of securing a line to the capital, and was not in contravention of the general intention of the legislature. The ordinances of the convention in terms ratified the transaction and reiterated the previous authority to extend to Austin. These ordinances are part of the history of the case, and reference to them in connection with the alleged scope of the particular provision of the constitution framed by that convention and submitted to the vote of the people may not improperly be made. In *Quinlan* v. *Houston &c. Railway Co.*, 89 Texas, 356, it was held that a convention called to frame a constitution to be submitted to a popular vote cannot pass ordinances and give them validity without submitting them to the people for ratification as part of the constitution.

These ordinances were not so submitted, and we are not called on to express any opinion as to whether in view of the anomalous circumstances under which this particular convention met; the previous decisions of the Supreme Court of the State; or any other considerations, they, or either of them, could be regarded as valid.

For irrespective of that, the act of August 15, 1870, expressly recognized and ratified the purchase of the Washington railroad and the State could not deny the validity of that which it had expressly validated, if otherwise open to question.

In *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, referring to a mortgage executed by a railroad company in Texas when there was no statute of that State expressly authorizing railroad companies to mortgage their roads as such, Mr. Justice Bradley, speaking for this court, said: "Without examining

how far the operative effect of a mortgage executed by a railroad company upon its road, works and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have."

It appears to us that this purchase comes within the rule thus expressed, and that if there had originally been objection it was technical merely and removed by the act of 1870.

Now the latter act authorized no new line nor made any new grant of lands to which no previous right existed, nor restored lands which had been forfeited. If ground of forfeiture had accrued by reason of failure to complete as rapidly as required, it had not been enforced, and if outstanding was waived by the act.

If there had been a failure to construct in time so that a forfeiture would have been justified, no such forfeiture was declared by any judicial proceeding, or by any legislative action equivalent to office found. *St. Louis, Iron Mountain &c. Railway* v. *McGee*, 115 U. S. 469; *Bybee* v. *Oregon & California Railroad*, 139 U. S. 663; *Galveston, Harrisburg &c. Railway* v. *State*, 81 Texas, 572.

And the executive officers of the State, charged with the administration of the laws granting lands to railroads, and vested with jurisdiction to determine the facts, had ascertained and determined the facts here, and issued the certificates because in their judgment the road had been completed in accordance with the law.

No argument was made that any ground of forfeiture could be availed of in the case, nor was any such point ruled by the Court of Civil Appeals, or by the Supreme Court.

The judgment of the Court of Civil Appeals may have been rested in part on the view that the constitution of 1869 repealed all laws granting lands to railroad companies regardless of the acceptance of such laws and the construction of the lines of road thereunder.

The Supreme Court proceeded on the ground that the road from Brenham to Austin was not authorized until after 1869

and fell into the category of a new line, and therefore the company had no right to the land grant.

From what we have said it will be perceived that we are unable to accede to either of these propositions.

In our opinion it results from the legislation and the facts that the company had the right to construct the line to Austin and earn sixteen sections per mile by so doing, prior to 1869; that by the acceptance of its charter and the subsequent legislation, and by the completion of an important part of its road before the adoption of the constitution of 1869, the company had acquired a vested right to the land grant; that the purchase of the Washington County road must be regarded as valid, and that thereby that road became part of the Austin line in operation as such before 1869; that the extension of the branch from Brenham to Austin cannot properly be treated as a new and independent line, and that there therefore was a contract between the State and the company in respect of lands earned by the construction thereof.

It follows that section 6 of Article X of the constitution of Texas as given effect by the state courts impairs the obligation of the contract and deprives the company of its property without due process of law.

Argument was also urged on behalf of defendant in error that the particular lands sued for are situated in what is known as the Pacific reservation, being a reservation for the benefit of the Texas and Pacific Railway Company, created by a special act of May 2, 1873, and hence, that though the certificates were valid, they were not located, as the law required, on unappropriated public domain.

This question was not determined by either of the appellate tribunals, but, on the contrary, their judgments rested distinctly on the invalidity of the certificates for reasons involving the disposition of Federal questions. We must decline to enter on an examination of the controversy now suggested on this point.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

SELVESTER *v.* UNITED STATES.

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

No. 397. Argued March 14, 1898. — Decided April 25, 1898.

Plaintiff in error was indicted for alleged violations of Rev. Stat. § 5457 The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second, an illegal passing and uttering of two such pieces; the third, an unlawful passing and uttering of three pieces of like nature; and the fourth the counterfeiting of five like coins. After the jury had retired, they returned into court and stated, that, whilst they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be, whereupon they rendered a verdict that they found the prisoner guilty on the first, second and third counts of the indictment, and that they disagreed on the fourth count, which verdict was received, and the jury discharged. *Held*, that there was no error in this.

Latham v. *The Queen*, 8 B. & S. 635, cited, quoted from, and approved as to the point that, "in a criminal case, where each count is, as it were, a separate indictment, one count not having been disposed of no more affects the proceedings with error than if there were two indictments."

THE plaintiff in error was indicted for alleged violations of section 5457 of the Revised Statutes. The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second, an illegal passing and uttering of two such pieces; the third, an unlawful passing and uttering of three pieces of like nature, and the fourth, the counterfeiting of five like coins. The case came on for trial, and, after the jury had retired, they returned into court and stated that, whilst they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be. The District Attorney thereupon asked leave to enter a *nolle prosequi* as to the fourth count, but, upon objection by the accused, the motion was withdrawn, and the jury rendered the following verdict:

"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second and third counts of the indictment, and disagree on the fourth count of the indictment."

Despite objection and exception by the accused, the court received this verdict and discharged the jury.

By motions in arrest of judgment, to set aside the verdict, and for a new trial, the defendant asserted that the verdict was a nullity, because "insufficient, incomplete and uncertain." Exceptions were duly noted to the overruling of these several motions, and the court having imposed sentence a writ of error was allowed.

Mr. Arthur English for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

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

The assignments of error challenge the sufficiency of the verdict to support the judgment which was entered thereon. The claim is that as the verdict expressed the agreement of the jury as to the guilt of the accused as to the distinct crimes charged in three of the counts, and stated a disagreement as to the distinct crime covered by the fourth count, the verdict was not responsive to the whole indictment, and was void. That is to say, the proposition is that the verdict of guilty as to the separate offences covered by the three first counts was in legal intendment no verdict at all, because the jury stated their inability to agree as to the fourth count, covering a different offence from those embraced in the other counts.

Reduced to its ultimate analysis, the claim amounts to this: That an indictment, although consisting of several counts, each for a distinct offence, is in law an indivisible unit, must be treated as an entirety by the jury in making up their verdict, and such verdict in order to be valid must finally pass upon and dispose of all the accusations contained in the in-

dictment. In effect it is claimed that where an indictment consists of several counts, repeated trials must be had until there is an agreement either for acquittal or conviction as to each and every count contained in the indictment. It needs but a mere statement of the proposition to demonstrate that it in reason rests necessarily on the premise just stated. That this is its essential postulate is conclusively shown by the authorities which are cited to sustain it. They are: *Hurley* v. *State*, 6 Ohio, 399; *Wilson* v. *State*, 20 Ohio, 26, 31; *Williams* v. *State*, 6 Nebraska, 334; *Casey* v. *State*, 20 Nebraska, 138, and *Muller* v. *Jewell*, 66 California, 216.

In the *Hurley case*, upon the assumption that the same rules, as respects the sufficiency of verdicts, governed in criminal as in civil cases, the Supreme Court of Ohio held that a trial court acted properly in refusing to enter a verdict which found the defendant not guilty on one count of an indictment, and stated their inability to agree as to other counts; and further held that no error was committed in discharging the jury and again putting the accused upon trial.

In the *Wilson case*, the opinion in the *Hurley case* was criticised, but it was held to be "prudent," where in one indictment distinct offences were charged in separate counts, especially when these offences might subject the accused to different degrees of punishment, to require the jury in their finding, in the absence of a general verdict, to affirm or negative each charge. In consequence of this view the court reversed, because the verdict had found the defendant guilty as charged in one series of counts in the indictment, but had omitted any reference whatever to his guilt or innocence as to certain other offences charged in another series of counts. The rule thus applied was declared to be necessary because of a possible doubt as to whether a defendant might not be subject to further prosecution for an offence not passed upon by a jury in a verdict under an indictment consisting of several counts.

The Nebraska cases followed the ruling in the *Wilson case*, mainly, however, because the Ohio decision was regarded as a construction of a statute, existing in Ohio, and which had been adopted into the Nebraska Code.

The California case relied upon may be dismissed from view, as it related to a verdict in a civil cause.

In passing, we note that the doctrine that a verdict in a criminal case must respond to every count in an indictment in order to warrant a judgment thereon, as stated in the Ohio cases just referred to, seems to be no longer maintained in that State. *Jackson* v. *State*, 39 Ohio St. 37. In the *Jackson case* the issues presented were as follows: The trial court had refused to receive a verdict on an indictment containing several counts for distinct offences, which found the defendant "guilty as charged in the first count of the indictment." The jury thereupon after further deliberation returned a general verdict of guilty. The Supreme Court of the State of Ohio, in considering an exception taken to the entry of the general verdict, said: "The objection is untenable. The prisoner might have been sentenced under the first verdict, for the count on which it was based was sufficient. (Whar. Crim. Pl. and Pr. sec. 740.) But the proper course was to endeavor to obtain a verdict responding to both counts, and that course was pursued."

Whatever may be the present rule in Ohio, it is manifest from the foregoing brief analysis of the cases cited by the plaintiff in error to sustain the contentions upon which reliance is placed, that they rest upon the theory that, even although the offences charged in the several counts of an indictment be distinct and separate crimes, such a solidarity is created between them by charging them in several counts of one indictment as to render void any verdict which does not specifically and affirmatively respond to each and every count. But this proposition, whatever may be the support found for it in early cases, is not sound in reason, and is negatived by the decisions of this court and the opinion of text writers, that is to say, it is refuted by the conclusive weight of authority.

The erroneous theory as to the indivisible union presumed to arise from charging distinct offences in separate counts of one indictment, applied in the cases referred to and in some other early American cases, took its origin from the case of

Rex v. *Hayes*, (1727) 2 Ld. Raym. 1518. (See observations in the opinion in *State* v. *Hill*, 30 Wisconsin, 421.) But it has been held in England that that case did not justify the view which had been sometimes taken of it, *Latham* v. *The Queen*, 5 B. & S. 635, and that it was a mistake to apply to the several counts of distinct offences in one indictment the rule which obtains as to verdicts in civil cases. In the course of his opinion, in the case just cited, Mr. Justice Blackburn said (p. 642):

"Then it is said we are concluded by authority. There is only one case which has the least bearing on the question, namely, *Rex* v. *Hayes*, 2 Ld. Raym. 1518. In that case the indictment contained three counts, and a special verdict was returned, finding the prisoners guilty on two of them, but said nothing on the third, and the question was whether judgment could be given against them as guilty on the whole. The court held, that as the jury had virtually found, and the facts showed, the prisoners not guilty on the third count, the record established that they were guilty on two counts, and not on the third. The counsel who argued that case for the defendants referred to authorities to show that where a verdict finds but a portion of an issue, or only one of several issues, it is bad and ground for a *venire de novo;* but the court did not determine that point at all — there was no occasion to decide that no verdict being given on one count vitiates a verdict on another count which is good. In civil cases there is only one process against the defendant, and therefore if a new trial is granted on one part of the case it is granted on the whole. But in a criminal case, where each count is as it were a separate indictment, one count not having been disposed of no more affects the proceedings with error than if there were two indictments. In *O'Connell* v. *The Queen*, 11 Cl. & F. 155, which has been referred to, Parke, B., says pp. 296–7: 'So in respect of those counts on which the jury have acted incorrectly, by finding persons guilty of two offences, (on a count charging only one,) if the Crown did not obviate the objection, by entering a *nolle prosequi* as to one of the offences, *Rex* v. *Hempstead*, R. & R.

C. C. 341, and so in effect removing that from the indictment, the court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendants should on the face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.' That is exactly what I say here. Each count is in fact and theory a separate indictment, and no authority has been produced to show that we ought to defeat the ends of justice by such a technical error as this."

And the rule in England thus clearly announced is generally applied in the American cases. Whar. Crim. Pl. and Pr. § 740; 1 Bishop New Crim. Proc. § 1011. Indeed, the doctrine, as settled by repeated adjudications of this court, is in entire harmony with the English rule as announced in the *Latham case*. In *Claassen's case*, 142 U. S. 140, it was held that where a jury found an accused guilty on some counts of an indictment, and the trial judge imposed a general sentence, which did not exceed the punishment authorized by law to be inflicted for a single offence, it was immaterial whether some of the counts upon which conviction was had were bad, as the judgment was valid if only one of the counts was legally sufficient. In *Dealy* v. *United States*, 152 U. S. 539, it was held that the reception of a verdict on an indictment containing numerous counts was valid, although the verdict which set out an affirmative finding as to all but one count was silent as to that count. The discharge of the jury under such circumstances was conceded to have been proper, and it was observed (p. 542) as to the count upon which the verdict was silent, that such silence "was doubtless equivalent to a verdict of not guilty as to that count." In *Ballew* v. *United States*, 160 U. S. 187, it was found that a judgment entered upon a general verdict of guilty on an indictment consisting of several counts was erroneous as respects one of the counts alone, and for this cause the judgment was not reversed *in toto*, but was only set aside as to the count in regard to which error had been committed, and the case was remanded to the

trial court for sentence on the count as to which no error was found to have arisen, and for further proceedings as to the other count. In *Putnam* v. *United States*, 162 U. S. 687, where distinct sentences of concurrent imprisonment had been imposed under separate counts of an indictment, reversible error having been found to exist as to one of the counts only, the judgment was affirmed as to the count where there was no error and was reversed as to the other, and the cause was remanded for further proceedings with respect to the count as to which error had been committed.

These rulings are absolutely in conflict with the proposition upon which the plaintiff in error relies, and conclusively demonstrate its unsoundness. True, it is claimed that there is a distinction between the doctrine announced in these cases and the proposition here relied on. Thus, it is urged that in the *Claassen case* there was no question presented of a failure of the verdict to affirmatively respond to all the counts in the indictment, but that the sole issue was, where the verdict did respond to all the counts and thereafter some of the counts were found to be bad, whether the verdict and sentence, which did not exceed the punishment imposed by law for the offence specified in the good counts, would be held to relate alone to the good counts, and be, therefore, not subject to reversal. Whilst it is true that the claimed distinction between the facts in the *Claassen case* and those in this exists, it is one, however, which in no way distinguishes the two cases, in so far as the legal principle is concerned by which they are to be determined. This is at once made apparent by considering that if the charging of distinct offences in several counts in one indictment so unified the various offences that action on all of them was necessary to action on any one, the conclusion reached in the *Claassen case* was erroneous. The necessary effect of the decision in that case was to establish that, although distinct offences were charged in separate counts in one indictment, they nevertheless retained their separate character to such an extent that error or failure as to one had no essential influence upon the other. It is also asserted that the ruling in *Dealy's case* does not control the question

here raised. There, on an indictment charging distinct offences in several counts, the jury returned a verdict of guilty as to certain of the counts and were silent as to the others. The maintaining of this verdict, it is urged, did not import the right of a jury to agree to convict as to some counts and disagree as to others, since the court in that case imputed the verdict to all the counts, and, therefore, treated it as affirmatively responsive to all. That is, the argument by which alone it is possible to distinguish this case from the *Dealy case* must rest on the extreme and unsound assertion that in that case, although the record plainly disclosed that the jury had found only as to certain counts, nevertheless the court, as a matter of fact, held that the jury had found as to all. The statement in the opinion in the *Dealy case* to which we have already referred and cited, that the silence of the verdict as to a particular count "was equivalent to a verdict of not guilty as to that count," when properly understood, does not lend itself to the construction which the argument seeks to place upon it. The contention arises from a failure to observe the difference between discharging a jury on mere silence on their part as to the guilt or innocence of an accused as to a particular count, and doing so only after a formal disagreement, and its entry of record. Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the *Dealy case*, the effect of such discharge is "equivalent to acquittal," because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent. But such obviously is not the case, where a jury have not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offence as to which the jury has disagreed and on account of which it has been regularly discharged, would not constitute second jeopardy. The error in the convic-

tion may additionally be shown by presupposing that each crime charged in several counts of one indictment, instead of being included in one, had been prosecuted by way of separate indictments as to each. Under these conditions, if a charge contained in any one of the indictments had been submitted to the jury, and the court had after such submission, and without verdict, undertaken of its own motion, over objection, to discharge the jury, it is elementary that such discharge would be equivalent to an acquittal of the particular charge for which the accused was tried, since it would bar a subsequent prosecution. But if, on the other hand, after the case had been submitted to the jury, they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution. This distinction was illustrated by the rulings in the cases of *Putnam* and *Ballew*, *supra*. In those cases, as the error found to exist as to the particular counts which caused the reversal, prevented the trial as to these counts from constituting legal jeopardy, the case as to such counts was remanded for further proceedings thereunder, although the conviction as to the counts in which there was no error was maintained.

Affirmed.

Mr. Justice Gray, Mr. Justice Brown and Mr. Justice Shiras concurred in part, as follows:

We concur in the judgment of affirmance, and upon this short ground: The indictment contained four counts. The defendant pleaded not guilty to the whole indictment, and thereby joined issue on each and all of the counts; and the jury might find the defendant guilty upon all or any of them. The jury did return a verdict of guilty upon each of the first three counts, and disagreed as to the fourth count. The jury thus answered the whole of the issue presented by the plea to each of the first three counts, and failed to answer the issue presented by the plea to the fourth count. Their failure to return a verdict on the fourth count did not affect the validity

of the verdict returned on the other three counts, or the liability of the defendant to be sentenced on that verdict. The defendant was sentenced upon those counts only upon which he had been convicted by the jury. There is no error, therefore, in the judgment rendered upon the verdict.

But in so much of the opinion of the court, as suggests that the plaintiff in error may be hereafter tried, convicted and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. Upon principle, on one indictment and against one defendant there can be but one judgment and sentence, and that at one time, and for the offence or offences of which he has been convicted; and a sentence, upon the counts on which he has been convicted by the jury, definitely and conclusively disposes of the whole indictment, operates as an acquittal upon, or a discontinuance of, any count on which the jury have failed to agree, and makes any further proceedings against him on that count impossible. No case has been found, in which, after a conviction and sentence, remaining unreversed, on some of the counts in an indictment, a second sentence, upon a subsequent trial and conviction on another count in the same indictment, has been affirmed by a court of error.

In *Ballew* v. *United States*, 160 U. S. 187, 203, and in *Putnam* v. *United States*, 162 U. S. 687, 715, in each of which a judgment upon conviction on an indictment containing two counts was affirmed as to one count, and reversed as to the other count, the order of reversal did not direct a new trial on the latter count, but was guardedly framed in general terms "for such proceedings with reference to that count as may be in conformity to law;" and under such an order it would be open to the defendant, if set at the bar to be tried again on that count, to plead the previous verdict and sentence in bar of the prosecution.

CALDERON *v.* ATLAS STEAMSHIP COMPANY.

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

No. 83. Argued March 8, 9, 1898.— Decided April 25, 1898.

The appellant shipped, by a vessel belonging to the appellee, goods under a bill of lading which contained the following stipulation: "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 as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder." Of these stipulations and conditions, this court regards only the following as material: "1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." "9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise." "14. This agreement is made with reference to, and subject to the provisions of the U. S. carriers' act, approved February 13, 1893." The goods were not delivered at the port to which they were consigned, and were subsequently lost at sea on another vessel belonging to the appellee, on which they had been placed without the appellant's knowledge. In a suit in admiralty to recover their value, *Held*,

(1) That as the negligence of the company was clearly proven, there can be no doubt of its liability under the act of February 13, 1893, c. 105, known as the "Harter Act;"

(2) That the clause limiting the amount of the carriers' liability is to be construed as a statement that the carrier shall not be liable to any amount for goods exceeding $100 per package; and being so interpreted, that it is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of $100 per package, and as such is not only prohibited by the Harter Act, but held to be invalid in a series of cases in this court.

THIS was a suit instituted in the District Court for the Southern District of New York, in admiralty, by the libel-

lant, Calderon, who was at that time consul general for the United States of Colombia at New York, to recover from the respondent, the Atlas Steamship Company, the sum of $5413.18, the value of a consignment of goods shipped from New York to Savanilla by the libellant on the steamer Ailsa, which goods the master failed to deliver at the port of destination, and thereafter brought back to New York, where they were reshipped by the respondent on the steamer Alvo. The goods were lost by the sinking of this ship through a peril of the sea.

It seems the respondent owned both the Ailsa and the Alvo, and ran them between New York, Kingston, Savanilla, Carthagena and Port Limon, from which last-named port they sailed direct to New York, usually carrying a cargo of fruit. Libellant had frequently shipped goods by this line and over the same route, and on July 19, 1893, about two hours before the Ailsa sailed on its regular voyage from New York, delivered to the company on its pier, under authority of a special permit from the company, the consignment of goods in question, which consisted of twenty-six bales and three crates of duck government uniforms, for transportation to the port of Savanilla, and from thence to Baranquilla in the United States of Colombia. The receipt given by the company to the truckman who delivered the goods stated that they had been received "at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading."

The bill of lading, subsequently obtained in lieu of the receipt, and a copy of which was sent by mail to the consignee by the same steamer, contained on its face the provision: "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, as printed on the back hereof, whether written or printed, as fully as if they were signed by such shipper, owner, consignee or holder."

Of the stipulations, exceptions and conditions printed on the back, only the following are material:

"1. It is also mutually agreed that the carrier shall not be

liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

"9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by the first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

"14. This agreement is made with reference to, and subject to the provisions of U. S. carriers' act, approved February 13, 1893."

It appeared from the testimony taken that these goods were the last to be loaded, and that instead of being stowed with other freight for Savanilla, the port of destination, they were placed in another hold of the ship and in the "last tier to come out" of the Carthagena freight. It also appeared that the consignment was not discharged at Savanilla, and that it was not discovered to be on board until the ship was well on its way to Carthagena. The ship, however, proceeded on its voyage without attempting to make the delivery of the goods, and upon receiving a cargo of fruit at Port Limon sailed for New York, where the consignment was reshipped, August 16, 1893, on the steamer Alvo. No notice was given to libellant of the return of the goods or of their reshipment. The Alvo was caught in a hurricane and lost at sea with her entire cargo.

The District Court held that there was a "failure in the proper delivery" of the goods at Savanilla, but that inasmuch as bills of lading were not signed specially designating the value of each of the twenty-nine packages, as provided by clause one on the back of the bill of lading, the liability of the company was limited to $100 for each of the twenty-nine packages, or $2900 in all. *Calderon* v. *Atlas Steamship Co.*, 64 Fed. Rep. 874.

From this decree the libellant alone appealed, and upon the

hearing the Circuit Court of Appeals for the Second Circuit, by a majority opinion, sustained the decree of the court below. 35 U. S. App. 587.

Mr. J. Langdon Ward for appellant.

Mr. Everett P. Wheeler for appellee.

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

Two questions are presented by the record in this case: First, whether the steamship company was liable at all under its bill of lading for the non-delivery of the goods at Savanilla; second, whether such liability was limited to the sum of $100 for each package.

1. Both the District Court and the Court of Appeals held the company to be liable under section 1 of the Harter Act, of February 13, 1893, c. 105, 27 Stat. 445, which provides "that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect," and this, notwithstanding the provision in the bill of lading that "in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

As the company did not appeal from this decree it must be regarded as acquiescing in the justice of such decree to the

amount therein awarded to the libellant; but as we should not make a further decree against the company for the amount now claimed by the libellant in excess of $100 per package, if we were satisfied that the company was not liable at all, we have thought it best to consider whether the courts below were correct in their construction of the Harter Act.

It may well be questioned whether the provision "that in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination" has any application to a case where the goods were not placed in the proper compartment when stowed on board the vessel, and for which it appears no search was made upon the arrival at Savanilla, notwithstanding the fact that a bill of lading had been given for them and their shipment had been entered upon the manifest or other "cargo books" of the steamer. It appears that after leaving Savanilla the purser discovered that these goods had not been "tallied out" on the cargo books for that port, and he at once made search for them, and found them stowed with the Carthagena cargo.

It was clearly the duty of the master of the vessel before leaving Savanilla to examine the manifests or other memoranda of the vessel to ascertain whether the portion of the cargo consigned to that place had been delivered, and if not, to search for the missing consignment before leaving the port. His failure to do this was obviously a breach of his general obligation to deliver his cargo to its consignee, and it is exceedingly doubtful whether, even in the absence of the Harter Act, the provision in the bill of lading would have excused him. But as the stipulation in the bill of lading was one which the Harter Act prohibited, it is only necessary to refer to this act to hold the company chargeable with negligence. Regard may doubtless be had to the custom of the port as to what shall be termed a proper delivery with respect to the time and manner of such delivery, but a failure to deliver at all was negligence. No such want of delivery can be excused under the terms either of the first or second section of the Harter Act. Not only was there negligence in failing to examine the ship's papers to ascertain what goods were consigned to Sava-

nilla, but there was also negligence in stowing such goods under that portion of the cargo destined for Carthagena, and thus concealing them from observation. If these goods were the last received by the vessel before her departure from New York, they would naturally have occupied a position which would have called attention to them upon arrival at the first port of destination, but they were so concealed beneath the goods consigned to another port that they were not discovered until after the vessel had left Savanilla.

The words "cannot be found" would seem to apply to a case where the goods had been misplaced, and an effort had been made to find them which had proven unsuccessful, and not to a case where no attempt whatever was made to deliver them. But however this may be, we are clearly of opinion that the provisions of section one of the Harter Act supersede and override this stipulation in the bill of lading, particularly as it is expressly provided that the agreement was "made with reference to, and subject to the provisions of the United States carriers' act, approved February 13, 1893." (Harter Act.) The first section of the act is cited above, but the second section further provides "that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement . . . whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in anywise be lessened, weakened or avoided."

It is to be noticed that by the first section the carrier shall not be "relieved from liability" for loss or damage arising from negligence in the proper stowage or proper delivery of the goods, while by the second section the carrier shall not insert any covenant or agreement in the bill of lading whereby the obligations of the carrier to carefully stow and properly deliver the cargo shall be "lessened, weakened or avoided." These two sections, in their general purport, so far as respects the care and delivery of the cargo, are not essentially different,

although it is possible that a somewhat ampler measure of liability was intended under the second section, which denounces any covenant whereby the obligations of the ship to properly deliver the cargo shall in anywise be lessened, weakened or avoided. As the negligence of the respondent in this connection was clearly proven, there can be no doubt of its liability under either of these sections of the Harter Act.

2. The alleged limitation of respondent's liability to the sum of $100 per package depends upon that clause of the bill of lading which declares "that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." Respondent insists that the words of this clause, "which are above the value of $100 per package," should be read as limiting its liability to $100 per package, and should be construed as if the words used were "beyond the sum or value of $100 per package." The courts below agreed in putting this interpretation upon it. Acting upon this view, it was held that the liability of the respondent was limited to $100 per package, following in this particular the rulings of this court in *Railroad Company* v. *Fraloff*, 100 U. S. 24, 27, and *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, and the principle announced in *Magnin* v. *Dinsmore*, 56 N. Y. 168; *S.C.* 62 N. Y. 35; 70 N. Y. 410; *Westcott* v. *Fargo*, 61 N. Y. 542, and *Graves* v. *Lake Shore & Mich. Southern Railroad*, 137 Mass. 33. In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing

a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See also *Ballou* v. *Earle*, 17 R. I. 441; *Richmond & Danville Railroad* v. *Payne*, 86 Virginia, 481; *J. J. Douglas Company* v. *Minnesota Transportation Co.*, 62 Minnesota, 288.

We are, however, not content with the construction put upon the contract by the courts below. Whether the limitation of liability to goods above the value of $100 per package applies to "gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks," as well as to goods of other descriptions, may admit of some doubt, in view of the fact that by Rev. Stat. § 4281 the vessel and her owners would not be liable for such articles at all, unless specifically mentioned at a valuation agreed upon. This stipulation in the bill of lading having been inserted by the ship owner for its own benefit, could scarcely have been intended to enlarge its statutory liability, and the more reasonable interpretation would seem to be that the company was not intended to be held liable at all for these articles. But whether this be so or not, the stipulation may be read as if those words were omitted, namely, that the carrier shall not be liable for goods of any description "which are above the value of $100 per package." The plain and unequivocal meaning of these words is that the carrier shall not be liable to any amount for goods exceeding in value $100 per package. It is true that contracts for the carriage of goods by water, as well as by land, frequently contain a provision limiting the liability of the carrier to a certain amount, usually $100 per package, and it was apparently in view of this custom that the courts below gave a like interpretation to the words of this stipulation. But this certainly does violence to its language. If it had been intended to so limit the respondent's liability, it would have been easy to say so, and the very fact that different language was used from that ordinarily employed indicates a desire on the part of the carrier to limit his liability to goods which are of less value than $100 per package. It is possible that the draughtsman of this bill of

lading may have had the more common limitation in his mind, and may have intended that the carrier should incur a liability upon all goods to the extent of $100 per package, but he certainly was unfortunate in the language he chose for that purpose. If, as we have already intimated, the carrier intended to exempt itself from all liability for the articles specifically mentioned in this clause, it is scarcely to be supposed that it intended to make itself liable to the amount of $100 for goods of other descriptions, which were above that value per package. It was probably intended that the carrier should incur no liability whatever for the value of the articles specifically mentioned, as well as for all other goods exceeding the value of $100 per package, while it remained liable to the full amount for goods of other descriptions which were of less value.

It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage. Clark on Contracts, p. 593.

It was said of penal statutes by Mr. Chief Justice Marshall in *United States* v. *Wiltberger*, 5 Wheat. 76, 95, that "the intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words,

there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

Similar language was used by Mr. Justice Swayne in *United States* v. *Hartwell*, 6 Wall. 385, 396: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." See also Endlich on the Interpretation of Statutes, § 4.

In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning. The clause in question seems to have been taken from the English carriers' act, 11 Geo. IV, and 1 Wm. IV, c. 68, which received a construction similar to that we have given to it in *Morritt* v. *Northeastern Railway Co.*, 1 Q. B. D. 302.

Under this interpretation there is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of $100 per package. Such exemption is not only prohibited by the Harter Act, but is held to be invalid in a series of cases in this court, culminating in *Chicago, Milwaukee &c. Railway* v. *Solan*, 169 U. S. 133, 135, wherein it was said that "any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or servants, is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle upon which the law of common carriers was established." The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if "bills of lading are signed therefor, with the value therein expressed and a special agreement is made." This would enable the carrier to do, as was done in this case — give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter Act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid.

The decree of the District Court is therefore reversed, and the case remanded to that court with directions to assess the value of the libellant's goods, and to enter a decree in conformity with the opinion of this court.

Mr. Justice White concurred in the result.

Mr. Justice Brewer dissented.

MAGOUN *v.* ILLINOIS TRUST AND SAVINGS BANK.

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

No. 464. Argued January 28, 1898. — Decided April 25, 1898.

The inheritance tax law of Illinois, of June 15, 1895, (Laws of 1895, page 301), makes a classification for taxation which the legislature had power to make, and does not conflict in any way with the provisions of the Constitution of the United States.

THIS was a bill in equity filed in the Circuit Court of the United States in and for the Northern District of Illinois by Jessie Norton Torrence Magoun, a resident and citizen of New York, against the Trust Company, as executor of and trustee under the last will and testament of Joseph T. Torrence, deceased, and the county treasurer of Cook County, Illinois, both residents and citizens of Illinois, to remove a cloud from the real estate devised by said decedent to the complainant, and to enjoin the first-named defendant from voluntarily paying, and the county treasurer from collecting or receiving, the inheritance tax, amounting to more than $5000, alleged to be due upon the entire estate of said decedent, and for which the complainant's interest in said estate was contended by the county treasurer to be liable.

The bill set forth the will of the decedent, a description and valuation of the real estate and personal property left by him, amounting in all to $600,000 above his debts, and the demand of the county treasurer for the inheritance tax, which, by the act in question, is made a lien upon all of said property, the request of the complainant to the defendant Trust Company not to pay the same and to contest the constitutionality of the act; to refrain from paying the same voluntarily and without protest, and to await the commencement of legal proceedings to enforce the same; the refusal of the Trust Company to comply with this request, and its threat and in-

tention to pay said tax at once voluntarily, which payment could not be recovered if said law should hereafter be declared unconstitutional.

The bill also alleged that such payment would result in waste of the estate, and would be a breach of trust on the part of said executor, to the irreparable loss and injury of the complainant; that the alleged lien of the tax clouds the title to the real property and renders the same unmarketable, and that the act is in conflict with the provisions of the Fourteenth Amendment.

The Trust Company answered, admitting the allegations of fact in the bill, but submitting the question of the constitutionality of the law to the court and praying to be advised of its rights and duties in the premises as executor and trustee aforesaid and as an officer of the court.

The county treasurer denied that the act was unconstitutional, and admitted the allegations respecting the estate of the deceased, the interest of the complainant therein, the lien of the inheritance tax thereon and the demand made therefor.

The cause was heard on bill and answers, and a decree was entered dismissing the bill from which an appeal was prayed to this court and allowed.

The act under which the taxes complained of were assessed is entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." Rev. Stat. Illinois, 1895, c. 120. It is only necessary to quote its first and second sections, which are as follows:

"§ 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, all property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, or if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any

person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporation shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the State, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interest to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the State of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock, in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person, and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interests to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, in every such case the rate of such tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person. In all other cases the rate shall be as follows: On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on

all estates over fifty thousand dollars, six dollars: Provided, That an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

"§ 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of a son, or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax prescribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid: Provided, That if the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come into the actual possession or enjoyment of such property, in that case said person or persons or body politic or corporate shall give a bond to the people of the State of Illinois in the penalty three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be filed in the office of the county clerk of the proper county: Provided, further, That such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years."

Two other cases were argued and submitted with this case, to wit, *Josephine C. Drake et al., Executors, etc., Plaintiffs in Error*, v. *Daniel H. Kochersperger, County Treasurer, etc., Cook County, Illinois*, error to the Supreme Court of the State of Illinois; and *Elizabeth Emerson Sawyer et al., Executors, etc., Plaintiffs in Error*, v. *The Same*, error to the Circuit Court of the United States for the Northern District of Illinois.

In the *Drake case* the Supreme Court of the State of Illinois sustained the statute as consonant with the constitution of the State. 167 Illinois, 122.

Mr. William D. Guthrie and *Mr. Benjamin Harrison* for plaintiffs in error. *Mr. Eugene E. Prussing* was on their brief.

Mr. Edward C. Akin and *Mr. Thomas A. Moran* for defendants in error. *Mr. Robert S. Iles* and *Mr. Frank L. Shepard* were on their brief.

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

Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and have been enacted in other States. They are not new in the laws of other countries. In *State* v. *Alston*, 94 Tennessee, 674, Judge Wilkes gave a short history of them as follows: "Such taxes were recognized by the Roman law. Gibbon's Decline and Fall of the Roman Empire, vol. 1, pp. 163–4. They were adopted in England in 1780, and have been much extended since that date. Dowell's History of Taxation in England, 148; Acts 20 George III, c. 28; 45 George III, c. 28; 16 and 17 Victoria, c. 51; *Green* v. *Craft*, 2 H. Bl. 30; *Hill* v. *Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. (Review of Reviews, February, 1893.) In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Vir-

ginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25 now repealed by chapter 174, acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reënacted in 1863, and repealed in 1884." Other States have also enacted them — Minnesota by constitutional provision.

The constitutionality of the taxes have been declared, and the principles upon which they are based explained in *United States* v. *Perkins*, 163 U. S. 625, 628; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *Eyre* v. *Jacob*, 14 Grat. 422; *Schoolfield* v. *Lynchburg*, 78 Virginia, 366; *State* v. *Dalrymple*, 70 Maryland, 294; *Clapp* v. *Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479; *State* v. *Hamlin*, 86 Maine, 495; *State* v. *Alston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; Dos Passos Collateral Inheritance Tax, 20; *Minot* v. *Winthrop*, 162 Mass. 113; *Gelsthorpe* v. *Furnell*, [Montana] 51 Pac. Rep. 267. See also *Scholey* v. *Rew*, 23 Wall. 331.

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right — a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter, for appellant conceded that testamentary disposition and inheri-

tance were subject to regulation. However, as pertinent to the subject, decisions of this court may be cited.

In *United States* v. *Fox*, 94 U. S. 315, 320, a law of the State of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The court said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat. 202. . . . Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Henry VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her constitution in 1777; and, with some modification in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."

In *Mager* v. *Grima*, 8 How. 490, 493, there was considered the validity of a law of Louisiana imposing a tax of ten per cent upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein. Mr. Chief Justice Taney considered the legal question of easy solution, and disposed of it summarily. He said: "This is a plain case, and when the facts are stated the questions of law may be disposed of in a few words." After stating the case briefly, he further said:

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of

regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take has been given to the alien, subject to a deduction of ten per cent for the use of the State.

"In some of the States laws have been passed at different times imposing a tax similar to the one now in question upon its own citizens as well as foreigners, and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

"We can see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

In *United States* v. *Perkins*, 163 U. S. 625, 627, the inheritance tax law of the State of New York was involved. Mr. Justice Brown, speaking for this court, said:

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. 'By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his

heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com. 492. Prior to the statute of wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of the property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child, one third if he leaves two children; one fourth if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."

Against the cases sustaining inheritance taxes and their classifications and exemptions, appellants cite *State* v. *Mann*, 76 Wisconsin, 469; *State* v. *Gorman*, 40 Minnesota, 232; *Curry* v. *Spencer*, 61 N. H. 624; *State* v. *Ferris*, 53 Ohio St. 314, and *Missouri* v. *Switzer*, lately decided.

These cases are not in all points irreconcilable with those first cited. *Curry* v. *Spencer* is extreme. It was held that an exception from an otherwise general inheritance law of legacies to husband or wife, children or grandchildren, of the person who died last seized offended the rigid uniformity of the constitution of that State and its bill of rights. The court however said, speaking by Blodgett, J.: "It is not to be questioned that the power to tax is vested in the legislature; that it is unrestricted, except when it is opposed to some provision of the Federal or state constitution, and that it extends to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession." And quoting 2 Bl. Com. 12, he further said: "Wills, therefore, testaments, and rights of inheritances and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them."

In *State* v. *Mann* and *State* v. *Gorman*, the distinction between a tax on successions and one on property was not necessary to observe. *State* v. *Gorman*, however, may be claimed as deciding that a tax based on the value of the estates is contrary to the rule of equality; also that exemptions are. *State* v. *Ferris* and *State* v. *Switzer* do not oppose the principles upon which inheritance taxes are sustained, but only decide that the statutes passed on were repugnant to equality and uniformity of taxation as prescribed by the state constitutions. They are authority against the Illinois statute. But it is not necessary to dwell on the points of agreement of the cases. Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the Federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.

This brings us to the law in controversy. The appellant attacks both its principles and its provisions — its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County* v. *Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity."

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or

profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205, to a different measure of damages than B, *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26, and it permits special legislation in all of its varieties. *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis and St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Duncan* v. *Missouri*, 152 U. S. 377.

In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. "Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," said Mr. Justice Bradley, in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237.

And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, 165, after a careful consideration of many cases, said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection."

Two principles, therefore, must be reconciled in the Illinois inheritance law if it is to be sustained, the equality of protection of the laws guaranteed by the Fourteenth Amendment, and the power of the State to classify persons and property. The latter principle needs further consideration. What test is there of the reasonableness of a classification — of one based upon "some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection?" Legislation special in character is not forbidden by it, as we have seen. Treating mechanics as a class, and

giving them a lien for the amount of their work, has been held reasonable. Charging a railroad corporation and not other corporations or persons with an attorney's fee has been held unreasonable, yet the former would seem to be as much an exclusive favor as the latter an exclusive burden.

Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, and Mr. Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley, as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State framing their constitution."

And so Mr. Justice Miller, speaking for the court in *Davidson* v. *New Orleans*, 96 U. S. 97, 105, said: The Federal Constitution imposes no restraints on the State in regard to unequal taxation.

The court, through Mr. Justice Lamar, in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, was equally emphatic. He said on page 351: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destruc-

tive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens." And it was said in *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461: "Indeed, this whole argument of a right under the Federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* v. *Pennsylvania*."

There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy.

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class — differences, therefore, which "bear a just and proper relation to the attempted classification" — the rule expressed in the *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances."

But the appellant asserts discrimination, and claims that the exemptions produce the greatest inequality. As stated above, the Supreme Court of the State of Illinois passed on and sustained the law in the *Drake case*, and, claiming the opinion for support, the appellant contends that there are two distinct systems and principles applied in the act, the one basing the tax on the amount received or the value of the

privilege of succession; the other basing the tax upon the estate owned by the decedent, irrespective of the amount or value of the legacy. And discriminations hence resulting, or rather which are claimed as hence resulting, are detailed.

We, however, do not read the opinion as counsel do. In answer to the objection that the statute offended against uniformity or proportion to valuation as prescribed by the constitution of Illinois, the court said:

"That statute provides certain classes of property, which were a part of an estate, shall be exempt from taxation under these provisions; and when the legislature provides other classes of property, some of which shall pay one dollar per hundred, others two, others three and others four, and still others five, and again others six dollars per hundred, six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property.

"The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to the class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature six classes of property are created heretofore absolutely unknown. *It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise.* The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited, and is not inconsistent with the principle of taxation fixed by the constitution, and is clearly within the sections of the constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute; and the State, having power to regulate this ques-

tion, may create classes and provide for uniformity with reference to classes which were before unknown."

The words which we have italicized are urged to support appellant's contention, but it is manifest that they do not do so when considered in relation to that which precedes and follows them, and it is, therefore, the estates which descend or are received which the court decides are new property, and which are to pay a tax in proportion to their value.

Appellant, however, says: "The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received. . . . Under such an assumption those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of $10,000 pays 3 per cent, or $300, thus receiving $9700 net, while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9600.96, $99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class. Other examples might be stated."

The reasoning of appellant is based on the view that the tax is one on property instead of one on the succession, as held by the Supreme Court of the State. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the $20,000 and other property not taxed are not, therefore, exemptions.

In this view the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be $20,000 as in Illinois law or $10,000 as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each State, and cannot be subject to judicial review. If such review could ascertain the factors of judgment and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That manifestly is a legislative, not a judicial, function.

The first and second cases, therefore, of the statute depend on substantial distinctions and their classifications are not arbitrary. Nor do the exemptions of the statute render its operation unequal within the meaning of the Fourteenth Amendment. "The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power wherever it has not in terms been taken away. To some extent it must exist always, for the selection of subjects of taxation is of itself an exemption of what is not selected." Cooley on Taxation, 200. See, also, the remarks of Mr. Justice Bradley in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232.

The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. These provisions are as follows:

"On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars; Provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of $10,000 pays 3 per cent, or $300, thus receiving $9700 net; while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9600.96, or $99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the

practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

If there is unsoundness it must be in the classification. The members of each class are treated alike, that is to say, all who inherit $10,000 are treated alike — all who inherit any other sum are treated alike. There is equality therefore within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on $10,000 and an increased percentage on the excess over $10,000 but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of ten thousand and one dollars by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless

they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is

Affirmed.

Mr. Justice Brewer dissenting.

I am unable to concur in the foregoing opinion, so far as it sustains the constitutionality of that part of the law which grades the rate of the tax upon legacies to strangers by the amount of such legacies. If this were a question in political economy I should not dissent, but it is one of constitutional limitations. Equality in right, in protection and in burden is the thought which has run through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality. *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461. But when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification.

That this is a law imposing taxes is not open to question. The title of the act is "An Act to Tax Gifts, Legacies, etc.," and the first section provides that "all property . . . which shall pass by will or by the intestate laws of this State . . . shall be, and is, subject to a tax at the rate hereinafter specified." Classifying inheritors and legatees into the three classes of near relatives, remote relatives and strangers, and imposing a different rate of taxation as to each of these classes, may not be objectionable. The classification is based upon differences which bear just and proper relation to it, and where classification is rightful, differences in the rate of taxation may be, so far as the Federal Constitution is concerned, permissible. But beyond this classification the statute provides that as to the third class, that is, strangers, the rate of taxation shall vary with the amount of the estate. In other

words, the actual tax to be paid does not increase simply as the legacy increases, which would be the rule of equality, but the rate of taxation is also increased as the amount of the legacy passes from one sum to another. Upon a legacy over fifty thousand dollars it is six per cent, while upon one under ten thousand dollars it is only three per cent.

It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon the succession it is held that a different rule prevails. The argument is that because the State may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses. There are doubtless some matters over which the State has purely arbitrary power. For instance, it is under no obligations to grant any charters, and the legislature may undoubtedly in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burdens he pleases. But I do not understand that legacies and inheritances stand upon the same footing. True, the State may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy. And yet if it is a purely arbitrary power I do not see what constitutional objection could be raised to any disposition which a legislature might make of the property of any decedent. Take the illustration made by counsel for appellant: Could the legislature of Illinois, which passed this statute, constitutionally enact that the estate of every person dying within the limits of the State should be given to the members of that legislature? Or, if the matter of personal benefit be interposed as against the validity of such legislation, could it enact that the property of A, on his death, should pass to the State; the property of B to some religious or charitable institution; and the property of C be divided

among his children? Can there be a doubt that such inequality of legislation would vitiate it? But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to wit, that of wealth — a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality.

DRAKE *v.* KOCHERSPERGER. Error to the Supreme Court of the State of Illinois. No. 425.

MR. JUSTICE MCKENNA: The judgment of the Supreme Court of the State was not final, and the writ of error must be

Dismissed.

SAWYER *v.* KOCHERSPERGER. Error to the Circuit Court of the United States for the District of Illinois. No. 463.

MR. JUSTICE MCKENNA: This was a petition by Kochersperger, as county treasurer and collector of Cook County, Illinois, filed in the County Court of that county, against Elizabeth E. Sawyer and others seeking the collection of certain taxes. The case was removed into the Circuit Court of the United States, but improvidently, as it falls within the rule laid down in *Tennessee* v. *Banks*, 152 U. S. 454, notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the taxes was in violation of the Constitution of the United States.

Decree reversed, and cause remanded to the Circuit Court with a direction to remand the case to the County Court of Cook County, the costs of this court and of the Circuit Court to be paid by plaintiffs in error.

These two cases were argued with No. 464.

WILLIAMS, TREASURER, *v.* EGGLESTON.[1]

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 210. Argued April 19, 20, 1898. — Decided May 2, 1898.

The legislation of the State of Connecticut whereby the franchise and property of a company which had constructed and was maintaining a toll bridge across the Connecticut at Hartford were condemned for public use, and the cost was apportioned between the State and the town of Glastonbury and four other municipal corporations in proportions determined by the statutes, and the proceedings had under this and subsequent legislation set forth in the statement of the case and the opinion of the court, did not violate any provisions of the Federal Constitution.

For three quarters of a century prior to 1887 the Hartford Bridge Company had under a charter from the State, (Priv. Laws Conn. vol. 1, p. 254, Resolve of October, 1808), maintained a toll bridge over the Connecticut River at the city of Hartford. It also maintained on the east side of the bridge and connected therewith a causeway across the lowlands adjacent to the river.

On May 19, 1887, the legislature of the State passed an act making said bridge and causeway a free public highway, and providing for the condemnation of the franchise and other property of the bridge company. (Pub. Acts Conn. 1887, chap. 126, p. 746.) Proceedings were directed to be instituted in the Superior Court of the county of Hartford for ascertaining the value of the property, determining the towns benefited by the establishment of the public highways, and apportioning the assessed damages. In this proceeding the damages assessed to the bridge company were $210,000, and apportioned between five towns, as follows: To the town of Hartford, ninety-five two hundred and tenths; East Hartford, sixty-six two hundred and tenths; Glastonbury, twenty-five two hundred and tenths, and the towns of South Windsor and Manchester each twelve two hundred and tenths.

[1] This case, as reported in the Connecticut Reports, was entitled *Morgan G. Bulkeley* et al. v. *Samuel H. Williams, Treasurer.*

Statement of the Case.

The State, however, appropriated out of its treasury 40 per cent of the entire amount, to wit, $84,000, leaving the balance to be paid by these several towns, and such sums were paid. The act also provided that this public highway should thereafter be maintained by the towns assessed in proportion to their assessments, and that the first selectman of each of said towns should become *ex officio* member of a board, constituted a body politic and corporate, and charged with this duty of care and maintenance.

On June 29, 1893, the legislature passed an act providing that said bridge and causeway should thereafter "be maintained by the State of Connecticut at its expense;" and that the Governor, with the consent of the senate, should appoint three commissioners, who should constitute "a board for the care, maintenance and control" of such bridge and highway. (Pub. Acts Conn. 1893, ch. 239, p. 395.) The bridge was a covered wooden bridge, which had been in existence for many years. On November 13, 1894, that board, acting through a majority of its members, made a contract with the Berlin Iron Bridge Company for the construction of a new bridge to cost $275,900. Some work had been done and some material furnished by the company, when on May 17, 1895, the old wooden bridge was entirely destroyed by fire. A week thereafter, and on May 24, 1895, the legislature passed an act (Pub. Acts Conn. 1895, ch. 168, p. 530) repealing the act of June 29, 1893, and directing that thereafter the five towns which had been assessed for the benefits accruing from the establishment of the public highway should maintain that highway, each of them bearing the share of the expense thereof fixed in the assessment proceedings. By the same act a commission was appointed to hear and determine all legal claims and demands (that of the Berlin Iron Bridge Company being specially named) arising under or by virtue of any contract made and executed by the board appointed under the act of 1893. The act provided that if the award of such commission was less than $40,000 the comptroller should draw his warrant on the treasurer for the amount thereof, to be paid upon the delivery of proper receipts, releases and discharges. It also

provided that if any party, particularly the Berlin Iron Bridge Company, should not be satisfied with the decision of said commission it might within three years commence and prosecute a suit against the State in the Superior Court of Hartford County for any legal claim, debt or demand arising under or by virtue of any valid contract made and executed by said board, and that in any event such Berlin Iron Bridge Company should be entitled to recover for all material furnished and all expenses of every kind actually incurred under said contract, including therein all legal and personal expenses; that on final judgment being rendered in such suit the comptroller should draw his order on the treasurer for the amount of the judgment; and further, if the contract which had been entered into should be declared valid and binding, the comptroller should carry out and complete the contract according to its provisions and draw his orders on the state treasurer for the cost thereof. Under this act the Berlin Iron Company presented its claim to the commission, which, on December 7, 1895, awarded to it the sum of $27,526. On December 13, 1895, the directors of the Berlin Iron Bridge Company voted to accept this award, and on the same day the company received the money and executed its release in the following words:

"$27,526. HARTFORD, CONN., *December* 13, 1895.

"Received of the State of Connecticut the sum of twenty-seven thousand five hundred and twenty-six dollars in full of award made on the 7th day of December, 1895, by Hon. Dwight Loomis, Hon. Benj. P. Meade, comptroller, and Hon. George W. Hodge, treasurer of the State of Connecticut, acting as a commission constituted by chapter 168 of the Public Acts of 1895, and all other claims presented by this company to said commission are hereby withdrawn, and this payment is received in full satisfaction and discharge of all claims and demands of every nature which this company has or ought to have, arising under or by virtue of any contract made and executed by the commission appointed under chapter 239 of the Public Acts of 1893 with this company, and the within contract is hereby surrendered to the State of Connecticut."

Statement of the Case.

On June 28, 1895, the legislature passed an act (Special Acts Conn. ch. 343, p. 485), the first section of which is as follows:

"SECTION 1. That the towns of Hartford, East Hartford, Glastonbury, Manchester and South Windsor be, and they are hereby created a body politic and corporate, with power to sue and be sued under the name of the Connecticut River bridge and highway district, for the construction, reconstruction, care and maintenance of a free public highway across the Connecticut River at Hartford and the causeway and approaches appertaining thereto, as described in a decree of the Superior Court of Hartford County, passed on the 10th day of June, 1889, in which decree said highway was laid out and established."

It also created a board of commissioners for such district, to consist of eight members, four from the town of Hartford and one from each of the other towns, who were given authority to maintain such free public highway and to erect new bridges along or upon said highway, to reconstruct, raise and widen the causeway and approaches appurtenant thereto or a part of said highway, at the expense of the towns composing the district. In case of a vacancy in the board the vacancy was to be filled by the town in which the retiring member resided. This board was authorized to issue the bonds of the district, if need be, to an amount not exceeding $500,000 for the construction of a new bridge or causeway. The burden of construction and maintenance of this public highway was distributed in a proportion different from that named in the original assessment proceedings, the town of Hartford being required to pay seventy-nine one hundredths, East Hartford twelve one hundredths and Glastonbury, Manchester and South Windsor each three one hundredths. For all expenditures the board was directed to draw warrants upon the several towns, and such orders were declared sufficient authority for the treasurer of each of said towns to pay the amounts named therein, and the board was authorized to apply to any court of competent jurisdiction for proper writs to compel the enforcement and execution of its orders. The board, having expended the sum of $500 in the ordinary support and main-

tenance of this highway, on September 14, 1895, passed a resolution apportioning the amount, and drew a warrant on the treasurer of the town of Glastonbury for the sum of $15, its proportion of the sum expended. The treasurer of that town refused to pay this order, whereupon, on October 16, 1895, the board presented an application to the Superior Court of Hartford County for an alternative writ of mandamus against him. The writ was answered by the treasurer, and in his answer he set forth, among other defences, that the act of May 24, 1895, repealing the act of June 29, 1893, was in violation of the Constitution of the United States, section 10, Article I, because it impaired the obligation of a contract; that the proceedings of the board were also in violation of the Fourteenth Amendment to the Constitution of the United States, because they deprived the towns and the citizens thereof of their property without due process of law, and denied to them the equal protection of the laws. The Superior Court rendered judgment *pro forma* in favor of the board, and directed the issue of a peremptory writ of mandamus. On appeal to the Supreme Court of the State this judgment was affirmed, June 25, 1896, *State ex rel Bulkeley* v. *Williams, Treasurer*, 68 Conn. 131, whereupon this writ of error was sued out.

Mr. Lewis E. Stanton and *Mr. John R. Buck* for plaintiff in error. *Mr. Olin R. Wood* was on their brief.

Mr. Lewis Sperry for defendant in error. *Mr. George P. McLean* and *Mr. Austin Brainard* were on his brief.

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

Inasmuch as the plaintiff in error, when sued in the state court, specifically set up certain sections of the Federal Constitution as a bar to the proceedings against him, and the judgment of the state court was that they constituted no such bar, it is not open to question that this court has jurisdiction, and the motion to dismiss must therefore be overruled.

Opinion of the Court.

The first contention of plaintiff in error is that the contract of November 13, 1894, made between the state board and the Berlin Iron Bridge Company, was a valid contract, and that the two acts of May 24, 1895, and June 28, 1895, together with the orders and proceedings of the board of commissioners thereunder, are in violation of the tenth section of Article I of the Federal Constitution, because they impair the obligation of that contract. A sufficient answer to this contention is, that the contract, if valid — and upon that we express no opinion — was between the State of Connecticut and the Berlin Iron Bridge Company, and that they have fully settled all differences in respect thereto. The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken. Counsel for plaintiff in error, conceding that an entire stranger cannot take advantage of any breach, insist that the town, though not a party to the contract, had an interest in its execution, for if it had been executed and the new bridge constructed and paid for by the State, the town would not now be under any obligations to assist in the construction of the new bridge. But this results, not from the mere adjustment between the State and the Berlin Iron Bridge Company, but by reason of the fact that the legislature, in the exercise of its unquestioned powers, has seen fit to cast the burden of the construction of a new bridge — which, as claimed, it had once assumed — upon the towns. Even if the contract had been carried into effect, according to its terms, the legislature might, at the time of passing the act of 1895, have provided that the cost of such construction should be borne by the towns specially benefited thereby. It is not the breach of any contract, but an independent act of the legislature which casts the burden on the town of Glastonbury. The town is, therefore, an entire stranger to the contract, and this contention must be overruled.

Again, it is insisted that the plaintiff in error is denied the equal protection of the laws because these five towns are put into a class by themselves, organized into a single municipal

corporation, and separated from other towns in the State by being subjected to different control in respect to highways. But this overlooks the fact that the regulation of municipal corporations is a matter peculiarly within the domain of state control; that the State is not compelled by the Federal Constitution to grant to all its municipal corporations the same territorial extent, or the same duties and powers. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature. That body may place one part of the State under one municipal organization and another part of the State under another organization of an entirely different character. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the State. "Whether territory shall be governed for local purposes by a county, a city or a township organization, is one of the most usual and ordinary subjects of state legislation." *Kelly* v. *Pittsburgh*, 104 U. S. 78, 81. See also *Forsyth* v. *Hammond*, 166 U. S. 506, 518, 519, and cases cited in the opinion; 1 Dillon on Municipal Corporations, 4th ed. Vol. 1, p. 52, and following.

It is further contended that the acts of May 24, 1895, and June 28, 1895, are in conflict with that portion of the Fourteenth Amendment which forbids the depriving of any person of life, liberty or property without due process of law, because, first "they deprive the town of the right to perform its town duties by officers of their own choosing, which is contrary to the settled practice and law of the State, and arbitrarily destroys the right which those towns had before the constitution of Connecticut was adopted and which was not taken away by that instrument; and, secondly, because the acts provide for arbitrarily taking the property of the inhabitants of Glastonbury without proper notice of any proceeding under which the property is to be taken and without opportunity to be heard." Whatever may have been the practice of the State in the past it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and Federal constitutions; and

that these acts in no way violate any provision of the state constitution is settled by the decision of the state Supreme Court. *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, 566, and cases cited. It is true there was a division of opinion between the members of the state Supreme Court, but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the state court decides that municipal corporations within the territorial limits of the State are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the state court was mistaken in its construction of the state constitution or in its declaration as to the extent of the power of the legislature over municipal corporations.

Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. *Spencer* v. *Merchant*, 125 U. S. 345, 356; *Parsons* v. *District of Columbia*, 170 U. S. 45. It should be noticed that no question is presented as to the necessity of notice before any property tax is cast upon the citizen. The only question is as to the power of the legislature to cast the burden of this improvement upon the five towns, towns which have been already judicially determined to be towns benefited thereby. Although the apportionment made between the towns was not that determined by the judicial proceedings, yet it was one of which certainly the town of Glastonbury cannot complain, for the judicial apportionment was as to it reduced by the legislative act. In casting this burden upon the towns the legislature did not proceed without a hearing from the

towns, for their representatives were in the legislature and took part in the proceedings by which the act was passed. So they had an opportunity to be heard, if such hearing was necessary, prior to the enactment of the law. These are all the questions made by counsel. We see nothing in the proceedings which can be said to be in violation of any provisions of the Federal Constitution, and therefore the judgment of the Supreme Court of Errors of Connecticut is

Affirmed.

SHAW *v.* KELLOGG.

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

No. 154. Submitted February 23, 1898. — Decided May 2, 1898.

In 1860 Congress granted a quantity of land in New Mexico, in fulfilment of a grant of non-mineral lands made by Mexico before its transfer, the land to be selected by the grantees, and the surveyor general to survey and locate the land selected, and thus determine whether it was such as the grantees might select. The grantees made their selection, and after considerable correspondence as to the forms of the application and as to the evidence that the selected lands were not mineral lands, the surveyor general, under the direction of the Land Department, approved the selection, and made the survey and location. The Land Department approved the survey, field notes and plat, and the parties were notified thereof, but no patent was issued, as Congress had not provided for such issue. The Land Department noted on its maps that this tract had been segregated from the public domain, and had become private property, and so reported to Congress, and that body never questioned the validity of its action. The grantees entered into possession, fenced the tract, and paid all taxes assessed upon it as private property by the State. *Held*, that the action taken by the Land Department was a finality, and that the title passed, all having been done which was prescribed by the statute.

Such approval entered upon the plat in the Land Department by the surveyor general, under the directions of that department, was in terms "subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860." *Held*, that such limitation was beyond the power of executive officers to impose.

Statement of the Case.

THIS was an action of ejectment brought in the Circuit Court of the United States for the District of Colorado on July 3, 1893, to recover possession of a certain tract in Saguache County, in the State of Colorado, described as follows:

"Section twenty-two (22), township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the county clerk and recorder of said Saguache County, and including in said section twenty-two certain mineral bearing property designated by the defendant as the Eastern Star Mine, with other mining lands adjacent thereto within said section twenty-two."

After answer a trial was had before a jury, which resulted in a verdict under instructions of the judge for defendant. Upon this verdict judgment was entered, May 22, 1895. Thereupon the plaintiff sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit. On March 30, 1896, that court certified certain questions. Upon an examination of those questions and after argument of counsel, this court, on December 22, 1897, ordered a certiorari to bring up the entire record, and upon such entire record the case was submitted for consideration.

The premises in question are within the limits of the so called Baca Grant No. 4. The plaintiff is the owner of that grant, and the question presented is as to the validity and extent of his title. Prior to the treaty of Guadalupe Hidalgo between Mexico and the United States of date February 2, 1848, by which New Mexico and other territory in the southwest was ceded to this Government, Mexico had made some quite extensive grants of tracts of land within the territory ceded. Since then Congress has provided for the several portions of the ceded territory different modes of determining the validity and extent of those grants. By the act of July 22, 1854, c. 103, 10 Stat. 308, the office of surveyor general for the Territory of New Mexico was created, and, by section 8, it was made his duty to examine into all claims for lands within the limits of that Territory and to make full report thereof to Congress. In pursuance of this authority the surveyor general examined and reported upon various claims, and

on June 21, 1860, Congress passed an act, c. 167, 12 Stat. 71, confirming several of them. There were two opposing claimants for a large tract of land in the vicinity of the town of Las Vegas. In settling the dispute between them Congress enacted, in section 6:

"SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas [Vegas], to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

On July 26, 1860, a letter of instructions was issued by the Land Department to the surveyor general of New Mexico in reference to these private land claims. In that letter, after directing a survey of the Las Vegas grant, and a determination of the area thereof, the instructions were as follows:

"The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number.

"You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square forms according to the existing line of the public surveys, the matter may be properly disposed of by their application duly endorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus endorsed is to be noted on the records of the register and receiver at Santa Fé, and sent on here by those officers for approval. Should the Baca

claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

"In either case the final condition of the certificate to this office, must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral."

The survey made of the grant to the town of Las Vegas showed an acreage of 496,446.96 acres, a certificate of which fact was given to the heirs of said Baca.

On December 12, 1862, the following selection was filed with the surveyor general of New Mexico:

"SANTA FÉ, NEW MEXICO, *Dec.* 12, 1862.

"To Surveyor General JOHN A. CLARK, surveyor general of New Mexico:

"I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected, as one of the five locations belonging to the said heirs under the sixth section of the act of Congress approved June 21, 1860, a tract of land in the Territory of New Mexico, described as follows:

"Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the rivers Arkansas and Del Norte; thence east along said parallel, four and one half miles; thence south along a meridian line twelve miles, thirty-six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty-six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning.

"I further state that the said land is entirely vacant, not claimed by any one, is not mineral, but located for purposes

of arable and pastoral agriculture, and is within the limits of the Territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

"JOHN S. WATTS,
"*Attorney for Heirs of Luis Maria Baca.*"

Prior to this time the Territory of Colorado had been organized and a portion of the Territory of New Mexico included within its boundaries, and the land described in this application was within the territory thus included in Colorado. The surveyor general of New Mexico, on the receipt of this application, forwarded it to the Land Department at Washington, and also transmitted a copy to the surveyor general of Colorado. The surveyor general of Colorado, writing on February 24, 1863, to the Land Department, informed it of the receipt of the copy above referred to, and at the close of his letter made this statement:

"I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the Land Department, on March 13, 1863, wrote as follows:

"It is necessary before the application can be approved by this office, that it be accompanied by the certificates of the surveyor general and the register and receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7, 1862; especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable

you to do so, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which when received you will forward to this office."

During the year 1863 ex-Governor Gilpin, who had become the owner, or at least interested in this location, made application to the surveyor general of Colorado for a survey of the tract. As the land was beyond the limits of the public surveys then completed, the surveyor general made a contract with deputy surveyor A. Z. Sheldon for its survey, and forwarded the same to the Land Department for approval. On November 2, 1863, that office wrote to the surveyor general disapproving of the contract, and adding:

"In your letter dated the 10th March last transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion *it would cover rich minerals* in the mountains.'

"Upon the receipt of your letter you were expressly informed, under date of the 13th March, 1863, that before the application could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is *vacant and not mineral*, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the locations as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.'

"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit, in relation to the location of the claims referred to. The contract and instructions for the survey of the above mentioned claim are herewith returned."

On December 12 the surveyor general wrote to the Land Office a letter containing this statement:

"SIR: I have the honor to acknowledge the receipt of your letter of the 2d of November last disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former surveyor general of this district, in which he says that he supposes that this location was made by Mr. Gilpin 'for the reason that in his opinion it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands. I have signed the accompanying certificate partly from my own knowledge of the country, but mostly for the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's Peak and extend in a course about 30° west of south to the headwaters of the San Juan, covering a belt of country about 30 miles in width of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2d. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been travelling over the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

"3d. In the summer of 1860 a party of one hundred and fifty miners from here under one Roeder went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory."

He enclosed in it certificates of himself and the register and receiver of the local land office in the following language:

"DENVER, C. T., *December* 5, 1863.

"SIR: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't servant, JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*"

"COLORADO TERRITORY, GOLDEN CITY, *December* 5, 1863.

"SIR: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

G. N. CHILCOTT,

"*Register Land Office, Colo. Dist.*

"C. B. CLEMENTS,

"*Receiver Land Office, Colo. Ty.*"

To this letter the Land Office replied on January 16, 1864, stating —

"The evidence furnished by you is not sufficient in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon the infor-

mation and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex-Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver required in our instructions is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated."

On February 12, 1864, the Land Office again wrote to the surveyor general the following letter:

"John Pierce, Esq., surveyor general, Denver City, Colo.

"Sir: I have considered your report of the 14th December last, respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis Park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then Territory of New Mexico, but now a part of Colorado Territory.

"The said statute makes it the 'duty of the surveyor general of New Mexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr. Gilpin the money placed in your 'hands and he has paid for the survey as a private survey, though he has permitted' you 'to

make an abstract of the field notes which ' you ' have placed on file in ' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies and surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the surveyor general's office of Colorado; upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid sixth section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats."

And again, on February 26, 1864, the Land Office sent the following to the surveyor general:

"Sir: At the request of William Gilpin, Esq., I herewith transmit the following papers, to wit:

"First. Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated October 3, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5, 1863.

"Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6, 1863.

"Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5, 1863.

"Fifth. The field notes of the boundary lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant."

Thereupon the field notes of the survey with the certificate of the surveyor and his assistants were duly filed in the surveyor general's office and approved by him, his certificate of approval being in these words:

"The foregoing field notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field notes and the survey they describe are hereby approved."

In the general description accompanying the field notes is this statement by the deputy surveyor:

"This grant contains every grade of land from the most productive to the most sterile. La 'Trois Tetons' and the Chatillon Creeks have each rich bottom lands, from one half of a mile to a mile in width, extending nearly to the mountains. About six miles from the mountains the bottoms rapidly widen until along the west boundary they become almost an unbroken savannah, thickly covered with grass, red-top and other varieties, some of which is five feet in height.

"The grant contains about forty thousand (40,000) acres which may be classed as first rate. The balance, excepting the sand hills in the southeast corner (about six square miles) and the extreme mountain portion (say ten square miles) is good grazing land; and between the Chatillon and Arenas Creeks affords a rich growth of gramma grass.

"The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines, and runs in a due westerly direction until it is lost in the savannah above mentioned. These creeks are timbered about five miles. There is considerable good pine near the base of the mountains and firs higher up. Along the streams are cottonwoods

(sweet cottonwoods) of considerable size. There is no stone except in the vicinity of the mountains. These are composed mainly of a dense and fine grained granite varying to sienite and gneiss. Near their base is found a very compact conglomerate, parti-colored, and presenting more than the beauties of the mosaic art. Saw fragments of limestone (jurassic) but none in position. Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general. A copy of the map, with the certificate of approval, is on page 324.

On March 29, 1864, the surveyor general forwarded to the Land Office a transcript of the field notes and plat of the survey with his approval entered thereon, the receipt whereof was acknowledged by the Land Office in a letter of date May 4, 1864, which letter is as follows:

"JOHN PIERCE, Esq., surveyor general, Denver City, C. T.

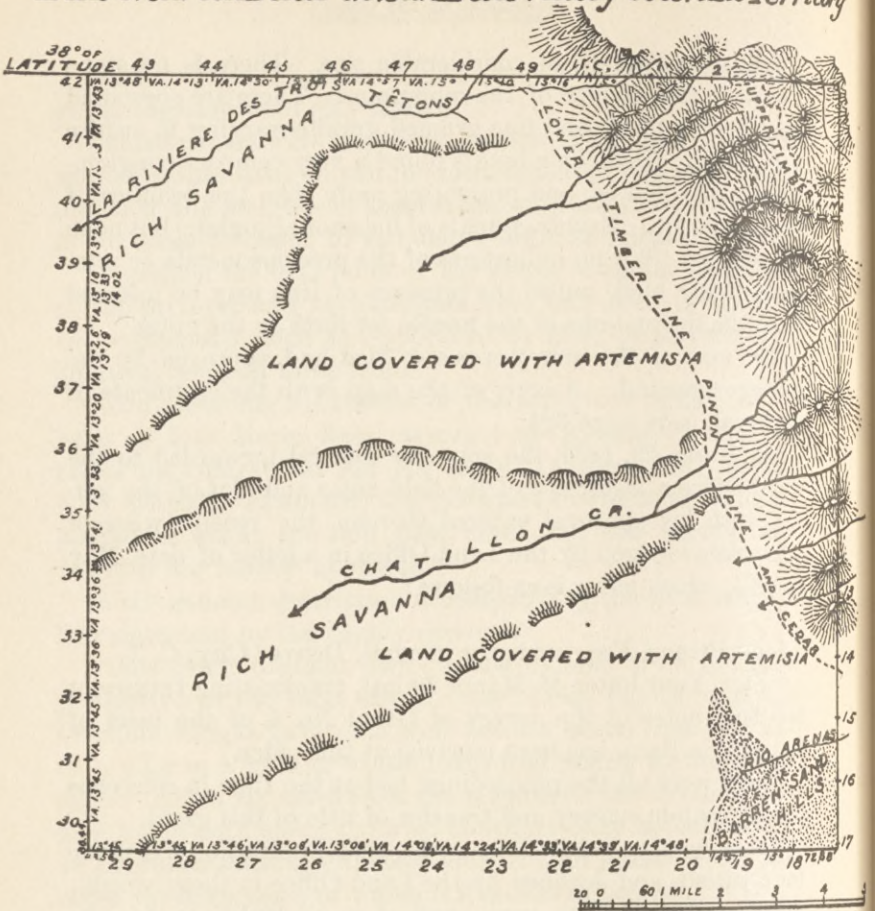
"SIR: Your letter of March 29 last, transmitting transcript and field notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office."

These were all the proceedings had at the time in reference to the location, survey and transfer of title of this grant.

Subsequently, and on January 14, 1868, application was made for a patent, and declined by the Land Office in these words:

"SIR: Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the sixth section of the act of 21st June, 1860, (Stats. vol. 12, page 72,) has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr. 128); a confirmation by a law is as

MAP OF THE SURVEY OF GRANT N°4 OF THE HEIRS OF Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Sur. Genl. Colo. & Utah

fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*.'"

Again, in March, 1879, a further application was made through the surveyor general of Colorado for a patent. This application was denied, and the Commissioner of the General Land Office, in his letter declining to issue a patent, after reciting the history of the grant, stated:

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that, as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that the Government may convey and vest the legal title without issuing a patent as effectually as may be done by patent. (*Larriviere* v. *Madegan*, 1 Dillon, 455; *Grignon* v. *Astor*, 2 Howard, 319; 3 Opinions of Att'y Gen. 350.)

"The surveyor general was authorized by the act to locate only vacant non mineral land. Unless the contrary appeared it would be presumed from the act of locating that the surveyor general determined the land was not mineral. But before locating, the surveyor general had expressly found and certified that this land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress, approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non mineral land.

"The act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power, to impose conditions not in the act.

"If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, preëmption and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or non mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat. 342), and by section 2447, Rev. Stat. U. S. But those provisions authorize a patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused."

Subsequently, and on June 28, 1884, in response to inquiries as to whether prospectors would be allowed to hold any mineral discoveries made on said location, the Land Office replied as follows:

"In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and non mineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for

the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Governor Gilpin for a patent, it was contended, before this office, that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusions reached:

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, to be non mineral.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power to impose conditions not in the act.

"The question as to the mineral or non mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.

"You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non mineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon, prior to or since 1880, must probably rest between them and the holders of the location No. 4."

And again, on June 8, 1889, in response to a similar application the acting commissioner replied as follows:

"In determining the various questions involved in the case, this office on March 21, 1879, decided that the character of the land involved had already been determined, and the matter, therefore, was *res adjudicata*.

"The question as to the mineral or non mineral character

of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain, etc.

"The case has, therefore, become final so far as this office is concerned."

In the annual report of the surveyor general of Colorado of the proceedings of his office, dated October 1, 1864, which was transmitted to Congress in the report of the Secretary of the Interior for 1864, it is stated:

"During the month of November, 1863, deputy surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located by William Gilpin, attorney for said heirs, under the act of June 21, 1860. The survey was made under the usual guarantee of its accuracy, and the field notes returned to this office for approval. Under instructions from the General Land Office dated February 12, 1864, that survey and location were approved, subject to the conditions and restrictions above referred to."

And in the report of the Commissioner of the General Land Office of the same year, and included in the same report to Congress, it is also stated:

"In Colorado Territory the returns of surveys for the last fiscal year consist of correction, parallel, township and sectional lines, with fifty miles of private grant embracing over 431,000 acres of public lands. Also 92,292 acres in the fourth location of the Las Vegas grant, as confirmed by the act of 21st June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado."

In the same volume is found a map accompanying the report of the Secretary of the Interior, which shows Baca Grant No. 4 segregated from the public domain, and it was admitted by counsel that all government maps issued from that time to this make a similar showing of the segregation of this tract.

The plaintiff and those under whom he claims have been in continuous and actual possession of this Baca Grant No. 4 since

at least 1869 ; in 1881 a fence was built entirely around the tract except for a little distance in the northeast corner, where the precipitous character of the mountains created a natural fence, and from that date onward to the present time it has remained under enclosure ; and the plaintiff and his grantors have paid the annual taxes levied thereon by the State of Colorado, amounting, since the year 1877, to $66,000.

In 1876 François Herard and two associates discovered a mineral vein, which they named the " Eastern Star," and on June 16 of that year filed a certificate of location in the proper office ; but in 1877, upon ascertaining that this mineral location was within the limits of the Baca grant, they abandoned the mine. In 1879 the owners of the grant leased this mine to one William Young, but he immediately thereafter threw up the lease. In 1883 the mine was again leased to the Gold Legion Mining and Milling Company, but this company soon abandoned the lease. In 1887 the defendant took a verbal lease from the manager of the grant for three months, at the expiration of which time he sought a renewal of the lease, but was refused. Subsequently to this refusal he took possession of the property, and has remained in such possession ever since. And it is this mine, with the adjacent ground, the possession of which was sought to be recovered by this action.

Mr. Edward O. Wolcott and *Mr. Joel F. Vaile* for plaintiff in error.

Mr. John R. Smith for defendant in error.

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

In 1860, in settlement of a claim under a Mexican grant to land in the vicinity of Las Vegas, Congress passed an act giving to the claimants an equal amount of land, to be by them selected elsewhere in the Territory of New Mexico, stipulating that the land should be vacant and non-mineral and should be located within three years in square bodies not exceeding five

in number. Within the three years they selected and located the tract in question as one fifth of the land to which they were thus entitled. They applied to the proper officers of the United States to take such steps as would perfect their title. More than thirty-four years ago the Land Department took its final action. Since then it has continuously treated the tract as private land, and refused to recognize it in any way as part of the public domain; within the same year, 1864, in which it took its final action, it reported the fact thereof to Congress, and that body has never in any way questioned the rightfulness of the action taken. And now at the end of this lapse of time the title is challenged, and challenged upon propositions which, if sustained, establish that the owners have never had, and do not now have, any certain title to a single foot of the land, and this although they have been in undisturbed possession all these years, and have paid taxes to the state authorities amounting to $66,000 at least and probably more.

The party who challenges the title of the plaintiff to the particular portion of the tract in controversy in this suit entered at first into possession of it as a tenant, and when at the termination of his lease he was refused a continuance thereof, took steps to maintain a possession and assert a right adverse to his former landlord. It is undoubtedly true that settled rules of law cannot be ignored because in any particular case their application works apparent harshness. At the same time the result to which the contentions of the defendant lead may well compel a careful examination of them.

These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the Government; that the Land Department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of minerals within the tract.

In examining these contentions it is well to consider first

the act of Congress of June 21, 1860, and the circumstances under which it was passed. For, as said in *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625, in reference to legislative grants, "they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." This act was a final disposition by Congress of certain claims under Mexican grants for lands situate in the Territory of New Mexico. The circumstances and character of these claims had been reported to Congress by the surveyor general of the Territory. Some of them were confirmed as reported and *in toto*, and, as stated in *Tameling* v. *U. S. Freehold & Emigration Co.*, 93 U. S. 644, *Maxwell Land Grant case*, 121 U. S. 325, and other cases, such confirmation operated as a grant *de novo*, and took effect at once as a relinquishment by Congress of all rights of the United States to the premises. Others were confirmed in part and for only fractions of the areas claimed, and as to them, by section 2, it was made "the duty of the surveyor general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section." Another claim was not confirmed, but leave was given to the claimant to bring suit, with a proviso that if the suit should not be instituted within two years the claim should be presumed to have been abandoned; and in respect to the claim before us the right of location was to continue in force for three years and no longer. Obviously, the thought was that these claims should not only be finally but speedily disposed of. It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future.

As the amount of the Las Vegas claim was large, and as the claimants were required to make their locations "in square bodies, not exceeding five in number," each location would necessarily be of a tract of considerable size; in fact, each one

was nearly 100,000 acres. The tract thus located was as a whole to be non-mineral. No provision was made for indemnity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none.

It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location. The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preëmption or townsite entries,

the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral. As was said in *Deffeback* v. *Hawke*, 115 U. S. 392, 404, where this matter was considered:

"We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the preëmption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." See also *Colorado Coal Co.* v. *United States*, 123 U. S. 307.

How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the

general Land Department of the Government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance or independently of the Land Department he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, written in response to an application for the right to make mineral locations within the tract, in which the Commissioner, after stating what had taken place, added: "You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be non mineral; the location was then perfected and the title passed."

It is also worthy of note that Congress did not consider that there was any great probability of the discovery of mineral wealth in New Mexico. By the act of 1860 it confirmed various claims, amounting to millions of acres; confirmed them absolutely and without any reservation of mines then known or to be thereafter discovered within their limits. And this, although under Spanish if not under Mexican law, all minerals were perpetually reserved from such grants. 1 Rockwell's Spanish and Mexican Law, p. 49, secs. 1, 2 and 3, pp. 112, 113 and 114. It made no appropriation for the exploration of the claims to be thereafter located, and although it required the completion of this location within three years, it made but meagre appropriation for surveys, the appropriation in 1860 for surveying both the public lands and private land claims in New Mexico being only $10,000. Act of June 25, 1860, c. 211, 12 Stat. 104, 108.

It will also be perceived that the surveyor general, as well as the register and receiver of the land office, each certified

that the land was non-mineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the Land Department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case [that is, whether the selection is either within or outside the existing surveys] the final condition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was non-mineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the Land Department.

But it is said that, the attention of the Land Department having been called to the fact that this location was made upon lands supposed to contain minerals, it was not satisfied with the requirements it had originally made; was not content with the certificates demanded of the surveyor general and the register and receiver, and expressly disapproved the evidence in fact furnished thereby, and, also, that while it finally authorized an approval of the survey and location, it directed that the certificate of approval should contain the special reservations named in the statute; that is, that the location should not embrace mineral lands. It is undoubtedly true that the suspicions of the Land Department were aroused by the report that was made as to the supposed character of the land embraced within this location, and that by its letter of January 16, 1864, it held that the evidence furnished as to the character of the land was not sufficient. This letter criticises the certificate of the surveyor general on the ground that, as appeared from an accompanying letter, it was based not solely upon his personal knowledge, but upon "information and conclusions deduced from reasoning." It also notes the fact that the certificate of the register and receiver required by the instructions was wanting. There is a seeming conflict between the statements in this letter and the records of the surveyor general's office. The latter indicate that the certificate of the register and receiver was forwarded with the

certificate of the surveyor general, while the letter of the Commissioner says that the former was lacking. This apparent contradiction may arise from the fact that the certificate of the register and receiver was sent in a different enclosure, or perhaps it was overlooked by the Commissioner of the Land Office. At any rate, it was about that time, at least, sent to the Land Department, for, as appears from the letter of February 26, it was returned by that department to the surveyor general. Obviously the Land Department, after sending the letter of January 16, reconsidered its action. It had received the certificate of the register and receiver, and had before it all the certificates required by the original letter of instructions, and instead of continuing the suspension of an approval for further proof, as indicated by the letter of January 16, it wrote, on February 12, to close the matter up, pointing out how all the difficulties which stood in the way could be removed. This letter notes the fact that by the statute it is made the duty of the surveyor general to make the survey and location. It contains no disapproval of the certificates or evidence furnished; authorizes him to approve the survey, although it directs that to his certificate of approval he "add the special reservation stipulated by the statute, but not to embrace mineral lands." It further notifies him that the statute does not provide for a patent, and that the law with the plat approved by him in the manner indicated will constitute the evidence of title. Thereupon the surveyor general proceeded to approve the survey, his certificate of approval being absolute and unconditional. He also approved the plat, though his certificate of approval to that was made as required by the letter of February 12, "subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860." He also forwarded to the Land Department the field notes, the survey and the plat with his certificates of approval attached, and they were received and filed by the department without objection. But one conclusion can be deduced from these proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been appropriated

by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected, ordered the closing of the matter, the passage of the title, and sought to protect the interests of the Government and guard against any criticism of its action by directing an entry in the certificate of approval that it was made subject to the conditions and provisions of the act of Congress.

In this three things are to be noticed: First, that the surveyor general, the officer specially designated to make the survey and location, the one primarily charged with the duty of determining its character, decided that the land was non-mineral. His certificate to that effect is unqualified. His certificate of approval to the field notes and the survey is the same. So far, therefore, as his action is concerned, there was an adjudication that the land was non-mineral. Second, the Land Department directed that the matter be closed, specified how it should be closed, and received and filed without question the report of the surveyor general's action. Third, the only qualification or limitation is found in the direction of the Land Department, followed by the action of the surveyor general in adding to his certificate of approval of the plat the proviso that it is "subject to the conditions and provisions of section 6 of the act of Congress of June 21, 1860." There was no reservation of the matter for further consideration in the Land Department or by the surveyor general. There was a finality so far as they were concerned.

What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred.

It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question — a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, preëmption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffeback* v. *Hawke*, *supra*, 406:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Further, it must be noticed that the Land Department has since 1864 again and again decided that the action then taken was final, that the land had been segregated from the public domain and become private property. Thus, so far as the judgment of the executive branch of the government is con-

cerned, the finality of the action taken in passing the title has been settled. But we may go further. As appears by the report of the surveyor general and of the Land Department, transmitted to Congress in 1864, the fact that this land had been finally appropriated to the claim of the Baca heirs was disclosed. Mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department.

Defendant relies largely on the decision of this court in *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States," held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass — and it passed unquestionably by the patent — it passed free from the contingency of future discovery of minerals.

Referring to the contention that if the question of mineral was open for consideration until the issue of a patent there would be great uncertainty in titles, the court said (pp. 326–7):

"We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places

under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized."

It quoted these words from the opinion in *Smelting Company* v. *Kemp*, 104 U. S. 636, 640:

"The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

And added (329–330):

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

* * * * *

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly, by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in officers of the Land Department."

But, it is said, no patent was issued in this case, and therefore the holding in the *Barden case*, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word "patent," or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued. *Rutherford* v. *Greene*, 2 Wheat. 196, 206; *Bryan* v. *Forsyth*, 19 How. 334; *Langdeau* v. *Hanes*, 21 Wall. 521, 531, in which this court said: "If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the lands segregated." The land passes out of the jurisdiction of the Land Department. The grant has then become complete, and the only remedy for any wrong in the transfer of such title is through the courts, and not in the Land Department. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 592, and cases cited in the opinion. In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in fact refused and when the

title passed the same as though a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Sec. 2447, Rev. Stat. taken from the act of December 22, 1854, c. 10, 10 Stat. 599, applies only to the case of a claim to land "which has heretofore been confirmed by law." And the same may be said as to the special act of March 3, 1869, c. 152, 15 Stat. 342. Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. In that respect it was like a land warrant, subject to location anywhere within the specified territory. As to land warrants, however, there is a specific provision for the issue of patents. Rev. Stat. § 2423. The Land Department was, therefore, technically right when it said that the statute did not order the issue of a patent, and that the case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title. *Carter* v. *Ruddy*, 166 U. S. 493. But as there was no statute in terms authorizing a patent, it was not within the power of the locators to compel the issue of one. No court would by mandamus order such issue in the absence of a specific and direct statute requiring it. So when the department refused to issue one the locators had no alternative but to accept that which the statute had provided as the means of acquiring and the evidence of title, and that must be treated as having all the efficacy of a patent.

Summing up the whole matter it results in this: Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the Territory of New Mexico, and directed the surveyor general of that territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statute and the instructions issued by the Land Department, that officer approved the selection and made the survey and loca-

tion. The Land Department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey and plat, and notified the parties through him that such field notes, survey and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the Land Department refused to issue one. All having been done that was prescribed by the statute, the title passed. The Land Department has repeatedly ruled that the action then taken was a finality. It has noted on all maps and in its reports that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the State upon it as private property, amounting to at least $66,000. While the approval entered upon the plat by the surveyor general under the direction of the Land Department was in terms "subject to the conditions and provisions of section 6 of the act of Congress, approved June 21, 1860," such limitation was beyond the power of executive officers to impose.

We are of opinion that at this late day the title of the locators and their grantees is not subject to challenge, and that it is a full, absolute and unconditional title.

The judgment of the Circuit Court will, therefore, be reversed and the case remanded for a new trial.

THOMPSON *v.* UTAH.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 553. Argued March 4, 7, 1898. — Decided April 25, 1898.

The provision in the constitution of the State of Utah, providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State.

Opinion of the Court.

THE case is stated in the opinion.

Mr. J. W. N. Whitecotton for plaintiff in error.

Mr. L. T. Michener for defendant in error. *Mr. A. C. Bishop*, *Mr. Benner X. Smith* and *Mr. W. W. Dudley* were on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an indictment returned in the District Court of the Second Judicial District of the Territory of Utah, at its May term, 1895 — that being a court of general jurisdiction — the plaintiff in error and one Jack Moore were charged with the crime of grand larceny alleged to have been committed March 2, 1895, in Wayne County of that Territory, by unlawfully and feloniously stealing, taking and driving away one calf, the property of Heber Wilson.

The case was first tried when Utah was a Territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a State.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground among others that the jury that tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offence a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, and the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside and another trial ordered.

This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the state prison for the term of three years. The judgment of conviction was affirmed by the Supreme Court of Utah, the court

holding that the trial of the accused by a jury composed of eight persons was consistent with the Constitution of the United States.

By the statutes of the Territory of Utah in force at the time of the commission of the alleged offence it was provided that a trial jury in a District Court should consist of twelve, and in a justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor; that the stealing of a calf was grand larceny and punishable by confinement in the penitentiary for not less than one nor more than ten years; that no person should be convicted of a public offence unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer, or upon the judgment of a court, a jury having been waived in a criminal action not amounting to a felony; and that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes. 2 Compiled Laws, Utah, 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997.

By the constitution of the State of Utah it is provided: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous." Art. I, Sec. 10. Also: "All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the State, and in the court having jurisdiction thereof. All offences committed against the laws of the Territory of Utah, before the change from a territorial to a state government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the State

of Utah, with like effect, as though such change had not taken place, and all penalties incurred shall remain the same, as if this constitution had not been adopted." Art. XXIV, Sec. 6.

As the offence of which the plaintiff in error was convicted was a felony, and as by the law in force when the crime was committed he could not have been tried by a jury of a less number than twelve jurors, the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the State while it was a Territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any State of an *ex post facto* law.

The Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed, but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Art. III, Sec. 2. And by the Sixth Amendment of the Constitution it is declared: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question. *Webster* v. *Reid*, 11 How. 437, 460; *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 468; *Springville* v. *Thomas*, 166 U. S. 707. In the last named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the Territory of September 9, 1850, 9 Stat. 453, c. 51, § 6, to provide that una-

nimity of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

It is equally beyond question that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States.

The judgment of this court in *Reynolds* v. *United States*, 98 U. S. 145, 154, which was a criminal prosecution in the Territory of Utah, assumed that the Sixth Amendment applied to criminal prosecutions in that territory.

In *Callan* v. *Wilson*, 127 U. S. 540, 549, 551, which was a criminal prosecution by information in the Police Court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the Third Article of the Constitution as well as by the Fifth and Sixth Amendments. The contention of the Government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be thereafter ceded for the purposes respectively of a seat of Government, forts, magazines, arsenals and dockyards; and, consequently, that that Amendment should be deemed to have superseded so much of the Third Article of the Constitution as related to the trial of crimes by jury. That contention was overruled, this court saying: "As the guarantee of a trial by jury, in the Third Article, implied

a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property — especially of the privilege of trial by jury in criminal cases." "We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States."

In *Mormon Church* v. *United States*, 136 U. S. 1, 44, one of the questions considered was the extent of the authority which the United States might exercise over the Territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which, *National Bank* v. *County of Yankton*, 101 U. S. 129, 133, it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the Territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it "may do for the Territories what the people, under the Constitution of the United States, may do for the States." Reference was also made to *Murphy* v. *Ramsey*, 114 U. S. 15, 44, in which it was said: "The people of the United States,

as sovereign owners of the national Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the court in *Mormon Church* v. *United States* then proceeded: "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein, is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161; 1 Chitty's Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this

country from England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power." 2 Story's Const. § 1779. In Bacon's Abridgment, Title Juries, it is said: "The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta." So, in 1 Hale's P. C. 33: "The law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah — which was under the complete jurisdiction of the United States for all purposes of government and legislation — the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a Territory.

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory,

that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the State not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offence was committed.

It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and "in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage." *United States* v. *Hall*, 2 Wash. C. C. 366; *Kring* v. *Missouri*, 107 U. S. 221, 228; *Medley, Petitioner*, 134 U. S. 160, 171. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: "But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in ex-

istence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." c. 9, 6th ed. p. 326. And this view was substantially approved by this court in *Kring* v. *Missouri*, above cited. So, in *Hopt* v. *Utah*, 110 U. S. 574, 590, it was said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan* v. *Missouri*, 152 U. S. 377, 382, said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt* v. *Utah*, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offence charged against him.

Now, Thompson's crime, when committed, was punishable by the Territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore be said that the constitution of Utah, when applied to *Thompson's case*, did not deprive him of a substantial right involved in his liberty, and

did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a Territory, it was competent for the State to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

The Supreme Court of Utah held that this case came within the principles announced by it in *State* v. *Bates*, 14 Utah, 293, 301. In the latter case no reference was made to the *ex post facto* clause of the Constitution of the United States. But it was held that the requirement of eight jurors in courts of general jurisdiction, except in capital cases, was not in conflict with the Sixth Amendment of the Constitution of the United States — the court saying that "if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end," and that "there can be no magic in the number twelve, though hallowed by time." But the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the State, in respect of a crime committed within its limits while it was a Territory, to dispense with that guarantee simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* v. *Utah*, above cited, the question arose whether

the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. The court said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be

deprived of his liberty by a tribunal not authorized by law to determine his guilt.

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

VIRGINIA AND ALABAMA COAL COMPANY *v.* CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA.

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

No. 100. Argued December 14, 15, 1897. — Decided May 9, 1898.

Where expenditures have been made which were essentially necessary to enable a railroad to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness so created would be paid out of the current earnings of the company, a superior equity arises, in case the property is put into the hands of a receiver, in favor of the material man, as against mortgage bondholders, in income arising from the operation of the property both before and after the appointment of the receiver, which equity is not affected by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the facts that the supplies were sold and purchased for use, that they were used in the operation of the road, that they were essential for such operation, and that the sale was not made simply upon personal credit, but upon

the understanding, tacit or expressed, that the current earnings would be appropriated for the payment of the debt.

Upon the evidence contained in the record it is *Held*, that in the contract with the Virginia and Alabama Coal Company and in that with the Sloss Iron and Steel Company, it was the intention of the parties that the coal furnished was to be used in the operation of the lines of the Central Company, and that the Coal Companies looked to the earnings of the Central System as the source from which the funds to pay for the coal to be furnished were to be derived.

In concluding that the claims of the intervenors were entitled to priority out of the surplus earnings which arose during the control of the road by the court, this court must not be understood as in anywise detracting from the force of the intimations contained in its opinions in *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, and *Thomas* v. *Western Car Co.*, 149 U. S. 95.

On December 19, 1888, the Georgia Pacific Railroad Company leased its line of railroad extending from Atlanta to Birmingham, Alabama, to the Richmond and Danville Railroad Company, a corporation organized under the laws of Virginia, and which owned or controlled by lease a line of railroad from Atlanta to Washington, in the District of Columbia; and, thereafter, the Georgia Pacific road was operated by the Richmond and Danville Company. On June 1, 1891, the Central Railroad and Banking Company of Georgia, a corporation under the laws of Georgia, owning and operating a line of railroad from Atlanta to Savannah, Georgia, and which owned or controlled various other railroads or lines of steamships and a large amount of other property, executed a lease for ninety-nine years of said railroad and various lines and property controlled by it to the Georgia Pacific Company. The lease was signed on behalf of the Georgia Pacific Company by its president, pursuant to the direction of the board of directors of the company, but it was subsequently asserted that this was done without previous authorization or ratification of the stockholders. The Georgia Pacific Company did not take possession of the property of the Central Company or assume or exercise any control over the same, except that on the date of the lease it requested the Richmond and Danville Company to assume the control of the leased property, with which request there was an immediate compliance.

Statement of the Case.

In March, 1892, a suit was instituted in the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia by Rowena M. Clarke, a stockholder of the Central Company, to obtain a cancellation of the lease of the property of that company and other specific relief. A temporary receiver was appointed on March 4, 1892. The Danville Company, as also the Georgia Pacific Company, appeared and disclaimed any rights under the lease, and, on March 28, 1892, the preliminary receiver, and other persons constituting the then board of directors of the Central Company, were appointed joint receivers to take charge of the railroad property and assets of the Central Company until there could be a reorganization of such board in pursuance to its charter.

As ancillary to Mrs. Clarke's bill, the Central Company, on July 4, 1892, filed a bill against the Farmers' Loan and Trust Company of New York, trustee, and other creditors, averring its inability to meet many matured obligations, and that it had defaulted on July 1, 1892, on the semi-annual interest due on $5,000,000 mortgage bonds dated October 1, 1872, for which the Farmers' Loan and Trust Company was trustee, and that for these reasons the directors were unable to assume the management of the property, and requesting the court by proper process to call upon its creditors to come into court, and that the court would administer the property for the benefit of all interested. The Farmers' Loan and Trust Company assented to the continuance of the receivership; and, on July 15, 1892, under the depending bill, all the receivers, with the exception of one H. M. Comer, were discharged, and Mr. Comer was continued as receiver.

Subsequently, in May, 1893, under bills filed to foreclose a mortgage executed by the Savannah and Western Railroad Company, Comer and one Lowry were appointed receivers, and directed to continue to operate the road as part of the system of the Central Company.

On January 23, 1893, the Farmers' Loan and Trust Company of New York, trustee for the mortgage bondholders of the Central Railroad and Banking Company of Georgia, filed its dependent bill in said court for the foreclosure of the five

million dollar mortgage on the main stem of the Central Railroad from Atlanta to Savannah because of default in the payment of the interest due July 1, 1892, and the receivership was extended to that bill.

In an agreed statement of facts contained in the record, it was stipulated as follows:

"It is a fact that since the receivership the receivers of the Central Railroad and Banking Company of Georgia have expended [for] betterments in its railroad lines from the income of the roads during the receivership a sum much larger than the entire claim of the intervenors."

On June 30, 1893, a final decree was entered dismissing, for want of equity, the bill filed on behalf of Mrs. Clarke, it being, however, recited that the validity of the lease by the Central Company was not passed upon.

On May 26, 1892, the Virginia and Alabama Coal Company was allowed to become a party complainant in the Clarke suit and to file an intervening petition therein. The Central Company and its receivers and the Danville Company were made parties defendant to the intervention. It was averred in the petition that the Danville Company, while operating the Central Company, purchased from the intervenor, for the use and benefit of the Central, in its several divisions, coal, which purchase was made in pursuance of a contract of Danville, dated July 13, 1891. For coal furnished under said contract and actually delivered to the Central Company, (against which latter company in the course of said business the bills were originally made out,) and used by said Central Company in the running of its machinery, $26,607.44, as shown by a statement of account annexed to the petition.

The contract referred to in the petition reads as follows:

"Richmond and Danville Railroad Company.

"Office general purchasing agent; Joseph P. Minetree, general purchasing agent, Atlanta, Ga.

"The Virginia and Alabama Coal Company; Mr. J. R. Ryan, V. P. and G. M., Birmingham, Ala.

"Dear Sir: We beg to accept your verbal offer of to-day

to furnish the C. R. and B. Co. of Ga. with, say 275,000 tons of best quality engine steam coal for the next twelve months, commencing July 1, 1891, and ending July 1, 1892, at 90 cents per ton of 2000 pounds, to be delivered on cars at mines, and to be shipped at times and in quantities to suit. Settlements for the coal delivered in any one month to be made on or about the first of the second succeeding month, and the C. R. and B. Co. of Ga. reserves the right to increase or decrease the monthly deliveries upon reasonable notice at any time. The division superintendents of the divisions for which the coal will be required will communicate with you as to the monthly deliveries, and all bills for coal furnished under this contract to be sent direct to the division superintendents. Kindly confirm this at once, and oblige, yours truly,

"(Signed) JOSEPH P. MINETREE,
"*General Purchasing Agent.*

"July 13, 1891."

Besides asking a decree against all the defendants jointly for the amount claimed with interest, the petition prayed for general relief. The petition was subsequently amended by averring that the Danville Company was liable under the contract or purchase, and that the Central Company was liable because the coal was bought and actually used for the benefit of the Central Company of Georgia.

An amendment was subsequently filed to the petition, setting up that the coal delivered by the Virginia Company had been furnished to the Central Company under the contract recited in the petition, and that said coal was furnished to the Central Company for the purpose of being used by it in the running of its machinery and the prosecution of its business; that a great portion of said coal remained on hand in the bins and storage places of the Central Company at the time of the appointment of the temporary receiver, and a large portion was still on hand when the board of receivers was appointed, and went into the possession of said receivers, and had since that time been actually used by the receivers in the running of the machinery of and the operation of the business of the

Central Company, and it was asked that an account might be taken as to the portions so used, and that it should be decreed to be a part of the operating expenses of the railroad company in the hands of the receivers, to be paid as a part of the expenses of the receivership.

On December 3, 1892, the Virginia and Alabama Coal Company, suing for the use of the Sloss Iron and Steel Company, a corporation under the laws of the State of Alabama, filed a further intervening petition, asking payment of an account aggregating $14,359.38, for coal furnished for use on the Central lines by the Sloss Company, under the contract between the Danville Company and the Virginia Company. Grounds of recovery were stated similar to those relied upon in the prior intervention, it being also insisted that if recovery was allowed against the receiver only for the coal used by him, it should be paid for at its value at the place where used, viz., $2.50 per ton.

To these interventions the Central Company and the receivers thereof separately demurred, while the Danville Company filed motions asking that it be dismissed as a party defendant thereto. The motions were overruled, while decisions upon the demurrers were deferred until the hearing of the interventions.

The issues raised by the respective interventions were referred to a master for report and decision. At different dates the master reported, recommending judgments in favor of the Virginia and Alabama Coal Company, on its behalf and as suing for the use of the Sloss Company, against the Danville and Central Companies and the receiver of the Central, jointly and severally, for the full amounts claimed with interest, and that upon the payment of the amount of the decree by the Central Company or its receiver, a judgment should be entered in its or his favor against the Richmond and Danville Company for whatever sum might be paid for coal delivered prior to March 4, 1892, and actually used before the appointment of a receiver. By a supplemental report the master reduced the judgment against the receiver for the benefit of the Virginia Company solely, by the sum $5543.10, with interest, and

the judgment for the use of the Sloss Company for the sum of $2682.80, owing to the fact that a specified quantity of the coal which had been sold and delivered under the contract had not been used on the lines of the Central Company, but by lines held to be independent roads. Exceptions were filed to the master's report, both as to his findings of fact and conclusions of law, on behalf of all parties to the intervention. The reports of the master and the exceptions filed thereto came on for hearing before the court; and, on December 29, 1893, an order was entered sustaining the exceptions in part and overruling them in part. A final decree was entered on January 1, 1894, and amended on March 31, 1894, setting aside the reports and adjudging that the Virginia and Alabama Coal Company recover from the Central Company $6171.98 for the "amount of unpaid for coal" in cars consigned to the officers of the Richmond and Danville Railroad Company, and which was unloaded after March 4, 1892, and appropriated by the receivers of the company, being 6857.75 tons, at ninety cents per ton; and the Virginia and Alabama Coal Company, suing for the use of the Sloss Iron and Steel Company, was adjudged to recover of the Central Company $735.16, for 816.85 tons of coal at ninety cents per ton, being the amount of unpaid for coal unloaded after March 4, 1892, and appropriated by the receivers. The receivers of the Central Company were directed to pay the sums so found due out of the current earnings of the Central Railroad and Banking Company in their hands.

An appeal was prosecuted from the final decree to the Circuit Court of Appeals for the Fifth Circuit, which court, on February 25, 1895, reversed the decree of the Circuit Court, 30 U. S. App. 263, and remanded the cause to that court "with instructions to enter a decree in favor of the intervenors, the Virginia and Alabama Coal Company and the Sloss Iron and Steel Company, for the amounts respectively due them for coal delivered to the lines under the control and forming a part of the system of the Central Railroad and Banking Company of Georgia, as shown by the evidence in this cause, including the coal furnished before the appoint-

ment of the receivers and that found in the bins of the line after such appointment and of which the receivers took possession, as well as the coal delivered to the receivers after their appointment, the amount due being determined by the contract price, and an order that they recover from the Central Railroad and Banking Company of Georgia and the receivers of the same such sums thus found to be due. No decree will be entered in favor of the intervenors for the payment of that portion of the coal which was used by the Charlotte, Columbia and Augusta Railroad Company."

An application for a rehearing being denied, a writ of certiorari was allowed by this court.

Mr. Thomas Mayhew Cunningham, Jr., and *Mr. Alexander Rudolf Lawton* for the Central Railroad and Banking Company.

Mr. Walter B. Hill and *Mr. N. E. Harris* for the Virginia and Alabama Coal Company.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

In each of the intervening petitions a liability of the Central Company was asserted to arise from the fact that the coal was sold to and purchased by the Danville Company for use in operating the lines of railway of the Central Company, and in the lower courts, as in this court, it was contended that under the prayer for general relief the petitioners were entitled to have their demands allowed as a preferential claim against any surplus income which might arise from the operation of the Central road under the receiver, after payment of the ordinary expenses of operation, or out of the corpus of the estate or the proceeds of sale thereof, in the event that the income had been diverted by the receivers in expenditures for betterments.

Had the Central Company, through its own officers, operated its line of railway during the period when the coal in question

was furnished, it cannot be doubted, in the light of the decision in *Burnham* v. *Bowen*, 111 U. S. 776, that in the event that the company failed to make payment for such coal while a going concern, the indebtedness created, upon the appointment of a receiver might have been properly allowed as a charge upon the surplus income arising during the receivership. In the case referred to, an Iowa state court in the early part of 1875, and subsequently, by removal, a Circuit Court of the United States sitting in equity, took possession of, and operated through a receiver, a line of railway owned by the Chicago, Dubuque and Minnesota Railroad Company. When the receiver took control the company was indebted to the Northern Illinois Coal and Iron Company for coal furnished "during 1874," and used in running locomotives. During the receivership there was paid from the earnings which came into the hands of the receiver the amount of a judgment indebtedness for lands purchased by the company for its depot and offices, and also several judgments rendered against the company for its right of way. The sum of these payments by the receiver exceeded the amount of the indebtedness owing for the coal furnished as above stated. In October, 1876, a decree of strict foreclosure was entered, in which, however, a reservation was made, for future decision, of all matters in controversy between the plaintiffs and all and any of the defendants and intervenors and claimants. Among the persons who had intervened in the foreclosure proceedings was one Bowen, who had acquired acceptances which had been given to the coal company for the indebtedness referred to. He petitioned for a judgment against the railroad company for the amount of such indebtedness, "and that such judgment be declared a lien on the property and road of said company in the hands of said trustees and their grantees." A decree was entered on October 30, 1880, finding due to Bowen on his claim a specified sum, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof, "said property having passed to said trustees subject to the rights and equities of said Bowen, intervenor,

and said trustees, and all parties holding under them, taking said property subject to such rights and equities on the part of said Bowen, intervenor." Provision was then made for a sale of the property if the claim was not paid. An appeal having been taken by the trustees, this court held that, at time of the appointment of the receiver, the indebtedness in question was one of the current debts for operating expenses made in the ordinary course of a continuing business, to be paid out of current earnings. In the course of the opinion, speaking through Mr. Chief Justice Waite, the court reiterated the doctrine enunciated in *Fosdick* v. *Schall*, 99 U. S. 235, 252, where it was declared that: "The income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income."

And it was further said pp. 781, 782:

"So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick* v. *Schall*, the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience

to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick* v. *Schall*, which we see no reason to modify in any particular."

It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property is a charge in equity on the continuing income as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected by the fact that while the company is operating its road its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation and improvement of the property. This principle finds support in *Miltenberger* v. *Logansport Railway Company*, 106 U. S. 286, 311, 312, the decision in which case was approvingly referred to in *Union Trust Company* v. *Illinois Midland Company*, 117 U. S. 434, and in the recent case of *Thomas* v. *Western Car Company*, 149 U. S. 95, 110. In the *Trust Company case*, the court said (p. 456):

"The principle laid down in *Wallace* v. *Loomis* was applied in *Miltenberger* v. *Logansport Railway Company*, 106 U. S. 286, 311, 312. In that case a bill was filed by a second mortgagee against the mortgagor and a first mortgagee and judgment creditors of the mortgagor to foreclose a mortgage on

a railroad. On the day the bill was filed, and without notice to the first mortgagee, a receiver was appointed, and power given him to operate and manage the road, 'receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses.' After that, and without notice to the first mortgagee, who had not appeared, though notified of the order appointing the receiver, and of the pendency of the suit, the court authorized the receiver to purchase engines and cars, and to adjust liens on cars, owned by the mortgagor, and to pay indebtedness not exceeding $10,000, to other connecting lines of road, in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment of the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes, and rights of way, and back pay, and supplies in operating the road, the certificates to be payable out of income, and, if not so paid, to be provided for by the court in its final order. Claims thus arising were afterwards allowed to be paid out of the proceeds of sale before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling stock, and for the adjustment of liens, and for the construction of the five miles of road and the bridge, and for the amount due connecting lines,

some of which were incurred more than ninety days before the receiver was appointed. On the latter branch of the subject it said: 'It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay preexisting debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non payment, the general consequence involving largely, also, the interests and accommodations of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by Mr. Justice Woods, in *Barton* v. *Barbour*, 104 U. S. 126.'"

Is there any good reason why the equitable doctrine applied in the cases to which we have referred should not be applied

under a state of facts such as shown at bar, where the immediate management of a road was confided by its owners, without protest or interference by the bondholders, to third parties? It would seem not. The dominant feature of the doctrine, as applied in *Burnham* v. *Bowen*, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the material man as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property.

The equity thus held to arise when a purchase of necessary current supplies is made by the owning company, is not in anywise influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and purchased for use, and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt. Clearly, if the owning company had entered into an agreement with some individual to commit to his uncontrolled management as their agent the operation of the company's lines, the bondholders could not be heard to say that thereby no equities could arise in favor of labor or supply claimants in the income of the property preserved or kept in operation by their efforts. This would be the category in which the Danville Company would stand if the lease of the Central lines was not valid. On the other hand, if the lease was lawful, upon the insolvency for any cause of the Danville Company while the lease continued in force, its relation toward its leased line in the adjustment and settlement, as against the leased road, of equities arising between those who had furnished supplies to the road and the bondholders would be precisely that of an owner of the leased lines, and if such possession is terminated by the court through

the agency of a receiver equities in the income of the property continue to survive.

Upon the evidence contained in the record, we hold that the contract upon which both intervenors relied — the deliveries of coal furnished by the Sloss Company being under the contract which had been made with the Virginia Company — was made with the Danville Company, but we conclude from the terms of the contract that the intention of the parties was that the coal was to be used in the operation of the lines of the Central Company, and that the mining companies did not rely simply upon the responsibility of the Danville Company, but on the contrary that the coal companies looked to the earnings of the Central system as the source from which the funds to pay for the coal to be furnished was to be derived.

While it was established that during the time the Danville Company was in control of the Central property a semi-annual instalment of interest — which exceeded the amount of the claims of the intervenors — was paid to the holders of bonds of the Central Company, we cannot say that there was a diversion of income from the Central lines for such purpose. At the best it could only be conjectured that such payment was probably made from that income. Whether, however, there was a diversion of income before the receivership, inuring to the benefit of the bondholders, the equity in favor of the coal company for payment out of subsequent income, as we have seen, survived and attached to the property when it was taken possession of by the receiver; and if a surplus of income was created by the operations of the road under the receiver, sufficient to satisfy the claims of the intervenors, the right to demand that the surplus income be applied in satisfaction of the claims in question was undoubted. From the evidence we find that there was such surplus. It was stipulated in the record, as a fact, "that since the receivership, the receivers of the Central Railroad and Banking Company of Georgia have expended for betterments on its railroad lines from the income of the roads during the receivership a sum much larger than the entire claim of the intervenors." Keep-

ing in mind the manifest purpose of this stipulation, which undoubtedly was to present the question of the right of the claimants to resort to the corpus of the estate for payment of their claims, we must give the term "betterments" a broad and not a restricted meaning. So construed, it must be held to have referred to expenditures for the improvement of the property as distinguished from mere payments for operating expenses and ordinary repairs which are usual and legitimate terms of outlay from current receipts. This is the sense in which the term was understood by this court in *Union Trust Company* v. *Illinois Midland Company*, 117 U. S. 434, where the validity of receivers' certificates was upheld, which had been paid out of the proceeds of the sale of the corpus of the property, because issued to replace earnings diverted from paying operating expenses and ordinary repairs to payment of betterments (p. 462).

The circumstance that it is uncertain from the terms of the stipulation, whether the expenditures for betterments were made by the receivers under the stockholders' bill, or under the bill filed by the Central Company or under the trustee's bill for foreclosure, is immaterial. Even though the mortgages securing the bonds provided for the sequestration by foreclosure of the income of the road for the benefit of the bondholders, for reasons already stated, that income until strict foreclosure or a sale of the road was charged with the prior equity of unpaid supply claimants such as those now before the court.

In concluding that the claims of the intervenors were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in anywise detracting from the force of the intimations contained in the recent utterances of this court in the *Kneeland* (136 U. S. 89) and *Thomas* (149 U. S. 95) *cases*, as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior

to a receivership. In the *Kneeland case*, however, the claim refused priority was based upon an alleged instrument of lease, and was for four months' rental of cars operated on a line of railroad by a receiver appointed at the suit of a judgment creditor, such receiver being succeeded in office by a receiver appointed in the foreclosure proceedings instituted by the trustees of the mortgage bondholders. It was held that the alleged contracts of lease were in substance and effect "antecedent contracts of sale;" that in those contracts ample provision had been made by the vendor for his security, by stipulations authorizing a retaking of the property upon failure to make payment promptly of the instalments of purchase money as they became due, and that the claim against the fund was in reality for a portion of the purchase price of the cars. Under these circumstances, the debt was held not to be embraced "in the few specified and limited cases" in which this court "has declared that unsecured claims were entitled to priority over mortgage debts;" and particular attention was called, among other things, to the fact that the receivership at the suit of the judgment creditor was not for the benefit of the mortgage bondholders, so that it could not be asserted that the expenditures of such receivership were payable in any event out of the income or corpus of the property; and the fact was also noticed that from the time of the purchase of the rolling stock in question in the suit to the time of the final disposition of the mortgage foreclosure the receipts did not equal the operating expenses, and there had been no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In the *Thomas case*, claims for rental of cars, which rental had accrued prior to the receivership, were denied priority over the mortgage bonds, but the facts in that case were such as to justify the conclusion that the car company contracted "upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity." In neither the *Kneeland* nor the *Thomas case* was there any intention to question the prior decisions of the court, which allowed priority to claims based upon the

furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity.

In view of the conclusion which we have reached, none of the other matters urged in argument need be noticed. The decree of the Circuit Court of Appeals being in consonance with the views we have expressed, the decree of that court is

Affirmed.

Mr. Justice Peckham and Mr. Justice McKenna, not having heard the argument, take no part in this decision.

SMITH *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 212. Submitted April 20, 1898. — Decided May 9, 1898.

When an entryman goes to the public land office for the purpose of obtaining public land, and is told by the receiver that his proofs cannot be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer of the United States, and not to him as the agent of the entryman, and the payment is to be regarded as one made to the Government and as public money, within the meaning of the law and of any bond given for the faithful discharge of the duties of his office by the receiver, and for his honestly accounting for all public funds and property coming into his hands.

This action was brought against Frederick W. Smith and the sureties on his official bond as receiver of public moneys in the Tucson land district in the Territory of Arizona. The bond was dated March 7, 1888, and the condition therein was that "if the said Frederick W. Smith shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for

the same and for all public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise, to remain in full force and virtue."

Smith was appointed receiver on the 28th of February, 1887, and remained such receiver until the latter part of November, 1889, when he was removed and Charles R. Drake was appointed his successor, who assumed the duties of the office and took charge of the books and papers on December 3, 1889. The Government claimed that the condition of the bond had been violated by the failure of Smith to faithfully disburse all public moneys and to honestly account for the same, and that he was indebted to the Government by reason thereof in various sums, amounting to over $19,000. During the time of Smith's incumbency there was either no register of the land office in the Tucson district, or the person occupying that position was in such ill health as to be unable to attend to the duties of the office. Smith was himself also in ill health during 1889. Owing to these facts the business of the office ran largely behind, and there were so many persons presenting their proofs and making their payments to Receiver Smith, before he was ready to pass upon the sufficiency of such proofs and before the register had acted upon any of them, that a large sum of money thereby accumulated in the hands of the receiver, amounting at the time he was removed from office to about the sum of $40,000. Prior to the time when the receiver was removed from office in November, 1889, no final action had been taken by him or the register in regard to any of the applications involved in this record.

Before his removal it had been the custom of the Land Department not to permit the giving of any receipt by a receiver, for money paid him by an applicant for entry, until such application had been finally acted upon by the receiver and the register, and then, if favorably decided, the custom was for the receiver to charge himself in his account with the Government with the amount of the money which had already been paid him by the applicant. If the application were not favorably acted upon, it was then the custom of a receiver to

return the money to the applicant. This was authorized by the Government.

An agent of the Government came to Tucson after the receiver's removal and on examining his books stated that the receiver did not owe the Government anything. One of the sureties on the receiver's bond had heard of the receipt of these moneys by Smith, and had obtained from him $25,000, being part of the moneys which Smith had received as above mentioned. While in possession of this money the surety saw the agent of the Government and inquired if there were any charges against the receiver, his principal, and that he wanted to know so that he might use the money Smith had paid him to repay the Government any amount that might be found due on an accounting, and he was told by the agent that Smith's accounts were all right, and that he did not owe the Government a dollar. It is claimed that thereafter the $25,000 were refunded to the entrymen who had made payments to Smith, until the amount was exhausted.

In April, 1890, there was still a very large accumulation of cases in the Tucson office where proofs had been made and filed with Smith, and moneys had been paid to him, while receiver, as the purchase price of the lands desired and no final receipts had been given by him or his successor. In this condition of affairs the Commissioner of the General Land Office wrote the following letter:

"Letter 'M.'

"DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

"WASHINGTON D.C. *April* 30, 1890.

"Register and Receiver, Tucson, Arizona.

"SIR: I enclose herewith a statement as taken from the records of your office, showing the final proofs now in your office awaiting examination on which the money in payment for the same was paid to Fred. W. Smith, the late receiver, and was by him appropriated to his own use and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the accompanying

list, and if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred. W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date as your authority therefor. The receiver will enter upon the books of his office, under the account of Fred. W. Smith, late receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted and prepare supplemental abstracts of the same, noting thereon, 'Allowed by letter "M" of April 30,' and purchase money is to be charged to Fred. W. Smith, the late receiver. You will then prepare an account current, Form 4–105, thereof and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen in accordance with the instructions herein contained, noting on the receipt, as his authority, this letter by initial and date, and after you have carefully examined all of these papers as instructed in this letter, you will forward them to this office for future consideration.

"The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States; but, as a matter of equity, in view of the general circular of this office, which provides that proof without payment must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accord with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and

clear that, reluctant as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fredrick W. Smith, receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the Government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

"Very respectfully, WILLIAM STONE,
"*Assistant Commissioner.*"

Pursuant to the directions contained in the above letter, the receiver, Mr. Drake, issued, in all cases where the proofs were satisfactory, final receipts to the various entrymen who had made applications for entry and paid their money to Smith while he was receiver, and the payments to Smith in such cases were recognized as payments to the Government.

Upon the trial of the action in the Arizona court judgment for nearly six thousand dollars was given for the United States for the amount found to be due by the jury in cases where payments had been made to Smith and the final proofs had been favorably decided upon by his successor. That judgment was affirmed by the Supreme Court of the Territory, and the defendants brought the case here for review.

Mr. L. E. Payson and *Mr. W. H. Barnes* for appellants.

Mr. Solicitor General and *Mr. Felix Brannigan* for appellees.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The question to be determined in this case is, whether, under the circumstances above set forth, the moneys received by Receiver Smith, and to recover which the action herein

was commenced, were public moneys within the meaning of the law and the bond given by the receiver.

The moneys paid to the receiver were paid upon the making of proofs by the entrymen under various statutes of the United States providing for the sale of the public lands, such as the statute relating to preëmptions, Rev. Stat. §§ 2257–2288; the statute relating to homesteads, Rev. Stat. §§ 2289–2317; the statute relating to the sale of desert lands. Act of March 3, 1877, c. 107, 19 Stat. 377. In the course of the proceedings under these acts and in the examination of the proofs submitted, various questions of fact arise and are to be decided by the register and receiver, who are to be satisfied of the existence of the necessary facts mentioned in the statute, and of the regularity and sufficiency of the proofs. When so satisfied the register issues his certificate to that effect, and the receiver gives what is known as a "final receipt," and upon the two papers the patent finally issues. There must be the favorable action of both register and receiver before the final papers issue, but such action need not be simultaneous. The receiver may act at one time and the register at another, but both must act before the case is concluded and the papers signed upon which the patent is subsequently issued. *Lytle* v. *Arkansas*, 9 How. 314; *Potter* v. *United States*, 107 U. S. 126.

The statutes are somewhat general in their provisions as to the time of payment of the purchase price of the lands, merely providing that the entries desired may be made upon satisfactory proof being made to the register and receiver and "upon paying to the United States the minimum price of such land."

The statutes do not provide that the entryman shall not pay the money before the final decision is made determining the sufficiency of his proofs, but they simply provide that when the register and receiver are so satisfied and upon payment of the money, entry may be made. The matter of the time of payment, so long as it is made before the entry, is thus left for regulation by the department having the matter in charge. Such regulations are made under § 161 Rev. Stat., permitting each head of a department to prescribe regulations, not incon-

sistent with law, for the government of his department and the conduct of its officers and clerks, etc.

Acting under the authority of section 161, the General Land Office provided by its general circular with regard to the time when payment for public lands sold should be made, and directed "that proofs without payment must in no case be accepted." This regulation did not refer to "final" acceptance of proof, resulting in a favorable decision upon the application. The statutes already provided that it was only *upon payment* that the entry might be made. The regulation referred to the taking of the proofs at all. It could only mean that no proof proffered by an entryman should be received without payment of the purchase price of the land which he desired to purchase. The probable purpose of the rule was to prevent the unnecessary examination of proofs in cases where they might be found to be satisfactory and yet the purchase price should not then be forthcoming. Whatever the reason, the direction was plain and unambiguous, and it absolutely forbade the reception of the proofs of the entryman unless at the same time he paid the purchase price to the receiver for the lands which he proposed to buy. Thus the entryman could not make his proofs and leave them with the receiver for him and the register subsequently to act upon them, unless the entryman at the time of making his proofs and leaving them for future examination and decision paid the purchase price for the lands. This regulation is not inconsistent with or in violation of the statutes in regard to payment. As we have observed, the payment must by statute be made before entry is allowed, but the particular time is not stated. The regulation above mentioned then comes in, the effect of which is to prevent the acceptance of proof without payment, and the payment must therefore be made when the proof is offered, and it may be some time before it is favorably acted upon by both register and receiver. Thus under provision of law and pursuant to valid requirements of the Land Office the entryman is compelled to pay his money at the time he proffers his proofs and before final action upon them is taken by the two public officers designated in the statutes. When the entryman

goes to the public land office for the purpose of obtaining the land he desires, and is told that his proofs cannot be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer, acting in the line of his duty, and it is safe to say that the entryman is without any thought or intention of paying the money to such receiver as his own private agent, to be kept by that agent in trust until the proofs are satisfactory, and to be then paid by him to the Government; nor are the circumstances of that nature which would lead to the belief that in making such payment the entryman is in fact trusting to the good faith and integrity of the receiver as his agent and that he does not regard himself as dealing with a public officer of the Government. The law accords with the fact. How can it be said that the money which he pays does not become public money upon such payment, when he pays it pursuant to law as the purchase price of land which he desires to buy and the money is exacted from him by the Government before any final action is taken upon his application? What difference does it make that the Government comes under an obligation to repay the money to the man in case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the Land Office. See *King* v. *United States*, 99 U. S. 229.

As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, and is consistent with and authorized by law, it seems to us that the money thus paid is received by the receiver as public money and in his official capacity, and he is neither in law nor in fact the agent of the entryman. If the proofs are unsatisfactory and the money is returned, it is returned by the receiver as a public officer and as the agent of the Government, and the money is returned by the Government through its agent.

The custom of the Land Office at the time in question not to have such money appear in the accounts of the receiver

with the Government until after the proofs had been passed upon by both register and receiver and a final receipt given, does not affect the character of the money so paid. The receiver receives the money as a public officer pursuant to the provisions of law. While in the hands of the receiver it remains public money, received by him by virtue of his office, and the money belongs to the Government as between it and the receiver, although it may be under obligations to return the same to the entryman in case his proofs were rejected. When the Government authorized the return of the money by the receiver, in making such return he acted as its agent and not as the agent of the entryman, and the payment was not by the receiver in his personal capacity.

It is true that on some occasions prior to the execution of this bond it had been decided by the Commissioner of the General Land Office that under the law the money paid to a receiver by an entryman before the final determination of his application and a certificate given by the register was not public money, but was paid by the entryman to the receiver as his own agent, and that until the proofs were favorably passed upon and a final receipt given, the money in the hands of the receiver was at the risk of the entryman; it was received by the receiver in his personal capacity as a private individual, and if not properly paid over recourse for the money must be had against the receiver personally by the parties aggrieved. Such was the case of *Matthiessen* v. *Ward*, 6 L. O. Decs. 713. This rule was upheld by the Secretary of the Interior.

The decision does not refer to the regulation made by the department that no proof shall be accepted from the entrymen without payment of the money. This regulation is a most vital part of the whole proceeding, and instead of the moneys not being payable to the receiver until an entry had been allowed by the register and a certificate given, the regulation of the department distinctly provided that payment of the purchase price was to be insisted upon as a condition precedent to the acceptance of proofs at all. The decision of the department was not in any sense a regulation under section

161 of the Revised Statutes, but was the opinion of the Secretary upon the law and regulations as they existed. Such opinion is entitled to and it receives great respect and consideration by this court, but it is not binding upon us as a valid regulation of the department and cannot be so regarded.

We are unable, for the reasons already stated, to concur with the opinion of the Commissioner.

These distinctions between the acts of the receiver as an alleged agent of the entryman in receiving the money prior to the decision upon the sufficiency of the proofs, and the same receiver as agent of the Government in the keeping of public moneys, ought not to be created by any refined reasoning. Fair protection of the entryman in his dealings with the Government ought to be given when possible. There can be no doubt of the fact that the entryman has no idea of any such distinction, nor can there be any doubt of the fact that when he pays the money to the receiver he supposes he is paying it to the Government through its public officer, and by reason of provisions of law and the regulations of the department.

Public money in the sense of the law, and as used in this bond, is money which legally comes to the receiver by virtue of his office and as a public officer and while carrying out the duties of his office, and he cannot be permitted to say that it was not public money when so received. Being public money, he is bound to account.

Is there any alteration of this liability caused by his removal from office before he has finally accounted for the moneys he received on these various applications? We think not. The applications are to be acted upon by the register and receiver; that is, by those persons who at the time of such action hold these offices. It is not a matter personal to the individual who receives the money, and therefore when the person receiving the money is removed from office before the proofs are finally acted upon by the register and receiver, and action is subsequently had by the receiver's successor in office, and the proofs are finally accepted by such successor and by the register, the Government is as much bound by such acceptance as if it had been acknowledged by the receiver who

received the money, and his obligation to account for the money which he received still remains in full force and is not altered in the slightest degree by the fact of his removal from office. As the agent of the Government he received it, and upon the acceptance of the proofs and final receipt it becomes the duty of the Government to issue the patent, and the fact that its agent had not paid the money over to it would constitute no defence to its obligation to issue the patent when the proofs were found satisfactory.

There may have been no breach of the bond at the time of his removal from office, but the liability of the receiver to account remained, and the bond continued in force until he had fully accounted and thus had fulfilled all the conditions of his bond. His repayment to the entryman, after his removal, in case the proof were rejected, would be an accounting *pro tanto* to the Government, the repayment being authorized and recognized by it as the fulfilment to that extent of the duty of the Government to make such repayment.

In this view the liability of the defendant and his sureties does not depend at all upon the letter written by the Commissioner and set forth in the above statement of facts. The letter simply officially recognized the duty of the receiver who then occupied the office to issue the final receipt when the officials were satisfied with the proofs and the money had been theretofore paid to Smith. Although before the writing of the letter the Land Office had not recognized its obligation to issue patents under the circumstances developed in this case and had refused to issue them unless it were again paid the money, that practice, as we have said, did not alter the law and did not take away or affect the obligation and liability of the Government to issue the patent when the proofs were found satisfactory.

Setting the letter aside, the liability of the Government remains the same, the character of the money received by the receiver remains the same, and the liability of himself and his sureties is of the same nature and of the same degree without the letter as with it. This, therefore, is no case of an alteration of the law or of the obligations of the bond made subse-

quently to the time of its execution, and we are not called upon to discuss the question as to how far alterations of the regulations or of the law may affect the continued obligation of the obligors in a bond like this.

Substantially the same question that we have been discussing arose in the case of *Meads* v. *United States*, decided in the Circuit Court of Appeals, Sixth Circuit, in July, 1897, and reported in 54 U. S. App. 150; also in 81 Fed. Rep. 684. The case was heard before Circuit Judges Taft and Lurton, and District Judge Clark, and conclusion arrived at in that case is in accord with that which we have come to herein.

There is no question of estoppel in the case. The surety had possession of some $25,000 of the moneys collected by the receiver, and when the agent of the Government said that the receiver did not owe it a dollar, the surety repaid to the various entrymen the amounts that they had paid, as far as the money went. In doing so, he lessened by that amount the liability of the sureties on the bond, and there is no proof that any portion of the indebtedness for which this judgment was recovered was represented in those payments.

We think this case was correctly decided, and the judgment is, therefore,

Affirmed.

STUART v. EASTON.

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

No. 197. Argued April 12, 13, 1898.— Decided May 9, 1898.

The construction and legal effect of a patent for land is matter for the court, and evidence to aid in that construction is incompetent.

The clear intent of the act of the Province of Pennsylvania of March 11, 1752, authorizing trustees to acquire the land in question, was, that while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county; and the provision following the authorization to acquire the land, "and thereon to erect and build a court house and prison," was

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no more than a direction to the trustees as to the use to be made of the land after it had been acquired.

The language of the habendum that the conveyance is "in trust," nevertheless to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever, under the decisions of the courts of Pennsylvania amounted simply to conforming the grant to the legislative authority previously given, and cannot be deemed to have imported a limitation of the fee.

The purposes of the grant by the patent of 1764 of the lot in the centre of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation.

Without positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752, it is *held*, that the trial court did not err in directing a verdict for the defendant.

By an act of the general assembly of the Province of Pennsylvania, passed on March 11, 1752, Penn. Provincial Laws 1775, p. 235, c. 2, the county of Northampton was erected out of a portion of the county of Bucks. In the sixth and seventh clauses of the act it was provided as follows:

"VI. And be it further enacted by the authority aforesaid, That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town (of Easton,) in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants.

"VII. And be it further enacted by the authority aforesaid, That for the defraying the charges of purchasing the land, building and erecting the court house and prison aforesaid, it shall and may be lawful to and for the commissioners and as-

sessors of the said county, or a majority of them, to assess and levy, and they are hereby required to assess and levy so much money as the said trustees, or any three of them, shall judge necessary for purchasing the land and finishing the said court house and prison. Provided, always, the sum of money, so to be raised, does not exceed three hundred pounds, current money of this province."

On March 4, 1753, an act was passed in which it was recited that the amount specified in the act of March 11, 1752, had been expended in building a prison, and authority was given to assess and levy a further sum not exceeding a stated amount, as the persons named in the act, or any three of them, should judge necessary for building a court house and finishing the prison already erected.

On July 9, 1762, the following warrant of survey was issued:

"PENNSYLVANIA, *ss.*

"*By the Proprietaries.*

"Whereas in and by an act of General Assembly of this Province entitled 'An Act of erecting the Northwest part of Bucks into a separate County,' which in and by the said act is called Northampton and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed Trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the said County, and thereon to erect and build a Court House and Prison sufficient to accommodate the public service of the said County, and for the ease and convenience of the inhabitants, as in and by the said act appears. And whereas on application and request of said Trustees, and out of our regard to encourage and promote the Improvement of the said Town and general good and convenience of the inhabitants of the said County, we have condescended and agreed to grant to the said trustees a lot or piece of ground of Eighty Feet square to be laid out in the centre of the great square in the middle of the said Town of Easton for a Court House for the use and the accommodation of the inhabitants of the said town and County forever. These are

therefore to require you to survey and lay out, or cause to be surveyed and laid out, a lot or piece of ground in the centre of the great Square in the said Town of Easton of the said dimensions of Eighty feet square for the public use of a Court House for the inhabitants of the said town and county, and make return thereof into our Secretary's Office in order for confirmation to the said Trustees and their heirs for the use aforesaid, and for your so doing this shall be your sufficient Warrant.

"Given under my hand and the seal of the Land Office, by virtue of certain powers from the said Proprietaries at Philadelphia, the ninth day of July, 1762.

"To JOHN LUKENS, JAMES HAMILTON.
"*Surveyor General.*"

A survey was made and returned, in which it was recited:

"In pursuance of a Warrant dated the 9th day of July, 1762. Surveyed the 8th day of October, 1763, to Thomas Craig and others the above described Lot of Ground Situate in the Public Square of the Town of Easton in the County of Northampton. Containing in length North & South eighty feet and in breadth East & West eighty feet."

Forming part of the certificate was a plat exhibiting a large open space, three hundred and twenty feet square, intersected from north to south and east to west by two eighty feet wide streets (Northampton and Pomfret). In the centre of the open space referred to, facing the streets mentioned, was a square plot of ground, marked as being eighty feet on each side.

On September 8, 1764, a patent was executed as follows:

"Thomas Penn & Richard Penn Esquires true and absolute Proprietaries and Governors in Chief of the Province of Pennsylvania & Counties of Newcastle Kent and Sussex upon Delaware To all unto whom these Presents shall come Greeting Whereas in and by an Act of General Assembly of the said Province passed in the twenty fifth year of the Reign of our late Sovereign Lord the Second Intituled 'An Act for Erecting the North West part of Bucks into a sepa-

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rate County' which in and by the said Act is called Northampton and John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse or any of them are appointed Trustees to purchase and take Assurance to them and their Heirs of a Piece of Land situate in some convenient Place in the Town of Easton in the said County and thereon to erect and build a Court House & Prison sufficient to accommodate the public Service of the said County as by the said Act appears And whereas in Pursuance of a Warrant dated the ninth of July 1762 under the Seal of our Land Office we have at the special Instance & Request of the said Trustees caused a Lot of Ground situate in the Center of the said Town of Easton to be laid out for a Court House for the Public Use and Service of the said County (another Lot of Ground in the said Town having been heretofore laid out for a Prison or Common Gaol erected thereon) which said lot in the Center Square contains in Length North and South eighty feet and in Breadth East and West eighty feet As by the said Warrant and Survey of the said Lot remaining in the Surveyor Generals Office and from thence Certified into our Secretarys Office more fully appears Now know ye that for the further Encouragement and better promoting the Public Benefit and Service of the said Town and County And for and in Consideration of the yearly Quitrent herein after reserved | and of the Sum of Five Shillings to us in Hand paid by the said Trustees (The Receipt whereof is hereby acknowledged) We have given granted released confirmed & by these Presents do give grant release and confirm unto the said Trustees John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse and their Heirs the said Lot of Ground situate in the Center of the Great Square in the said Town of Easton containing Eighty feet in Length North & South and eighty feet in breadth East and West Together with all Ways Waters Watercourses Liberties Easements Privileges Profits Commodities Advantages and Appurtenances thereto belonging And the Reversions and Remainders thereof To have and to hold the said herein before described Lot of Ground with the Appurtenances unto

the said John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse their Heirs and Assigns for ever In Trust nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever to be holden of us our Heirs and Successors Proprietaries of Pennsylvania as of our Manor of Fermor in the County of Northampton aforesaid in free and common Soccage by Fealty only in Lieu of all other Services Yielding & Paying therefor yearly unto us, our Heirs and Successors, at the Town of Easton aforesaid at or upon the first day of March in every Year from the first day of March next one Red Rose for the same or value thereof in Coin Current according as the Exchange shall then be between our said Province and the City of London to such Person or Persons as shall from Time to Time be appointed to receive the same And in Case of Nonpayment thereof within ninety days next after the same shall become due That then it shall and may be lawful for us our Heirs and Successors our and | their Receiver or Receivers into and upon the hereby granted Lot or Piece of Ground and Premises to Reenter and the same to hold and Possess until the said Quitrent and all arrears thereof Together with the Charges accruing by Means of such Nonpayment and Reentry be fully paid and discharged

"Witness John Penn Esquire Lieutenant Governor of the said Province who by virtue of certain Powers and Authorities to him for this Purpose inter alia granted by the said Proprietaries hath hereunto set his Hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this twenty eighth day of September, in the Year of our Lord one thousand seven hundred and sixty four The Fourth year of the Reign of George the Third the King over Great Brittain &c And Forty seventh Year of the said Proprietaries Government."

A court house was built upon the property between the years 1763 and 1766 and remained thereon until the year 1862, when it was removed. No buildings have since been placed upon the ground, but it was asserted in argument that a public fountain had been erected thereon.

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By an act of the general assembly of Pennsylvania of date April 15, 1834, the title of the trustees was vested in the county of Northampton.

On July 25, 1888, William Stuart, as sole heir of the original grantors, by his duly authorized attorney, made entry upon the lot in question for a breach of an alleged condition as to its use, claimed to have been incorporated in the patent of 1764, and which, it was asserted, revested the land in the claimant as succeeding to the rights of the original grantors. Being ousted by the representatives of the county of Northampton and the citizens of Easton, Stuart soon after instituted an action of ejectment in the United States Circuit Court for the Eastern District of Pennsylvania to recover possession of the land. At the trial a verdict was directed for the defendant, and the case subsequently came into this court for review, when the judgment was reversed because of an omission of the plaintiff to properly plead his alienage. 156 U. S. 46. Thereafter, William Stuart having died, his son, the present plaintiff in error, was substituted as plaintiff, and, the pleadings having been amended, a new trial of the action was had in April, 1895. During the course of the trial counsel for the plaintiff separately offered in evidence:

1. A certified copy of the deed referred to in the acts of 1752 and 1753, acquiring land on which to erect a prison, stating that he proposed to follow this by the offer of a subsequent grant to the county by the heirs of Penn of the reversion of the prison lands. The purpose of the offer was declared to be to throw light on the terms of the grant of land for the court house, and thereby to demonstrate that the county was estopped from claiming that the grant of such land by the patent of 1764 was not upon a condition.

2. A deed by Granville John Penn and Richard Penn to the county of Northampton, dated in 1852, for the reversion in the prison lot, which was offered for two purposes: first, for the former purpose of establishing an estoppel upon the county; and, second, to show grants by Penn of land in the township of Easton subsequent to the Divesting Act; to be followed by other deeds made by Penn subsequent to the Divesting Act.

Counsel for Parties.

The Divesting Act referred to was an act passed November 27, 1779, (1 Smith's Laws, 479,) vesting the title to the Province of Pennsylvania in the Commonwealth.

3. A deed by John Penn to Peter Schuyler et al., for a lot in the county of Easton, subsequent to the Divesting Act.

4. A certified copy from the books of the land office, showing that the records of the Department of Internal Affairs of Pennsylvania contain a number of warrants issued for lots in the town of Easton, Pennsylvania, and surveys made in pursuance thereof, and lots granted by the proprietaries of the Province of Pennsylvania.

5. That no evidence can be found to indicate that any warrants were issued, and surveys made or patents granted by the Commonwealth of Pennsylvania for any lots in the town of Easton, Pennsylvania.

Offers Nos. 3, 4 and 5, it is claimed in argument, were made to establish that the property in question was part of the private estate of the Penns, preserved to them by section 8 of the Divesting Act.

Upon objection that the evidence was irrelevant to the issue, it was excluded, and exceptions to such rulings were reserved.

At the close of the testimony for the plaintiff, counsel for defendant moved the court to direct a verdict for the defendant. This motion was granted, the court instructing the jury that the deed on its face was a conveyance to trustees for the use and benefit of the people of Northampton County in the erection and use of public buildings, and that the land had not reverted to the grantors by a diversion of the use. Judgment having been entered in favor of the defendants, the cause was taken by writ of error to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the judgment. 39 U. S. App. 238. A writ of certiorari was subsequently allowed by this court.

Mr. C. Berkeley Taylor and *Mr. A. T. Freedley* for Stuart. *Mr. William Brooke Rawle* was on their brief.

Mr. Aaron Goldsmith and *Mr. Edward J. Fox* for Easton.

Opinion of the Court.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The errors assigned are misdirection in instructing the jury to render a verdict for the defendant and wrongful exclusion of the offered evidence. We at once dismiss the latter assignments from consideration. The evidence offered to aid in the construction of the patent was clearly incompetent, as the patent, being a written instrument, its construction and legal effect were a matter for the court, and, even if an estoppel had been pleaded, the excluded evidence could not have estopped the county from asserting that the patent of 1764 had the meaning contended for. As regards the evidence offered to establish that the rights of the proprietaries, if any, in the property in question had not been cut off by the Divesting Act, the evidence, if not cumulative, was clearly not material, if by the terms of the patent, as we hold to be the case, no interest in the land granted thereby remained in the grantors.

Did the trial court improperly direct a verdict for the defendant?

This question requires an interpretation of the grant contained in the patent of 1764; and, as the question arising on such construction relates to the title to real property, we must, in reaching a conclusion, be guided by the local law of Pennsylvania, the State in which the land is situated.

We premise our examination of the terms of the patent with the following extract from the opinion delivered by Kennedy, J., in *Ingersoll* v. *Sergeant*, 1 Wharton, 337, 348:

"King Charles the 2nd, in granting the Province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage, and by fealty only, for all services. And by the seventeenth section thereof, William Penn, his heirs and assigns had full and absolute power given to them, at all times thereafter, and forever, to assign, alien, grant, demise or enfeoff such parts and parcels thereof to such persons as might be willing to purchase the same, their heirs and assigns, in fee simple, fee tail, for term of life, lives or years,

to be held of the said William Penn, his heirs and assigns as of the seigniory of Windsor by such services, customs and rents as should seem fit, to the said William Penn, his heirs and assigns, and not immediately of the said King Charles, his heirs or successors. And, again, by the 18th section, it was further provided, that the purchasers from William Penn, his heirs or assigns, should hold such estates as might be granted to them, either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns, should seem expedient, the statute of *quia emptores terrarum* in anywise notwithstanding."

The proper construction of the patent in question is free from difficulty when construed in connection with the act of the assembly to which the patent refers. The act of 1752 constituted the authority of the trustees for acquiring the land in question, and that authority was to the individuals named in the act "to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town of Easton, in trust and for the use of the inhabitants of the said county." The inhabitants of the county of Northampton not being a corporation, were unable to take a direct conveyance of the land, but the clear intention of the statute was that while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county. The provision following the authorization to acquire the land, "and thereon to erect and build a court house and prison," was no more than a direction to the trustees as to the mode of use to be made of the land after it had been purchased.

The authority to the trustees being to "purchase," adds force to the clear implication that it was the intention of the assembly that a title in fee simple should be acquired. When, therefore, we find a recital in the patent that it is conveyed upon a named consideration, and the patent expressly refers to the act of the assembly as the authority from which the patentees derived the power to take and hold the property, we naturally infer an intention of the parties on the one hand to convey, and on the other to receive, just such an estate in

the land as the act contemplated. It is true that the consideration is apparently nominal, but, at common law, in a deed like the one in question, a pecuniary consideration, however small, was sufficient to divest the title. *Queen* v. *Porter*, 1 Rep. 22, 26; *Van Der Volgen* v. *Yates*, 9 N. Y. 219.

The patent expressly purports to convey the fee, the reservation of an annual quitrent of a red rose being merely a feudal acknowledgment of tenure, *Marshall* v. *Conrad*, 5 Call, 364, 398, which was in effect annulled by the Revolution and acts of the assembly of Pennsylvania subsequently passed, declaring all lands within the Commonwealth to be held by a title purely allodial. In the premises the grant is to the trustees by name "and their heirs," while the habendum is to the individuals theretofore referred to as the trustees, "their heirs and assigns forever. In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever." This last clause, it is claimed, qualifies the prior grant of an estate in fee, and limits the duration of the estate in the land to the period while the land was used as the site of a court house. But, it will be remembered, that the act of 1752 authorized the acquisition of a lot upon which the trustees were directed to build a court house *and prison*, and the act of 1753 recited that the amount authorized by the act of 1752 to be expended for a court house and prison had already been expended for building a prison, and authority was given to assess and levy a further sum for the erection of a court house. The patent of 1764 recited the fact that another lot of ground had been laid out for a prison site, and it may be well in reason considered that had the act of 1752 authorized solely the erection of a court house instead of a court house and prison, that the clause to which we have referred would have simply recited that the patentees were to hold the land for the uses and purposes mentioned in the act of the assembly. In the condition in which matters stood, however, the recital that the land was to be held in trust for the object stated may well be treated as having been inserted with the intent of showing that the grant related alone to one

of the purposes covered by the law, the court house, and not to both therein expressed; that is, the prison and the court house. Be it as it may, however, under the facts disclosed by the record, the decisions of the courts of Pennsylvania leave no doubt that the clause in question cannot be construed as anything more than a recognition of the trust previously created by the act of the general assembly, and that it amounted simply to conforming the grant to the legislative authority previously given, and that it cannot be deemed to have imported a limitation of the fee. Thus in *Slegel* v. *Lauer*, 148 Penn. St. 236, whilst it was held that the grant there considered, though absolute in terms, merely conveyed a fee on limitation, because the purpose expressed in the grant was not one for which counties usually acquired a fee simple in lands, the court reviewed the cases of *Kerlin* v. *Campbell*, 15 Penn. St. 500; *Griffitts* v. *Cope*, 17 Penn. St. 96; *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415, and *Seebold* v. *Shitler*, 34 Penn. St. 133, and declared the doctrine established by those cases to be that where a conveyance purporting to be in fee is made to public trustees or commissioners, religious societies, etc., for the particular purpose for which the grantees could lawfully hold real estate, such declaration could not be construed as qualifying a prior grant of the fee. The court said (p. 241):

"Of course, the mere expression of a purpose will not of and by itself debase a fee. Thus, a grant in fee simple to county commissioners of land 'for the use of the inhabitants of the Delaware County to accommodate the public service of the county,' was held not to create a base fee: *Kerlin* v. *Campbell*, 15 Penn. St. 500; as also a grant to county commissioners and their successors in office of a tract of land with a brick court house thereon erected, 'in trust for the use of said county, in fee simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a court house, jail and offices for the safe keeping of the records: *Seebold* v. *Shitler*, 34 Penn. St. 133. Similarly a devise of land to a religious body in fee 'there to build a meeting house upon,' etc., was held to pass an unquali-

fied estate: *Griffitts* v. *Cope*, 17 Penn. St. 96; as was also a grant to a congregation 'for the benefit, use and behoof of the poor of said . . . congregation, . . . forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and if occasion shall require, a place to bury their dead:' *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415. . . .

"It is apparent in all the cases cited that the purposes for which the grants were made were really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can, in no event take a fee simple absolute, because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration, in the grant, that it is conveyed for those uses cannot be deemed to import a limitation of the fee. *Expressio eorum quæ tacite insunt nihil operatur.* Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant."

The case at bar is precisely analogous in its main features to the facts which were under consideration in *Kerlin* v. *Campbell*, *supra*, the only difference being that in the case just cited, instead of the purpose for which the land was to be held being specified in the grant, a declaration of trust was made in a separate instrument. The facts in the *Kerlin case* were as follows: Certain public buildings had been erected on land and the land with the erections was sold to a private individual. Subsequently, five named individuals, or any three of them, were authorized by statute "to take conveyances and assurances to them, and their heirs, of the said old court house, and of the prison and workhouse, in the said borough of Chester, with the lots of ground thereunto belonging, in trust, and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county." A deed was made in pursuance of this act to the individuals named "and to their heirs and assigns" for an expressed consideration, "to have and to hold the same to them, their heirs and assigns forever." A declaration of trust was made contemporaneously with the deed, reciting

that the latter instrument had been made or was intended to be "in trust and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the said recited act of assembly;" and also declaring that the interest held in the land and buildings was "only to and for the uses and services hereinbefore mentioned, expressed and declared, and to and for no other use, interest or purpose whatsoever." A part of the lot and the workhouse building thereon having been subsequently sold to a private individual under authority of an act of assembly, the heirs of the original grantor brought ejectment to recover possession, upon the ground that the property was granted for a grossly inadequate consideration, if the unrestricted fee was conveyed, and that the deed to the individuals named in the original act and the declaration of trust by them executed was but a single transaction and constituted a conveyance to the parties named, in trust to and for the use of the inhabitants of the county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the act of assembly, and to no other use, intent or purpose whatsoever, and that the estate which the trustees took was a base or determinable fee; in other words, an interest which might continue forever, but was liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. On the part of the defendants in error it was contended that the transaction was a purchase, and not a trust. The court said (p. 506):

"The doctrine of charitable uses is inapplicable to a question like the present. Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way, he might have had a plausible case on the cessation of the user; but he conveyed it for its value, by an absolute deed, to persons who executed a declaration of trust, not for his benefit, but to vest the equitable ownership in the county. After that, it is impossible to conceive of a dormant interest in him. The two deeds, though executed at the same time, were as diverse as if the latter were a conveyance of the legal title to a stranger,

with whom the grantor in the first could not be in privity. There could be no resulting trust, for every part and particle of the grantor's estate, legal or equitable, present or prospective, had passed from him and was paid for. Nor was the estate granted a base fee. It was unclogged with conditions or limitations. The ancestor received a full consideration for it; and the plaintiffs cannot rescind the bargain."

We think the two cases are not distinguishable in principle. The purpose of the grant by the patent of 1764 of the lot in the centre of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title. While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, conjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted and a declaration of the trust made in an independent instrument.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that; provided; if it shall happen;* etc., 4 Kent Com. note *b*, p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled with any clause of reëntry or a provision that the estate conveyed should cease or be void on any contingency. (Ib.) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while; so long as; un-*

til; during; &c., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.

The cases mainly relied upon as supporting the claim of the plaintiff in error that by the patent an estate was conveyed which was "to be commensurate in duration with the purpose to be answered by it," clearly present no analogy in their facts to the case at bar. Thus, in *Kirk* v. *King*, 3 Penn. St. 436, 438, the material part of the conveyance reads as follows:

"Know all men by these presents, that I, Thomas McElroy, of Plum township, in the county of Allegheny, for and in consideration of the sum of 50 cents to me in hand paid, the receipt of which is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, to the employers of the school at Plum Creek meeting house that lot of land, beginning [describing it], to have and to hold said lot for an English school house and no other purpose, for me, my heirs, and assigns, to them who are now, or may hereafter be the employers of said school, to have and to hold the same forever for said purpose.

"Witness my hand and seal," etc.

It will be noticed that the deed did not contain words of inheritance or expressly purport to convey a fee simple; and in *Wright* v. *Linn*, 9 Penn. St. 433, the decision in *Kirk* v. *King* was construed to hold that "The legal title remained in the original owner, the 'school company' having but an equity, which was thought to be dependent on the agreement to use the ground 'for an English school house and for no other purpose.'" In other words, the deed was construed as making the substantial consideration of the grant the erection of the school house, and as though the land was conveyed, in terms, to the grantees, to have and to hold the same *so long* as they used it for an English school house. And the court in the *Wright case*, while questioning the correctness of the holding

in the *Kirk case*, that the deed there considered did not establish a trust for a charitable use, not liable to be defeated by non user, said (p. 438):

"It has long been held, that money given to build or repair a church, is given to a charitable use; and surely it must be agreed that land given as the site of a public school house, *prima facie*, stands in the same category. It may be otherwise where the object in the contemplation of the party is ephemeral, and the subject sought to be promoted is intended to be of temporary duration. This is the point on which *Kirk* v. *King* was made to turn; and, where such is the case, perhaps the grant may be taken as on an implied condition of reverter, as soon as the temporary object is accomplished. But such a condition should either expressly appear or be unerringly indicated by the circumstances attendant on the gift."

The object to be attained by the grant in the case at bar was, however, not ephemeral in its character, the assurance being expressly to the trustees and their heirs and assigns forever; while the attendant circumstances we have heretofore alluded to rebut any inference of an implied reverter.

Scheetz v. *Fitzwater*, 5 Penn. St. 126, also relied on, was the case of a conveyance "of a certain mill dam or pond of water, and mill race or stream of water, issuing and proceeding from said mill dam or pond of water, as the same is now situate, and being in and upon a certain tract or parcel of land situate in the manor of Springfield, together also with the site and soil of the said mill pond or dam of water and race of water, and also one perch of land on each and every side of the said pond, or dam and race of water, to and for the use and service of a certain mill, with the land thereto belonging, and for no other use whatsoever." The deed did not contain words of inheritance or expressly grant a fee simple. The grant was of the mill dam, etc., and, in the same sentence, the qualification was attached that it was for a particular use only, that is, "for the use and service of a certain mill, with the land thereto belonging."

The mill pond having been drained and converted into a

meadow, the claim was made that there had been a diversion from the purposes of the grant, and an action was commenced for the taking of grass from the site of the mill pond. The trial judge held that a fee simple estate in the land had not been conveyed, but that it was the intention of the grantor to only convey a qualified interest in the land or limited fee, and to retain a reversionary interest, and that the estate in the grantee determined on the abandonment of the use and service for which the conveyance had been made as stated in the deed. The appellate court held this construction to be correct.

First Methodist Episcopal Church v. *Old Columbia Public Ground Co.*, 103 Penn. St. 608, is relied upon as sustaining the proposition that where a deed refers to a certain mode of user of the land conveyed, coupled with words such as "and for no other use," a conditional estate is granted. The decision, however, does not justify this broad statement. The action was ejectment. One Wright had covenanted under seal to convey certain property to named parties, their heirs or assigns, in fee simple, clear of all incumbrances, in trust for the sole use of a company which might thereafter be formed for the purpose of bringing a supply of water into the borough of Columbia, the grantees covenanting to give, grant and assure unto Wright, his heirs and assigns, when a reservoir should be erected, "the privilege of erecting a hydrant at said reservoir at his own expense and for his own use, and shall have a supply of water therefrom sufficient to water his cattle or stock or for the use of a family at all times when the same is in repair or water sufficient therein." A deed was subsequently made to the water company, and that corporation constructed a reservoir on the land, but subsequently abandoned the same, filled up the reservoir and sold the land, and the purchaser erected a chapel thereon. Ejectment was brought by the grantees of the heirs of Wright to recover possession of the land. The trial judge held that under the agreement first referred to the grantees took a base or qualified fee only, and when they and their vendees ceased to use the land for a reservoir it reverted to Wright or his heirs.

The appellate court, however, held that a conditional estate had not been created by the deed, and discussed the effect of the grant solely as to whether an estate upon condition subsequent was created. After reviewing various authorities holding that a mere recital in a deed that it was made upon a certain consideration, while it might create a covenant, would not raise a condition, the court said (p. 614):

"Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. *Labaree* v. *Carleton*, 53 Maine, 211. It was said by Mr. Chief Justice Bigelow in *Packard et al.* v. *Ames et al.* 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act by the grantee on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. *Cook* v. *Trimble*, 9 Watts, 15.

"Turning to the writing executed by Wright, we see that he absolutely and unconditionally covenanted to convey the premises in fee simple clear of all incumbrances to the vendees, their heirs, or assigns, whenever requested by them. No restraint was imposed on an alienation of the land. No construction of a reservoir, nor any work on the ground, was required to precede the right to demand a deed. No clause provided for a forfeiture or termination of the estate, in case the land ceased to be used as a reservoir. No right of reëntry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used, equivalent thereto or proper to create a condition. The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate."

At page 613 of the opinion, it is true, the cases of *Kirk* v. *King* and *Scheetz* v. *Fitzwater* are referred to as though the

grants considered in those cases were of estates upon condition subsequent, and as illustrating the proposition that words clearly equivalent to the technical words usually employed to create a condition would be sufficient. Weight was attached to the circumstance that the grants in those cases were expressed to be for a particular named use, "and no other purpose;" but it is manifest that importance was attached not alone to the emphatic statement of the particular use expressed, but to that language coupled with the other provisions of the grant.

But, manifestly, under the authorities referred to in the *Slegel case* which we have above cited, the declaration of the purposes contained in the patent under consideration had not the effect of qualifying or limiting the estate in fee expressly granted to the trustees for the benefit of the inhabitants of the county, and which has since become vested, by act of the legislature, in the county of Northampton. Without, however, positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752, *Brendle* v. *German Reformed Congregation*, 33 Penn. St. 415, 425, we hold that the trial court did not err in directing a verdict for the defendant, and the judgment of the Circuit Court of Appeals must therefore be

Affirmed.

Mr. Justice Brown concurred in the result.

JOLLY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

No. 238. Submitted April 28, 1898. — Decided May 9, 1898.

Postage stamps belonging to the United States are personal property, within the meaning of Rev. Stat. § 5456, which enacts that "Every person who robs another of any kind or description of personal property belong-

ing to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one year nor more than ten years, or by both such fine and imprisonment," and may be made the subject of larceny.

THE case is stated in the opinion.

Mr. Robert S. Todd for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error seeks to reverse his conviction of the crime of stealing certain postage stamps on the 25th day of April, 1894, being the property of the United States, upon which conviction he was sentenced to be imprisoned for the term of two years. The indictment against him was found in the District Court of the United States for the District of Kentucky, Owensborough Division, in the June term, 1895, and contained five counts. It was drawn under section 5456 of the Revised Statutes. The first count alleged, in substance, that on the 25th day of April, 1894, at Hardinsburg, in the district mentioned, the defendant did feloniously steal, take and carry away from a building then and there used as a post office building by the United States, certain postage stamps of the United States, of various denominations mentioned in the indictment, and of the value named ($163.12), and which stamps were then and there the personal property of the United States of America.

The second count was the same, except that it alleged the stealing to have been from the possession of Thomas McClure, the postmaster, etc.

The third and fourth counts alleged the stamps to have been the property of the Post Office Department, and the fifth count alleged that he had the stamps in his possession with intent to convert to his own use, the same having there-

tofore been stolen from the United States by some other person, which the defendant well knew.

Upon being arraigned, the defendant filed a demurrer to each count of the indictment, which was sustained as to the third and fourth counts and overruled as to the others.

His counsel upon the trial again raised the question as to the validity of the first and second counts, duly excepting to the decision of the court in holding that he might be convicted upon either of them.

The judge charged the jury that the defendant could not be convicted under the first, second and fifth counts together; that if convicted upon either the first or second count, or both, he could not be convicted under the fifth.

He was found guilty as charged in the first and second counts, but the jury said nothing in their verdict as to the fifth count.

The same objections to the conviction that were taken below are now urged upon us by counsel for the plaintiff in error as grounds for the reversal of the judgment.

Section 5456 of the Revised Statutes, under which the indictment was drawn, reads as follows:

"Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one nor more than ten years, or by both such fine and imprisonment."

The contention on the part of the plaintiff in error is, that in order to sustain an indictment under this statute (1) there must be a felonious and forcible taking of personal property; and (2) the property must be the subject of larceny, which postage stamps belonging to the Government are not.

(1) There are two distinct offences mentioned in the statute.

One is the offence of robbery, the legal and technical meaning of which is well known. It is a forcible taking, or a taking by putting the individual robbed, in fear.

There is also set forth in the statute the crime of feloniously taking and carrying away any kind or description of personal

property belonging to the United States. This is a distinct and separate offence from that of robbery. If the statute required the taking to be forcible in all cases, the language providing against the felonious taking and carrying away of the personal property of the United States would be surplusage, the forcible taking being already implied and included in the use of the word "rob." But in addition to robbery, the offence of feloniously (not forcibly) taking the personal property of the United States is created. The indictment herein comes under the latter head.

(2) The objection that the postage stamps are not the subject of larceny while in the possession and being the property of the United States, we think is also untenable.

The language used in the statute is much broader and covers more ground than the common law definition of larceny, and it is also more comprehensive than the statute of 1790. Act of April 30, 1790, c. 9, 1 Stat. 112, 116. "Any kind or description of personal property" is an exceedingly broad designation. It is difficult to imagine language which would be plainer in its meaning, or which would more certainly embrace property such as is the subject of this indictment.

Postage stamps while in the hands of the Government, ready to be sold and used, are most surely its personal property. Although section 5413 provides that the words "obligation or other security of the United States" shall be held to mean, among other things, "stamps and other representatives of value, of whatever denomination, which have been or may be issued under any act of Congress," yet that language does not preclude the stamps from being the personal property of the United States before they are issued and sold by it. The section in question (5413) precedes those sections relating to the forgery or counterfeiting of United States obligations or securities, national bank notes, letters-patent, certificates of entry, public records and the like, and it includes stamps or any obligation of the United States that may be the subject of forgery or counterfeiting, but it does not thereby exclude postage stamps, before they are issued and while in the possession of the Government, from the

general designation of personal property belonging to the United States.

There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps. They are incapable of being distinguished, the one from the other. All postage stamps of the same denomination are alike, and the moment they are taken from the possession of the Government they are valuable in proportion to their denomination and are subject to use, the same as if they had been purchased, because it is wholly impossible for the Government to detect or identify any particular stamp as having been stolen or otherwise fraudulently put in use. Once out of the possession of the Government they may be used for their full value to obtain carriage by mail of the article to which they are affixed. There is every reason therefore why such stamps should be regarded as personal property even while in the possession of the Government. They become valuable to the amount of their denomination the very instant they get into the possession of another. They are not mere obligations, but a species of valuable property in and of themselves the moment they are out of the possession of the Government.

The case of the *United States* v. *Davis*, 5 Mason, 356, 362, 365, was an indictment for stealing bank bills, a promissory note, etc., and it was founded upon a different statute in which very different language was used. The act under which that indictment was found was chapter 9 of the laws of 1790, (1 Stat. 112, 116,) and section 16 thereof provided "that if any person . . . shall take and carry away, with intent to steal or purloin, the personal goods of another," etc. It was held by Mr. Justice Story that the meaning of the words "personal goods of another" was to be determined by a resort to the common law as furnishing the proper rule of interpretation, and he held that in the strict sense of the common law "personal goods" are goods which are movable, belong to, or are the

property of some person, and which have an intrinsic value; that bonds, bills and notes, which are choses in action, are not esteemed by common law goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in the possession of the person from whom they are stolen, but only evidence of property. Therefore, strictly construing the statute as a penal one, the court held that the analogy of the common law in respect to larceny might well furnish the proper rule for decision, and that personal goods in the sense of the act under consideration did not embrace choses in action. Since that statute was passed the common law definition of larceny has been largely extended by statute in almost every State in the Union.

The statute from which section 5456, Revised Statutes, was taken was passed March 2, 1867, c. 193, 14 Stat. 557, and the same all-embracing language is found therein. "Any kind or description of personal property" is the phrase used. It was no doubt passed to enlarge the common law in relation to the subjects of larceny. Although at common law written instruments of any description were not the subject of larceny, as not being personal goods; that is, movables having an intrinsic value, yet although such instruments could not in strictness be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description frequently took place in England. *People* v. *Loomis*, 4 Denio, 380; 3 Chit. C. L. 932; 2 Russ. on Crimes, 74 to 80; *Rex* v. *Clark*, R. & R. 181; *Vyse's case*, Ry. & Mood. 218; *Reg.* v. *Morris*, 9 C. & P. 347; *Reg.* v. *Rodway*, 9 C. & P. 784; *Rex* v. *Bingley*, 5 Id. 602; *Rex* v. *Mead*, 4 Id. 535. To make stamps, while unissued and in the hands of the Government, the subject of larceny is not, therefore, any very great departure from the general doctrine of the common law.

Counsel for plaintiff in error claims that the offence, as shown by the evidence in this case, assuming it to be true on the part of the United States, is brought within section 5453 of the Revised Statutes in relation to secreting, embezzling, taking or carrying away any property, etc., stamped in whole or in part, and intended to be issued in behalf of the United

States, and he also argues that the indictment is wholly defective under that section.

Whether the facts might or might not warrant an indictment under such section, it is not now necessary to decide, for the reason that we hold the indictment good under section 5456, because we regard postage stamps belonging to the United States as being included in the section in question as personal property, and therefore the subject of larceny.

The action of the jury in returning a verdict of guilty upon the first and second counts and being silent as to the fifth was equivalent to a verdict of not guilty as to that count. See cases cited by Mr. Justice White in *Selvester* v. *United States*, 170 U. S. 262.

For the reasons already given, we think the judgment is right, and that it should be

Affirmed.

HAVNOR *v.* NEW YORK.

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

No. 227. Argued April 21, 1898. — Decided May 9, 1898.

It was essential, in order to confer jurisdiction on this court, in this case, that the chief judge of the Court of Appeals of the State of New York, or his lawful substitute, or a justice of this court should have allowed the writ and signed the citation; and as the writ was signed by a judge as "asso. judge, Court of Appeals, State of New York," and there was nothing in the record warranting the inference that he was, at that time, acting as chief judge *pro tem.* of that court, the writ is dismissed.

The case is stated in the opinion.

Mr. Albert I. Sire, for plaintiff in error.

Mr. Asa Bird Gardiner, for defendant in error.

Mr. Justice White delivered the opinion of the court.

Plaintiff in error seeks the reversal of a judgment of the

Court of Appeals of the State of New York, which affirmed a judgment of an appellate division of the Supreme Court of that State, holding valid a judgment entered in the court of special sessions for the city and county of New York, sentencing the plaintiff in error upon a conviction for violation of a statute of the State of New York prohibiting any person from carrying on or engaging in the business of "barbering" on the first day of the week. The record having been remitted by the Court of Appeals to the Supreme Court of the State, the writ of error was directed to the latter tribunal.

The correctness of the ruling of the Court of Appeals, upholding the validity of the statute referred to, was vigorously attacked in argument, emphasis being laid on the fact that three judges dissented from the opinion of the court, two of whom (Judges Gray and Bartlett) delivered opinions.

We are unable, however, to pass upon the question pressed upon our notice as to whether the statute referred to is repugnant to the Constitution of the United States, for the reason that the Court of Appeals of the State of New York is composed of a chief judge and several associate judges, and the writ of error in this case was allowed and the citation signed by an associate judge, who did not purport to act as chief judge or chief judge *pro tem.* of the court. The signature to the allowance of the writ was as follows: "Edward T. Bartlett, Asso. Judge, N. Y. Court of Appeals;" while following the signature to the citation was the designation: "Asso. Judge, Court of Appeals, State of New York." There is nothing contained in the record warranting an inference that the associate judge was at the time acting as chief judge *pro tem.* of the court. True it is, that there is contained in the record, at the end thereof, an affidavit verified by counsel for plaintiff in error on July 29, 1896, stating that the deponent was informed and believed that the chief judge of the Court of Appeals was then abroad in Europe and would be for some space of time to come, while the writ of error was allowed and the citation signed on the 6th of August following. The affidavit purports to have been filed with the papers in the case in the Supreme Court of New

York on September 2, 1896. It manifestly, however, in no particular justifies the inference that the associate justice who allowed the writ was, at the time of such allowance, the chief judge *pro tem.* of the Court of Appeals. It was essential, in order to confer jurisdiction on this court, that the chief judge of the Court of Appeals of New York or his lawful substitute or a Justice of this court should have allowed the writ and signed the citation.

Thus, it is provided in the Revised Statutes as follows:

"SEC. 999. When the writ" (of error) . . . "is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, a judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

The provision referred to was contained in the twenty-fifth section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 86, and section 7 of the act of February 5, 1867, c. 29, 14 Stat. 387. It was construed in *Bartemeyer* v. *Iowa*, 14 Wall. 26, where the court, taking notice *sua sponte* of the fact that there had been no proper allowance of a writ of error, said (p. 27):

"Writs of error to the state court can only issue when one of the questions mentioned in the 25th section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the Chief Justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction, and the case before us raises the question whether the writ has been allowed by the judge authorized to do so.

"The Supreme Court of Iowa, which rendered the judgment complained of, is composed of a chief justice and three

associate justices, and this writ is allowed by one of the associate justices.

"We are of opinion that the act of Congress requires that, when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a Justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a Justice of the Supreme Court of the United States.

"The result of this construction of the statute is that the associate justice of the Supreme Court of Iowa who allowed the present writ had no authority to do so, and it is accordingly dismissed."

The *Bartemeyer case* was approvingly referred to in *Butler* v. *Gage*, 138 U. S. 52, 55, where the court, speaking through Mr. Chief Justice Fuller, said:

"Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice, judge or chancellor of the court rendering the judgment or passing the decree complained of, or by a Justice of this court; and it was held in *Bartemeyer* v. *Iowa*, 14 Wall. 26, that when the Supreme Court of a State is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a Justice of this court."

In *Butler* v. *Gage*, however, the judge allowing the writ described himself as "Presiding Judge of the Supreme Court of the State of Colorado." As the constitution of Colorado provided that when the chief justice was absent, the judge having the next shortest term should preside in his stead, and as the record showed that the chief justice was absent at the time the writ was allowed, and counsel conceded that the judge who allowed the writ had the next shortest term to serve, it was held that the writ was properly allowed.

Upon the facts appearing in the case at bar, however, it is manifest that the writ of error was not properly allowed, and it must be

Dismissed.

RHODES *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 21. Argued February 23, 1898. — Decided May 9, 1898.

Section 1553 of the code of Iowa, which provides that "if any express company, railway company or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this State, for any other person or persons or corporation, any intoxicating liquors, without having first been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of said company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offence and pay costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid," cannot be held to apply to a box of spirituous liquors, shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that State while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa Law to be repugnant to the Constitution of the United States.

Moving such goods in the station from the platform on which they are put on arrival to the freight warehouse is a part of the interstate commerce transportation.

THE case is stated in the opinion.

Mr. Robert Mather for plaintiff in error.

Mr. Milton Remley, attorney general of the State of Iowa, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The Chicago, Burlington and Quincy Railroad Company was, in 1891, a common carrier, incorporated under the laws of

Illinois, and operated among others a line of railway from Dallas, Illinois, to Burlington, Iowa, and beyond said point. The Burlington and Western Railway Company was, at the same date, a common carrier, incorporated under the laws of Iowa, and operated a line of railway from Burlington, Iowa, to Oskaloosa in that State, with stations at intervening points, one of which was Brighton in Washington County. Both of these corporations had a depot at Burlington, which they jointly used. The two carriers had, at the time stated and for years previous thereto, between themselves joint freight tariffs, by which transportation, under a single through way bill, was given to merchandise from any station on either of the lines to any station on the line of the other.

In August, 1891, the Dallas Transportation Company delivered to the Chicago, Burlington and Quincy Railroad at Dallas, Illinois, a wooden box stated to contain groceries consigned to William Horn, Brighton, Iowa. It had been the habit of the agent of the Dallas company before this date to ship intoxicating liquors over the Chicago, Burlington and Quincy. The box in question was receipted for as through freight and was billed through in accordance with the custom above stated, was taken to Burlington, Iowa, there delivered to the Burlington and Western company, by whom it was carried to Brighton. On its arrival there, the package was placed by the trainmen on the station platform, and shortly afterwards the plaintiff in error, who was the station agent of the Burlington and Western, in the discharge of his duties opened the door of the freight house and moved the box into a freight warehouse, which was about six feet from the platform. In about an hour thereafter the box was seized by a constable under a search warrant, on the ground that it contained intoxicating liquors, which proved to be the truth, and subsequently the liquor was condemned and ordered to be destroyed, and the order was executed. At the time of the seizure the freight charge due to the railways was unpaid. It was admitted that there was nothing on the package to notify the receiving railway of its contents, unless such knowledge can be imputed from the nature of the previous dealings of the Dallas com-

pany with the railway. There was, however, testimony showing that the railroad agent who moved the box from the freight platform to the warehouse had reason to know or suspect that it contained liquor since it was proven that, before the arrival of the box at Brighton, a mail carrier called at the station and asked for a package consigned to William Horn, stating that one was expected from Dallas, and that it would contain intoxicating liquor.

The plaintiff in error was proceeded against by information before a justice of the peace, charging him with the unlawful transportation of intoxicating liquors conveyed from Burlington to Brighton, Iowa. This prosecution was under the provisions of the statutes of the State of Iowa, to which we shall hereafter refer. He was convicted and sentenced to pay a fine of $100. An appeal from this sentence was taken to the district court, where it was affirmed, in which court, among other defences, it was alleged that the package in question was not subject to the jurisdiction of the State of Iowa, because at the time of its removal from the platform to the freight warehouse it was in course of interstate commerce transportation. The district court having affirmed the conviction, an appeal was taken to the Supreme Court of the State of Iowa, where the judgment below was also affirmed. *State* v. *Rhodes*, 90 Iowa, 496. To this judgment of affirmance this writ of error is prosecuted.

The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. That is to say, whether the law of the State of Iowa can be made to apply to a shipment from the State of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States.

In *Bowman* v. *Chicago & Northwestern Railway*, 1888, 125 U. S. 465, this court was called upon to determine the validity of a statute of the State of Iowa, which it was asserted was repugnant to the third clause of section 8 of article I of the

Constitution of the United States, because its provisions amounted to a regulation of interstate commerce. The facts upon which the controversy then presented arose were briefly as follows: Kegs of beer were offered in the State of Illinois to a common carrier operating a line of railway in the States of Illinois and Iowa. The beer was consigned to a point in Iowa, and the carrier refused to receive it, on the ground that the statute of Iowa made it unlawful to bring intoxicating liquors within the limits of that State, except when accompanied with a specified certificate, which the Iowa law provided should be granted under particular and exceptional conditions. The one by whom the beer was tendered to the carrier in the State of Illinois thereupon sued the railroad company for the damages claimed to have arisen from its refusal to receive and carry the merchandise. The railway company defended on the ground that it was justified in its refusal because of the provision of the Iowa statute. This, on the other hand, was asserted not to be an adequate defence, because it was claimed that the Iowa statute was wholly void, as it constituted a regulation of interstate commerce. The sole issue arising therefrom was whether the Iowa law protected the refusing carrier, and thus involved determining whether the statute of the State was repugnant to the Constitution of the United States. After great consideration, it was held that the law of the State of Iowa, in so far as it affected interstate commerce, was repugnant to the interstate commerce clause of the Constitution, and was void. It was decided that the transportation of merchandise from one State into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned. The court in the course of its opinion adverted to the question whether goods so shipped continued to be protected by the interstate commerce clause after their delivery to the consignee and up to and including their sale in the original package by the one to whom they had been delivered, but did not decide the question, as it was

not essential to do so. Referring to the subject, however, the court said (pp. 499–500):

"It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

"It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State."

Subsequently, in *Leisy* v. *Hardin*, (1890) 135 U. S. 100, the question which was thus reserved in the *Bowman case* arose for adjudication, and it was held that the right to sell the imported merchandise in the original package free from inter-

ference of state laws was protected by the Constitution of the United States, as up to such sale the goods brought into the State were not commingled with the mass of property in the State. Summing up its conclusions the court said (p. 124): "The plaintiffs in error are citizens of Illinois, are not pharmacists and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago &c. Railway Co.*, *supra*, they had the right to import this beer into that State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

The statute of the State of Iowa, under which the prosecution now before us was instituted, is as follows:

"If any express company, railway company or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this State, for any other person or persons or corporation, any intoxicating liquors, without having first been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of said company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offence, and pay costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail

until such fine and costs of prosecution are paid. The offence herein defined shall be held to be complete, and shall be held to have been committed in any county of the State, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of the State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the county records. Provided, however, that the defendant may show as a defence hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him." (Iowa Code, section 1553, paragraph 2410, McClain's Annotated Code of Iowa.)

This statute is identical with the one which was held to be unconstitutional in the *Bowman case*, except that the latter contained the words "knowingly bring within this State," these words having been stricken out by an amendment adopted after the decision in the *Bowman case*. In other words, the statute which was under review in the *Bowman case* provided, "if any express company, railway company or any agent or person in the employ of any express company, or of any common carrier, or if any other person shall knowingly bring within this State, or transport or convey between points or from one place to another within the State," whilst the statute now before us provides exactly the same thing, except that the words "knowingly bring within this State" are omitted. It is hence manifest that the present statute, as interpreted by the Supreme Court of Iowa, has exactly the significance it would have did it contain the words found in the act reviewed in the *Bowman case*. It follows that the law before us now, as interpreted below, is the exact equivalent of the statute which has once before been declared by this court to be repugnant to the Constitution. This result in reason is inevitable, since the court below held that the words, as found in the present law, were not confined to transporta-

tion of commodities originating within the State, but related to shipments made from another State. This ruling hence subjects shipments made from another State to the control of the statute at once on the arrival of the merchandise within the territorial limits of the State, and before the completion of the interstate shipment, as completely as if the words "bring within this State" were yet in the statute. As it was held in the *Bowman case* that the power to ship from one State into another embraced of necessity the right to have the goods carried to the place of destination, and be delivered at that point to the consignee, it follows that an interpretation of the present law which gives the State the right to stop the goods shipped into the State at the state line, and before their arrival at destination, is directly within the rule announced in the *Bowman case.*

The fundamental right which the decision in the *Bowman case* held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one State into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. This protection of the Constitution of the United States is plainly denied by the statute now under review, as its provisions are interpreted by the court below. The power which it was held in the *Bowman case* the State did not possess was that of stopping interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consummation. The right of a State to exert these very powers is plainly upheld by the decision rendered below. It follows that if the ruling in the *Bowman case* is applicable to the question here presented, it is decisive of this controversy, and must lead to a reversal of the judgment below rendered. The claim is, however, and it was upon this ground that the court below rested its judgment, that under and by virtue of the provisions of the act of Congress of August 8, 1890, c. 728, 26 Stat. 313, the ruling in the *Bowman case* is no longer apposite, as the effect of the act of Congress in question was to confer upon the State of Iowa

the power to subject to its statutory regulations merchandise shipped from another State the moment it reached the line of the State of Iowa, and before the consummation of the contract of shipment by arrival at its destination and delivery there to the consignee. And it is to this question that the discussion at bar has mainly related, and upon which a decision of the cause really depends.

It is not gainsaid that the effect of the act of Congress was to deprive the receiver of goods shipped from another State of all power to sell the same in the State of Iowa in violation of its laws, but whilst it is thus conceded that the act of Congress has allowed the Iowa law to attach to the property when brought into the State before sale, when it otherwise would not have done so until after sale, on the other hand, it is contended that the act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction. To otherwise construe the act of Congress, it is claimed, would cause it to give to the statutes of Iowa extraterritorial operation, and would render the act of Congress repugnant to the Constitution of the United States. It has been settled that the effect of the act of Congress is to allow the statutes of the several States to operate upon packages of imported liquor before sale. *In re Rahrer*, 140 U. S. 545.

Did the act of Congress referred to operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the state line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee is then the pivotal question? The act of Congress is as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt

therefrom by reason of being introduced therein in original packages or otherwise."

The words "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," in one sense might be held to mean arrival at the state line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word "arrival" signified that the goods should actually come into the State, since it is provided that "all fermented, distilled or other intoxicating liquors or liquids transported into a State or Territory," and this is further accentuated by the other provision, "or remaining therein for use, consumption, sale or storage therein."

This language makes it impossible in reason to hold that the law intended that the word "arrival" should mean at the state line, since it presupposes the coming of the goods into the State for "use, consumption, sale or storage." The fair inference from the enumeration of these conditions, which are all-embracing, is that the time when they could arise was made the test by which to determine the period when the operation of the state law should attach to goods brought into the State. But to uphold the meaning of the word "arrival," which is necessary to support the state law, as construed below, forces the conclusion that the act of Congress in question authorized state laws to forbid the bringing into the State at all. This follows from the fact that if arrival means crossing the line, then the act of crossing into the State would be a violation of the state law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. Thus, if the construction of the word "arrival" be that which is claimed for it, it must be held that the state statute attached and operated beyond the state line confessedly before the time when it was intended by the act of Congress it should take effect.

But the subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate. Undoubtedly the purpose of the act was to enable the laws of the several States to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the States the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another State, the necessary effect must be to give to the laws of the several States extraterritorial operation, for, as held in the *Bowman case*, the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments. If the construction claimed be upheld, it would be in the power of each State to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the State merchandise of the character named covered by the inhibitions of a state statute. The force of this view is well illustrated by the conclusions of the court below, where it is said:

"Was the defendant, in the removal of the liquor, engaged in transporting or conveying it within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight room of the depot. He was one of the instruments necessary to complete the act of transportation. If it be not so, then clearly he is within the terms of the act, as he conveyed 'the liquor from one point to another within this State.' His guilt is not to be determined by the distance

he conveyed the package, but his conveying it any distance was a violation of the law. With the propriety of legislation, making such an act a crime, and with the severity of the punishment attached to doing the act, we have nothing to do."

If it had been the intention of the act of Congress to provide for the stoppage at the state line of every interstate commerce contract relating to the merchandise named in the act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods "into any State or Territory for use, consumption, sale or storage therein," negatives the correctness of the interpretation holding that the receipt into any State or Territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the act by another consideration. The *Bowman case* was decided in 1888, the opinion in *Leisy* v. *Hardin* was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in *Leisy* v. *Hardin* had just previously declared to exist.

This view gives meaning and effect to the language of the act providing that such merchandise "shall not be exempt therefrom" (legislative power of the State) by reason of being introduced therein in "original packages or otherwise." These words have no place or meaning in the act if its purpose was to attach the power of the State to the goods before the termination of the interstate commerce shipment. The words "original packages" had, at the time of the passage of the act by the decisions of this court, acquired with reference

to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages.

Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. On the other hand, the right to contract for the transportation of merchandise from one State into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several States, since it embraced a contract which must come under the laws of more than one State. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed. And this view is cogently illustrated by the opinion in the *Bowman case*, where it was said (pp. 486–487):

"Has the law of Iowa any extraterritorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall* v. *De Cuir*, 95 U. S. 485, 488, is exactly in point. It was there said: 'But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the

business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is

untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be.'"

And it was doubtless this construction which caused the court to observe in the opinion in *In re Rahrer*, 140 U. S. 545, 552, that the act of Congress "divests them (objects of interstate commerce shipment) of that character at an earlier period of time than would otherwise be the case." We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution.

It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below is, therefore,

Reversed.

Mr. Justice Gray, with whom concurred Mr. Justice Harlan and Mr. Justice Brown, dissenting.

Mr. Justice Harlan, Mr. Justice Brown and myself are constrained to dissent from this judgment, which appears to us to deny due effect to the police power, reserved to each State by the Constitution of the United States, and recognized by Congress in the act of August 8, 1890, c. 728, commonly known as the Wilson act. 26 Stat. 313.

The purpose and effect of this act may be best understood by recalling the history of the law upon the subject.

In order to keep this opinion within reasonable compass,

we shall, in referring to the previous decisions of this court, confine ourselves, as far as possible, to those decisions which directly relate to the traffic in intoxicating liquors.

The regulation of the manufacture, sale and use of intoxicating liquors has always been recognized as a subject peculiarly appertaining to the police power of the several States respectively. *License cases*, 5 How. 504; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Foster* v. *Kansas*, 112 U. S. 201; *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31.

Upon the question how far the police power reserved to each State over this subject is affected by the grant to Congress of the power to regulate commerce among the several States, there have been conflicting opinions, and even varying decisions, at different periods.

The earliest cases which came before this court, concerning the extent of the police power of each State over intoxicating liquors within its borders, were *Thurlow* v. *Massachusetts*, *Fletcher* v. *Rhode Island* and *Peirce* v. *New Hampshire*, decided in 1847, and reported under the name of *The License cases*, 5 How. 504.

In *Peirce* v. *New Hampshire*, a statute of New Hampshire, prohibiting sales of intoxicating liquors by any person without a license from municipal authorities, and authorizing licenses to be granted only to persons residing within the State, was held by all the justices to be constitutional and valid, as applied to a barrel of intoxicating liquors, brought into New Hampshire from another State, and sold in New Hampshire by the importer, in the same barrel, unbroken and in the same condition in which it had been brought in — there having been no legislation of Congress upon the subject.

That decision was afterwards repeatedly cited with approval. *Gilman* v. *Philadelphia*, 3 Wall. 713, 730; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33; *Mobile County* v. *Kimball*, 102 U. S. 691, 701; *Mugler* v. *Kansas*, 123 U. S. 623, 657, 658. And in several cases the validity of statutes of a State, taxing the sale of intoxicating liquors brought from another State, was

treated as depending upon the question whether the statutes made any discrimination in favor of liquors manufactured within the State. *Hinson* v. *Lott*, 8 Wall. 148; *Tiernan* v. *Rinker*, 102 U. S. 123; *Walling* v. *Michigan*, 116 U. S. 446, 460.

The question whether the power of Congress to regulate commerce with foreign nations and among the several States is exclusive, or only paramount, was a subject of much diversity of opinion from an early period until 1851, when this court, speaking by Mr. Justice Curtis, in *Cooley* v. *Board of Wardens*, 12 How. 299, laid down this principle: When the nature of the particular subject in question is such as to demand a single uniform rule, operating equally throughout the United States, the power of Congress is exclusive; but when the subject is of such a nature as to require different systems of regulation, drawn from local knowledge or experience, and conformed to local wants, it may be the subject of state legislation so long as Congress has not legislated. 12 How. 319, 320. The principle there laid down has become fully recognized and established in our jurisprudence. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 704; *Crandall* v. *Nevada*, 6 Wall. 35, 42; *Mobile County* v. *Kimball*, 102 U. S. 691, 701.

Wherever, from the nature of the subject, the power of Congress to regulate commerce is exclusive, the several States, of course, cannot legislate, even if there has been no legislation by Congress; or, as the proposition has been stated in another form, "where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom." *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493.

The theory that the bringing of intoxicating liquors from one State into another, and the selling of them there in the packages in which they had been introduced, are subjects requiring to be regulated by a national and uniform rule, and therefore within the exclusive power of Congress, and wholly

free from state legislation, was not broached by any member of the court before the cases of *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100.

In *Bowman's case* Chief Justice Waite and two other justices dissented, and in *Leisy's case* three justices dissented; and the reasons for and against the decisions were stated at length in the opinions delivered in those cases. It will be sufficient, for our present purpose, to state the points there decided.

Each of those cases arose under the statutes of the State of Iowa, regulating the manufacture, the sale and the transportation of intoxicating liquors within the State.

Bowman v. *Chicago & Northwestern Railway*, decided by this court March 19, 1888, involved the validity of a provision of those statutes, (substantially similar to the provision now before us, as construed by the highest court of the State,) imposing a penalty upon any railroad company or other common carrier, or any agent of either, or any other person, that should knowingly bring within the State, or knowingly transport or convey between points or from one place to another within the State, for any other person or corporation, any intoxicating liquors, without first having obtained a certificate, from the auditor of the county to which it was consigned, or within which it was to be conveyed from place to place, certifying that the consignee was authorized by the laws of Iowa to sell such liquors. The majority of this court, upon a consideration of the whole statute, frankly recognized that "the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors." 125 U. S. 475, 476. Nevertheless, the provision was held to be unconstitutional and void, as applied to a railroad company transporting intoxicating liquors into the State from another

State, upon the ground that the State "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be." 125 U. S. 493. The court took pains to distinguish the case from *Peirce* v. *New Hampshire*, above cited, and distinctly reserved the expression of any opinion upon the question whether the State had the right to regulate or prohibit the sale of the liquor by the importer in unbroken packages after it had been brought within the State. 125 U. S. 479, 499, 500.

But in *Leisy* v. *Hardin*, two years later, that question was distinctly presented for decision; and it was decided that the provision of the statutes of Iowa, prohibiting the sale of any intoxicating liquors, otherwise than for pharmaceutical, medicinal, chemical or sacramental purposes, and under a druggist's license from a county court of the State, was, as applied to a sale by the importer, and in the original packages, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the grant by the Constitution to Congress of the power to regulate interstate commerce. The majority of the court, in its opinion, delivered by the present Chief Justice, April 28, 1890, treated *Peirce* v. *New Hampshire* as overruled; and stated its own conclusions as follows: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago & Northwestern Railway*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer." And it was said in that opinion that "the responsibility is upon Congress, so far as the regulation

of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." 135 U. S. 123, 124.

Thereupon Congress immediately interposed, and by explicit legislation unequivocally manifested its purpose that no silence on its part should give rise to the presumption that it intended that either the transportation of intoxicating liquors from one State into another, or their sale in the latter State, even in the packages in which they had been brought, should be free, and beyond the reach of the police power of the State.

On May 14, 1890, Mr. Wilson, of Iowa, reported to the Senate, from the Committee on the Judiciary, a bill, which, as amended upon his motion on May 29, was passed August 8, 1890, enacting that "all fermented, distilled or other intoxicating liquors or liquids, transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Congressional Record, 51st Congress, 1st sess. pt. 5, p. 4642; pt. 6, p. 5430; act of August 8, 1890, c. 728, 26 Stat. 313.

Soon after the passage of this act of Congress, the question of its constitutionality and effect was brought before this court in *Rahrer's case*, 140 U. S. 545. Intoxicating liquors, which had been sent, before the passage of this act, by their owners in Missouri to Rahrer in Kansas to be sold by him on their account, were, after the passage of the act, sold by him in Kansas as the agent of the consignors and in the original packages. This court unanimously held that Rahrer was liable to be prosecuted for such a sale under statutes of the State of Kansas, passed in 1889, which made no distinction between imported and domestic liquors.

Dissenting Opinion: Gray, Harlan, Brown, JJ.

The Chief Justice, in delivering the opinion of the majority of the court, said: "Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature." 140 U. S. 560. The grant by the Constitution to Congress of the power to regulate interstate commerce, said the Chief Justice, "furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws." "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." 140 U. S. 561, 562. "Congress did not use terms of permission to the State to act; but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State, not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reënactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach." 140 U. S. 564, 565.

The necessary effect of that decision is that the police power of each State includes the regulation of the transportation, as well as the sale, of all intoxicating liquors within its territory, except so far as affected by the grant by the Constitution to Congress of the power over interstate and foreign commerce; and that, so far as Congress manifests its intention that the interests of such commerce do not require its exemption from the exercise of the police power of the State, this power is unrestricted.

The opinions heretofore delivered in this court upon the effect of the act of Congress of 1890, although they do not decide, clearly imply, that the "arrival in such State," contemplated and intended by the act, is an arrival within the territorial limits and jurisdiction of the State. In *Rahrer's case*, the Chief Justice, in the passages already quoted, said that Congress by this act has declared that "imported liquors shall, upon arrival in a State, fall within the category of domestic articles of a similar nature," and has allowed "imported property to fall at once upon arrival within the local jurisdiction." 140 U. S. 560, 564. The natural meaning of these expressions is that imported liquors, upon arrival within the jurisdiction of the State, become at once subject to its jurisdiction. And in *Scott* v. *Donald*, 165 U. S. 58, the phrase used in the opinion of the majority of the court was, "upon arrival in a State," and, in the dissenting opinion, "upon their arrival within the State," without a suggestion in either opinion that the two phrases were not exactly synonymous, or that any "arrival within the State" was not an "arrival in the State." 165 U. S. 99, 102.

The case at bar directly presents the question of the meaning of the words "upon arrival in such State," as used by Congress in this act.

Chief Justice Marshall, when discussing the general meaning of the words "arrival" and "to arrive," said: "'To arrive' is a neuter verb, which, when applied to an object moving from place to place, designates the fact of 'coming to' or 'reaching' one place from another, or of coming to or reaching a place by travelling, or moving towards it. If the place

be designated, then the object which reaches that place has arrived at it. A person who is coming to Richmond has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate destination, or the end of his journey. A person going from Richmond to Norfolk, by water, arrives within Hampton Roads, when he reaches that place; or, if he diverges from the direct course, he arrives in Petersburg, when he enters that town. This is, I believe, the universal understanding of the term." *The Patriot*, 1 Brock. 407, 411, 412.

If, as Chief Justice Marshall declared, it is the universal understanding of the term that it designates the fact of "coming to" or "reaching" a place by travelling or moving towards it, and does not require that the place at which the traveller arrives should be his ultimate destination, and consequently that a traveller arrives in a city or town when he enters that city or town, it would seem to follow that "arrival in the State" is complete when the person or the merchandise in question enters the State.

That such is the meaning of the word "arrival," as used in the act of Congress now in question, appears to us to be confirmed by the whole scope and by the obvious purpose of the act.

The act declares and enacts that all intoxicating liquors, "transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory" be subject to the effect and operation of its laws enacted in the exercise of its police powers, to the same extent and in the same manner as though they had been produced in it, "and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The act, in terms, includes all intoxicating liquors "transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein." If it be assumed that the words, "for use, consumption, sale or storage therein," are not restricted to the next preceding clause, "or remaining therein," but also extend back to the earlier clause, "trans-

ported into any State or Territory," still the effect of the words is to cover all intoxicating liquors, transported into or remaining in the State for any possible purpose, except that of being transported through the State to another State or country. All such liquors are "upon arrival in such State" to be subject to the operation and effect of the laws enacted by the State "in the exercise of its police powers," to the same extent and in the same manner as if the liquors had been produced within its limits. And it is expressly provided that intoxicating liquors shall not be exempt from the exercise of the police powers of the State, "by reason of being introduced therein in original packages or otherwise." The phrases "transported into any State," "upon arrival in such State," and "introduced therein," would seem to have been used as substantially equivalent.

The act makes no mention of arrival at a specific destination or place in the State. Its whole object, as appears upon its face, as well as from the circumstances which led to its enactment, is not to define when a particular voyage or transit shall be considered at an end; but to assure to the State, throughout its territorial jurisdiction, the full exercise of its police powers over the subject of intoxicating liquors. And we find nothing in the act to indicate an intention on the part of Congress that the mere fact that intoxicating liquors, brought by a common carrier into the State, have not reached their ultimate destination in the State, or been delivered to the consignee, shall exempt them, after coming within the territorial limits of the State, from the exercise of its police powers.

By the statute of the State of Iowa, under which Rhodes was prosecuted, "if any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points or from one place to another within this State, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of

the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed or delivered, is authorized to sell such intoxicating liquors in such county," the company, agent or person so offending shall, upon conviction, be fined in the sum of $100 for each offence; and "the offence herein defined shall be held to be complete and shall be held to have been committed in any county of the State, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered." But it is provided that "the defendant may show as a defence hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him." McClain's Code of Iowa, § 2410. And it was held by the Supreme Court of the State that, in order to support the conviction of Rhodes, it must appear that, when doing the act complained of, he knew that the box in question contained intoxicating liquor.

The material facts, as appearing by the record, and stated in the opinion of the Supreme Court of Iowa, reported 90 Iowa, 496, were as follows:

The intoxicating liquor, which Rhodes has been adjudged guilty of transporting or conveying from one place to another within the State of Iowa, in violation of the statute of the State, was a jug of whiskey, contained and hidden in a wooden box about a cubic foot in size, marked "W. H.," represented to contain groceries, delivered at Dallas in the State of Illinois, by a company doing business at that place, to the Chicago, Burlington and Quincy Railway Company, and consigned to one William Hown at Brighton in the State of Iowa; and was carried, under a through way bill, by that railway company over its road to Burlington in the State of Iowa, and was there transferred to the Burlington and Western Railway Company, whose road was wholly within the State of Iowa, and was carried by this company to Brighton. Upon its arrival at Brighton, it was delivered by the trainmen

upon the platform of this company's depot; and immediately afterwards Rhodes, the company's station agent at Brighton, complying with the directions of his employer, carried the box from the platform into the freight room of the depot building, where, on the same day, it was seized by a constable on a search warrant, being then held by the company for payment of the unpaid freight and for delivery to the consignee. Neither Rhodes nor the company held a permit for the transportation or sale of intoxicating liquors, or a certificate from the county auditor that the consignee was authorized to sell such liquors.

Rhodes testified that before the arrival of the box a mail carrier told him he was looking for a box from Dallas for William Hown, and said it was likely to be marked "W. H.," and would contain alcohol or whiskey; that he told the mail carrier he had not received a box of that description; that the box arrived the next day; and that he supposed, perhaps, this was the box the mail carrier told him would come. The Supreme Court of Iowa was of opinion that this testimony clearly showed that Rhodes knew that the box contained intoxicating liquors; and its conclusion upon this question of fact is not reviewable by this court. *Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Turner* v. *New York*, 168 U. S. 90, 95.

Nor does the conclusion of that court, that Rhodes, by moving the box from the depot platform to the freight house, only a few feet off, transported or conveyed the box from one place to another within the State, within the meaning of the statute of Iowa, present any question of law which this court is authorized to review, except so far as the statute, thus construed, may deprive him of a right under the Constitution and laws of the United States.

The intoxicating liquor in question was brought by rail under a through way bill from Dallas in the State of Illinois to Burlington and Brighton in the State of Iowa. It was carried by the Chicago, Burlington and Quincy Railway Company (whose road ran from Illinois into Iowa) to Burlington, and was there delivered to the Burlington and Western Rail-

way (whose road was wholly in the State of Iowa) and was carried by this company to Brighton, and was there delivered by its servants upon the platform of its freight station. Taking into consideration that so much of the transportation as was performed by an interstate railroad company had been accomplished, and that the remainder of the transportation was by an Iowa corporation and wholly within the State of Iowa, and had been so far completed as to land the intoxicating liquor upon the soil of Iowa, we are of opinion that there had been "an arrival in such State," so as to subject the liquor to the exercise of the police powers of the State of Iowa, within the letter and the spirit of the act of Congress.

VANCE *v.* W. A. VANDERCOOK COMPANY (No. 1).

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 514. Argued March 9, 10, 1898. — Decided May 9, 1898.

It is settled by previous adjudications of this court:

(1) That the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other States of the Union;

(2) That the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States;

(3) That the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods

Statement of the Case.

received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State; but, since the passage of the act of August 8, 1890, c. 728, 26 Stat. 313, which provides "that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," while the receiver of intoxicating liquors in one State, sent from another State, has the constitutional right to receive them for his own use, without regard to the state laws to the contrary, he can no longer assert a right to sell them in the original packages in defiance of state law.

The South Carolina act of March 5, 1897, No. 340, amending the act of March 6, 1896, No. 61, is unconstitutional in so far as it compels the resident of the State who desires to order alcoholic liquors for his own use, to first communicate his purpose to a state chemist, and in so far as it deprives any non-resident of the right to ship by means of interstate commerce any liquor into South Carolina unless previous authority is obtained from the officers of the State of South Carolina, since as, on the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges.

The bill below was filed by the appellee, a corporation created by the laws of California and a citizen of that State. It alleged, in substance, that the corporation was the owner of large vineyards in California, from which it produced well known qualities of pure wines and brandies and other liquors; that through its travelling agent, a citizen of the State of Virginia, it took orders from certain residents of the State of South Carolina residing in the city of Charleston, to deliver to each of them in Charleston certain original packages of wines and brandies, the products of the vineyards of the complainant; that in consequence of said orders seventy-three original packages for the customers aforesaid were shipped

in one car, by a contract for continuous interstate carriage from San Francisco to Charleston; that under a law of South Carolina, known as the dispensary law, certain officers of the State of South Carolina had seized the packages of liquor above described and prevented the delivery thereof, and openly avowed their intention to continue to levy upon any packages of liquor shipped into the State of South Carolina in violation of the law of the State. The bill moreover alleged another shipment of the same character and a like seizure. The bill then averred as follows:

"And your orator further shows that your orator intends in the course of its said business, as aforesaid, further and in addition to said shipments so ordered by its said customers in advance, as aforesaid, to ship also from San Francisco, California, to its agent in the State of South Carolina, and to store and warehouse in the State of South Carolina, and to sell in the State of South Carolina, in the original unbroken packages as imported, as aforesaid, to the residents and citizens of the State of South Carolina, its wines and other liquors, products of its vineyards, as aforesaid, for the lawful use and consumption of the said residents and citizens of the State of South Carolina in the due and lawful exercise of your orator's right of importation of such wines, etc., products of its vineyards, into the State of South Carolina in lawful intercourse, trade and commerce with the citizens and residents of the State of South Carolina, under the Constitution and laws of the United States, all of which shipments, as aforesaid, the defendants and other persons claiming to act as state constables and officials threaten to seize, take and carry away, detain, convert and sell, to the manifest wrong, damage and injury of your orator and its trade and business, as aforesaid.

"And your orator further shows that by and under the terms, principle, policy and operation of the said dispensary law of the State of South Carolina, as aforesaid, approved March 6, 1896, and amended March 5, 1897, all wines, beers, ales, alcoholic, spirituous and other intoxicating liquors are subjects of lawful manufacture, barter, sale, export and import in the State of South Carolina, and have been, are being,

and will continue to be lawfully used and consumed as a beverage by the citizens and residents of the State of South Carolina."

Averring the avowed purpose of the state officers to continue to seize all liquors thereafter shipped by the complainant into the State to residents therein or for sale in original packages, the bill proceeded to charge that the state law upon which the officers relied was void, because repugnant to the Constitution of the United States. That to prevent the continuing wrong which would necessarily arise from the conduct of the state officers and to avoid a multiplicity of suits, a writ of injunction was necessary restraining the state officers from interfering with complainant in its shipment of its products to residents of the State on their orders, and also enjoining the state officers from interfering with the complainant in shipping its products from the State of California into the State of South Carolina to its agents there for the purpose of selling the same in original packages, the provisions of the South Carolina law to the contrary notwithstanding. This mere outline of the averments of the bill suffices to convey an understanding of the controversy which the record presents. A restraining order was granted as prayed for against the designated state officers, and after due pleadings and proceedings this restraining order was perpetuated, and a final decree was entered in favor of the complainant in accordance with the prayer of the bill.

Mr. William A. Barber, Attorney General of the State of South Carolina, for appellants.

Mr. J. P. Kennedy Bryan for appellee.

Mr. Justice White delivered the opinion of the court.

In the two cases of *Scott* v. *Donald*, 165 U. S. 58, 107, the court was called upon to determine whether a law of the State of South Carolina, controlling the sale of intoxicating liquors within that State, was repugnant to the Constitution of the

United States. In one of the cases it was held that the court below had jurisdiction to entertain a bill filed by the complainants to enjoin the execution of the law, as to liquors by them owned; while in both cases it was decided that, in so far as the law then in question forbade the sending from one State into South Carolina of intoxicating liquors for the use of the person to whom it was shipped, the statute was repugnant to the third clause of section 8 of the first article of the Constitution of the United States, commonly spoken of as the Interstate Commerce clause of the Constitution. It was besides decided that the law in question, which created state officers or agents with authority to buy liquor to be sold in the State, and which forbade the sale of any liquor except that so bought and offered for sale by the state officers or agents, was also in violation of the Constitution of the United States, because amounting to an unjust discrimination against liquors, the products of other States. The conclusion reached on this latter subject was predicated not on the general theory which the statute put in practice, but on particular provisions of the law by which the discrimination was brought about. Whether a State could, without violating the Constitution of the United States, confer upon certain officers or agents the sole power to buy all liquors which were to be sold in the State, allowing no other liquor to be sold except that offered for sale by the designated officers or agents, was not decided. On the contrary, this question was reserved, for as the state law was found to violate the Constitution because of express discriminatory provisions which it contained, it became unnecessary to determine whether a law of that general character would be inherently repugnant to the Constitution of the United States. Referring to this last question, the court said (p. 101):

"It was pressed on us in the argument that it is not competent for a State, in the exercise of its police power, to monopolize the traffic in intoxicating liquors, and thus put itself in competition with the citizens of other States. This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it. It is sufficient for the present case to hold, as we do, that when a State recognizes the

manufacture, sale and use of intoxicating liquors as lawful it cannot discriminate against the bringing of such articles in and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of other States."

The controversy which this record presents arises from a law of South Carolina, similar in its general scope to the one which was under review in *Scott* v. *Donald*. The statute before us, however, was enacted after the decision in *Scott* v. *Donald*, and changes in many important particulars the law which was passed on in that case. The statute, as changed, retains the general provisions conferring on the state officers or agents the exclusive right to buy all liquor which is to be sold in the State and to sell the same, but does not contain those clauses in the previous statute which were held to operate a discrimination. It, moreover, modifies the previous statute to the extent that it allows shipments of intoxicating liquors to be made from other States into the State of South Carolina to residents therein for their own use, but subjects the exercise of this right to designated regulations and restrictions. Despite these differences, it is asserted that the present law is repugnant to the Constitution of the United States for the following reasons: *First*, because although the features in the prior act which were held to be discriminatory have been eliminated from this act, nevertheless there are, it is asserted, other provisions in the present act which on their face amount to a discrimination, and therefore render the act void. *Second*, because as the act as at present drawn created state officers and confers upon them the power to buy all the liquor which is to be sold in the State, and forbids the sale of any other liquor by any other person, it is therefore in violation of the Constitution of the United States to the extent that it seeks to control or forbid the sale in original packages of all liquor shipped into South Carolina from other States. And this controversy presents for consideration the question which was reserved in *Scott* v. *Donald*. *Third*, because, although the amended statute recognizes the right of residents

of other States to ship intoxicating liquors to the residents of South Carolina and their right to receive the same, for their own use, it, in reality, it is asserted, denies such right, since its exercise is subjected to conditions which hamper and frustrate the same to such a degree that they are equivalent to a denial of the right itself. The two first contentions go to the whole statute, and therefore, if well taken, render it void as an entirety. The third is narrower in its purport, since it only assails as unconstitutional the particular restrictions which the statute imposes upon the right of the residents of another State to ship into South Carolina and of the residents of that State to receive liquor for their own use. We, therefore, at the outset, dispose of the two first contentions before approaching the third.

In the inception it is necessary to bear in mind a few elementary propositions, which are so entirely concluded by the previous adjudications of this court, that they need only be briefly recapitulated.

(*a.*) Beyond dispute the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other States of the Union.

(*b.*) Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is Interstate Commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.

(*c.*) It is also certain that the settled doctrine is that the power to ship merchandise from one State into another car-

ries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by Interstate Commerce remain under the shelter of the Interstate Commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State.

This last proposition, however, whilst generically true, is no longer applicable to intoxicating liquors, since Congress in the exercise of its lawful authority has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors, shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages except in conformity to lawful state regulations. In other words, by virtue of the act of Congress the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary. The act of Congress referred to, c. 728, was approved August 8, 1890, and is entitled "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases." It reads as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313.

The scope and effect of this act of Congress have been settled. *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, *ante*, 412.

In the first of these cases the constitutional power of Congress to pass the enactment in question was upheld, and the

purpose of Congress in adopting it was declared to have been to allow state laws to operate on liquor shipped into one State from another, so as to prevent the sale in the original package in violation of state laws. In the second case the same view was taken of the statute, and although it was decided that the power of the State did not attach to the intoxicating liquor when in course of transit and until receipt and delivery, it was yet reiterated that the obvious and plain meaning of the act of Congress was to allow the state laws to attach to intoxicating liquors received by Interstate Commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale if made unlawful by the state law.

The claim that the state statute is unconstitutional because it deprives of the right to sell imported liquor in the original packages rests, therefore, on the assumption that the state law is a regulation of Interstate Commerce, because it forbids the doing of an act which in consequence of the permissive grant resulting from the act of Congress, the State had undoubtedly the lawful power to do. Indeed, the entire argument by which it is endeavored to maintain the contention arises from excluding from view the change as to the sale of intoxicating liquor arising from the act of Congress; that is, it rests on the fallacious assumption that the State is without power to forbid the sale of intoxicating liquors in original packages despite the act of Congress, while in fact, as a result of that act, the restrictions and regulations of state laws become operative on the original package before the sale thereof, and therefore such packages cannot be sold if the state law forbids the sale, or can be only so sold in the manner and form prescribed by the state regulations. In view of the self-evident misconception upon which the argument proceeds, it becomes unnecessary to review the many decisions of this court cited in support of the proposition relied upon. Their authority is unquestioned, but their irrelevancy is equally obvious. They all relate to and illustrate various aspects of the principle that the right to send merchandise from one State to another carries with it as an incident the power of

the one by whom they are received to sell them in the original package, even although so doing may be contrary to a state law. None of them have the remotest bearing on the exception to this general rule springing from the act of Congress. The right of the State to forbid the sale of liquors in the original packages being clear, it results that a state law cannot be void because in excess of state authority, when it is but the execution of a power lawfully vested in the legislature of the State. This reasoning would dispose of the case, but for the contention that the act of Congress in question has no bearing on the controversy, and indeed that in this case the power of the State to control the sale of intoxicants in an original package must be determined just as if the act of Congress had never been passed.

Congress, it is argued, by the act in question has submitted merchandise in original packages only to the control of state laws "enacted in the exercise of its police powers." As the state law here in question does not forbid, but, on the contrary, authorizes the sale of intoxicants within the State, hence it is not a police law, therefore not enacted in the exercise of the police power of the State, and consequently does not operate upon the sale of original packages within the State. But the premise upon which these arguments rest is purely arbitrary and imaginary. From the fact that the state law permits the sale of liquor subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the States absolutely forbade sales of liquor, and not to apply in case the States determined to restrict or regulate the same.

The confusion of thought which is involved in the proposition to which we have just referred is embodied in the principle upon which the court below mainly rested its conclusion. That is, "if all alcoholic liquors, by whomsoever held, are

declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power; but so long as their manufacture, purchase or sale, and their use as a beverage in any form or by any person are recognized, they belong to commerce and are without the domain of the police power." But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the state law. If the purpose of the act had been to allow the state law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States.

Nor is the claim well founded that it was decided in *Scott* v. *Donald* that the provisions of the act of Congress of 1890 do not apply in any State by whose laws the sale of liquor is not absolutely forbidden, that is to say, that the right exists to sell original packages in violation of the state laws wherever they do not prohibit liquor from being sold under any circumstances. The language in *Scott* v. *Donald*, which it is asserted establishes this doctrine, is as follows (p. 100):

"It (the South Carolina law then considered) is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890."

Separated from its context these words might have the significance sought to be attached to them, but when elucidated by a reference to what immediately preceded them, and that which immediately followed, it is obvious that they refer to the matter which was being considered, that is, a state law which did not forbid the sale, but, on the contrary, allowed it,

under conditions of express discrimination against the products of other States. Immediately following the passage cited is this language:

"That law (the act of Congress) was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that 'all fermented, distilled or intoxicating liquors transported into any State or Territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

Having found that the law under consideration expressly discriminated against the products of other States, the question which arose for decision was whether the act of Congress allowed such a law to operate on the original package, and it became therefore not necessary to decide what would be the rule where discrimination did not exist. The conclusion expressed on that branch of the case was this and nothing more, that although the act of Congress authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which

injuriously discriminated against the products of other States, and which in consequence of such discrimination was not a police law in the correct sense of those words. It would lead to an impossible conclusion to treat the sentences in *Scott* v. *Donald*, upon which reliance is placed as having the significance attributed to them in argument, since, as we have already stated, the court expressly reserved the question of whether a state law which undertook to confer on its officers power to buy all liquor which was to be sold in the State would be constitutional if no express discriminatory provisions were found in it. It is obvious from even a casual reading of the opinion that the court did not pass on the very question which it expressly declared it abstained from deciding.

A more plausible but equally unsound proposition is involved in the contention that the state law in question is inherently discriminatory. The argument by which this is supported is as follows: The law gives to the state officers exclusive right to purchase all the liquor to be sold in the State. The authority to purchase includes the right on the part of the buyer to determine from whom and where the purchase may be made. This gives the officers the opportunity, by exercising their right of purchase, to buy in one State to the detriment and exclusion of the products of every other State. As no other product, then, but that which the officers buy can be sold in the State, it follows that, although intoxicants will be freely offered for sale in the State, only liquors coming from the State in which the officer has purchased will be so sold, and the products of all other States will be excluded from sale and be thereby discriminated against. And whether these consequences will arise will depend solely upon the arbitrary discretion of the state officers in determining where and from whom the liquor that they propose to offer for sale will be by them purchased. This, it is argued, demonstrates the inherent discrimination arising from legislation which makes state officers the sole persons authorized to buy and sell liquor — a discrimination whose unjust consequences can only be avoided by recognizing the right of the residents of all other States to ship their products into the State and sell them in original

packages. In the first place, to maintain this proposition, the presumption must be indulged in that the state officer, in purchasing as provided by the state statute, instead of buying fairly and in the best markets, affording an equal chance to all sellers and to every locality, will, on the contrary, so act as to discriminate against the products of one or more States and in favor of those of others.

Such a presumption would be equally justified in case the state law authorized only residents to be licensed to sell liquor and restricted the number of such licenses. The persons so licensed, whether one or one hundred, would buy where they pleased the liquor they proposed to sell, and it would therefore be fully as cogent to argue that they might elect to buy in one place instead of another, and thus discriminate against the persons or places from where or from whom they did not buy. The argument will not be strengthened, even if it be conceded that there is a difference between licensing a number of persons to buy or sell and concentrating the power, to buy all the liquor to be sold, in the hands of state officers, and by further conceding that whether the statute discriminates against producers of other States is to be determined solely by the power to bring about the discrimination which might arise from its execution, and not by whether the power has been so carried out as to cause an actual discrimination. Under these concessions there would doubtless be force in the position taken, if the authority of the state officers to buy the liquor to be by them sold, excluded the right of the residents of every other State to ship to the residents of South Carolina liquor for their own use, for in that event the products of the State from which no liquor was bought by the state officers would be wholly excluded from the State, although by the state law liquor could be sold therein by the state agents. But the weight of the contention is overcome when it is considered that the Interstate Commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state

authority to attach to the original package before sale but only after delivery. *Scott* v. *Donald*, *supra*; *Rhodes* v. *Iowa*, *supra*. It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other States and that the inhibitions of a state statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use. This demonstrates the unsoundness of the contention that if state agents are the only ones authorized to buy liquor for sale in a State, and they select the liquor to be sold from particular States, the products of other States will be excluded. They cannot be excluded if they are free to come in for the use of any resident of South Carolina who may elect to order them for his use. The products of other States will be, of course, excluded from sale in the original packages in the State, but as the right of the State to prevent the sale in original packages of intoxicants coming from other States, in consequence of the state law forbidding the sale of any but certain liquor, attaches to the original packages from other States by virtue of the act of Congress, the inability to make such sales arises from a lawful state enactment. To hold the law unconstitutional because it prevents such sale in the original package would be to decide that the state law was unconstitutional because it exerted a power which the State had a lawful right to exercise. Indeed, the law of the State here under review does not purport to forbid the shipment into the State from other States of intoxicating liquors for the use of a resident, and if it did so, it would, upon principle and under the ruling in *Scott* v. *Donald*, to that extent be in conflict with the Constitution of the United States. It is argued, that the foregoing considerations are inapplicable since the state law, now before us, whilst it recognizes the right of residents of other States to ship liquor into South Carolina for the use of residents therein, attaches to the exercise of that right such restrictions as virtually destroy it.

But the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the

grant of the state law. Either the conditions attached by the state law unlawfully restrain the right or they do not. If they do — and we shall hereafter examine this contention — then they are void. If they do not, then there is no lawful ground of complaint on the subject.

We are thus brought to examine whether the regulations imposed by the state law on the right of the residents of other States to ship into the State of South Carolina alcoholic liquor to the residents of that State when ordered by them for their use, are so onerous and burdensome in their nature as to substantially impair the right; that is, whether they so hamper and restrict the exercise of the right as to materially interfere with or, in effect, prevent its enjoyment.

Before, however, approaching this question, we briefly dispose of two other contentions. It is said that the law now before us is expressly discriminatory, since it really contains the provisions found in the previous statute, and which were held in *Scott* v. *Donald*, to be repugnant to the Constitution of the United States. This argument is predicated on the following proposition: The law now before us was passed subsequent to the decision in *Scott* v. *Donald*, holding that the discriminatory clauses in the previous act were void, and it entirely omits them. Its repealing clause, however, only repeals laws inconsistent therewith, and the argument is, that as the provisions found in the previous law, and which were declared unconstitutional by this court, are not inconsistent with the present law, therefore they continue to exist, and the present law must be interpreted as if they were written in it. The error of the argument is so self evident as to require only a passing notice. The very fact that the omitted provisions had been before the enactment of the new law declared to be unconstitutional affords a conclusive demonstration of their inconsistency with the present law. In addition, the fact that the present law has omitted the provisions which had been declared unconstitutional excludes the supposition that it was the intention of the new law, by silence on the subject, to perpetuate and reenact the void provisions. It is, moreover, contended that there is an express discrimination found in the present stat-

ute, which was not referred to in *Scott* v. *Donald*, the provision in question being one which authorizes the use by a resident of South Carolina of wine or liquor made by him for such purpose. The context of the entire statute conclusively demonstrates that the right thus given in an exceptional and limited case in no way relieves alcoholic liquors made by a citizen of South Carolina for his own use from the restrictions imposed by the statute as to the sale of all other liquors, and this, therefore, leaves liquor made by a resident for his own use, under the control of the general regulations which the statute creates, and this completely answers the contention.

The right recognized by the State in residents of another State to ship into South Carolina to a resident of that State liquor for his own use is regulated by the statute as follows, act of March 5, 1897, No. 340, amending the act of March 6, 1896, No. 61:

"Any person resident in this State intending to import for personal use and consumption any spirituous, malt, vinous, fermented, brewed or other liquor, containing alcohol, from any other State or foreign country, shall first certify to the chemist of the South Carolina College the quantity and kind of liquor proposed to be imported, together with the name and place of business of the person, firm or corporation from whom it is desired to purchase, accompanying such certificate with a statement that the proposed consignor has been requested to forward a sample of such liquor to the said chemist at Columbia, South Carolina. Upon the receipt of said sample, the said chemist shall immediately proceed to test the same, and if it be found to be pure and free from any poisonous, hurtful or deleterious matter, he shall issue a certificate to that effect, stating therein the name of the proposed consignor and consignee, and the quantity and kind of liquor proposed to be imported thereunder, which certificate shall be dated and forwarded by the said chemist, postpaid, to the proposed consignor at his place of business. The said consignor shall cause such certificate to be attached to the package containing the liquor when it is shipped into this State, and no package bearing such certificate shall be liable to seizure and confiscation;

but any package of spirituous, malt, vinous, fermented, brewed or other liquid or liquor containing alcohol imported into this State without such certificate, or any package containing liquor other than that described in the certificate thereto attached, or any package shipped by or to any person or persons not named in such certificate, shall be seized and confiscated as provided in this act. Any certificate obtained from the chemist as herein provided shall be used within sixty days after the date of its issue, and shall be invalid thereafter. It shall be unlawful to use said certificates for more than one importation."

The regulation, then, compels the resident of the State who desires to order for his own use, to first communicate his purpose to a state chemist. It moreover deprives any non-resident of the right to ship by means of Interstate Commerce any liquor into South Carolina unless previous authority is obtained from the officers of the State of South Carolina. On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another State to avail himself of Interstate Commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina, and finds its support in the Constitution of the United States. Whether or not it may be exercised depends solely upon the will of the person making the shipment, and cannot be in advance controlled or limited by the action of the State in any department of its government. As the law directs that a sample of the liquor proposed to be shipped shall be sent to the state officer in advance of the shipment, and as a prerequisite for obtaining permission to make a

subsequent shipment, it is claimed in argument that this law is an inspection law passed for the purpose of guaranteeing the purity of the product to be shipped into the State for the use of a resident therein, and therefore it is but a valid manifestation of the police power of the State exerted for the purposes of inspection only. But it is obvious that this argument is unsound, as the inspection of a sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the State. The sample may be one thing and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the State from other States, when in fact it exacts no inspection whatever. Conceding, without deciding, the power of the State where it has placed the control of the sale of all liquor within the State in charge of its own officers to provide an inspection of liquors shipped into a State by residents of other States for use by residents within the State, it is clear that such a law to be valid must not substantially hamper or burden the constitutional right on the one hand to make and on the other to receive such shipment. A law of this nature must at least provide for some inspection of the article to justify its being an inspection law. The power of the State to inspect an article protected by the guarantees of the Constitution, because intended only for use and which cannot be sold, is in the nature of things restrained by limitations arising from the constitutional provisions of a more restricted nature than would be the power to inspect articles intended for sale within the State. The greater harm and abuse which might arise in the latter case suggests a wider power than is incident to the other.

It follows from the foregoing that the decree below rendered was well founded in so far as it restrained the defendants from seizing the property shipped into the State of South Carolina from the State of California by the complainant for the residents of the State of South Carolina on the orders of such residents for their own use, because said shipments had not been made in compliance with the regulations

of the law of South Carolina. But it further follows that the decree below was wrong in so far as it restrained the state officers from levying upon the property of the complainant shipped into the State to agents of complainant for the purpose of being stored and sold therein in original packages and from interfering with such sales. These conclusions require that the judgment below be affirmed in part and reversed in part.

This renders it necessary to remand the case to the court below with instructions to enter a decree setting aside the injunction and dismissing the bill to the extent above indicated, and perpetuating the injunction only in so far as is above pointed out, the whole in accordance with the views herein above expressed, and it is so ordered.

Mr. Justice Shiras dissenting in part, with whom the Chief Justice and Mr. Justice McKenna concurred.

In the opinion and judgment of the court, in so far as they affirm the decree of the Circuit Court restraining the state officers from seizing property shipped into the State of South Carolina from the State of California by the complainant for residents of South Carolina on their order for their own use, I fully concur. But the reasons which lead me to so concur constrain me to withhold my assent from that portion of said opinion and judgment which reverses the decree below, in respect that it restrained such officers from levying upon and confiscating property of the complainant shipped into the State to agents for the purpose of being stored and sold therein in original packages.

In the few observations I shall submit it will be assumed, as well settled, that before the passage of the act of August 8, 1890, known as the Wilson Act, it was not within the power of any State to forbid the importation of wines and liquors from foreign countries or other States, nor their sale in the original packages, nor to subject such sale to discriminatory taxes or regulations. *Walling* v. *Michigan*, 116 U. S. 446; *Bowman* v. *Chicago Railway Co.*, 125 U. S. 465, 507;

Leisy v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161.

The case before us, therefore, turns upon the proper construction and application of that statute.

Since its passage it has been considered by this court in two cases, and the conclusions therein reached will now be pointed out.

In the case of *In re Rahrer*, 140 U. S. 545, the question for adjudication was the validity of a constitutional provision of the State of Kansas, which provided that "the manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes," and of certain statutes of that State which declared that "any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors shall be guilty of a misdemeanor, and be punished as hereinafter provided: Provided, however, That such liquors may be sold for medical, scientific and mechanical purposes as provided in this act;" and it was held that, in the case of a person arrested by the state authorities for selling imported liquor on the 9th day of August, 1890, contrary to the law of the State which forbade the sale, the act of Congress which had gone into effect on the 8th day of August, 1890, providing that imported liquors should be subject to the operation and effect of the state laws to the same extent and in the same manner as though the liquors had been produced in the State, justified the imposition of the penalties of the state law.

It will be perceived that this was a case in which the state laws wholly prohibited the manufacture and sale of intoxicating liquors as articles of ordinary consumption and merchandise; and this court said, referring to the Wilson bill, "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition. . . . It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

Dissenting Opinion: Shiras, J., Fuller, C.J., McKenna, J.

In *Scott* v. *Donald*, 165 U. S. 58, was presented the question of the validity of the act of the general assembly of South Carolina, approved January 2, 1895, generally known as the State Dispensary Law. That legislation did not forbid the use, manufacture or sale of intoxicating liquors, but enacted an elaborate system of regulation, whereby no wines or liquors, except domestic wines, should be manufactured or sold except through the agency of a state board of control, a commissioner and certain county dispensers, and after an inspection by a state chemist.

Packages of wines and liquors made in other States and imported by a resident of the State for his own use, and in the possession of railroad companies which, as common carriers, had brought the packages within the State, were seized and confiscated as contraband by constables of the State.

This court, after considering certain provisions of the act which relieved the sale of domestic wines from restrictions imposed upon imported wines and also those which created a system of inspection, said —

"This is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of its inhabitants, and hence is not within the scope and operation of the act of Congress of August 8, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that 'all fermented, distilled or intoxicating liquors, transported into any State or Territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniform-

ity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful. . . . It is sufficient for the present case to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other States; that such legislation is void as a hindrance to Interstate Commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

Accordingly the conclusion reached was that, as respected residents of the State of South Carolina desiring to import foreign wines and liquors for their own use, the act in question in that case was void.

In the present case, which arose under a later statute, this court follows *Scott* v. *Donald* in holding that the act is invalid as sought to be applied to the importation by residents of the State for their own use, but holds that the residents of other States cannot import wines and liquors and sell them in the original packages, although such articles are recognized by the State as lawful subjects of manufacture, use and sale.

The court concedes that it is not within the power of the State, even when reinforced by the act of Congress of August, 1890, to deprive a resident of one State of the right to ship liquor into another State to a resident for his own use, "because such right is derived from the Constitution of the United States, and does not rest on the grant of the state law," yet holds that the act of South Carolina can validly declare that all liquors imported from other States, for the purpose of sale in original packages, can be seized and confiscated, the com-

mon carrier thereof subjected to fine, and the consignee, if he removes the liquors from the depot or pays freight or express charges thereon, subjected to a fine of five hundred dollars, and to an imprisonment of twelve months at hard labor in the state penitentiary.

Such legislation manifestly forbids Interstate Commerce in articles whose manufacture and sale within the State are permitted, and, in view of the previous decisions of this court, can only be defended by invoking the provisions of the act of Congress. This seems to be the theory upon which the opinion of the majority proceeds, as shown by the following statement: "The claim that the state statute is unconstitutional because it deprives of the right to sell imported liquors in the original packages, rests on the assumption that the state law is a regulation of Interstate Commerce, because it forbids the doing of an act which, in consequence of the permissive grant resulting from the act of Congress, the State had undoubtedly the lawful power to do. Indeed, the entire argument by which it is endeavored to maintain the contention arises from excluding from view the change as to the sale of intoxicating liquors arising from the act of Congress."

But, if the act of Congress can validly operate to authorize the State to forbid the sale in original packages of imported articles of the same kind with those whose manufacture and sale within the State are permitted and regulated, I am unable to see why it cannot also operate to authorize the State to forbid the importation for use. Once concede that it is competent for Congress to abdicate its control over Interstate Commerce in articles whose manufacture, sale and use are lawful within the State, and to confer upon the State the power to forbid importation of such articles for *sale*, it must follow that it would equally be competent for Congress to authorize the State to forbid the importation of such articles for *use*. And, conversely, if it be not competent for Congress to authorize a State to forbid the importation for use of articles whose use in domestic commerce is lawful, so it would not be competent for Congress to authorize a State to forbid the importation for sale of articles whose sale in domestic commerce is lawful.

Dissenting Opinion: Shiras, J., Fuller, C.J., McKenna, J.

I am altogether unwilling to attribute to Congress an intention to abandon the protection of Interstate Commerce in articles of food or drink, whether for personal use or for sale, where similar articles are treated by a State as lawful subjects of domestic commerce. If such were the intention of Congress in the act of August, 1890, I should be compelled to regard such legislation as invalid. The control and regulation of foreign and interstate commerce are among the most important powers possessed by the National legislature, and, as has often been said by this court, were among the most potent causes which led to the establishment of the Constitution. The conceded purpose of protecting commerce from hostile action between the States would be defeated if Congress could withdraw from the exercise of its powers in such matters, and turn them over to the legislatures of the States.

But there is no reason to suppose that Congress intended any such act of abdication in the present instance. Reasonable meaning and effect can be given to the act of August 8, 1890, without giving it such a construction as would raise the serious question of its constitutionality.

Its plain meaning is that, if, in the *bona fide* exercise of its police power, the State finds it necessary to declare that all fermented, distilled or other intoxicating liquor is of a detrimental character, and that its use and consumption are against the morals, good health and safety of its inhabitants, it may legislate, on that assumption, with equal effect as to such liquor whether imported or of domestic manufacture. Such legislation may take the form of total prohibition, and be valid, as we held in *In re Rahrer*, 140 U. S. 545, under a statute of the State of Kansas. The articles prohibited were thus taken out of the sphere of commerce, whether interstate or domestic, and no discriminations were thereby made or attempted adversely to the persons or property of other States.

Or the legislation may seek to regulate the sale of intoxicating liquors, and if the regulations are reasonable, in the fair exercise of the police power, applicable alike to articles imported and to those made in the State, their validity may well be sustained, without infringing upon the Federal control of Interstate Commerce.

Thus if the State of South Carolina, instead of prohibiting the sale of imported liquors in imported packages altogether and confiscating them to her own use, had seen fit to prescribe reasonable regulations of the sale — such, for instance, as forbade its taking place on Sunday, or in the night time, or to be drunk on the premises, or to be made to minors, and if such regulations likewise applied to the sale of domestic liquors — then the case might be deemed to fall within the proper exercise of the police power.

Far different is the nature of the provisions of these acts of South Carolina. They do not pretend to forbid either the use, manufacture or sale of intoxicating liquors. They do not provide a reasonable system of inspection, calculated to protect the public from imposition. They do not seek to subject the sale to reasonable regulations, but do contain provisions which, if carried into effect, would wholly prevent the makers and owners of wines and liquors made in foreign countries or in the other States from exercising the *right* of free commerce under the Constitution. At the most, it can only be said that such persons can be permitted to send their property into South Carolina for sale if the state authorities think fit to allow them that *privilege.*

Nor, even if allowed this restricted privilege of importation, are they permitted to sell their property for what it is worth in the market, because they can sell only through a county dispenser, who is compelled to give a bond in the penal sum of three thousand dollars, conditioned that he will not sell intoxicating liquors at a price other than that fixed by the state board of control. This provision not merely hampers the citizens of the other States in their exercise of the right of trade and commerce, but deprives the residents of the State of the right to purchase articles of a commercial character at prices regulated by open competition.

It may be said that such a construction of the act of Congress would deprive it of actual operation — that the power and laws of the States would be left just as they were before its passage. But, not infrequently, courts have said that there are statutes that are merely declaratory of the law as

it previously existed. And such declaratory statutes are not without value when they serve to elucidate existing law, or to remove uncertainty when decisions or prior enactments are supposed to conflict. The act in question may well be regarded as a legislative attempt to define the boundaries between Federal and state powers in respect to interstate commerce in intoxicating liquors; and this court, in the cases of *In re Rahrer* and of *Scott* v. *Donald*, and in the recent case of *Rhodes* v. *Iowa*, *ante*, 412, has so treated it. But it cannot, as I think, be either interpreted or sustained as an effort to transfer the regulative control in matters of Interstate Commerce from the Nation to the States.

The opinion of the majority, as I read it, fails to recognize frequent and well considered decisions of this court, and seems to justify a brief reference to them.

In *Brown* v. *Maryland*, 12 Wheat. 419, an act of the State of Maryland imposing penalties on all importers of foreign articles or commodities, including wines and spirituous liquors, if they should sell the same without having first procured a license from the state authorities, was held repugnant to the provision of the Constitution of the United States, which declares that "no State shall, without consent of Congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws," and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes." In the course of his reasoning Chief Justice Marshall said: "The object of the Constitution would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

And again: "If this power to regulate commerce reaches the interior of a State, and may be there exercised, it must

be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . . The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

Walling v. *Michigan*, 116 U. S. 446, was a case wherein was brought into question the validity of a statute of the State of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling liquors, to be shipped into the State; and it was held that a discriminating tax imposed by a State, operating to the disadvantage of products of other States when introduced into the first mentioned State, is, in effect, a regulation of commerce between the States, and as such a usurpation of the power conferred by the Constitution upon Congress. Replying to the contention on behalf of the statute, that it was passed in the exercise of the police power of the State, Mr. Justice Bradley said: "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Fed-

eral Constitution, or the powers of the United States Government created thereby."

In *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, it was held that interstate commerce cannot be taxed at all by a State, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.

A law of the State of Iowa forbidding any common carrier from bringing within that State, for any person or corporation, any intoxicating liquors from any other State or Territory, without a permit from the state authorities, was held void in the case of *Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465, and the court, through Mr. Justice Matthews, said: "Here is the limit between the sovereign power of the State and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce is within the jurisdiction of the United States. . . . The same process of legislation and reasoning adopted by the State and its courts would bring within the police power any article of consumption that a State might wish to exclude, whether to that which was drank or to food and clothing."

By an act passed in 1871, the legislative assembly of the District of Columbia subjected persons selling imported goods without a license to penalties, and this act was held invalid in *Stoutenburg* v. *Hennick*, 129 U. S. 141; and in disposing of the contention that Congress must be regarded as having authorized or adopted this legislation, Mr. Chief Justice Fuller said: "In our judgment Congress, for the reasons given, could not have delegated the power to enact the third clause of the twenty-first section of the act of assembly, construed to include business agents such as Hennick; and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, and although by several acts Congress repealed or modified parts of this particular by-law, these parts were separably operative and such as were within the scope of municipal action, so that this Congressional legislation can-

not be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not have been originally authorized."

In *Minnesota* v. *Barber*, 136 U. S. 313, this court held invalid a statute of the State of Minnesota, which made it a matter of fine or imprisonment for any one to sell any fresh beef, mutton, lamb or pork which had not been inspected in a manner prescribed in the act. Referring to the contention, in behalf of the State, that there was no discrimination against the products and business of other States for the reason that the statute requiring an inspection of animals on the hoof, as a condition for the privilege of selling in the State, was applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States, this court, through Mr. Justice Harlan, said: "To this we answer that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of Interstate Commerce which a State may not establish. A burden imposed by a State upon Interstate Commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or affect commerce with other States, as involved in the transportation into that State, for the purposes of sale there, of all fresh beef, veal, mutton or pork, however free from disease may have been the animals from which it was taken."

We did not find it necessary in *Scott* v. *Donald* to pass upon the validity of a scheme whereby a State should seek to establish itself as a trader in articles of commerce, and to punish as criminals all persons who should attempt to deal in such articles. Nor has the court seen fit to discuss that question in the present case. It may be that, if confined to articles of

state production, such a scheme might not be open to objections on Federal grounds. But where a State proposes to create a monopoly in articles which its own legislation recognizes as proper subjects of manufacture, sale and use, and where those articles are a part of international and Interstate Commerce, it is, I submit, too plain to call for argument that such an attempt does not comport with that freedom of trade and commerce, to preserve which is one of the most important purposes of our Federal system.

If these views are sound, then the acts of South Carolina in question, in so far as they seek to prevent citizens of that State from importing for their own use wines and liquors, and to arbitrarily forbid, and not by reasonable regulations, control sales of such articles when imported, are void as an unconstitutional interference with Interstate Commerce.

I think the decree of the Circuit Court should be affirmed.

I am authorized to state that the CHIEF JUSTICE and MR. JUSTICE MCKENNA concur in the views of this opinion.

VANCE *v.* W. A. VANDERCOOK COMPANY (No. 2).

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 515. Argued March 9, 10, 1898. — Decided May 9, 1898.

In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum.

The courts of South Carolina having held that in an action of trover consequential damages are not recoverable, and the damage claimed by the plaintiff below, in this case, omitting the consequential damages, being less than the sum necessary to give the Circuit Court jurisdiction of it, it follows that, on the face of the complaint, that court was without jurisdiction over the action.

Statement of the Case.

THE appellee, a corporation of the State of California, began this action against the present plaintiffs in error, citizens of the State of South Carolina, averring the alleged wrongful seizure by the defendants Bahr and Scott, at a railroad depot in the city of Charleston, South Carolina, of packages of wines and brandies, the property of the plaintiff. It was averred that at the time of the seizure the liquors were in the custody of a common carrier, under a shipment from San Francisco to the agent of the plaintiff at Charleston, who was to make delivery of each package to a particular individual, who, prior to the shipment, had given an order for the same. Averring that the defendant Vance had subsequently to the seizure, and with knowledge of its wrongful nature, received said packages into his custody, it was further alleged that demand had been made for the return of the property seized, that it was still detained, and that plaintiff was entitled to the immediate possession thereof. Judgment was prayed against the defendants for the recovery of possession of the packages or their value, alleged to be one thousand dollars, in case delivery could not be had, and for damages in the sum of ten thousand dollars. There was an allegation of special damage, to wit: "That by said malicious trespass of said defendants and their continuation in the wrongful detention of said sixty-eight packages of wine the plaintiff has been greatly injured in its lawful trade and business with the citizens and residents of the State of South Carolina to its great hurt and damage in the breaking up of such trade and commerce." Itemized lists of the packages were attached as exhibits to the complaint.

It was also alleged that the defendants claimed that the acts by them done were performed under the authority of a law of South Carolina designated as the dispensary law, and it was charged that the statute was void, because in conflict with the Constitution of the United States. It was moreover averred that the forcible seizure and carrying away of the packages and the detention thereof were done "knowingly, wrongfully, wilfully and maliciously, with intent to oppress and humiliate and intimidate this plaintiff, and make it afraid

to rely upon the Constitution and laws of the United States, and the judicial power thereof, for its protection in those rights, privileges and immunities secured to the plaintiff by the Constitution and laws of the United States." It was also alleged that the defendants, by "the said malicious trespass and wrongful detainer," intended to deter and intimidate plaintiff and others from asserting their rights under the Constitution of the United States.

S. W. Vance filed a separate answer, while Bahr and Scott jointly answered. The respective answers set up that the court had no jurisdiction of the action; that the complaint did not state facts sufficient to constitute a cause of action; that by the provisions of the dispensary law of South Carolina, approved March 6, 1896, the action could not be maintained against the defendants, for the reason that the acts complained of were by them performed in the discharge of duties imposed upon the defendants by the said law; and, if the action was maintainable, that there was a misjoinder of causes of action, in that the plaintiff sued for the recovery of the possession of personal property, and also for exemplary damages for the commission of a trespass in taking the same. It was denied that the seizures and detentions complained of were made with the intent to injure or oppress the complainant, and it was also denied that the property was of the value alleged in the complaint, or that the plaintiff had been damaged in the sum claimed. It was, further, specially averred that the packages were seized and detained because the liquors contained therein had not been inspected as required by the provision of an amendment to the dispensary law, adopted in 1897, and because of a failure to have attached to each package a certificate of inspection, as required by the statute.

By a stipulation in writing it was agreed that the issues of fact should be tried by the court without a jury. At the trial, as appears by a bill of exceptions allowed by the presiding judge, the court, on the request of counsel for the defendants, passed upon the matters of law heretofore referred to and also upon several propositions of law relied on by the defendants, that is, that the dispensary law was not in conflict with the

Constitution of the United States and was a valid exercise of the police power of the State, particularly by reason of the provisions of the act of Congress of 1890, known as the Wilson act. Each of these propositions of law was decided adversely to the defendants, and an exception was noted.

The facts found by the court were: "That the property described in the complaint is the property of the plaintiff, and that the value thereof is the sum of one thousand dollars, and that the damages to the plaintiff from the detention of the said property by the defendants is the sum of one thousand dollars." And, as matter of law, the court found "That the plaintiff is entitled to judgment against the defendants for the recovery of the possession of the said property described in the complaint, or the sum of one thousand dollars — value of said property — in case delivery thereof cannot be had, and for the further sum of one thousand dollars damages." Judgment was entered in conformity with the findings. A writ of error having been allowed, the cause was brought to this court for review.

Mr. William A. Barker, Attorney General of the State of South Carolina, for plaintiffs in error.

Mr. J. P. Kennedy Bryan for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

Counsel for plaintiffs in error discuss in their brief the contentions that the Circuit Court erred in holding that it had jurisdiction of the action and that there was not a misjoinder of causes of action, and also assert that the court erred in refusing to hold that the dispensary law of South Carolina was a valid enactment.

We shall dispose of the case upon the jurisdictional question, as it is manifest that the amount of recovery to which the plaintiff was entitled, upon the construction put upon the complaint by its counsel and acted upon by the trial court, could not equal the sum of two thousand dollars.

In his brief, counsel for defendant in error says:

"It is clear that the complaint is a case for recovery of personal property and for damages for its detention. The allegations in the complaint as to the wrongful taking of the property are not by way of stating a cause of action for malicious trespass, but, under the law of the State of South Carolina, are necessary as allegations of wrongful seizure, wrongful taking, and support an action for recovery of personal property and damages for detention, without a previous demand before the suit, and the court, by its judgment, so construed the complaint and gave judgment in conformity to the code. . . .

"The Circuit Judge has treated the complaint as an ordinary action for recovery of personal property and for damages for its detention, and has found the title of the property in the plaintiff, and has found the *damages for detention.* He has found no other damages, he has found no damages for malicious taking, he has found no damages for malicious trespass, he has found only '*damages for detention.*' And those damages, as matter of fact, were testified to as being at least twelve hundred dollars. The Circuit Judge has found them to be one thousand dollars, and they are conclusive as matters of fact, and are the usual damages accompanying the successful plaintiff who recovers judgment against the defendants for recovery of possession of personal property and damages incident to wrongful detention. The defendants, therefore, have no possible cause of complaint."

In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Barry* v. *Edmunds*, 116 U. S. 550, 560; *Wilson* v. *Daniel*, 3 Dall. 401, 407.

As by section 914 of the Revised Statutes of the United States the practice, pleadings and forms and modes of pro-

ceedings in actions at common law in a Circuit Court of the United States are required to conform, as near as may be, to those prevailing in the state court, and as by section 721 the laws of the several States are made rules of decision in trials at common law in the courts of the United States, in cases where they apply, *Bauserman* v. *Blunt*, 147 U. S. 647, we will examine the laws of South Carolina and the decisions of its courts, in order to ascertain the nature of the state statutory action to recover possession of personal property, and the rights of the parties thereunder.

The action of claim and delivery of personal property, under the code of South Carolina, is one of the class of statutes referred to by Judge Cooley, in his treatise on Torts, (note 2, p. 442,) which permits the plaintiff in an action of replevin to proceed in it as in trover, and recover the value of the property in case the officer fails to find it to return to the plaintiff on the writ. The proceeding was introduced into the legislation of South Carolina by the code of procedure adopted in 1870, Title 8, c. 1, 14 Stats. S. C. 423, which provided in section 269 (p. 480) that, upon the making of an affidavit containing certain requisites and the giving of a bond, the plaintiff might obtain an immediate delivery of the property. By section 285, c. 3, (p. 484) it is provided that "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property." In section 301, c. 6, (p. 488) it is provided: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention." By section 300 it is provided that, "Whenever damages are

recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action."

Prior to the code, by a statute passed December 19, 1827, No. 2433, entitled "An act to alter the law in relation to the action of trover and for other purposes," 6 S. C. Stats. 337, it was provided that upon the giving of a bond and the making of an affidavit by a plaintiff who intended to commence an action of trover for the conversion of any specific chattel, that the chattel belonged to the plaintiff and had been converted by the defendant, an order might issue requiring the defendant to enter into a bond with sufficient surety, for the production of the chattel to satisfy the plaintiff's judgment in case he should recover against the defendant or defendants, and it was declared that such specific chattel should be liable to satisfy the plaintiff's judgment to the exclusion of other creditors. Under this act the surety might take the body of the defendant and keep him in custody until he gave the required security. *Poole* v. *Vernon*, 2 Hill, 667.

The measure of damages in South Carolina in an action of trover was early settled in that State. Thus, in 1792, in the case of *Buford* v. *Fannen*, 1 Bay, 270, an action of trover to recover the value of several negroes and a horse, after proving the value of the horse, the plaintiff offered evidence of consequential damages sustained by the loss of his crop. The trial judge having refused to receive the evidence, the case came before the Superior Court on a motion for a new trial. Chief Justice Rutledge was of opinion that this kind of testimony might be allowed in some cases, and was for granting a new trial, but the court ruled otherwise, the following opinions being delivered (p. 273):

Waties, J. "It is of great importance to keep different issues distinct, that the parties in one form of action, may not be surprised by evidence which belongs to another. The evidence which the plaintiff wished to produce, would have been admissible in trespass; but was, I think, properly rejected in this action. Where there has been an unlawful taking, either trespass or trover will lie; but if the party proceeds in trover,

he waives the tort, except as it is evidence of a conversion, and can only have damages for the value of the property converted, and the use of it while in the defendant's possession. The real value of the property is not always the sole measure of damages; if the conversion of it is (or may reasonably be supposed to be) productive of any benefit to the defendant, the jury may give additional damages for it; as where trover is brought for money in a bag, interest ought to be allowed by way of damages for the detention; so, in this case, if the negroes had not been delivered, damages could be given for the labor of the negroes; for the use of money or negroes is a certain benefit to the party who converts them, and he ought to pay for it. But where he acquires no gain to himself by the conversion, it does not appear to me that he is answerable for any damages above the real value of the thing converted; if he was, he would be answering for a mere *delictum*, for which he is not liable in trover. By waiving the trespass in this action, which the plaintiff must do, he waives, I conceive, every kind of personal wrong which is unattended with any gain to the trespasser; he releases him from everything which death would release him from. If, for instance, the defendant had been dead at the time of bringing this suit, what could the plaintiff, in any form of action, have recovered from his executors? The same amount which he has now recovered and no more, that is the value of the horse taken. Or damages for the use of the negroes, while they were in the defendant's possession; but nothing for the loss of crop, which proceeded *ex delicto*, and produced no benefit to the defendant. For the same reason, as this action is founded in property only, and no damages can be allowed for the mere *delictum*, I think the evidence offered was not admissible, and that the judge was right in refusing it.

"Bay, J., thought, that as in an action of trover, the tort was waived, all its consequences were relinquished with it. The very nature of the action supposed that the defendant came lawfully into possession; and, if so, no damages could or ought to be given till the true owner made his demand; from which time only, damages ought to be calculated. And

where no specific demand was proved, then from the time of the commencement of the action; and relied on the case of *Cooper et al* v. *Chitty et al.*, 1 Burr. 31, where the nature of this action is particularly defined; also 3 Burr. 1364-65; 2 Esp. 353."

In 1818, in the case of *Banks* v. *Hatton*, 1 N. & McC. 221, an action of trover to recover the value of three negroes, a verdict having been rendered for the plaintiff, a new trial was asked for, among other grounds, because the damages were excessive. In the course of the opinion of the appellate court granting the motion, Mr. Justice Colcock said on this branch of the case (p. 222):

"It is stated, that the presiding judge instructed the jury, that they were at liberty to give 'smart money' in estimating the damages. In the action of trover, the correct measure of damages is the value of the property, and interest thereon; or if the action be for the conversion of negroes, the value of their *labor*, in addition to the value of the negroes. It is impossible to determine by what rule the jury have been governed; but from the amount of the verdict, it is highly probable, that they were influenced by the charge of the presiding judge, and I therefore think the defendant entitled to a new trial on this ground."

On a subsequent appeal from the new trial granted in the case, Mr. Justice Nott, with whom four justices concurred, said (Ib. p. 223):

"Damages for the detention, may be given according to the nature of the thing converted or detained; as for instance, for the use of money, the interest may be made the measure of damages, or the value of their labor, in the case of negroes. *Buford* v. *Fannen*, 1 Bay, 270. Sometimes the increased value may be added, as was decided in the case of *Kid and Mitchell*, in this court (*post*). The defendant is not to be benefited by his own wrong. Neither can the rights of the plaintiff be affected by the death of the destroyer of the property after demand and refusal."

In *McDowell* v. *Murdock*, 1 N. & McC. 237, an action of trover for the value of two negroes, Mr. Justice Nott, in deliv-

ering the opinion of the court, held that the defendant was entitled to a new trial, because, among other grounds, of an erroneous instruction to the jury as to the rule of damages, said (p. 240):

"It has lately been determined by this court, in several cases, that a jury cannot give *vindictive* damages in an action of *trover*. The *value* of the property, with such damages as must *necessarily* be supposed to flow from the *conversion*, is the only true measure. Such, for instance, as the *work* and *labor* of negroes; interest on the value of dead property, etc."

In 1853, in *Harley* v. *Platts*, 6 Richardson, 310, an action of trover brought to recover the value of four slaves, a new trial asked for on the ground of excessive damages was refused, it being held that the verdict was warranted by the evidence, under the rule allowing the jury to give the highest value up to the time of trial, with interest, or hire. Glover, J., delivering the opinion of the court, said (p. 318):

"In trover, the jury is not limited to finding the mere value of the property at the time of conversion; but may find, as damages, the value at a subsequent time, at their discretion. 3 Steph. N. P. 2711. The jury may give the highest value up to the time of trial. *Kid* v. *Mitchell*, 1 N. & McC. 334. In *Burney* v. *Pledger*, 3 Rich. 191, Judge O'Neall says, 'That the plaintiff is entitled to recover for the value of the property at the time of the trial, with interest; or for the value of the property at the time of the trial, with hire from the conversion, as may be most beneficial.' And in *Rodgers* v. *Randall*, 2 Sp. 38, it was held that the jury have a discretion between the highest and lowest estimates.

"Governed by these rules, so long and so repeatedly established, the evidence appears to have authorized the conclusion attained by the jury in this case."

That the decisions referred to are applicable under the code was recognized in the case of *Sullivan* v. *Sullivan*, (1883) 20 S. C. 509, an action of claim and delivery to recover the possession of certain notes with damages for their detention, where it was held by the appellate court that, in addition to a recovery of the notes, the plaintiff was entitled to recover

the amount they had diminished in value while in the hands of defendant. After quoting section 298 (formerly section 300) of the code, which we have heretofore referred to, the court said (p. 512):

"The code has made no material changes in the primary rights of parties, or in the causes of action, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term 'remedy' in the sense of 'redress') are still the same.

* * * * *

"The action below was an action for the recovery of personal property and damages for its detention. It was an action in the nature of the old action of trover. It will not be denied that in actions of that kind, under the former practice, (as a general rule,) damages for detention beyond the property itself could be, and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of *McDowell* v. *Murdock*, 1 Nott & McCord, 237, where the court said: 'It has lately been determined by this court, in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property.' *Buford* v. *Fannen*, 1 Bay, 2d ed. 273; *Harley* v. *Platts*, 6 Rich. 318; *Kid* v. *Mitchell*, 1 Nott & McCord, 334."

A recent decision construing the provisions of the action of claim and delivery of personal property is *Loeb* v. *Mann*, 39 S. C. 465, in which the defendant, a sheriff, was alleged to have wrongfully and unlawfully taken from the plaintiffs and to have unjustly detained from them certain liquors. Bond having been given, the goods were taken from the possession of the defendants and delivered to the plaintiffs. The appellate court, in the course of its opinion, held that the trial judge erred in permitting evidence of expenditures by the plaintiffs for hotel bills, railroad fare and attorney's fees, and

declared that such damages were not recoverable for the *detention* of the property. The court said (p. 469):

"It is urged that this action of 'claim and delivery' is peculiar in this, that the law expressly gives to the prevailing party damages in addition to costs and disbursements. It is true that section 283 of the code provides as follows:

"'In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property,' etc. What damages? Why, surely such damages as 'may have been sustained by reason of the seizure and detention of the property itself; that is to say, by direct and proximate injury of the property in question, or in reducing its value; and not for the purpose of allowing a party to reimburse himself as to consequential losses alleged to have been sustained in the prosecution of the case, in respect to the speculative value of time lost, and the payment of the bills of railroads and hotels, lawyers' fees,' etc."

After reviewing authorities in support of the proposition that counsel fees were not allowable as damages for the detention of property, for the reason that they could not be said to be the *necessary* result of the act done by the defendant, the court said (p. 471):

"It is true that the decided cases do not seem to be as full and clear in reference to the other items of expenditures claimed here as damages; but we confess that in respect to damages, we are unable to draw a distinction in principle between expenses incurred in paying lawyers' fees and in making a charge for the speculative loss of time and paying railroad and hotel bills, etc."

Under the decisions to which we have referred, it is evident

that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of *Conard* v. *Pacific Insurance Co.*, 6 Pet. 262. In the course of the opinion there delivered by Mr. Justice Story, the court held that the trial judge did not err in giving to the jury the following instruction:

"The general rule of damage is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass."

Indeed the same rule was in effect reiterated in *Watson* v. *Sutherland*, 5 Wall. 74, 79, where it was substantially held that "loss of trade, destruction of credit and failure of business prospects" could not be recovered in an action at law where malice or bad faith was not an ingredient, because such damages were collateral or consequential as regards a seizure of personal property, and could only be recovered at law where the issue of bad faith was involved. In other words, that however at law such damages might be considered when the suit was based upon a malicious trespass they were not a proximate result of an injury to property caused by an illegal seizure thereof.

The courts of South Carolina, as we have seen, have held that in an action of trover *consequential* damages are not recoverable, and have also held that in the action of claim and delivery damages for the detention must have respect to the property and to a direct injury arising from the detention. Destruction of business not being of the latter character, it follows that the special damages averred in the complaint were not recoverable.

Syllabus.

It results that as the plaintiff's action was solely one for claim and delivery of property alleged to have been unlawfully detained and for damages for the detention thereof, the amount of recovery depended first upon the alleged value of the property, which in the present case was one thousand dollars, and such damages as it was by operation of law allowed to recover in the action in question. As, however, by way of damages in an action of this character, recovery was only allowable for the actual damage caused by the detention, and could not embrace a cause of damage which was not in legal contemplation the proximate result of the wrongful detention, and such recovery was confined, as we have seen, to interest on the value of the property, it results that there was nothing in the damages alleged in the petition and properly recoverable adequate, when added to the value of the property, to have conferred upon the court jurisdiction to have entertained a consideration of the suit. Upon the face of the complaint, therefore, the Circuit Court was without jurisdiction over the action, and it erred in deciding to the contrary.

The judgment of the Circuit Court of the United States for the District of South Carolina is reversed with costs and the cause is remanded to that court with directions to dismiss the case for want of jurisdiction.

ANDERSEN *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 583. Argued April 11, 1898. — Decided May 9, 1898.

The indictment in this case, which is set forth at length in the statement of the case, alleged the murder to have been committed "on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of

Statement of the Case.

America, in and on board of a certain American vessel." *Held*, that nothing more was required to show the locality of the offence.

The indictment was claimed to be demurrable because it charged the homicide to have been caused by shooting and drowning, means inconsistent with each other, and not of the same species. *Held*, that the indictment was sufficient, and was not objectionable on the ground of duplicity or uncertainty.

There was no irregularity in summoning and empanelling the jury.

There was no error in permitting the builder of the vessel on which the crime was alleged to have taken place, to testify as to its general character and situation.

As there was nothing to indicate that antecedent conduct of the captain, an account of which was offered in evidence, was so connected with the killing of the mate as to form part of the *res gestæ*, or that it could have any legitimate tendency to justify, excuse or mitigate the crime for the commission of which he was on trial, there was no error in excluding the evidence relating to it.

After the Government had closed its case in chief, defendant's counsel moved that a verdict of not guilty be directed, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol shots. *Held*, that there was no error in denying this motion.

While a homicide, committed in actual defence of life or limb, is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act was necessary in order to avoid death or harm, where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self-defence cannot avail.

The evidence offered as to the general reputation of the captain was properly excluded.

As the testimony of the accused did not develop the existence of any facts which operated in law to reduce the crime from murder to manslaughter, there was no error in instructing the jury to that effect.

Andersen was indicted in the Circuit Court of the United States for the Eastern District of Virginia, for the murder of William Wallace Saunders, on an American vessel, on the high seas, of which vessel Saunders was the mate and Andersen the cook.

The indictment charged that Andersen —

"On the sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, on the high seas and within the jurisdiction of this court and

within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner called and named 'Olive Pecker,' then and there belonging to a citizen or citizens of the said United States of America whose name or names is or are to the grand jurors aforesaid unknown, in and upon one William Wallace Saunders, sometimes called William Saunders, then and there being on board said vessel, did piratically, wilfully, feloniously and of his malice aforethought make an assault, and that the said John Andersen, alias John Anderson, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said John Andersen, alias John Anderson, in his hand (but which hand is to the said jurors unknown) then and there had and held, then and there piratically, feloniously, wilfully and of his malice aforethought did discharge and shoot off to, against and upon the said William Wallace Saunders, sometimes called William Saunders, with intent him, the said William Wallace Saunders, sometimes called William Saunders, then and there to kill and murder, and that the said John Andersen, alias John Anderson, with the leaden bullets aforesaid out of the pistol by the said John Andersen, alias John Anderson, discharged and shot off as aforesaid, then, to wit: On the said sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and there, to wit: On the high seas as aforesaid, in and on board of the said American vessel, and within the admiralty and maritime jurisdiction of the said United States of America and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the United States of America, piratically, feloniously, wilfully and of his malice aforethought did strike, penetrate and wound the said William Wallace Saunders, sometimes called William Saunders, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders, (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders,

to the said jurors unknown,) giving to him, the said William Wallace Saunders, sometimes called William Saunders, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said John Andersen, alias John Anderson, with the intent aforesaid, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders, (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown,) several grievous, dangerous and mortal wounds, and the said John Andersen, alias John Anderson, did then and there, to wit: At the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, wilfully and of his malice aforethought cast and throw from and out of the said vessel into the sea, and plunge, sink and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking and drowning the said William Wallace Saunders, sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they cannot describe the said mortal wounds with greater particularity."

The case coming on before Goff, Circuit Judge, and Hughes, District Judge, defendant "demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offence occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the said demurrer being in anywise considered, for reasons not assigned. Whereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid and admonished the accused that he must state any

other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was overruled."

Defendant was duly and formally arraigned and pleaded not guilty; and then "moved to quash the writ of *venire facias* for the petit jury to be used in the trial of this particular case, on the ground that the said writ must show that said venire were summoned for the trial of this particular case, and not the general venire for offences in general to be tried at this term of the Circuit Court of the United States for the Eastern District of Virginia." This motion was overruled and defendant excepted.

A jury was thereupon duly empanelled and sworn and the trial proceeded with, and during its progress exceptions to the admission and exclusion of evidence and the giving and refusal of instructions were preserved by defendant. At the close of the Government's case in chief, defendant's counsel moved the court to instruct the jury to bring in a verdict of "not guilty" on the ground that defendant was indicted for the murder of Saunders by drowning, whereas the evidence showed that he met his death by the discharge of a pistol. The court overruled the motion and defendant excepted. A verdict of guilty having been returned, defendant made successive motions for a new trial and in arrest of judgment, which were severally overruled, whereupon he was sentenced to be executed. This writ of error was then sued out, the cause docketed, and duly argued at the bar.

The bill of exceptions contained the following preliminary statement of uncontroverted facts:

"That the American three-masted schooner 'Olive Pecker' sailed from Boston, Massachusetts, on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, viz., the defendant, John Andersen, and four seamen, viz., Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios

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Barrial, a native of Spain, and Andrew March, a native of Newfoundland; that the said 'Olive Pecker' was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course to her port of destination until the morning of August 6, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between nine and ten o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head and his body immediately thrown into the sea. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel 'Olive Pecker' was burned and the cook, engineer and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the 'Bernadotte,' bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain. The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the 'Olive Pecker,' with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused, and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the 'Olive Pecker,' and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

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"At the direction of the Government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port some time in the month of September, 1897, of the United States man-of-war 'Lancaster,' when they were put on board of that vessel and brought into Hampton Roads, Virginia, in the Eastern District of Virginia, that being the first district into which the accused was brought after the commission of the alleged offence; and the said accused, together with the five men, was turned over by the officers of the 'Lancaster' to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Virginia."

The evidence introduced on the trial was given in full, and included the testimony of the four seamen, Barstad, Lind, Barrial and March, and the engineer Horsburgh, on behalf of the Government, and that of the defendant on his own behalf. A considerable portion is set forth in the margin.[1]

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[1] Barstad, who was at the wheel when the mate was shot, testified:

"I last saw William Saunders, the mate of the said vessel, alive on the morning of August the 6th, 1897, on the left side of the forecastle head of that vessel. It was between nine and ten o'clock of that morning. He was shot at that time and place by John Andersen, the cook of the vessel and the prisoner here. I saw him shoot him. I was at the wheel of the vessel in the wheelhouse, just aft of the after-cabin.

"I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately after I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidships by the rigging of the middle mast. He said something to Lind, but I did not hear what it was. I heard him sing out to the mate, Saunders, who was up on the cross-tree of the foremast, at work in the rigging, and say, 'Come down, Mr. Saunders.' The mate said, 'What do you want, steward?' In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook, Andersen, was standing on top of the forward house, the mate started down and said, 'What you got in your hands, cook?' 'I got guns,' he says. 'Where you get them?' says the mate. 'Down in the cabin,' he says. The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said, 'For God's sake don't shoot me, cook.' The

Counsel for Parties.

Mr. George McIntosh for plaintiff in error.

Mr. Solicitor General and *Mr. William H. White* for defendants in error.

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cook fired another shot, and the mate kept on reeling; and the cook fired another one, and a third one, when the mate fell, and he shot him once after he had fallen. Then the cook sung out to the men, who were in the forecastle, 'I am in charge of this vessel; I am next to the mate.' He sung out again, 'Won't you fellows come out?' They came out, and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said, 'If any man like he can put me in irons.' He had two or three pistols, one in his hands then. He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says, 'Boys, come down and have a drink.' He went down in the captain's cabin and handed a bottle of whiskey, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said, 'You know all you men is guilty for helping me throw the bodies over the side.'

"The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said, 'Damn; you want me to get hung.' We said, 'No, steward, we don't want you to get hung.' All the time he was armed. After a little he said to the Spaniard, 'You the only sensible man amongst the crowd; I want to speak to you.' Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes, and no more; he said take no discharges, bank books, nothing. He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said 'No.' He says, 'You go,' and handed his pistol in my face. 'All right,' I says, 'steward.' I filled three buckets and passed them up, and Andrew March took it and threw it on the deck-load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it." . . . "It was twelve or one o'clock when we left the 'Olive Pecker.' No vessels were in sight which could have picked up the bodies of the mate and captain."

He then gave the particulars of the sail to the shore; the arrest; etc.

This witness further said that when Andersen called to Saunders to come down —

"The mate asked him, 'What do you want, steward?' He finished his job and hung the marlin spike around his neck and came down the rigging.

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

1. The cause assigned in support of the demurrer to the indictment was that it did "not specify the locality on the

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The marlin spike had a half hitch on the point, which put the point upwards. That is the way sailors do it to keep the point from striking them as they go up and down the rigging.

"There was nothing to keep me from seeing the mate in the rigging and when he came down, and all along the vessel on her port side to where the shooting occurred. The sails were all swinging to starboard. The lumber was so piled on the deck that a man running along on it would run right on top of the forward house. John Andersen was standing on top of the forward house when he shot the mate, and the mate was standing on the forecastle deck. The forecastle deck is about three feet lower than the top of the house where the cook was standing. The body of the mate was lying, when picked up, on the forecastle head, on the left side of the vessel."

On cross-examination he said: "I mean to tell the jury that five of us were intimidated by that one man, the cook — the cook with the pistols. He intimidated us so that when he ordered us to burn the ship we obeyed. He was following us up all the time. He ordered one to go there and another to go there, and another one there. We had to follow the man at the point of the pistol or else get killed. We did what we were told to do through his pistol." . . . "When the mate came down out of the rigging, he asked the cook, 'What have you got in your hands, steward?' The steward said, 'I got guns.' The mate came down, stepped on the forecastle head, and John Andersen fired a shot. The marlin spike was not in the mate's hand, but was hanging around his neck, with the point up. I am sure of that, though I was a hundred and fifty feet away. I did not have a glass. The mate was standing with his hands at his side, with the marlin spike around his neck. He did not make any hostile demonstration towards the cook. He did not come at him to strike him. I am positive of that. I do not know the mate had threatened the cook's life."

Lind testified:

"I last saw Mate William Saunders on the 6th of August of this year; he was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companionway and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; he came right up to me and asked me where the mate was, and said, 'I have killed the captain, and now the mate goes too.' The mate was then aloft, in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, 'You better look out because the cook is on deck with revolvers.'

high seas where the alleged offence occurred." The objection was without merit. The indictment alleged the murder to have been committed "on the high seas and within the jurisdiction of this court, and within the admiralty and mari-

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As I was calling through the window I could not see on the left of the vessel. While I was calling to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots, I don't know exactly how many. I heard the steward call to the men to come out, for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up, all hands were there except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head with his face downward. He had a marlin spike tied around his neck. A marlin spike is used for splicing ropes, an instrument that all sailors carry aloft when they go up to splice a rope; it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair; sitting like this, sir, with his hands folded in his lap. He looked as if he was alive. I saw blood on the side of his head, on the left side. We were told to take him up by Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. Before throwing the captain's body overboard, Andersen took hold of the captain's arm and felt his pulse. When the body was thrown overboard, Andersen cursed it. The captain's body was sitting in a chair in the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin and from the mate's room into these cabins.

"After the captain's body was thrown overboard, Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining-room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle I think, not enough to make any one drunk. I didn't see any one drunk. After taking a drink, we went up on deck and talked about making the small sails fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said, 'No, keep her up to her course,'—she was off a little. 'Keep her up to her course,' he said; 'you want me to be hanged?' He then said to the Spaniard, 'You are about the sensiblest man; I want to speak to you.' I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with the vessel. I said, 'The only thing we can do now is to try to make for some land.' He said, 'No, nothing is go-

time jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, . . ." Nothing more was required to

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ing to be done but to destroy the vessel.' He did not say anything more to me after that. If he spoke to any of the rest, I didn't see or hear it. He then ordered everything to make ready for to leave the ship. The old boat sail was all tore up and I started to patch that. I was engaged about it about an hour I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols." . . . "There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies."

On cross-examination this witness gave an account of a difficulty between the cook and the captain that morning about the captain's dog. About eight o'clock the captain's dog was down by the galley door and the cook threw some water on him. The dog ran up on the deck load "hollering." The captain came up and said to the cook, "Did you throw hot water on that dog?" Andersen replied that he did not throw hot water on him; that it was cold. The captain felt the dog's back and then called the cook a liar, cursed him and struck him. Lind did not see the captain strike the cook but heard the noise in the galley. Shortly after this the cook appealed to the mate, "Won't you protect me until we get to port?" To this the mate replied, "Get to port! You will get killed anyhow," or something like that. "'Go to hell — you will get killed anyhow,' or something like that."

March testified:

"After the shooting the cook came and called us out of the forecastle. He says, 'Come out here, boys, lower the boat and put me ashore. The captain and mate is dead and I am in charge of this ship.' I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, 'Come out here, won't you? Come out here, Manuel,' and he says, 'Yes.' We went out and went on the topgallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left-hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the

show the locality of the offence. *St. Clair* v. *United States*, 154 U. S. 134, 144. But the point is now made that the indictment was demurrable because it charged the homicide to have been caused by shooting and drowning, which are means

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mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. The mate had a marlin spike tied around his neck when the body was throw overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about three feet higher than the forecastle deck, where the mate was standing when he was shot. To get to where Andersen was when he was shot, the mate would have had to step up those three feet on top of the forecastle house." . . . "I couldn't say whether the half hitch was around the point or not.

"After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard Andersen swore oaths at it. When he swore oaths at the body the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. (Here the witness identified the diagram, showing the inside of the after cabin, and marked number two.) The captain's body was found sitting in his chair, dead, with both arms folded in his lap. He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear. The captain was sitting in his chair near the sofa, on the starboard side of the vessel, the point marked on the diagram 'A.' John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. He swore at it when the body was thrown into the sea, calling it 'a mean bastard.' After the body of the captain was thrown overboard the steward ordered us to get ready the boat. He then invited us down into the cabin to get a drink of whiskey. There was about two thirds of a bottle of whiskey. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load and the ship was set on fire. Then we made for land in the sail boat. It was about two hours, I think, after the bodies were thrown overboard before we left the 'Olive Pecker.' At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up."

* * * * * * *

"That morning before the captain was shot and before the mate was

contended to be inconsistent in themselves and not of the same species. This ground of demurrer was not brought forward in the Circuit Court, although defendant was admonished that he must state all the grounds on which he relied. But, treating

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shot I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog, and he said no. The captain went back and felt the dog. Then I saw the captain go in the galley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before the captain was shot. I had been at the wheel of the 'Olive Pecker' many times. While standing at the wheel, in the wheelhouse, looking forward, with the sails swinging to the right or starboard side of the vessel, you can see all the way along the left-hand side of the ship, on top the forecastle house, or a man standing on top the forecastle house. The deck load did not interfere with seeing that."

On cross-examination: "I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. He did not tell me he would kill me if I did not, but I knew enough to know he would do it. There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. At the time I knew he was, because he had all the guns. It makes a big difference when he had all the arms."

Barrial testified:

"I last saw Mate Saunders alive on board that vessel on the morning of the 6th of August, 1897, when the vessel was about a hundred or a hundred and fifty miles off the Brazilian coast. On that morning I left the wheel of the vessel about 8 o'clock, being relieved by Martin Barstad, and went after my breakfast; then went to the forecastle and to my cabin. While I was lying down, after that — I do not know how long — I heard the captain's dog holler. Andrew March came in the forecastle and says, 'The captain is having a racket with the cook,' and I says, 'What can we do? Let him racket,' says I, and it was a little while before John Lind came and knocked at the window where I was sleeping. When he finished talking to me I heard the report of four shots. I went in the forecastle in a narrow place between the engine room and my bunk. I went in there because I thought the cook wanted to kill us too. The engineer jumped on my bunk and got out, too. I heard the cook sing out in the door,

it as open to consideration, we think the indictment was clearly sufficient as ruled in effect in *St. Clair's case.*

In that case, defendant was charged with the murder of Fitzgerald on board the bark Hesper on the high seas, by

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'Come out here, boys! Come out here quick!' 'Yes, sir,' says I, 'let me finish dressing.' He says, 'Come out here. I am in charge of the vessel.' I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, with his face downwards. The cook says, 'Throw him overboard,' and then I says, 'Don't, cook; don't throw him overboard, he's alive.' He says, 'Throw him overboard; he's dead enough.' We threw him overboard, and after we threw him overboard the cook says, 'Now go aft and pick the captain up.' When he threw the body overboard he cursed at the body. Then he ordered the men aft to throw the captain overboard. All the while he was armed with pistols. We went under his orders and into the captain's cabin. When we got in the cabin we saw the captain sitting in his chair with both hands in his lap, and his head leaning slightly to one side and on his breast. I thought he was alive. I saw he had a bullet to go through near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard, the cook cursed it also. After it was thrown over he said, 'Come on, boys, I will give you a drink.' We took a drink, and after we took a drink all came on deck and I said, 'We will make the staysails and the topsails fast and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro or Bahia.' I sung out to Martin Barstad at the wheel, 'Keep her off,' and the cook says, 'No, I don't want to go to the land.' He was standing close to the rail. And he said, 'Do you want me to be hung? There is nothing to be done but destroy the vessel,' he said. Then he called me and said to me, 'You are the sensiblest man on board this vessel, and I want to speak to you.' 'All right, cook,' I says. He took me on top the galley and says, 'I am a murderer, and I killed these people to save my life and your lives. Now, you fellows,' he says, 'you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear.' Says he, 'Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away.' I told him I had nothing to fear with the vessel in port. I says, 'Look here, cook, destroy the vessel, it's a terrible thing, it's worse than what you have done already. Call all hands here and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into port.' 'No, no,' he says, 'that won't do; the vessel must be burned.' He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin and he says, 'I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest,' and we went in and everybody took some clothes, and the cook says,

striking and beating him with a weapon unknown, and thereby giving him "several grievous, dangerous and mortal wounds," and then and there casting and throwing him from the vessel into the sea, and drowning him, "of which said

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'You fellows can put on your best clothes,' and he gave me a suit of clothes, and he says, 'You don't want to take anything;' so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, 'What are you doing there? Come and give your hand with this oil.' I says, 'Yes, cook; let me finish shaving and I go.' When I went on deck I could see that the oil was already. It had been spread over the deck. The cook then told us to lower a boat and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in too. Provisions were then put in the boat and when everything was ready Andersen called to me, 'Come up and light the fire.' 'Well,' I says, 'let me keep the lookout on the boat; it might smash against the vessel.' So he called Andrew March, and the first time he called Andrew he did not come, so he called him again in wild words and March went up."

On cross-examination: "Q. After the cook here had killed the mate, didn't he tell you you might put him in irons? A. Yes, sir; he came and he says, 'Now you fellows can put me in irons and carry me to port, if you want.' Q. And give me to the American consul? A. No, sir; the same words I told you, sir. 'Now you fellows,' he says, 'can put me in irons and take me in port if you want.' I says, 'No, no, cook, I no put you in irons,' because he looked right in my face; and I says, 'Why don't you throw your revolvers away?' Q. He offered to give himself up to you, holding out his hands, and said: 'Put me in irons?' A. He didn't throw his revolvers away. Q. He didn't? A. No, he didn't. Q. Did he hold out his hands to put him in irons? A. With his revolvers, yes; and I says, 'No, no, cook, I won't put you in irons; no, no.' Q. Do you mean to say he had the revolvers in his hands when he offered you to put him in irons? A. Yes, sir."

Horsburgh was asleep in his berth in the after cabin when the captain was shot. What he supposed was the noise of the shooting of the captain awakened him, and then Andersen came to the companionway and asked him to come on deck, that he had killed the captain. He came on deck and went aft along the starboard side, where he told the crew that the cook had killed the captain. Directly after the shots, the cook came forward, shouting, "Come out, boys: I am in charge of the vessel," and ordered the mate's body to be thrown overboard. The mate was lying with his face down on the port side of the forecastle head, with a marlin spike hanging about his neck. After the mate's body was thrown overboard, the cook ordered them to go aft and throw the captain's body overboard. "We went down in the

mortal wounds, casting, throwing, plunging, sinking and drowning," Fitzgerald "then and there instantly died." The language used was much the same as that employed in *United States* v. *Holmes*, 5 Wheat. 412. The indictment was sus-

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cabin and found the captain in the chair, so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink." After that the cook ordered them to get the boat ready with provisions, etc. The cook was armed and witness was frightened. The burning of the vessel and the escape in the open boat as told by this witness corresponded with that of the others. On the cross-examination the difficulty between the captain and the cook about the captain's dog was reiterated.

Defendant Andersen testified in his own behalf:

"It was just after breakfast, and the dog was standing at the galley door. He used to keep himself around there all the time. The captain didn't want him to stay at the galley door, and I took some water I had left in a bucket, some dirty water, to throw it onto the dog, as I always used to throw some water on him, and he used to run and holler. I took the bucket, and there was a little water left at the bottom of it. He was standing right at the door and I had been giving him his breakfast. As the dog turned the bucket slipped in my hand. I had the handle on the edge of it, and it hit him here in the leg, and he ran up on deck and made a noise. I was looking around there for some place to run into and hide, as the captain was coming down there into the galley, and I was standing in the middle of the floor of the galley, facing the galley dresser. He struck me in the side here, and that sent me right on top the red-hot stove, on top the pots and pans. He commenced to curse me and threaten me and everything, and I pleaded to him. I says, 'Captain, don't hurt me; don't hurt me, Captain.' He looked at the axe, and he looked up through the slide. There is a little slide in the galley. He saw John Lind standing on top there, and he looked at me; he says, 'You whore's son,' he says, 'I will have the heart out of you.' And there he left me standing. I had cut them two fingers into my knuckles. The mate came along, and it was my last hopes in that vessel to see maybe another day; I had been sleeping in the galley for a week; I didn't know whether I would live to see the next day or not, so I turned to the mate, with tears rolling down my cheeks, and I said to him, 'Mr. Saunders,' I says, 'won't you protect me until we get into port?' He turned around to me with scorn. He says, 'Go to hell,' he says, 'you will get killed anyhow.' Then I did not know what I was doing. My mind was in that condition I didn't know whether to run overboard or to stay there and go and hide. I didn't know what to do. So I went up in the galley slide and looked around to see if I could see any vessel. Then I made up my mind if I should see any vessel I should take a board and jump overboard. So there I was. My basket of dishes was standing upon the dresser, all dirty, after breakfast, and I was washing them, and I saw at

tained though the particular objection under consideration was not commented on. The indictment in this case was evidently drawn from that, and charged that Andersen assaulted Saunders with a pistol with intent to kill him, by the

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the time it was twenty-five minutes to ten then. I looked around, and I didn't know if I had washed my dishes at all. Of course I was completely out of my head then, so I thought about the cabin. Now, I used to sweep that cabin every morning and dust it and everything before nine o'clock. I used to have my dishes done in the galley before this time, and I had my dinner to have ready before twelve o'clock. So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck, I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin and started into the mate's room first. I saw the mate's gun lying on the shelf, and I took that down, thinking if worst come to worst, I will have to defend myself. So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, 'You whore's son!' Then he took it up like this as if to split my head open, when I pulled my gun out and fired. The bullet struck him in the left temple. He fell into the chair, and I ran into the captain's room. Then I thought about the mate. I ran into the captain's room then and got his two guns. He used to keep one gun in under the pillow and one on the shelf. I ran up on deck and I didn't know where the mate was then. I came up to John Lind and he was at the main rigging. I says, 'Where is the mate?' He says, 'He is aloft.' I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the ————, piece next to the rail, he says, 'Where in the h—ll did you get them guns?' He says, 'And where is the captain?' I never made no answer to him, but I stayed on top of that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike, as represented to you before. He came down like this and walked up like this [indicating by appropriate gestures] (walking towards the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture]

discharge of which he inflicted on him "several grievous, dangerous and mortal wounds," and that he did "cast and throw from and out of the said vessel into the sea and plunge, sink and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sink-

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to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him here somewhere (in the side). He was still coming towards me, and I shot twice or three times together, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, 'Now the mate will go, too.' But that belongs on the lee side of the house; to that man. When he came there he told them, 'Now the mate will go, too.'

"Q. You mean by that that you didn't say it at all?

"A. No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there, and John Lind—he was the man that came up first, and there was nobody else came up—so I says, 'Men,' I says, 'ain't you coming up?' I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. We throwed the mate overboard. I helped them also, so far as I can remember. And we took the captain out of the cabin and threw him overboard. And now, when this was done, I told them, I says, 'Now, men,' I says, 'you can do as you like with me,' I says; 'you can put me in irons and take into port and give me up. You see I had to defend my own life.' 'Yes,' they says, 'we all know that.' There I was, broke down completely, like a child, and here they are, coming up here yesterday to put everything onto me."

He also gave an account of the burning of the vessel and trip to the shore. On cross-examination he admitted that he was about three feet from the mate when he shot him; that he was standing on the forecastle house and the mate was down on the forecastle head; that the mate asked him not to shoot. As soon as he had killed the captain, what came into his head then was the mate; that he got the captain's pistols; that he ran up on deck through the pilot house where Barstad was and to Lind, who stood amidships, and asked where the mate was; that Lind told him the mate was aloft; that he got on top of the forecastle house, and in the excitement may have called him down. He denied having asked the men to throw the mate's body overboard, but admitted that he asked them to throw the captain's body overboard. He denied asking the crew to take a drink, but admitted that he may have got the whiskey. He denied ordering the vessel to be burned, and said that it was the engineer's suggestion. He admitted that he took the captain's watch and sold it and that the compass was thrown overboard before they reached the beach.

ing and drowning" Saunders "then and there instantly died." And it was further said, as in the indictment against St. Clair, that by reason of the casting and throwing of Saunders into the sea as aforesaid, the grand jurors "could not describe the said mortal wounds with greater particularity."

In *Commonwealth* v. *Webster*, 5 Cush. 295, the first count charged an assault and a mortal wound by stabbing with a knife; the second, by a blow on the head with a hammer; and the third, by striking, kicking, beating and throwing on the ground. The fourth count charged that the defendant feloniously, wilfully and of his malice aforethought, deprived the deceased of life "in some way and manner, and by some means, instruments and weapons to the jurors unknown." The Supreme Judicial Court of Massachusetts was unanimously of opinion that the latter was a good count. The court, speaking through Chief Justice Shaw, said: "From the necessity of the case, we think it must be so, because cases may be imagined where the death is proved, and even where remains of the deceased are discovered and identified, and yet they may afford no certain evidence of the form in which the death was occasioned; and then we think it is proper for the jury to say that it is by means to them unknown. . . . The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and, if the circumstances will not permit a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of law." In explaining the indictment and the setting out of several modes of death, the Chief Justice also said: "Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined."

Commonwealth v. *Desmarteau*, 16 Gray, 1, was an indict-

ment for murder, containing three counts. The first charged that the murder was committed by casting, throwing and pushing the deceased into the Connecticut River, and so choking, suffocating and drowning her; the second, that the death was caused by the blows of some weapon or instrument to the jurors unknown; the third, that the death was caused by the blows and drowning both. It was held that all the counts were in proper legal form and related to a single offence, and that as a conviction on any one required the same judgment and the same sentence as a conviction on all, the jury were properly instructed that if they found the prisoner guilty of the murder as set forth in either, they might return a verdict of guilty, generally.

So an indictment which alleged that death was caused by a wounding, an exposure and a starving, was held in *Commonwealth* v. *Macloon*, 101 Mass. 1, not to be bad for duplicity, and it was ruled that it was sufficient to allege that the death resulted from all these means, and to prove that it resulted from all or any of them.

And see *Joy* v. *State*, 14 Indiana, 139; *Woodford* v. *People*, 62 N. Y. 117; *State* v. *Fox*, 1 Dutcher, (25 N. J. L.) 566, 601; *State* v. *Johnson*, 10 La. Ann. 456; *People* v. *Colt*, 3 Hill, 432; *Jones* v. *Georgia*, 65 Georgia, 621; *Rodgers* v. *State*, 50 Alabama, 102; *Gonzales* v. *State*, 5 Tex. App. 584.

In our opinion the indictment was not objectionable on the ground of duplicity or uncertainty.

Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading. For the indictment charged the transaction as continuous, and that two lethal means were employed coöperatively by the accused to accomplish his murderous intent, and whether the vital spark had fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial.

If the mate had been shot in the rigging and fallen thence into the sea, an indictment alleging death by shooting and drowning would have been sustainable.

The Government was not required to make the charge in

the alternative in separate counts. The mate was shot and his body immediately thrown overboard, and there was no doubt that, if not then dead, the sea completed what the pistol had begun.

2. The venire for the jury in this case was issued after the term began, and it is insisted that it does not appear that it was authorized by any order of court. This was a point not made below, and it appeared on the argument at bar that an order of court directing the jury to be summoned had been duly entered, but was omitted from the record because no question had been raised in that regard. A duly certified copy of that order being produced, counsel for plaintiff in error very properly waived the necessity of issuing a certiorari, on suggestion of diminution, to bring it up. This disposed of the objection as made.

On the trial plaintiff in error moved to quash the venire on the ground that it should have shown that the jurors were summoned for the trial of this particular case. The motion was overruled. The law did not require jurors necessarily to be summoned before the term began, nor the name of the particular person or persons to be tried to be inserted in the writ. This was the November term of the court, and the order was entered on the second day of December and the writ was issued on the sixth of that month, after the commencement of that term, and was in the usual form, directing the persons named to appear on a day named to serve as petit jurors at said term. So far as appears there was no irregularity in summoning and empanelling the jury, and no exception was taken to the jury as empanelled. The point was untenable.

3. One A. J. Hall testified for the Government that he built the "Olive Pecker" and had sailed her for seven years. He described the vessel, and in connection with his testimony certain diagrams and an oil painting of the vessel were introduced without objection. He testified, among other things, that with a deck load of lumber of a certain height and the vessel on the port tack a man in the wheelhouse could command a view of the port side. After he had given his testi-

mony counsel for plaintiff in error "moved to strike out all testimony as to the condition of the vessel at the time of the casualty." Counsel for the Government insisted that he had asked the witness nothing about that, and the Circuit Judge said: "The court does not understand that he has so testified. Anything that would bear that construction as a matter of course will be excluded from the jury: I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it; he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offence. He is giving the general character and situation of the vessel, so that you may understand it, which I think is eminently proper. As he was not on the vessel at the time of this occurrence the court will not permit him to testify about anything that took place then." The ruling was correct. *Bram* v. *United States*, 168 U. S. 532, 568.

The witness was asked this question: "Is it customary in loading vessels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?" He answered: "We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't." He was then asked, "Are you or not familiar with the deck load of the 'Olive Pecker' when she sailed from Boston on the 20th of June?" He answered: "No, I don't know anything about that."

Counsel now contends that defendant moved to strike out the testimony as to what was customary, but the record contains no such motion, and we think the reference must be to the motion above mentioned, which was properly disposed of.

4. John Lind had testified, on cross-examination, that Andersen asked the mate: "'Won't you protect me until we get to port?'" and that the mate said: "'Get to port! You will get killed anyhow,' or something like that." The question was then put: "How came he to ask the mate to protect him?" He answered: "The captain was cussing and treating him badly." Objection was made by the District Attorney on the ground that counsel had no right to go into any alterca-

tion between the accused and the captain, but counsel for the accused insisted that he might "ask what took place between the captain and Andersen that morning, whether the mate was present or not, and let the jury infer whether Andersen was alluding to that when he asked the mate for protection." The court ruled: "You may ask it. We want all the facts in the case, and if it is not relevant testimony it will be excluded." The witness thereupon gave an account of the quarrel about the captain's dog. He was then asked: "Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?" This question was objected to on the ground "that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the *res gestæ* of this case." After argument, the court sustained the objection and excluded the question, and exception was taken. Counsel for plaintiff in error immediately remarked: "I mean by the interrogatories I am going to propound now to confine myself to that morning," and continued the cross-examination. The record makes it plain that all evidence offered as to what occurred that morning was admitted, and that what was excluded in this instance was evidence of the conduct of the captain prior to the day the mate was killed. And there was nothing to indicate that that antecedent conduct of the captain was so connected with the killing of the mate as to form part of the *res gestæ*, or that it could have any legitimate tendency to justify, excuse or mitigate the crime for the commission of which Andersen was on trial.

5. After the Government had closed its case in chief, defendant's counsel moved that a verdict of not guilty be directed, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol shots. There was no error in denying this motion.

We repeat that the indictment charged the death to have resulted from shooting and drowning, and that the fact was uncontroverted that the mate was shot and immediately

thrown into the sea. There was no examination to ascertain whether he was then dead or not. He was lying face down and was picked up and thrown overboard as ordered by the accused, according to the testimony for the Government. Lind and March believed he was dead. Horsburgh said he appeared so. Barstad was doubtful, and Barrial testified he told the cook he was alive.

So far as this motion was concerned it was enough that the evidence was not conclusive that he was killed by the pistol shots.

And, as already indicated, the Government was not required to make the charge in the alternative and elect to proceed in respect of one means of death rather than the other, where the murderous action was continuous.

6. Several of the errors assigned relate to the rulings of the court limiting the testimony to the transactions on the day of the homicide. These rulings were made on certain questions propounded to the accused. His counsel asked: "Now, I want to ask this question to the witness: I want you to detail, with truth, to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August?"

This was objected to, and after argument the court, through Goff, Circuit Judge, ruled as follows: "I have no objection to your having the accused commence in his own way and detail as to him is best, confining himself to the truth, just what took place there on the morning of that day, and without any assistance from you, but I cannot permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate." Exception was taken. Counsel then proceeded: "Q. Did you ship on the 'Olive Pecker'? A. Yes, sir. Q. Did you have trouble with the captain?"

This was objected to, and the court said: "I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July. Suppose the mate was a party, the charge is that of killing Saunders in

August and the testimony is confined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury." Exception was taken.

Counsel continued: "Q. You shipped on board the 'Olive Pecker' some time in June, 1897? A. Yes, sir. Q. Now state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August?"

All that part of the question intended to elicit what occurred between the mate and the cook from the time they left Boston was objected to.

The court said: "The trouble, Mr. McIntosh, is this, in the present condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it pertinent to bring in previous incidents as tending to explain what took place on the 6th, it can come in." Exception was taken.

The accused was then asked: "Detail to the court and jury all the occurrences which took place on the morning of the 6th of August, 1897." Thereupon the accused gave his account of the transactions of that date, the trip to shore and the subsequent arrest. After he had concluded his counsel put this question: "Now state what trouble, if any, you had had with this mate previous to this occasion?" The question was objected to on the ground that the testimony of the witness should be confined to what occurred on the day of the homicide. After argument, Goff, J., delivered this opinion:

"The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day was that

the testimony might be confined to a certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who has attacked; if he bases that belief upon a previous threat; if he bases that upon previous personal encounters; if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will permit him to act upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness. The witness states that he had a controversy with the captain; that the captain was cruel to him; then, in that hour, he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct, at least, does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, and not the mate who sought the witness. I fail to see how a party can, under those circumstances, show, either by himself or by another, that he had had a controversy with the party he is about to attack, the day before or the week before, if he has had time to cool. If there had been a controversy of that kind, even under any circumstances of that kind, it does not authorize the party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago, on another ruling, with reference to threats."

To this ruling exception was taken. Counsel then said:

"Now, in order that this matter may go down right, and in order that I may save the point, but without any disrespect to the court, I want to propound this question to the witness.

"Q. I don't want you to answer this, Andersen, until the court passes upon it. I want it to go down in the record. I want to ask you whether on the day before you had had a difficulty with the mate, and, without provocation on your part, the mate had not attempted to throw you overboard?

"Mr. McIntosh. I understand that your honor rules that I cannot ask that?

"The Court. The question is improper and cannot be answered."

And to this, exception was taken.

The preliminary rulings of the court which required the incidents of August 6 to be given at the outset are not open to criticism. The point to be considered is whether evidence of transactions previous to that day was admissible in the light of the testimony of the accused in respect of what passed on that day. It will be perceived that no specific offer of proof was made. But, assuming that counsel had offered to show by the accused that he had had trouble with the mate previously to August 6, and that the day before he had had a difficulty with him, and the mate, without provocation, had attempted to throw the accused overboard, would such testimony by the accused have been admissible in view of his own detailed account of the homicide and its surrounding circumstances? On what legal principle could it have been held to have a tendency in justification, excuse or mitigation?

Andersen's story was that on the morning of August 6 he had a difficulty with the captain about the dog; that the captain cursed him, struck him and sent him on top the red-hot stove and the pots and pans; that he subsequently appealed to the mate for protection, and he treated the application with scorn and profanity; that some time afterwards he went to the cabin to sweep it, and that the captain glared at him and cursed him. He commenced sweeping the cabin, and started into the mate's room first; saw the mate's gun lying on the shelf and took it down, thinking that if the worst came to the worst he would have to defend himself. He finished the cabin and started into the captain's room; the captain arose and was about to assault him with a bottle and he shot him.

"*Then I thought about the mate.* I ran into the captain's room then and got his two guns." He ran up on deck; asked Lind where the mate was; was told he was aloft; looked up and saw him there, and called him down or waited for him. As the mate came down he asked Andersen where he got the guns and where the captain was, but Andersen made no answer to this, and stayed on top of the forecastle house. Then as he stood on the house with the pistols, and the mate was three feet below on the forecastle head, but coming towards witness as if "to take the marlin spike off his neck and shove the marlin spike into me," witness pulled his gun and shot him. He shot him several times — the mate begging him not to shoot. Immediately after that he called up the sailors and the body was thrown overboard.

It is true that a homicide committed in actual defence of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self defence cannot avail. *Wallace* v. *United States*, 162 U. S. 466; *Allen* v. *United States*, 164 U. S. 492; *Addington* v. *United States*, 165 U. S. 184.

According to his own statement, Andersen, after he had shot the captain, thought about the mate, armed himself with the captain's pistols, went in search of his victim, and finding him aloft on the mainmast at work, called him down, or, seeing him coming down, awaited him, and shot him. He was not only the aggressor but the premeditated aggressor. The captain being dead, he knew the mate would assume command, and that it would be his duty to arrest him and take him ashore for trial. The imminent danger which threatened him was the danger of the gallows. The inference is irresistible that to avert that danger he killed the mate, cast the bodies into the

sea, burned the ship and took to the open boat. There can be no pretence that he was acting under a reasonable belief that he was in imminent danger of death or great bodily harm at the hands of the mate. He testified, to be sure, that when he had armed himself, gone in search of the mate, and stood on the forecastle house ready to receive him, he thought the mate was going to use against him the marlin spike, which he had been using at his work in the rigging, and to protect himself against that marlin spike, swung around the neck of a man standing three feet below him, the accused shot him down while he was asking for his life. It was, indeed, the duty of the mate to attack Andersen as he stood there with three pistols, fresh from the slaughter of the captain, and in open mutiny. But as the accused told his story he was not repelling violence, and if the mate attempted to make use of the marlin spike, it was simply in self defence.

The case as Andersen's testimony made it afforded no basis for the introduction of evidence of prior provocation, or even of injuries previously inflicted, for no overt act on the mate's part provoked the evil intent with which Andersen sought him out on this occasion. Such evidence would not have been relevant, in view of the circumstances, as tending either to make out self defence or to reduce the grade of the crime.

We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation. But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands, nor for the suspension of those general rules intended for the protection of all alike on land or sea.

7. Complaint is made because the court refused to allow a witness to testify as to the general reputation of the captain. If there had been any adequate basis for the contention that Andersen killed the mate in self defence, by reason of a reasonable belief in imminent danger from him, evidence of his character for ferocity, brutality and vindictiveness might have been

admissible. *Smith* v. *United States*, 161 U. S. 85. But, as the record stood, the character of the captain could have no legal bearing on the issue of the guilt of the accused of the murder of the mate.

8. Various instructions were asked on behalf of the defendant, as well as on behalf of the Government, which were, respectively, refused by the court, except so far as included in the instructions given. But the only ruling in this regard pressed on our attention is the alleged error of the court in instructing the jury as follows: "The other felonious homicide to which I called your attention, manslaughter, is the unlawful killing of a human being without malice, either express or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder."

This instruction was similar to that given by Mr. Justice McKenna, then Circuit Judge, which was reviewed and approved in *Sparf* v. *United States*, 156 U. S. 51, 63. That case is decisive of this, for the evidence disclosed no ground whatever upon which the jury could properly have reached the conclusion that the defendant was only guilty of an offence included in the one charged, or of a mere attempt to commit the offence charged. The testimony of the accused did not develop the existence of any facts which operated in law to reduce the crime from murder to manslaughter.

The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offence of a less heinous character than murder. But if there be sufficient time for the passions to subside, and shaken reason to resume its sway, no such distinction can be entertained. And if the circumstances show a killing "with deliberate mind and formed design," — with comprehension of the act and determination to perform it, the elements of self defence being wanting, — the act is murder. Nor is the

presumption of malice negatived by previous provocation, having no causal connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the access of fury to moderate. Kerr on Homicide, § 68, *et seq.;* 2 Bishop New Cr. L. § 673, *et seq.;* Whar. Cr. L. § 455, *et seq.;* and cases cited.

There is nothing in *Stevenson's case*, 162 U. S. 313, to the contrary. The doctrine of *Sparf's case* is there reaffirmed, that "the jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect."

No other error assigned requires notice.

Judgment affirmed.

Mr. Justice McKenna dissented.

PLAQUEMINES TROPICAL FRUIT COMPANY *v.* HENDERSON.

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

No. 204. Argued April 15, 1898. — Decided May 2, 1898.

The courts of a State may take cognizance of a suit brought by the State, in its own courts, against citizens of other States, subject to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by act of Congress, and subject also to the authority of this court to review the final judgment of the state court, if the case be one within its appellate jurisdiction.

The case is stated in the opinion.

Mr. Duane E. Fox for appellant. *Mr. J. Ward Gurley* was on his brief.

Mr. Victor Leovy for appellees. *Mr. Henry J. Leovy, Mr.*

Joseph Paxton Blair and *Mr. Alexander Porter Morse* were on his brief.

Mr. Justice Harlan delivered the opinion of the court.

This suit was commenced February 11, 1895, in the Circuit Court of the United States for the Eastern District of Louisiana by the Plaquemines Tropical Fruit Company, a New Jersey corporation, against the defendants in error William Henderson and Henry J. Leovy, citizens of Louisiana.

It is, in effect, a suit to quiet the title of the plaintiff to certain lands in the Parish of Plaquemines in the State, and to restrain the defendants from committing trespasses thereon.

The defendants filed a joint and several plea, in which it was averred: That in 1892 a suit was instituted by the State of Louisiana in the Civil District Court of the Parish of Orleans, Louisiana, against the Plaquemines Tropical Fruit Company, Charles C. Buck the vice president of that company and a citizen of Maryland, and others, in which suit the State sought a decree adjudging it to be the owner of certain lands within its limits; in which action, the defendants having appeared, it was found by the verdict of a jury, and in accordance with the verdict it was adjudged by the court, that the lands here in question belonged to the State, and that the Plaquemines Tropical Fruit Company and Buck had no title thereto; that such judgment, upon the appeal of the company and Buck, was affirmed by the Supreme Court of Louisiana; that a writ of error sued out by the same defendants to this court was dismissed; that the lands the title to which is involved in this suit are part of those the title to which was involved in that action; that Henderson and Leovy acquired title from the State after the above judgment obtained by it had become final; and that such judgment remained unreversed and unmodified.

The defendants Henderson and Leovy pleaded the above proceedings and the judgment obtained by the State in bar of the present suit.

At the hearing below, the plaintiff having admitted the

correctness in point of fact of the defendants' plea in bar, it was adjudged that the plea was sufficient. The bill was accordingly dismissed.

The contention of the appellant is that the Civil District Court of the Parish of Orleans could not, consistently with the Constitution of the United States, take cognizance of any suit brought by the State of Louisiana against citizens of other States, and, consequently, its judgment, now pleaded in bar, was null and void. If that contention be overruled the judgment below must be affirmed; otherwise it must be reversed, and the cause remanded with directions to hold the plea insufficient.

The appellant, in support of its contention, insists that the entire judicial power surrendered to the United States by the people of the several States vested absolutely in the United States under the Constitution; that by that instrument the nation acquired certain portions of the judicial power naturally inherent in sovereignty; that thereafter a state court could not, without the expressed consent of the United States, take cognizance of a case embraced in such cession of judicial power; and that the judicial power of the United States, not distributed by the Constitution itself, cannot be so distributed that a state court may take cognizance of a case or controversy to which that power is extended, *if* its determination thereof is not made by Congress subject to reëxamination by some court of the United States.

These propositions applied to the case before us mean that the Civil District Court of the Parish of Orleans was without jurisdiction to render judgment in the above suit instituted by the State, because there was no provision in the acts of Congress whereby its judgment could be reviewed by some court of the United States.

The Constitution provides —

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. . . ." Art. III, Sec. 1.

"The judicial power shall extend to all cases in law and

equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects. Art. III, Sec. 2.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Ib.

Do the words, "the judicial power shall extend . . . to controversies . . . between a State and citizens of other States," and the words "in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily manifest a purpose to exclude all such controversies from cognizance by the courts of the several States? Was it intended that the Constitution should, by its own force, without legislation by Congress, divest the courts of the States of jurisdiction of cases or controversies to which the judicial power of the United States was extended?

These questions were the subject of earnest consideration while the Constitution was before the people of the United States for acceptance or rejection. It was contended by some who recommended its rejection that the proposed Constitution, without legislation by Congress, would give to the one Supreme Court established by it, and to such other courts as Congress should from time to time create, *exclusive* jurisdiction in all such cases or controversies. That interpretation was disputed, and Hamilton in the Federalist said: "The principles established in a former paper teach us that the State will retain all *preëxisting* authorities, which may not be exclusively delegated

to the Federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or, where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule that the state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes." He recognized the fact that there was apparent support to the objection referred to in the clause "the *judicial power* of the United States *shall be vested* in one Supreme Court, and in *such* inferior courts as the Congress shall from time to time ordain and establish." That clause, he said, "might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes, to which their authority is to extend; or simply to denote that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals. And as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction." He also said that the judicial power of every government "looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we con-

sider the state governments and the national government as they truly are, in the light of kindred systems and as parts of one whole, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in cases arising under the laws of the Union, where it was not expressly prohibited." Federalist, No. 82.

The first Congress acted upon this view of the scope and effect of the Constitution when it passed the Judiciary Act of September 24, 1789, c. 20, creating the Circuit and District Courts of the United States and defining their jurisdiction. 1 Stat. 73. By that act it was declared that the District Courts should have "exclusively of the courts of the several States" cognizance of specified crimes and of certain named civil causes or suits, and cognizance "concurrent with the courts of the several States or the Circuit Courts, as the case may be," of certain other causes or suits. By that act also the Circuit Courts were given cognizance, "concurrent with the courts of the several States," of all suits of a civil nature at common law or in equity where the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and the United States were plaintiffs or petitioners, or where an alien was a party, or where the suit was between a citizen of the State in which it was brought and a citizen of another State. And by the same act it was provided that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; *and except also between a State and citizens of other States*, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction, . . . and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul shall be a party." The act also made provision for the removal of a suit commenced in a state court against an alien, or by a citizen of one State against a citizen of another State, if the matter in dispute exceeded the above sum or value; but it contained no provision giving the Circuit Courts original jurisdiction of a suit by a State against a citizen of another State, nor for the removal into a subordi-

nate Federal court, of a suit brought by a State in one of its own courts against a citizen of another State. Nor did that act provide for the review by this court of the final judgment of the state court simply because it was rendered in a suit brought by a State against a citizen of another State which involved no question of a Federal nature.

So, that in the first judiciary act — passed by a Congress many of whose members, as was the eminent jurist who drew the act, were delegates in the convention that framed the Constitution — we have a contemporaneous interpretation of the clauses relating to the exercise of the judicial power of the United States, which negatives the suggestions now made on behalf of the appellant.

It cannot be doubted that each of the original States had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. *Tennessee* v. *Davis*, 100 U. S. 257.

If it was intended to withdraw from the States authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States.

This was the view taken of this question by Chancellor Kent in his Commentaries. Referring to the clauses of the Constitution relative to the judicial power of the United States, he said: "The conclusion then is, that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be

revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter." 1 Kent's Com. 400.

In *Gettings* v. *Crawford*, Taney's Dec. 1, the question was considered whether the ninth section of the Judiciary Act of 1789, giving jurisdiction to the District Court of the United States of cases against consuls and vice consuls, was consistent with the clause of the Constitution providing that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." It was held that those words did not expressly exclude the jurisdiction of other courts of the United States in the cases mentioned. Chief Justice Taney observing: "The true rule in this case, is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same matter." That case, it is true, did not present any question as to the jurisdiction of the state courts, but it affirms the rule that the grant of original jurisdiction to a particular court in enumerated cases does not, of itself, import that the jurisdiction of that court is exclusive in such cases. If the clause just quoted is not to be interpreted as giving this court exclusive jurisdiction in cases affecting consuls, upon like grounds it cannot be interpreted as giving this court exclusive jurisdiction in suits instituted by a State, simply because of the provision giving the Supreme Court original jurisdiction where the State is a party.

But the cases most directly in point are those reported under the title of *Ames* v. *Kansas*, 111 U. S. 449, 464. One was a suit against the Kansas Pacific Railway, a corporation organ-

ized under the laws of the United States; the other a suit against certain persons constituting the board of directors of the Union Pacific Railway Company and citizens of States other than Kansas. Both suits were brought by the State in one of its own courts. It was contended that as the State was a party to those suits, this court had exclusive jurisdiction. After observing that the evident purpose of the Constitution was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government, this court said: "So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden. Acting on this construction of the Constitution, Congress took care to provide [in the original judiciary act] that no suit should be brought *against* an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the District Courts, and suits of a civil nature could be brought against them in either tribunal. With respect to States it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and *except*, also, between a State and citizens of other States, or aliens, in which latter case its jurisdiction should be original, but not exclusive. Thus, the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States, or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the Supreme Court

exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States, ambassadors and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that has the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way, or to any extent, it chose."

And in *Robb* v. *Connolly*, 111 U. S. 624, 636, it was held that in defining and regulating the jurisdiction of the courts of the United States, Congress has taken care not to exclude the jurisdiction of the state courts from every case to which by the Constitution the judicial power of the United States extends. The reason given for this view was that upon the state courts, equally with the courts of the Union, rested the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights were involved in any suit or proceeding before them; for, the court said, "the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.'"

It is said that the present case differs from *Ames* v. *Kansas*, in that the latter was a suit arising under the Constitution and laws of the United States, and was, therefore, removable into the Circuit Court of the United States, while the present suit was not removable from the state court under any statute regulating the jurisdiction of the courts of the United States. But that difference only shows that Congress has not seen proper to provide for the removal from a state court of a suit brought by the State against citizens of other States and involving no question of a Federal nature, nor for the review

by this court upon appeal or writ of error of the final judgment in such a suit. It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time. Its failure to invest the national courts with jurisdiction by removal from the state courts of a suit brought by a State against citizens of other States which involves no Federal question, cannot have the effect to deprive the States of the right which they possessed prior to the adoption of the Constitution to submit to one of its own courts all matters in which it was concerned and which were capable of judicial determination, to be there finally adjudicated as between the State and the parties who were within its jurisdiction so as to be bound by any judgment rendered, and who were not, by reason of their representative character or for other cause, placed exclusively under Federal jurisdiction, and exempted altogether from process issuing from state tribunals.

As, under the long-settled interpretation of the Constitution, the mere extension of the judicial power of the United States to suits brought by a State against citizens of other States did not, of itself, divest the state courts of jurisdiction to hear and determine such cases, and as Congress has not invested the national courts with exclusive jurisdiction in cases of that kind, it follows that the courts of a State may, so far as the Constitution and laws of the United States are concerned, take cognizance of a suit brought by the State in its own courts against citizens of other States; subject, of course, to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by the acts of Congress, and subject, also, to the authority of this court to review the final judgment of the state court, if the case be one within our appellate jurisdiction.

For the reasons stated, it is adjudged that the court below did not err in sustaining the plea, and its judgment is

Affirmed.

UNITED STATES *v.* WINSTON.

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

No. 205. Submitted April 14, 1898. — Decided May 9, 1898.

The boundaries of his district are the limits of the official duties of a District Attorney, and if he is called upon by the Attorney General to do professional duty and services for the Government outside of those limits, and is allowed compensation therefor, he is entitled to receive the same, or to recover it in the Court of Claims if he has the certificate required by Rev. Stat. § 365, or if the court may, from all the evidence before it, fairly assume that the allowance was made in such a way as to secure to him the compensation to which he was entitled.

United States v. *Crosthwaite*, 168 U. S. 375, is adhered to, and the rule laid down in it is not qualified in the least by this decision.

THE defendant in error, who had been the District Attorney of the United States for the District of Washington from February 19, 1890, to May 30, 1893, brought this action in the Circuit Court to recover for special services as an attorney, rendered during that period, and there recovered a judgment. The Court of Appeals for the Ninth Circuit struck out one claim which had been allowed, but otherwise affirmed the judgment. 44 U. S. App. 401. Whereupon the United States sued out this writ of error.

The Government concedes that some of the items included in the judgment of the Court of Appeals are correct, and disputes only three. With respect to one of these disputed items, the Circuit Court made the following finding of fact:

"4. That during said term of office, to wit, about the month of April, 1892, plaintiff, at the request of the defendant, appeared in the Circuit Court of Appeals, Ninth Judicial Circuit, at San Francisco, in a case wherein the defendant was appellee, and the owner of the steam tug 'Pilot' was appellant, and as such attorney conducted the trial of said cause to its conclusion for the defendant. That the Attorney General of the United States allowed plaintiff for services in said cause the sum of $400, the law providing no specific com-

pensation, and that said services were reasonably worth said sum. Of this sum defendant paid plaintiff $212.79, retaining the balance of $187.21 on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which these services were rendered and the money earned."

The other items are substantially similar, and it is, therefore, unnecessary to state the particular facts as to them.

Mr. Assistant Attorney General Pradt for the plaintiffs in error.

Mr. Patrick H. Winston and *Mr. Alexander M. Winston* for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

Is a District Attorney entitled to extra compensation for services rendered under the direction of the Attorney General in the conduct of a government case in the Court of Appeals? Section 767, Revised Statutes, provides that —

"There shall be appointed in each district, except in the middle district of Alabama and the northern district of Georgia and the western district of South Carolina, a person learned in the law to act as attorney of the United States in such district." . . .

Section 771 is —

"It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury."

These two sections define the place, character and extent of his duties. He is the District Attorney of the United States in the district. So far as locality is concerned, the boundaries of the district are the limits of duty. Within these boundaries he is to discharge all his official duties. Beyond them he is not called to go. Sections 773, 774 and 775 prescribe some details in respect to the duties enjoined by section 771, but do not add to their scope.

The suit in the Court of Appeals in which the plaintiff rendered services was not one then pending in his district. The sessions of that court were held in San Francisco, in the Northern District of California. But, wherever held, the Court of Appeals is not a court in or for any district. The act creating that court (26 Stat. 826, c. 517) does not create a court in or for a district, but one in and for each circuit. The relations of that court to a district are similar to those of this court. The Supreme Court is not a court in or of or for a district, but in and of and for the United States as a whole. The fact that this case was originally pending in the Circuit or District Court of the District of Washington does not make the Court of Appeals a court of that district when engaged in hearing the case on appeal. The case when it reached the Court of Appeals passed out of the courts of the district, just as fully as if appealed to this court. In other words, when a case is transferred to the Court of Appeals or to this court it passes beyond the limits within which a district attorney has jurisdiction and exercises his powers.

When a case in which the Government is interested comes to this court from any lower court it falls by the terms of the statute within the special care of the Attorney General. Section 359, Rev. Stat., provides:

"Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any

court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Under this section the Attorney General may, in his discretion, make other arrangements for the management of such a case, but this discretion does not abridge the fact that the full responsibility and control are imposed directly upon him as the head of the Department of Justice. In the act creating the Court of Appeals there is no special direction to any attorney to represent the Government. Clerks and marshals were provided for, but the act is silent as to who shall represent the Government as its counsel. Undoubtedly, however, the matter falls within the general jurisdiction of the Department of Justice, and the Attorney General, by virtue of section 359 or sections 362 and 363, may either himself assume the management of all Government cases, or direct what officer shall have the control and management, or, if he deems it essential, employ special counsel. Whenever the Attorney General calls upon a district attorney to appear for the Government in a case pending in the Court of Appeals, he is not directing him in the discharge of his official duties as district attorney, but is employing him as special counsel. The duties so performed are not performed by him as district attorney, but by virtue of the special designation and employment by the Attorney General, and the compensation which he may receive is not a part of his compensation as district attorney or limited by the maximum prescribed therefor. It seems to us that this is the clear import of the statutes, and we have no difficulty in agreeing with the Court of Appeals in its opinion upon this question.

A more difficult matter is presented by these facts. Section 365, Revised Statutes, provides:

"No compensation shall hereafter be allowed to any person, besides 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."

We held in *United States* v. *Crosthwaite*, 168 U. S. 375, that this section is controlling, and that "the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation." There is in this record no finding that this particular certificate was ever made, nor on the other hand is there anything to suggest that it was not made. It does appear affirmatively that the Attorney General allowed plaintiff for his services, the law providing no specific compensation, and that the services were reasonably worth the sum so allowed. We find no reference anywhere in the pleadings, the findings or the opinion of the Circuit Court, or in that of the Court of Appeals, to the particular terms of the certificate called for by this section. The language of its findings and opinion seems, however, to indicate that the Circuit Court found that proper certificates were given, and that everything necessary to entitle plaintiff to extra compensation had been performed, providing the case was one in which he could receive such compensation and in which the services rendered were not included within his duties as district attorney. We are strengthened in this conclusion by the fact that neither in the assignments of error made when the case was taken to the Court of Appeals nor in those filed when the case was brought here is there a suggestion that any certificate was lacking or deficient. It seems to us, therefore, that when it is expressly found that the Attorney General allowed this claim, and no showing is made of the particular form in which the allowance was made or certificate given, and no assignment of error raises a question as to the sufficiency of any certificate, we have a right to assume that the allowance was made in such a way as to secure to the plaintiff the compensation to which he was entitled. And so, although we adhere to the rule laid down in *United States* v. *Crosthwaite*, *supra*, and do not intend to qualify it in the least, we think a

Counsel for Parties.

fair conclusion from this record is that the proper certificate was given.

The judgment of the Court of Appeals will, therefore, be

Affirmed.

UNITED STATES *v.* HERRON. Appeal from the Court of Claims. No. 272. Submitted with No. 205.

MR. JUSTICE BREWER delivered the opinion of the court. This case, like the preceding, is one for the recovery by a district attorney for services rendered in a Court of Appeals outside the limits of his district. But in this record there is a distinct finding by the Court of Claims that the certificate required by section 365, Revised Statutes, was not given. We are constrained, therefore, under *United States* v. *Crosthwaite*, 168 U. S. 375, to hold that the judgment cannot be sustained.

The order will be that the judgment be reversed and the case remanded to the Court of Claims for further proceedings.

Mr. Assistant Attorney General Pradt for appellants.

Mr. W. W. Dudley, Mr. L. T. Michener and *Mr. F. P. Dewees* for appellee.

UNITED STATES *v.* GARTER.

APPEAL FROM THE COURT OF CLAIMS.

Submitted April 14, 1898. — Decided May 9, 1898.

It is not part of the official duties of the District Attorney of the district, in which, at the time, a session of the Court of Appeals is held, to assume the management and control of the government cases in that court.

THE case is stated in the opinion.

Mr. Assistant Attorney General Pradt for appellants.

Mr. W. W. Dudley, Mr. L. T. Michener and *Mr. F. T. Dewees* for appellee.

Opinion of the Court.

Mr. Justice Brewer delivered the opinion of the court.

This case, like the two preceding, is one brought by a district attorney to recover for services rendered in a Court of Appeals. There is this difference, however, between them. The plaintiff in the court below was district attorney for the Northern District of California. The Court of Appeals was held at San Francisco, within the limits of that district, though the case in which he was employed and in which he rendered the services was one coming to that court from the District Court of Alaska.

In a geographical sense the services were rendered in a government case pending in the district for which he was district attorney, and technically, therefore, it may be said that those services were within the statutory designation of his duties. But we are of the opinion that this fact is not decisive, and for these reasons: At the time the sections defining his duties were enacted there was no Court of Appeals, and therefore no service in such court could have been within the contemplation of Congress in their enactment. Undoubtedly the fact that Congress thereafter added to his duties would not of itself change the measure or limits of compensation. But the question is whether a fair construction of the Court of Appeals act casts upon him any duties in respect to cases pending in that court. That act was a new and great departure in the judicial system of the United States. It divided the appellate jurisdiction theretofore vested in this court and distributed it between this and the newly created Courts of Appeal. To accommodate suitors it provided that the sessions of those courts should be held within their respective circuits, but for all practical purposes those courts became for several classes of cases practically the Supreme Court, and this notwithstanding the fact that there was reserved to this court a control over their proceedings. They were, as we held in the opinion just filed, in no sense courts in or for a district, but distinctively appellate courts for the entire circuit. No express provision was made for appearances in those courts by the district attorneys of the several districts, and the control

of cases in them comes within the general jurisdiction of the Attorney General as head of the Department of Justice.

While one city in each circuit was named as a place for holding at least one term of the court, authority was given to the judges to hold terms at other places within the circuit, and in fact in several circuits the Courts of Appeals are held at more than one place. Obviously great practical inconvenience would result if the management and control of a case pending in a Court of Appeal was adjudged the duty of the district attorney of the district in which the court is held. For if the case was placed on the docket for one term and the district attorney of the district in which that term was held should assume the management and control of the case, it might often be that before the case was reached for argument the court would have finished its term there and adjourned to a place in some other district, and then upon the district attorney of that district would rest the duty of undertaking the management and control. So not merely the nature of the court and its relations to the entire circuit, but the practical difficulties which would attend the matter concur in compelling the conclusion that it is not a part of the official duties of the district attorney of the district in which at the time a session of the Court of Appeals is held to assume the management and control of government cases in that court.

As we indicated in *United States* v. *Winston*, *ante*, 522, that court must stand in relation to cases pending therein, so far as concerns the legal representatives of the Government, precisely as this court, and the management and control of all cases therein must be regarded as a part of the immediate duties of the Department of Justice and under the control of the Attorney General. So, although the particular case in which this plaintiff was employed was pending in the Court of Appeals, whose sessions were then held within the territorial limits of his district, the duty of attending to the management of that case was not cast upon him, and when he was employed by the Attorney General to represent the Government in that case he was employed as a special counsel, and the rule of compensation must be the same as adjudged in the prior case.

Statement of the Case.

The same observations must be made here as in *United States* v. *Winston*, *ante*, 522, in reference to the matter of certificate, and the conclusions to which we came in that case find additional support from the fact that this case and the one immediately following (*United States* v. *Herron*, *ante*, 527) were tried in the Court of Claims, and both were decided during the same month. (31 Ct. Cl. 344–473). In that there was an express finding, as we have seen, that no certificate was given, as required by section 365, Revised Statutes, while in this such finding is omitted, and simply the general finding of an allowance by the Attorney General. We think, therefore, this comes within the rule laid down in *United States* v. *Winston*, *ante*, 522, and the judgment of the Court of Claims is

Affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* REEDER.

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

No. 208. Submitted April 15, 1898 — Decided May 9, 1898.

A provision in a contract, made with a railroad company for the carriage of live stock, that the person in charge of the stock shall remain in the caboose car while the train is in motion, is not violated by his being in the car with the live stock when the train is not in motion, even though he may have been in that car instead of in the caboose car when the train was in motion; and in case of an accident happening to him, while so in the cattle car, caused by a sudden jerk made when the train was at rest, his being in the cattle car at that time, and under such circumstances, does not make him guilty of contributory negligence.

This was an action originally instituted by Alexander Reeder against the Texas and Pacific Railway Company in the District Court of Marion County, Texas, to recover for personal injuries sustained by Reeder. The action was afterwards removed upon petition of the defendant to the United

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States Circuit Court for the Eastern District of Texas. The facts of the case were substantially as follows:

Reeder shipped from Scottsville, Kansas, to Houston, Texas, a car loaded with an emigrant outfit, consisting of ten head of live stock and of household goods, and accompanied the same upon a drover's pass. It was provided in the contract which he entered into with the railway company, that he should "assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock" while on the way, and to better care for the stock he rode in the car with them. In the ninth paragraph of the contract it was further provided "that the person or persons in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever."

The evidence shows that it was the custom on the road of the defendant company for stockmen to ride in the caboose, but that in a case of an "emigrant outfit," like the one in question, it was not unusual for the person in charge to ride in the car with the live stock. Reeder rode with the live stock during the whole trip, and although his car was next to the caboose, and he was invited by the conductor and trainmen to ride in the caboose, he declined for the reason that it would be inconvenient for him to get in and out of the car to look after his stock.

Reeder, whose age was about seventy, testified that he had travelled about five hundred miles over connecting lines before reaching the line of the defendant company, and in that distance neither his stock nor himself had sustained any injury. He further testified that during his whole trip on the line of the defendant his stock was roughly handled by the sudden stopping and starting of the engine, and had been knocked down at least eight times, and that his complaints to the trainmen that the jerks and jolts were killing his stock did no good. He also testified that at or about the place along the line of the road where he received his injury, called

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Longview, the train was stalled on a steep grade, and the engineer in trying to get headway would back the train a short distance and then start with a sudden jerk as he took up the slack of the train; that one of the jerks threw down three cows and two horses, whose halters had been snapped by the jerk; that the engineer uncoupled the train, taking part up the grade, leaving his car; that after the car stopped he got the stock up and was on his way back to his seat when the engine came back against the train with such a sudden jar that he was thrown off his feet, and to save himself he grabbed an iron support. It seems that the sudden jar or jerk pulled his right arm out of joint at the shoulder, which subsequently was followed by a partial paralysis of the shoulder muscles.

The engineer and others of the train crew testified that the train was not uncoupled at the place mentioned by Reeder, but was uncoupled at another place called Marshall, where there was a very steep grade. The witnesses for the defendant also testified that the trip was no rougher than usual, and one of the brakemen said on the stand that he was riding in the caboose at the time of the jerk which caused the injury, and that he did not suffer from it in any way.

After all the evidence was in, the defendant requested the court to charge the jury to return a verdict for the defendant. This the court refused to do, whereupon the defendant requested the court to charge the jury to find for the defendant in case it should find from the evidence that the plaintiff would not have been injured if he had been in the caboose instead of the stock car; that he was invited to ride in the caboose; that the latter was a safer place than the stock car, and that the plaintiff knew it. The court refused to grant any of the instructions requested by the defendant, and charged the jury as follows:

"If you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, he at the time, in a

prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time, by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives; you will find for the plaintiff, and assess actual damages as hereinafter instructed.

"If, however, you believe from the evidence, that at the time the plaintiff was hurt, that the train upon which he was riding was in motion, at the time he was giving the horses and cattle the assistance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant."

The jury returned a verdict for the plaintiff in the sum of $1500, upon which judgment was entered. The case was then taken to the Court of Appeals for the Fifth Circuit, 41 U. S. App. 775, where the judgment below was affirmed, and the case is now before this court on writ of error.

Mr. John F. Dillon, *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* for plaintiff in error.

Mr. Presley K. Ewing, *Mr. Henry F. Ring* and *Mr. L. S. Schluter* for defendant in error.

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

The several assignments of error in this case all resolve themselves into the two questions whether the defendant railway company was entitled to a peremptory instruction in its favor, or, in case of a refusal of such instruction, whether it was entitled to submit to the jury the question of the contributory negligence of the plaintiff in the mere fact of riding in the stock car.

In this connection defendant relies upon the ninth clause of the contract under which plaintiff was travelling and transporting his stock, which provided that "the person or persons

in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion." This clause was undoubtedly intended to provide a safe place for drovers in attendance upon their stock, although in the case of emigrants accompanying their outfits it was a common custom to permit them to ride in the car with their outfits. But, assuming that the plaintiff was bound by this stipulation, it was manifestly obligatory upon him only while the car was in motion, the design evidently being that drovers should be permitted to visit their stock cars and see to their cattle while the train was at rest. Indeed, the contract specially provided that the plaintiff should "assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock provided for by this contract, while in yards, pens or elsewhere." The stipulation was doubtless primarily intended to permit drovers to visit their stock cars while the train was stopping at its regular stations, but as there is no such limitation in the contract, we think the plaintiff was not guilty of contributory negligence in attending to his cattle whenever the train was not in motion, whatever may have been the cause of its stoppage, and whether the same occurred at a station or not. The company might doubtless have restricted the right of its drovers to visit their stock while the train was stopping at its regular stations, but it did not choose to do so, and there evidently was as much necessity in the present case for the plaintiff to care for his stock and to protect it against injury as there would have been if the train had been stopping at such a station.

If the plaintiff, while riding in a caboose, might, within the terms of the contract, have been visiting his cattle at the time the accident occurred, then the fact that he was actually riding in the same car with them while the car was in motion becomes immaterial, since the propriety of his action in being in the stock car must be gauged by the fact whether the train was in motion or not. Had the accident occurred while the plaintiff should have been riding in the caboose, that is, while the train was in motion, it would have been strong, if not conclusive, evidence of contributory negligence on his part.

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What then is meant by the train being "in motion"? The jar or sudden jolt which occasioned the injury doubtless presupposes a momentary motion of the car, but that is an extremely limited sense of the word, and one inconsistent with the obvious purpose of the license, since, while stopping at a regular station, freight trains are frequently subject to be moved short distances in order to drop off or take on cars, to be switched on side tracks in order to accommodate passenger trains, or to take on fuel or water. If cars were held to be in motion while making these trifling changes, the privilege of entering a stock car while the train was at rest would be of no practical value. The more reasonable interpretation is that by the word "motion," as here used, is intended that continuous movement of the cars towards their destination which is commonly understood when we speak of moving trains or trains in motion. Whether the train was really in motion was a question which was submitted to the jury, and we have no criticism to make of the instruction of the court in that particular: "That if you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, he at the time, in a prudent and careful manner, attempted to or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed."

Evidently the action of the plaintiff upon the occasion in question was entitled to some liberality of construction and was dictated by a manifest prudence for the care of his stock. In his deposition he states:

"My car was next to the caboose and received the full force of the jerk and threw several of my cows down and the horses on top of them; the jar broke the halters that held the horses;

I saw they were being killed by the repeated jerks and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car; while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time; I then managed to get the stock all up and was still holding on to the side of the car and up in the feed trough, when the engine came back against the train without my knowing that it was coming with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed. The car jerked my arm out of place in the shoulder joint. Soon afterwards I called the conductor and he came to my assistance. . . . The engine came back against the car with great force and then plunged forward taking up the slack, and jerked the car I was in with such force as to hurt me, as already stated. I was up in the feed trough and was just going to get down when the jerk came, and was entirely unexpected to me."

When on the stand the plaintiff testified:

"Just before I was injured the jar knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again, and after I got them up I was going back to take the seat again, and when I was about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and after they got started on the run, and then I got down and got on my feet again; as soon as they stopped again I called to the conductor and brakemen."

The truth seems to be that the train was not provided with sufficient traction power, and that a stronger or additional locomotive should have been employed. If the train was not in motion when the accident occurred, we think that, in view of the obviously negligent conduct of the defendant, motives of humanity as well as of prudence may have required of the plaintiff more than ordinary care in looking after and protecting his stock.

The company was evidently not entitled to an instruction

that plaintiff, by riding in the stock car while the train was in motion, was guilty of contributory negligence, or even to go to the jury on that point. The real question was whether the train was actually in motion when the injury was received, and, if there was any error at all in submitting that question to the jury, it was not one of which the defendant was entitled to complain.

There was no error in the action of the Court of Appeals, and its judgment is, therefore,

Affirmed.

Mr. Justice White dissented.

WESTINGHOUSE *v.* BOYDEN POWER BRAKE COMPANY.

BOYDEN POWER BRAKE COMPANY *v.* WESTINGHOUSE.

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

Nos. 116, 99. Argued March 10, 11, 1898. — Decided May 9, 1898.

The Boyden device for a fluid-pressure break is not an infringement of patent No. 360,070 issued to George Westinghouse, Jr., March 29, 1887, for a fluid-pressure automatic-brake mechanism.

This was a writ of certiorari to review a decree of the Circuit Court of Appeals, reversing a decree of the Circuit Court for the District of Maryland, which had sustained, in part, a bill filed by Westinghouse against the Boyden Power Brake Company for the infringement of patent No. 360,070, and from which decree both parties had taken an appeal to the Circuit Court of Appeals.

The patent in suit, which was issued March 29, 1887, to George Westinghouse, Jr., is for a fluid-pressure automatic-brake mechanism, the object of which is said in the speci-

fication to be "to enable the application of brake-shoes to car-wheels by fluid pressure to be effected with greater rapidity and effectiveness than heretofore, more particularly in trains of considerable length, as well as to economize compressed air in the operation of braking, by utilizing in the brake-cylinders the greater portion of the volume of air which in former practice was directly discharged into the atmosphere."

"To this end my invention, generally stated, consists in a novel combination of a brake-pipe, an auxiliary reservoir, a brake-cylinder and a 'triple-valve' device, governing, primarily, communication between the auxiliary reservoir and the brake-cylinder, and, secondarily, communication directly from the brake-pipe to the brake-cylinder."

There follows here a description of the Westinghouse automatic brake as theretofore used, its mode of operation, and the defects or insufficiencies which attended its application to long trains, in the following language:

"In the application of the Westinghouse automatic brake as heretofore and at present commonly in use, each car is provided with a main air-pipe, an auxiliary reservoir, a brake-cylinder and a triple-valve, the triple-valve having three connections, to wit, one to the main air-brake pipe, one to the auxiliary reservoir and one to the brake-cylinder. The main air-pipe has a stop-cock at or near each of its ends, to be opened or closed as required, and is fitted with flexible connections and couplings for connecting the pipes from car to car of a train, so as to form a continuous line for the transmission of compressed air from a main reservoir supplied by an air-pump on the engine. When the brakes are off or released, but in readiness for action upon the wheels of the train, the air which fills the main reservoir and main air-pipes has a pressure of from sixty-five to seventy-five pounds to the square inch, and by reason of the connections referred to the same pressure is exerted in the casings of the triple-valves on both sides of their pistons and in the auxiliary reservoirs connected therewith. At the same time passages called 'release-ports' are open from the brake-cylinders to the atmosphere. When it is desired to apply the brakes, air is

allowed to escape from the main air-pipes through the engineer's valve, thereby reducing the pressure in the main air-pipes, whereupon the then higher pressure in the auxiliary reservoirs moves the pistons of the triple-valves, so as to first close the passages from the triple-valves to the brake-pipe and at the same time close the release-ports of all the brake-cylinders, and then open the passages from the auxiliary reservoirs to the brake-cylinders, the pistons of which are forced out by the compressed air thereby admitted to the brake-cylinders, applying the brakes by means of suitable levers and connections, all of which mechanism is fully shown in various letters patent granted to me."

"The application of the brakes with their full force has heretofore required a discharge of air from the main pipe sufficient to reduce the pressure in said pipe below that remaining in the auxiliary reservoir after the brakes have been fully applied, and it has been found that, while the brakes are sufficiently quick in action on comparatively short trains, their action on long trains of from thirty to fifty cars, which are common in freight service under present practice, is in a measure slow, particularly by reason of the fact that all the air required to be discharged from the main pipe to set the brakes must travel from the rear of the train to a single discharge opening on the engine. This discharge of air at the engine has not only involved a serious loss of time in braking, but also a waste of air. Under my present invention a quicker and more efficient action of the brakes is obtained, and air which has been heretofore wasted in the application of the brakes is almost wholly utilized to act upon the brake-pistons."

After a detailed description of the invention, an important feature of which is a triple-valve, (hereinafter more fully explained in the opinion,) with references to the accompanying drawings, the specification proceeds to state that, "so far as the performance of its preliminary function in ordinary braking is concerned — that is to say, effecting the closure of communication between the main-air pipe and the auxiliary reservoir, and the opening of communication between the aux-

iliary reservoir and the brake-cylinder in applying the brakes, and the reverse operations in releasing the brakes—the triple-valve 10 accords substantially with that set forth in letters patent of the United States No. 220,556, granted and issued to me October 14, 1879, and is not, therefore, saving as to the structural features by which it performs the further function of effecting the direct admission of air from the main air-pipe to the brake-cylinder, as presently to be described, claimed as of my present invention. Certain of its elements devised and employed by me prior thereto will, however, be herein specified, in order to render its construction and operative relation to other members of the brake mechanism fully intelligible."

After a further reference to the drawings he again states that "so far as hereinbefore described, the triple-valve accords in all substantial particulars with and is adapted to operate similarly to those of my letters patent Nos. 168,359, 172,064 and 220,556, and, in order that it may perform the further functions requisite in the practice of my present invention, it is provided with certain additional members, which will now be described." These additional members, which are said to be for the purpose of effecting the admission of air directly from the main air-pipe to the brake-cylinder when it is desired to apply the brakes with great rapidity and full force, consist of (1) a passageway through which air can be admitted directly from the main air (or train) pipe to the brake-cylinder, without passing through the auxiliary reservoir; and, (2) an auxiliary valve in connection with such passage, that, when the triple-valve piston makes a short or preliminary movement, the passageway direct from the train-pipe to brake-cylinder, controlled by said valve, will not be opened, while, in the event of a long or full movement of the piston, or "further traverse," as it is called, such direct passageway will be thrown wide open to the admission of train-pipe air, and the brake-cylinder will be rapidly filled thereby.

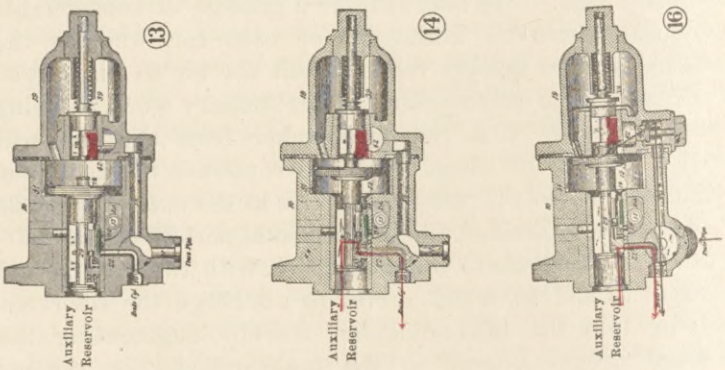
After describing the auxiliary sliding valve 41 and its connections, as well as the operation of the device in ordinary (non-emergency) cases of checking the speed of or stopping trains, already fully provided for in previous patents, he pro-

ceeds to state its operation in cases of emergency which the patent was specially designed to cover, as follows:

"In the event, however, of its becoming necessary to apply the brakes with great rapidity and with their greatest available force, the engineer, by means of the valve at his command, instantly discharges sufficient air from the front end of the main air-pipe to effect a sudden reduction of pressure of about twenty pounds per square inch therein, whereupon the piston 12 of the triple-valve is forced to the extreme limit of its stroke in the direction of the drain-cup 19, carrying with it the stem 36 and auxiliary slide-valve 41, which instantly uncovers the port 42 and discharges air from the main air-pipe through the opening of the check-valve 49 and the passages 46 and 48 to the brake-cylinder, and, each car being provided with one of these devices, it will be seen that they are successively moved with great rapidity, there being practically on a train of fifty cars fifty openings for discharging compressed air from the main pipe instead of the single opening heretofore commonly used. Not only is there a passage of considerable size opened from the brake-pipe on each car, whereby the pressure is more quickly reduced, but the air so discharged is utilized in the performance of preliminary work, it being found in practice that the air so taken from the pipe will exert a pressure of about twenty-five pounds in the brake-cylinders. When the piston 12 arrives at the extremity of its stroke as above specified, the supplemental port 35 of the slide-valve 14 is brought into communication with the port 33 and passages 22 and 16, which serves to discharge the reservoir-pressure into the brake-cylinder, thereby augmenting the pressure already exerted in the brake-cylinder by the air admitted from the main air-pipe. Upon the reduction of the pressure in the main air-pipe below that in the brake-cylinders, as by the breaking in two of the train, the check-valve 49 closes communication between the passages 46 and 18, thereby preventing the return of the air from the brake-cylinder to the main air-pipe. The feed-opening for the admission of air from the auxiliary reservoir to the brake-cylinder is purposely made of comparatively small diameter, it having been determined

by experiment that the initial application of the brakes should not be made with maximum force, and this opening may be made of such size as to apply the brakes exactly in accord with the requirements of the most efficient work."

"In using the terms 'triple-valve' and 'triple-valve device' I refer to a valve device, however specifically constructed, having a connection with the main air or brake-pipe, another with an auxiliary reservoir or chamber for the storage of power, and another with a brake-cylinder or its equivalent for the utilization of the stored power, and with a release or discharge passage for releasing the operative power from the brake-cylinder, whether the valves governing these passages or connections are arranged in one or more cases and are moved by a piston or its equivalent or by a series of pistons or their equivalents, there being numerous examples in the art of constructions varying materially in appearance whereby these functions are performed, both in plenum and vacuum brake mechanisms."



The above drawings are somewhat clearer than those annexed to the patent, and exhibit the triple-valve and its connections in three positions, viz., No. 13, Released or "Brakes Off;" No. 14, Ordinary Service Application, and No. 16, "Quick Action" Position.

The only claims of the patent alleged to have been infringed are the first, second and fourth, which read as follows:

"1. In a brake mechanism, the combination of a main air-

pipe, an auxiliary reservoir, a brake-cylinder, a triple-valve and an auxiliary-valve device, actuated by the piston of the triple-valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air-pipe to the brake cylinder, substantially as set forth."

"2. In a brake mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder, and a triple-valve having a piston whose preliminary traverse admits air from the auxiliary reservoir to the brake-cylinder, and which by a further traverse admits air directly from the main air-pipe to the brake-cylinder, substantially as set forth."

"4. The combination, in a triple-valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston-stem and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake-cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston-stem and controlling communication between passages leading to connections with a main air-pipe and with the brake-cylinder, respectively, substantially as set forth."

The joint and several answer of the Boyden Brake Company and the individual defendants admitted that such company was engaged in manufacturing and selling a fluid-pressure brake, but denied that the same was an infringement upon complainants' patent, and also denied that Westinghouse was the original inventor of the mechanism covered by the patent, and alleged that an apparatus, substantially identical in character, had been previously granted Westinghouse, March 5, 1872, (No. 124,404,) and that a like apparatus was previously described in the following patents issued to Westinghouse, viz.: No. 138,827, May 13, 1873; No. 144,006, October 28, 1873; No. 168,359, October 5, 1875; No. 172,064, January 11, 1876; No. 220,556, October 14, 1879, and also in three patents to other parties, not necessary here to be specifically mentioned.

The answer further denied any infringement of the first, fourth and fifth claims of the patent sued upon, (No. 360,070,) and, with respect to the second claim, averred the same to be

Counsel for Westinghouse.

invalid because the combination of parts therein named is inoperative to perform and incapable of performing the function set forth in said claim; and that, if the said claim be considered merely as the combination of parts therein set forth, and without reference to the function described as performed by it, it is invalid for the reason that the same combination of parts is shown in most of the prior patents above cited, and has been publicly used by the complainants for a long time prior to the date of the said letters patent No. 360,070.

The answer further averred the claim to be uncertain and ambiguous, and if the functions recited by it are construed as amplifying the description of the combination to distinguish this combination from that shown in the prior patents, "then the defendants say that the said claim is anticipated by the prior letters patent issued to George A. Boyden on June 26, 1883, for the reason that air-brake valves made in accordance with the last mentioned patent embody the same combination of parts, and will perform the same functions, and operate in substantially the same manner as stated in said second claim."

Upon a hearing in the Circuit Court upon the pleadings and proofs, that court was of opinion that the second claim was valid, and had been infringed, but that defendants had not infringed claims one and four, and as to those the bill was dismissed. 66 Fed. Rep. 997. From the decree entered in pursuance of this opinion both parties appealed to the Court of Appeals for the Fourth Circuit, which affirmed the action of the Circuit Court with respect to the first and fourth claims, but reversed it with respect to the second claim, and dismissed the bill. 25 U. S. App. 475. Whereupon complainants applied for and were granted a writ of certiorari.

Full copies of the principal Westinghouse patents are printed in *Westinghouse Brake Co.* v. *N. Y. Brake Co.*, 26 U. S. App. 248, and of the Boyden patents in the report of this case in 25 U. S. App. 475.

Mr. George H. Christy and *Mr. Frederic H. Betts* for Westinghouse. *Mr. J. Snowden Bell* and *Mr. Bernard Carter* were on their brief.

Mr. Philip Mauro and *Mr. Lysander Hill* for the Boyden Power Brake Company. *Mr. Hector T. Fenton*, *Mr. Melville Church* and *Mr. Anthony Pollok* were on their brief.

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

The history of arresting the speed of railway trains by the application of compressed air is one to which the records of the Patent Office bear frequent witness, of a gradual progress from rude and imperfect beginnings, step by step, to a final consummation, which, in respect to this invention, had not been reached when the patent in suit was taken out, and which, it is quite possible, has not been reached to this day. It is not disputed that the most important steps in this direction have been taken by Westinghouse himself.

The original substitution of the air-brake for the old hand-brake was itself almost a revolution, but the main difficulty seems to have arisen in the subsequent extension of that system to long trains of freight cars, in securing a simultaneous application of brakes to each of perhaps forty or fifty cars in such a train, and finally in bringing about the instantaneous as well as simultaneous application of such brakes in cases of emergency, when the speediest possible stoppage of the train is desired to avoid a catastrophe.

Patent No. 88,929, issued April 13, 1869, appears to have been the earliest of the Westinghouse series. This brake, known as the *straight-air brake*, consisted of an air-compressing pump, operated by steam from the locomotive boiler, by which air was compressed into a reservoir, located under the locomotive, to a pressure of about eighty pounds to the square inch. This reservoir, being still in use, is now known as the main reservoir. From this reservoir an air-pipe, usually called the train-pipe, led into the cab, where the supply of air was regulated by an "engineer's valve," thence down and back under the tender and cars, being united between the cars by a flexible hose with metal couplings, rendering the train-pipe continuous. These couplings were automatically

detachable; that is, while they kept their grip upon each other under the ordinary strains incident to the running of the train, they would readily pull apart under unusual strains, as when the car coupling broke and the train pulled in two.

From the train-pipe of each car, a branch pipe connected with the forward end of a cylinder, called the "brake-cylinder," which contained a piston, the stem of which was connected with the brake levers of the car. This piston was moved and the brakes applied, by means of compressed air admitted through the train-pipe and its branches, into the forward end of the brake-cylinder. When the brakes were to be applied, the engineer opened his valve, admitted the compressed air into the train-pipes and brake-cylinders, whereby the levers were operated and the brakes applied. To release the brakes, he reversed the valve, whereby the compressed air escaped from the brake-cylinders, flowed forward along the train-pipe to the escape port of the engineer's valve, thence into the atmosphere. Upon the release of the compressed air, the pistons of the brake-cylinders were forced forward again by means of springs, and the brake-shoes removed from the wheels. By means of this apparatus, the train might be wholly stopped or slowed down by a full or partial application of the brakes. As between a full stop and a partial stop, or slow speed, there was only a question of the amount of air to be released from the main reservoir. The validity of this patent was sustained by the Circuit Court for the Northern District of Ohio, Mr. Justice Swayne and Judge Welker sitting, in *Westinghouse* v. *The Air Brake Company*, 9 Official Gazette, 538. The court said, in its opinion, that while Westinghouse was not the first to conceive the idea of operating railway brakes by air pressure, such fact did not detract at all from his merits or rights as a successful inventor; that the new elements introduced by him "fully substantiated his pretensions as an original and meritorious inventor, and entitled him as such to the amplest protection of the law;" and that it appeared from the record and briefs that he was the first to put an air-brake into successful actual use.

While the application of this brake to short trains was

reasonably successful, the time required for the air to pass from the locomotive to the rear cars of a long train (about one second per car) rendered it impossible to stop the train with the requisite celerity, since in a train of ten cars it would be ten seconds before the brakes could be applied to the rear car, and to a freight train of fifty cars nearly a minute. While the speed of the foremost car would be checked at once, those in the rear would proceed at unabated speed, and in their sudden contact with the forward cars would produce such shocks as to often cause damage. As a train moving at the rate of fifty miles an hour makes over seventy feet per second, a train of fifty cars would run half a mile before the brakes could be applied to the rear car. So, too, if the rear end of the train became detached from the forward end by the rupture of the train-pipe or couplings, the brakes could not be applied at all, since the compressed air admitted to the train-pipe by opening the engineer's valve would escape into the atmosphere without operating the brakes, or if the brakes were already applied, they would be instantly released when such rupture occurred.

The first step taken toward the removal of these defects resulted in what is known as "the *automatic brake*," described first in patent No. 124,404 in a crude form, and, after several improvements, finally culminating in patent No. 220,556 of 1880. The salient features of this brake were an auxiliary reservoir beneath each car for the reception and storage of compressed air from the main reservoir, and a triple-valve, so called, automatically controlling the flow of compressed air in three directions, by opening and closing, at the proper times, three ports or valve openings, viz.: 1. A port or valve known as the "feeding-in valve" from the train-pipe to the auxiliary reservoir, allowing the auxiliary reservoir to fill so as to be ready when the brakes were applied; 2. A port or valve from the auxiliary reservoir to the brake-cylinder, which allowed a flow of compressed air to apply the brakes, and was called the "main valve;" 3. A port or valve from the brake-cylinder to the open air, denominated the "release-valve," to be opened when it was desired to release the brakes.

The operation of these valves was as follows: Before the train starts, compressed air from the main reservoir is permitted to flow back through the train-pipe, and through valve No. 1, for the purpose of charging the auxiliary reservoir beneath each car with a full working pressure of air. When it is desired to apply the brakes, the engineer's valve is shifted, and the air in the train-pipe is allowed to escape into the atmosphere at the engine. Thereupon the compressed air in the auxiliary reservoir closes valve No. 1, leading to the train-pipe, and opens the main valve No. 2, from the auxiliary reservoir to the brake-cylinder, whereby the piston of that cylinder operates upon the brake-levers and applies the brakes. By this use of the auxiliary reservoirs a practically simultaneous application of the brakes is secured for each car. This application of the brakes is secured, not by direct application of compressed air from the engine through the train-pipe, but by a reverse action, whereby the air is allowed to escape from the train-pipe toward the engine, the pressure being applied by the air escaping from the auxiliary reservoirs. It also results that, if a train should pull in two, or a car become detached, the same escape of air occurs, the same action takes place automatically at the broken part, and the same result follows by the escape of the compressed air through the separated couplings. When it is desired to release the brakes, the engineer's valve is again shifted, and the compressed air not only opens valve No. 1 from the train-pipe to the auxiliary reservoir, but valve No. 3 from the brake-cylinder to the open air, which allows the air from the brake-cylinder to escape and thus release the brake.

From this description it will be seen that the action of the automatic brake was, in fact, the converse of that of the straight air-brake, and that the result was to obviate the most serious defects which had attended the employment of the former.

This automatic brake appears, in its perfected form, in patent No. 220,556, although this patent was but the culmination of a series of experiments, each successive step in which appears in the prior patents. Thus in patent No. 124,404, (1872,)

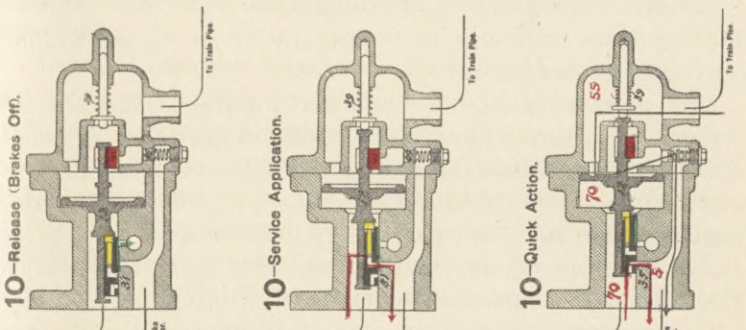
is introduced the auxiliary reservoir beneath each car in connection with a double line of brake-pipes and a single cock with suitable ports for charging the reservoir and for operating the brakes — a device which was obviously the foundation of the triple-valve which first made its appearance in patent No. 141,685, (1873,) in which the main valve, which admitted air from the auxiliary reservoir to the brake-cylinder, was of the poppet form; and as a poppet-valve can govern only one port, separate valves had to be provided for feeding in the air from the train-pipe to the auxiliary reservoir, and for discharging the air from the brake-cylinder to release the brakes. In subsequent patents, No. 144,006, (1873,) and No. 163,242, (issued in 1875 to C. H. Perkins and assigned to Westinghouse,) Mr. Westinghouse improved upon his prior devices by substituting a sliding-piston valve for the poppet form of main valve previously used by him. This enabled the piston to perform the feed-valve function of admitting air from the train-pipe to the auxiliary reservoir; the main-valve function of admitting air from the auxiliary reservoir to the brake-cylinder to apply the brakes, and the release-valve function of discharging the air from the cylinder to release the brakes. In patent No. 168,359, (1875,) a piston actuating a slide-valve was substituted for the piston-valve, and, after a series of experiments, which did not seem to have been successful, he introduced into patent No. 217,838 the idea of venting the train-pipe, not only at the locomotive, but also under each car, in order to quicken the application of the brakes. Prior to this time, "when the engineer desired to apply his brakes with full force he operated the valve at the engine and opened the port wide, letting the compressed air out of the train-pipe at the locomotive, then its only vent. The air, as before said, had to travel from the rear cars along the cars forward to the engine before it could lessen the pressure of the train-pipe air, . . . and before the brake-cylinder could be operated with air from the auxiliary reservoirs. In a train of fifty cars it would have to travel nearly half a mile to get out at the engine." He embodied in patent No. 220,556, (1879,) the most complete form of the automatic brake, and as stated by the

court below, "the ordinary work of braking was performed by a partial traverse of its chamber by the triple-valve piston, graduated according to the purpose desired, at the will of the engineer, and emergency work was done by an extreme traverse of the piston to the end of its chamber."

While the automatic brake had thus obviated the most important defects of the old or straight air-brake, and come into general use upon passenger trains throughout the country, it was found, in practice upon long freight trains, that the air from the auxiliary reservoirs did not act with sufficient promptness upon the brakes of the rear cars, where a particularly speedy action was required, and that it would be necessary to devise some other means for cases of special emergency. In the business of transporting freight over long distances, the tendency has been in the direction of increasing the load by using stronger and heavier cars and larger locomotives. Upon a long train of this kind, composed of thirty to fifty cars, a demand was made for quicker action in cases of emergency than had yet been contemplated, although for ordinary work, such as checking the speed of a train while running, holding it at a slow speed on a down grade, and also for making the ordinary station stops, the automatic brake was still sufficient, and produced satisfactory results even in the equipment of long and heavy trains. But however effective for ordinary purposes, the automatic brake did not sufficiently provide for certain emergencies, requiring prompt action, and, therefore, failed in a single important particular.

Upon examination of these defects it was found that they could only be remedied by securing, (1) in cases of emergency, a more abundant discharge of compressed air into the brake-cylinder; and (2) an escape of air near to each triple-valve without requiring the escaping air to travel all the way back to the engine. The latter device having been already embodied in patent No. 217,838, these features Mr. Westinghouse introduced into the patent in suit, by which a passage was opened directly from the train-pipe filled from the main reservoir on the engine, to the brake-cylinder through which, in cases of emergency, the train-pipe air, instead of being dis-

charged into the atmosphere, could pour directly from the train-pipe into the brake-cylinder. This operation resulted in charging the brake-cylinder and applying the brakes more quickly than before, and also, by reason of the fact that the filling of the brake-cylinder from the train-pipe on one car made what was, in effect, a local vent for the release of pressure sufficient to operate the valve on the next car behind, each successive valve operated more quickly than when a diminution of pressure was caused by an escape of air only at the locomotive. The direct passage of the air from the train-pipe to the brake-cylinder was effected by a valve (41), colored red in the above diagrams, which is never opened except in cases of emergency. In ordinary cases, when the brakes are desired to be applied, sufficient air is released from the train-pipe to open the passage from the auxiliary reservoir to the brake-cylinder by what is called a preliminary traverse of the piston (12), but when a quick action is required sufficient air is drawn from the train-pipe, not only to open this passage, but by a further traverse of the piston, to shove valve 41 off its port, and introduce air directly from the train-pipe to the brake-cylinder, as shown in the following drawings.



In the foregoing skeleton drawings, from which all details of construction, and all figures of reference, not necessary for a clear understanding of the structure, are omitted, the

essential parts are colored, so that their changes of position in the different stages of action can be easily followed.

The access of train-pipe air is shown located at the right end of the structure, instead of the left, (as in the patent drawings,) simply for greater clearness. Its course from the train-pipe to the auxiliary cylinder is through the small port above the upper arm of the piston 12.

The "main valve" of the triple is *black*. Its office is to admit auxiliary reservoir air to brake-cylinder.

The "quick-action" valve is colored *red*. Its office is to admit *train-pipe air* to brake-cylinder.

The release port is colored *green*. Its office is to discharge air from brake-cylinder, in releasing the brakes.

There is also shown in *yellow* what is known as the graduating valve, the function of which will be hereafter explained. As at present used, the triple-valve is in reality a quadruple-valve.

The flow or movement of air, in the several positions of the structure is also shown by colored lines and arrows, viz.:

Air released from brake-cylinder to open air by *green* arrow.

Air flowing from auxiliary reservoir to brake-cylinder, in "service" application of the brakes, by *red* line. And air flowing from train-pipe to brake-cylinder in "quick-action" application, by *blue* line.

This patent, although it introduced a novel feature into the art, does not seem to have been entirely successful in its practical operation, since in October of the same year an improvement was patented, No. 376,837, with the object of still further increasing the rapidity of action. As observed by the District Judge in this connection, "the success of this improved device, No. 376,837, has demonstrated that the invention, by which the further traverse of the triple-valve piston beyond the extent of the traverse required for the ordinary application of the brakes, is made to admit a large volume of train-pipe air directly to the brake-cylinder, was one of great importance. The proofs show that a quick-action automatic brake, which would give the results which this brake has accomplished, was eagerly

sought after by inventors and car builders, and all had failed until Westinghouse discovered that it could be done by this mode of operation."

We are now in position to take up the several claims of the patent in suit, and their defences thereto. It may be stated generally that the position of complainants in this connection is, that the novel feature of this patent, in respect to which they are entitled to be protected, is the opening of a passage directly from the train-pipe to the brake-cylinder, without passing through the auxiliary reservoir and without reference to the means by which such passageway is controlled. Defendant's theory is that they are limited to such passageway when governed by the auxiliary valve 41, a device which, although of no utility as arranged in the patent in suit, became afterwards exceedingly useful when further combined with the supplementary piston shown in patent No. 376,837. The further inference is that, as they do not use the auxiliary valve of this patent, they cannot be held liable as infringers.

Complainants' case must rest either upon the theory that the admission of compressed air directly from the train-pipe to the brake-cylinder is patentable as a function, or that the means employed by the defendants for that purpose are a mechanical equivalent for the auxiliary valve 41, described in the patent.

1. The first theory is based upon the second claim, which is "in a brake mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder and a triple-valve having a piston, whose preliminary traverse admits air from the auxiliary reservoir to the brake-cylinder, and which by a further traverse admits air directly from the main air-pipe to the brake-cylinder, substantially as set forth."

In the construction of this claim, the District Judge was of opinion that it was broad enough to cover other devices in which air was admitted directly from the train-pipe to the brake-cylinder by the further traverse of the piston actuating a valve admitting such air, and that the defendants could not exculpate themselves from the charge of infringement, from the fact that in their device the train-pipe air was admitted

through the triple-valve chamber, and not through a by-passage, nor by the fact that in their device the further traverse of the piston opens the main valve in a special manner, which produces the same result, but does not make use of a separate auxiliary valve.

Upon the other hand, the Circuit Court of Appeals held that "the transmission of train-pipe air and auxiliary reservoir air simultaneously to the brake-cylinder is a result of [or] function, and is not patentable;" that "the means by which this or any other result or function is accomplished may be many and various, and if these several means are not mechanical equivalents, each of them is patentable." It was of opinion that when the second claim, "in its language describing the action of that device, failed to describe any means by which the extreme traverse of the piston produced it, declaring merely that the piston, 'by a further traverse, admits air directly from the main air-pipe to the brake-cylinder,' it was fatally defective, claiming only a result which is public property, and not identifying the specific means (his own property) by which the result is achieved."

It is true, as observed by the Court of Appeals, that the further traverse of the piston for use in cases of emergency had been shown in prior patents, but it had never been employed for the purpose of admitting air directly from the main air-pipe to the brake-cylinder until the patent in suit was taken out.

The claim in question is, to a certain extent, for a function, viz., the admission of air directly from the train-pipe to the brake-cylinder, and is only limited to such function when performed by the further traverse of the piston of the triple-valve. This limitation, however, does not obviate the objection that the means are not fully and specifically set forth for the performance of the function in question.

The difficulty we have found with this claim is this: That, if it be interpreted simply as a claim for the function of admitting air to the brake-cylinder directly from the train-pipe, it is open to the objection, held in several cases to be fatal, that the mere function of a machine cannot be patented.

This rule was clearly laid down in the leading case of *Corning* v. *Burden*, 15 How. 252, in which Mr. Justice Grier, delivering the opinion of the court, drew the distinction between such processes as were the result or effect of "chemical action, by the operation or application of some element or power of nature, or of one substance to another," and the mere result of the operation of a machine, with regard to which he says:

"It is for the discovery or invention of some practicable method or means of producing a beneficial result or effect that a patent is granted, and not for the result or effect itself. It is when the term 'process' is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations.

"But the term 'process' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process."

"In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

In the subsequent case of *Burr* v. *Duryee*, 1 Wall. 531, 570, Mr. Justice Grier laid down the same principle as follows:

"The patent act grants a monopoly 'to any one who may have discovered or invented any new and useful art, machine, manufacture or composition of matter.' . . . The law requires that the specification 'should set forth the principle and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions, and shall particularly point out the part, improvement or combination which he claims as

his own invention or discovery.' We find here no authority to grant a patent for a 'principle' or 'a mode of operation,' or an *idea*, or any other abstraction. A machine is a concrete thing, consisting of parts, or of certain devices and combination of devices. The principle of a machine is properly defined to be its mode of operation, or that peculiar combination of devices which distinguishes it from other machines. A machine is not a principle or an idea. The use of ill defined abstract phraseology is the frequent source of error. It requires no great ingenuity to mystify a subject by the use of abstract terms of indefinite or equivocal meaning. Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for 'a mode of operation as exhibited in the machine.' Much less can any inference be drawn from the statute, that an inventor who has made an improvement in a machine, and thus effects the desired result in a better or cheaper manner than before can include all previous inventions and have a claim to the whole art, discovery or machine which he has improved. All others have an equal right to make improved machines, provided they do not embody the same, or substantially the same devices, or combination of devices, which constitute the peculiar characteristics of the previous invention."

So also in *Fuller* v. *Yentzer*, 94 U. S. 288, this court, speaking through Mr. Justice Clifford, said:

"Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the Patent Act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation independent of the mechanical devices employed; nor will a patent be held valid for a principle or for an idea, or any other mere abstraction."

Most of the prior authorities upon this subject are reviewed in the recent case of *Risdon Locomotive Works* v. *Medart*, 158 U. S. 68, in which it was also held that a valid patent could not be obtained for a process which involved nothing more than the operation of a piece of mechanism, or the func-

tion of a machine. See also to the same effect *Wicke* v. *Ostrum*, 103 U. S. 461, 469. These cases assume, although they do not expressly decide, that a process to be patentable must involve a chemical or other similar elemental action, and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions. Where the process is simply the function or operative effect of a machine, the above cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable, though none of the powers of nature be invoked to aid in producing the result. *Eastern Paper Bag Co.* v. *Standard Paper Bag Co.*, 30 Fed. Rep. 63; *Union Paper Bag Machine Co.* v. *Waterbury*, 39 Fed. Rep. 389; *Travers* v. *Am. Cordage Co.*, 64 Fed. Rep. 771. This case, however, does not call for an expression of our opinion upon this point, nor even upon the question whether the function of admitting air directly from the train-pipe to the brake-cylinder be patentable or not, since there is no claim made for an independent process in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism.

But if the second claim be not susceptible of the interpretation that it is simply for a function, then the performance of that function must be limited to the particular means described in the specification for the admission of air from the train-pipe to the brake-cylinder. This we understand to be the theory of the defendants, and this raises the same question which is raised under the first and fourth claims, whether defendants' device contains the auxiliary valve of the Westinghouse patent, or its mechanical equivalent.

In this view, it becomes unnecessary to express an opinion whether the second claim be valid or not, since in the aspect of the case most favorable to the complainants, it is necessary to read into it something which is not found there, or, in the

language of complainants' brief, "to refer back to the specification; not, it is true, for a slavish adoption of the identical instrumentalities therein described, but for the understanding of the essential and substantial features of the means therein illustrated." In thus reading the specification into the claim, we can adopt no other construction than to consider it as if the auxiliary valve were inserted in the claim in so many words, and then to inquire whether the defendants make use of such valve, or its mechanical equivalent.

There are two other facts which have a strong bearing in the same connection, and preclude the idea that this can be interpreted as a claim for a function, without reading into it the particular device described in the specification.

One of these is that the claim is for a triple-valve device, etc., for admitting air from the main air-pipe to the brake-cylinder, "substantially as set forth." These words have been uniformly held by us to import into the claim the particulars of the specification, or, as was said in *Seymour* v. *Osborne*, 11 Wall. 516, 547, "where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications, and where it contains words referring back to the specifications, it cannot be properly construed in any other way." In that case it was held that a claim which might otherwise be bad, as covering a function or result, when containing the words "substantially as described," should be construed in connection with the specification, and when so construed was held to be valid. To the same effect is *The Corn Planter Patent*, 23 Wall. 181, 218.

Again, it appears from the file-wrapper and contents, that in his original application Mr. Westinghouse made a broad claim for the admission of air directly from the main air-pipe to the brake-cylinder, which was rejected upon reference to a prior patent to Boyden, No. 280,285, and that on January 19, 1887, his attorney wrote the Patent Office in the following terms:

"It is respectfully submitted that while the Boyden patent No. 280,285 referred to, shows that what the inventor terms

'an always-open one-way passage,' by which communication may be established under certain conditions, between the main air-pipe or train-pipe, and hence might be held to meet the terms of the claim as originally broadly drawn, yet it fails to embody a device which in structure or function corresponds with the auxiliary valve of applicant, which in no sense relates to 'an always-open one-way passage.' This amended claim, above submitted, prescribes a valve device actuated by the piston of the triple-valve for admitting air to the brake-cylinder in the application of the brake, while Boyden's check-valve *d* is not actuated by the piston, and is designed to recharge the auxiliary reservoir and brake-cylinder while the brakes are on. It is submitted, as to claim 2, that a piston, which by its preliminary traverse, admits air from the auxiliary reservoir to the brake-cylinder and by its further traverse admits air directly from the main air-pipe to the brake-cylinder, as set forth in said claim, is not found in the Boyden patent, the check-valve *d* of which is described as actuated by the manipulation of the cock *q* on the locomotive to 'recharge and continue charging the reservoir and brake-cylinder while the brakes are applied.' . . . It is to be understood that applicant *does not seek to broadly claim a device for admitting air directly from the main air-pipe to the brake-cylinder*, as the four-way cock long heretofore employed by him (similar to the cock K of the Boyden patent) would be a structure of such character. When, however, the triple-valve is provided with an *auxiliary valve, operated by its piston which performs a new function* additional to that of the triple-valve as previously employed, it is believed that such *combination* is wholly novel."

So, too, in the specification it is stated:

"So far as the performance of its preliminary function in ordinary braking is concerned — that is to say, effecting the closure of communication between the main air-pipe and the auxiliary reservoir, and the opening of communication between the auxiliary reservoir and the brake-cylinder in applying the brakes, and the reverse operations in releasing the brakes — the triple-valve 10 accords substantially with that set forth in letters patent of the United States No. 220,556, granted and

issued to me October 14, 1879, and is not, therefore, saving as to the *structural features* by which it performs the further function of effecting the direct admission of air from the main air-pipe to the brake-cylinder, as presently to be described, claimed as of my present invention."

Apparently, too, in consequence of the above letter of January 19, 1887, the patentee erased from his original specification the following sentence: "Further, while in the specific construction described and shown, the function of admitting air from the main pipe is performed by a valve separate from that which effects the preliminary admission of reservoir pressure to the cylinder, a modification in which the same office is performed by a valve integral with the main valve and formed by an extension thereof, would be included in and embody the essential operative features of my invention," and inserted in its place the following: "I am aware that a construction in which 'an always-open one-way passage' from the main air-pipe to the brake-cylinder is uncovered by the piston of the triple-valve simultaneously with the opening of the passage from the auxiliary reservoir to the brake-cylinder, has been heretofore proposed, and such construction, which involves an operation different from that of my invention, I therefore hereby disclaim."

We agree with the defendant that this correspondence, and the specification as so amended, should be construed as reading the auxiliary valve into the claim, and as repelling the idea that this claim should be construed as one for a method or process. Language more explicit upon this subject could hardly have been employed.

While it is true that no claim is formally made for the admission of train-pipe air directly to the brake-cylinder as a method or process, a construction is given by the complainants and the Circuit Court to the second claim which eliminates the mechanical features described, and one which could only be supported upon the theory that the claim was for a method or process. If the mechanism described by Westinghouse, and particularly the auxiliary valve, be not essential to the validity of the second claim, then it could only be supported

upon the theory that it was for the process of admitting train-pipe air directly to the brake-cylinder.

2. The first and fourth claims of this patent are as follows:

"1. In a brake mechanism, the combination of a main air-pipe, an auxiliary reservoir, a brake-cylinder, a triple-valve and an auxiliary valve device, actuated by the piston of the triple-valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air-pipe to the brake-cylinder, substantially as set forth."

"4. The combination, in a triple-valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston-stem and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake-cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston-stem and controlling communication between passages leading to connections with a main air-pipe and with the brake-cylinder, respectively, substantially as set forth."

These two claims are practically little more than different expressions of one and the same invention. In both of them there is a main air-pipe, an auxiliary reservoir, a brake-cylinder, a triple-valve and piston, described in the fourth claim as "fixed upon a stem and working in a chamber" in a case or chest, and an auxiliary valve; and in the fourth claim also a case or chest, which contains the whole device and is immaterial.

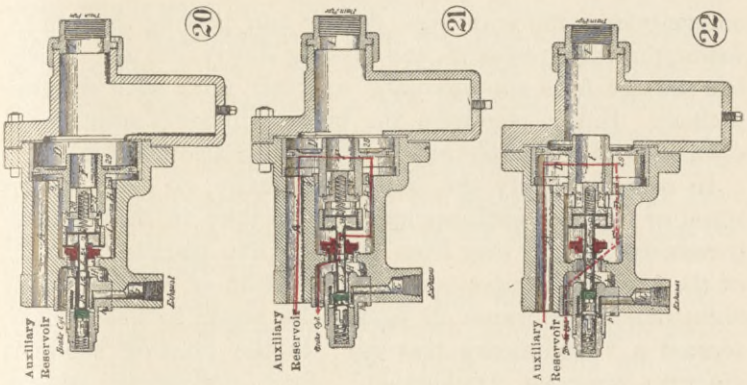
In both of these claims an auxiliary valve is named as an element. In the first it is described as "actuated by the piston of the triple-valve and independent of the main valve thereof;" and in the fourth as "actuated by the piston-stem and controlling communication between passages leading to connections with the main air-pipe and with the brake-cylinder."

To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a "pioneer." This word, although used somewhat loosely, is commonly understood to denote a patent covering a function

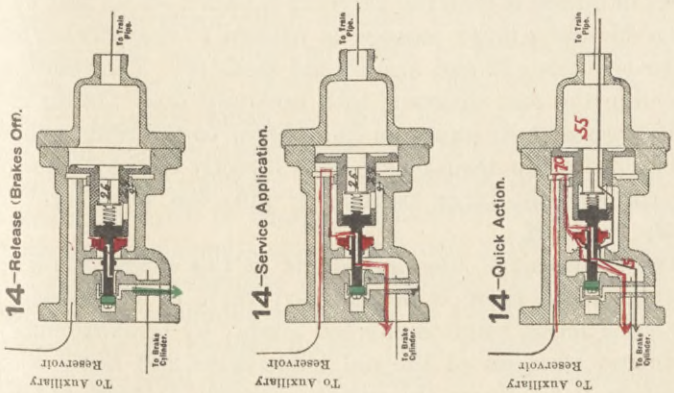
never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing machine; to Morse of the electrical telegraph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might be safely bestowed upon the original air-brake of Westinghouse, and perhaps also upon his automatic brake. In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a "pioneer," although the principle involved subsequently and through improvements upon this invention became one of great value to the public. The fact that this invention was first in the line of those which resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had stopped, is certainly deserving of recognition, and entitles the patent to a liberality of construction which would not be accorded to an ordinary improvement upon prior devices. At the same time, as hereinafter observed, this liberality must be exercised in subordination to the general principle above stated: that the function of a machine cannot be patented, and, hence, that the fact that the defendants' machine performs the same function is not conclusive that it is an infringement.

The device made use of by the defendants is exhibited in patents No. 481,134 and No. 481,135, both dated August 16, 1892, and both of which were granted after the commencement of this suit. There are two forms of this patent, one of which, illustrated in patent No. 481,135, is here given on the opposite page in its three positions of release (20), service application (21), and quick action (22).

In this device there is found a main air-pipe, an auxiliary reservoir, a brake-cylinder, a triple, or rather a quadruple, valve and piston (29) with three ports; first, for the admission



of air from the train-pipe to the brake-cylinder through the feeding-in valve 26; second, for the passage of air from the auxiliary reservoir to the brake-cylinder through the apertures *i*, *j*, *k* in the stem slide-valve 18; and, third, for the release of air from the brake-cylinder to the exhaust port by means of valve 17, colored green. Whether this device has an auxiliary valve or not is one of the main questions in the case, complainants' theory being that poppet-valve 22 is an auxiliary valve, while defendants' claim is that it is in reality the main valve.



The operation of this device is best shown by the foregoing skeleton drawings.

The auxiliary reservoirs are charged by air under pressure,

entering from the train-pipe, raising and passing through the feeding-in valve piston 26, and flowing slowly into and through the passage A to the auxiliary reservoir, until such reservoir is filled. In this condition the brake-cylinder is emptied and opened to the atmosphere through the exhaust passage G.

In order to apply the brakes gradually, so as to slacken speed or make an ordinary stop, air pressure in the train-pipe is reduced slightly (say from three to five pounds) by action of the engineer's valve, and the reduction of pressure on the right side of the piston 29 causes the piston to make what is termed a "preliminary traverse" to the position shown in diagram "Service Application." Such preliminary traverse pulls the stem slide-valve 18 to the right, and opens the apertures *i*, *j* and *k*, (one of these apertures being to the right and the other to the left of valve 22,) and through these apertures air rushes from the auxiliary reservoir to the brake-cylinder; but the poppet-valve 22 still remains upon its seat.

If quick action be required, the pressure in the train-pipe is suddenly lowered to the extent of fifteen or twenty pounds, and the travelling piston 29, instead of making a preliminary traverse to the intermediate position shown in the "Service Application," makes a full traverse to the extreme right, the effect of which is that the valve 22 is pulled off its seat by the collar M, and a large passage is opened to the brake-cylinder under the valve 22 and around the stem 18. The result is, as shown in the last diagram, that not only does the air in the auxiliary reservoir escape in full volume to the brake-cylinder, but air from the train-pipe rushes directly to the brake-cylinder through the large passage F into the chamber C and under valve 22.

The argument of the defendants in this connection is that, in this device, there is no auxiliary valve or by-passage, but the quick-action result is effected simply by proportioning the ports and passages of the old triple-valve, and using a fixed partition, 9, to divide the piston chamber D from the main-valve chamber C; that it is this partition which produces the quick action, and that such partition is not a valve, nor the mechanical equivalent of a valve, but merely a metal ring

screwed immovably into the triple-valve casing, and serving to divide the piston-chamber from the main-valve chamber; that this partition was a new element, never before found in triple valves, and introduced a new principle and mode of operation, totally different from anything ever invented by Mr. Westinghouse or any other inventor, and that its effect is to make valve 22, termed by them the main valve, admit the train-pipe air to the brake-cylinder at the same time that it admits the auxiliary air thereto.

It is claimed that, in embodying this new principle, Mr. Boyden adopted the form of triple-valve shown in the expired Westinghouse patent No. 141,685, (1873,) in which the main valve, 22, is of the poppet form, and the separate valve 17, controlled by a rod sliding through the main valve, is employed for releasing the brakes. For charging the auxiliary reservoir he adopted, from the expired Westinghouse patent No. 144,006, (1873,) a check-valved feed passage through the triple-valve piston, but arranged the feed passage and its check-valve, 26, in a tubular extension, F, of the piston, and substantially in the form shown in Boyden patent No. 280,285, (1883). He also provided a sensitive graduating valve, similar in results to the graduating valve e' of the Westinghouse patent No. 220,556, (1879,) by so arranging a small passage, 40, in the sliding stem, which actuates the release valve, that such passage will be opened and closed by the sliding of such stem through the main valve 22. As thus constructed, the triple-valve operates much the same as that of patent No. 220,556, and, like the latter, is incapable of quick action.

In both the complainants' and defendants' devices there is (1) a feeding-in valve to charge the auxiliary reservoir; (2) a valve which complainants call their "main valve," and which the defendants denominate a "graduating valve," which is opened by the preliminary traverse of the piston to admit reservoir air to the brake-cylinder; (3) a release valve which discharges air from the brake-cylinder to the atmosphere; and (4) a quick-action valve — 41 in the complainants' patent, and 22 in the defendants' — which is opened by the further traverse of the piston to admit train-pipe air to the brake-

cylinder. In defendants' patent, it may also be used to admit auxiliary reservoir air to the brake-cylinder.

One of the main controversies in the case turns upon the construction and operation of the poppet-valve 22, called by the defendants their "main-valve." Complainants insist that the office of *their* main valve is performed by the stem slide-valve 18 of defendants' patent, and by its apertures *i*, *j* and *k*, through which air passes from the auxiliary reservoir to the brake-cylinder, and that the poppet-valve 22 is only called into action in emergency cases, when a large quantity of air is suddenly withdrawn from the train-pipe, and the valve is unseated by the traverse of the piston to the extreme right.

There is no doubt that the function of admitting air from the auxiliary reservoir to the brake-cylinder, which is performed in the Westinghouse patent by what the complainants term the main-valve, (aided, however, by the graduating-valve,) is, in ordinary cases, performed principally, if not altogether, by the stem slide-valve 18 and its three ports *i*, *j*, *k*, of the Boyden patent, which defendants term their graduating-valve. It is equally clear that, in emergencies, where quick action is required, air, which in the Westinghouse patent passes through auxiliary valve 41, (opened by the further traverse of the piston,) in the Boyden patent finds its way through the poppet-valve 22, which has also been lifted from its seat by the further traverse of the piston.

One of the main differences between the two devices is this: That in the preliminary traverse of the piston of the Westinghouse patent, there is a movement, first, of the graduating-valve to open its port from the auxiliary reservoir, and then of the main valve, carrying the graduating-valve also with it, to open a passage to the brake-cylinder, while in the Boyden patent it is only the graduating-valve which is opened by the preliminary traverse of the piston. In doing this, the graduating-valve moves *through* the poppet-valve, but does not lift it from its seat. In emergency cases not only do the graduating-valve and the main-valve of the Westinghouse patent move as before, but, by the extreme traverse of the piston, the auxiliary-valve 41 is shoved from its seat, and a separate

passage is opened for the air from the train-pipe to the brake-cylinder. In the Boyden patent, however, the extreme traverse of the piston lifts the poppet-valve from its seat, and opens a wide passage to the brake-cylinder, not only for the air from the auxiliary reservoir, but, through the peculiar operation of the partition 9 and its aperture B, directly from the train-pipe. As the graduating-valve of the Boyden patent practically does all the work in ordinary cases, and the poppet-valve is only called into action in emergency cases, the latter is practically an auxiliary valve, by which, we understand, not necessarily an independent valve, nor one of a particular construction, but simply a valve which in emergency cases is called into the assistance of the graduating-valve. In this particular, the poppet-valve of the Boyden device performs practically the same function as the slide-valve 41 of the Westinghouse. It is not material in this connection that it is a poppet-valve while the other is a slide-valve, since there is no invention in substituting one valve or spring of familiar shape for another; *Imhaeuser* v. *Buerk*, 101 U. S. 647, 656; nor, that in one case the piston *pushes* the valve off its seat, and in the other *pulls* it off; nor is it material that this poppet-valve may have been used in prior patents to perform the function of a main-valve, so long as it is used for a different purpose here. Indeed, this valve seems to have been taken bodily from Westinghouse patent No. 141,685, where it was used as a main-valve, and the stem-valve 18 with its ports *i*, *j*, *k*, added for ordinary uses, and the poppet-valve thus converted from a main-valve to an auxiliary valve.

We have not overlooked in this connection the argument that the poppet-valve 22 is also sometimes used for graduating purposes, but it is not commonly so used, and appears to be entirely unnecessary for that purpose. It seems to be possible to move the piston 29 to its extreme traverse so slowly, and hence to open valve 22 so gradually, that the pressure in the chamber C will be reduced so slightly, that the train-pipe air will not have sufficient force to throw open the check-valve 26, and hence, in such case no train-pipe air will be admitted directly to the brake-cylinder, which will be filled with auxil-

iary reservoir air only. But, as a matter of fact, this seldom or never takes place in the practical operation of the device, and is an unnecessary and wholly unimportant incident, and for all practical purposes valve 22 is solely a quick-action valve. As this valve is actuated by the piston of the triple-valve, and in such action is independent of the main valve, it meets the demand of the first claim of the patent, and as it is actuated by the piston-stem, and controls communication between passages leading to connections with the main air-pipe and with the brake-cylinder, it seems also to be covered by the fourth claim.

But even if it be conceded that the Boyden device corresponds with the letter of the Westinghouse claims, that does not settle conclusively the question of infringement. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. *Machine Co.* v. *Murphy*, 97 U. S. 120; *Ives* v. *Hamilton*, 92 U. S. 426, 431; *Morey* v. *Lockwood*, 8 Wall. 230; *Elizabeth* v. *Pavement Company*, 97 U. S. 126, 137; *Sessions* v. *Romadka*, 145 U. S. 29; *Hoyt* v. *Horne*, 145 U. S. 302. The converse is equally true. The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent. "An infringement," says Mr. Justice Grier in *Burr* v. *Duryee*, 1 Wall. 531, 572, "involves substantial identity, whether that identity be described by the terms, 'same principle,' same '*modus operandi*,' or any other. . . . The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect, is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent.'"

We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional, and the defendant's device differs from that of the patentee

only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr* v. *Duryee*, 1 Wall. 531, 573, an infringement "is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way. . . . That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used are, therefore, mere equivalents for those of the other."

Not only is this sound as a general principle of law, but it is peculiarly appropriate to this case. Under the very terms of the first and fourth claims of the Westinghouse patent, the infringing device must not only contain an auxiliary valve, or its mechanical equivalent, but it must contain the elements of the combination "substantially as set forth." In other words, there must not only be an auxiliary valve, but substantially such a one as is described in the patent, *i.e.* independent of the triple-valve. Not only has the Boyden patent a poppet instead of a slide-valve — a matter of minor importance — but it performs a somewhat different function. In the Westinghouse patent the valve is not in the line of travel between the

auxiliary reservoir and the brake-cylinder, and admits train-pipe air only. In the Boyden patent, it is in the line of travel, both from the auxiliary reservoir and from the train-pipe, and admits both currents of air to the brake-cylinder. The by-passage, to which the auxiliary reservoir is merely an adit, is wholly wanting in the Boyden device, both currents of air uniting in chamber C and passing to the brake-cylinder together, through the poppet-valve.

But a much more radical departure from the Westinghouse patent is found in the partition 9, separating the valve-chamber C from the piston-chamber D. This partition has an aperture, B, the capacity of which is less than that of the large passage A, and intermediate in size between that of the graduating passage 40, and that of the port covered by the valve 22. The office of this partition is thus explained by the defendants in their briefs: When the engineer's valve is thrown wide open, the poppet-valve is lifted from its seat by the extreme traverse of the piston, and a new action takes place. "The port of the main valve 22 is so much larger than the passage B, that the pressure in the main valve-chamber C is instantly emptied into the brake-cylinder, and, as the passage B cannot supply air so fast as the main-valve port can exhaust it, the pressure in the main valve-chamber suddenly drops to about five pounds. Meanwhile the passage A, leading from the auxiliary reservoir to the inner end of the piston-chamber, is so much larger than the passage B, leading from the piston-chamber to the main valve-chamber, that full reservoir pressure is maintained in the piston-chamber between the partition 9 and the inner side of the piston, thereby holding the piston back firmly at its extreme traverse. But the feed-valve 26 is now exposed on the one side to a train-pipe pressure of about fifty-five pounds, and on the other side to a main valve-chamber pressure of only about five pounds, and therefore valve 26 is instantly forced open by the greater train-pipe pressure, which then vents freely through the said feed valve-port into the main valve-chamber C where it commingles with the auxiliary reservoir air passing through said chamber, and both airs pass together through the port opened by the main valve 22

to the brake-cylinder. The whole operation is substantially instantaneous, and the result is that the train-pipe is freely vented at each car, the time of serially or successively applying the brakes of the several cars from one end of the train to the other is reduced to a minimum, and the train is quickly stopped without shock, a result which Mr. Westinghouse did not attain with the device of patent No. 360,070, nor did he attain it until he had invented his later apparatus of patent No. 376,837, not here in suit."

In a word, this partition maintains upon the outside of valve 26 a much higher pressure than upon the inside, the effect of which is to open feed-valve 26 and admit a full volume of train-pipe air upon the brake-cylinder.

Conceding that the functions of the two devices are practically the same, the means used in accomplishing this function are so different that we find it impossible to say, even in favor of a primary patent, that they are mechanical equivalents. While the poppet-valve, which for the purposes of this case, we may term the auxiliary valve, is in its operation independent of the main valve, the word "independent" in the claims of the Westinghouse patent evidently refers to a valve auxiliary to the triple-valve, and independently located as well as operated. The difference is that in one case the air from the train-pipe is introduced into the brake-cylinder separately and independently from the air from the auxiliary reservoir; while in the other case they unite in the chamber C and pass through the same valve to the brake-cylinder. In the Westinghouse patent there is one valve operated by the direct thrust of the piston, opening a by-passage; in the other, there is a poppet-valve also opened by the piston, and another valve, 26, opened by the pressure maintained upon the outside of the partition 9.

It is claimed, however, by the complainants that Boyden was not the inventor of the differential pressure theory; that there is such a differential pressure in their own patent, caused by the fact that the air from the auxiliary reservoir in passing to the brake-cylinder travels through a restricted port, 35, and, as the entrance to the brake-cylinder is through a much larger port, the air is taken up by it much more rapidly than it is

supplied by the restricted port, which reduces the pressure in the by-passage so much that when the quick-action valve 41 is opened, the pressure from the train-pipe air is sufficient to open the valve 49 and admit a full volumne of train-pipe air, at a pressure of fifty-five pounds, to the brake-cylinder. The fact, however, that no suggestion is made in the patent of such a function of the restricted port 35, indicates either that none such had been discovered, or that it was not considered of sufficient importance to mention it. Indeed, it seems to have been an afterthought, suggested by the necessity of an answer to defendants' argument, based upon their partition 9. That when the auxiliary valve is opened there must be a difference in pressure above and below the check-valve 49, in order to open it, is manifest; yet, this is rather an incident to the Westinghouse device than the controlling feature that it is made in the Boyden patent. There is no partition in the proper sense of the word — certainly none located as in the Boyden device — between the chambers D and C, and no aperture in such partition opened for the express purpose of maintaining this differential pressure. If such differential pressure existed to the extent claimed in the Westinghouse patent, it certainly was not productive of the results flowing from the same device in the Boyden patent.

We are induced to look with more favor upon this device, not only because it is a novel one and a manifest departure from the principle of the Westinghouse patent, but because it solved at once in the simplest manner the problem of quick action, whereas the Westinghouse patent did not prove to be a success until certain additional members had been incorporated into it. The underlying distinction between the two devices is that in one, a separate valve and separate by-passage are provided for the train-pipe air, while in the other, the patentee has taken the old triple (or quadruple) valve, and by a slight change in the functions of two of its valves and the incorporation of a new element, (partition 9,) has made a more perfect brake than the one described in the Westinghouse patent. If credit be due to Mr. Westinghouse for having invented the function, Mr. Boyden has certainly exhibited

great ingenuity in the discovery of a new and more perfect method of performing such function. If his patent be compared with the later Westinghouse patent No. 376,837, which appears to have been the first completely successful one, the difference between the two, both in form and principle, becomes still more apparent, and the greater simplicity of the Boyden patent certainly entitles it to a favorable consideration. If the method pursued by the patentee for the performance of the function discovered by him would naturally have suggested the device adopted by the defendants, that is in itself evidence of an intended infringement; but, although Mr. Boyden may have intended to accomplish the same results, the Westinghouse patent, if he had had it before him, would scarcely have suggested the method he adopted to accomplish these results. Under such circumstances, the law entitles him to the rights of an independent inventor.

Upon a careful consideration of the testimony we have come to the conclusion that the Boyden device is not an infringement of the complainants' patent, and the decree of the Circuit Court of Appeals is, therefore,

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Brewer, dissenting.

I am unable to concur in the reasoning and conclusion of the court, and shall briefly state my views.

The history of the art discloses that the patent in suit was what is called a "pioneer invention." In it, for the first time, was brought to light a method or process which, by the cooperation of the air from the train-pipe with that from the car reservoir, created the "quick action" brake. The patent, in its specification and claims, clearly described a machine or mechanical combination whereby the invention was exemplified or rendered operative.

It is not an unwarrantable extension of the term to speak of this invention in suit as a pioneer, since it is practically conceded in this case, and justly observed by the court below,

"one of the highest value to the public," and conspicuously one "which entitles the proprietor to a liberal protection from the courts in construing the claim." The very fact that this invention resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had been stopped, is certainly deserving of recognition. The claims of such patents have from time out of mind been allowed a liberal construction, and considered as entitled to the fullest benefit of the doctrine of mechanical equivalents.

It in nowise detracts from the merit of this invention that later devices have been adopted which render its practical operation more efficient. The very term, "pioneer patent," signifies that the invention has been followed by others. A pioneer patent does not shut, but opens the door for subsequent invention.

The particular patent in suit was, as I understand it to be admitted, an entire success in supplying passenger trains and short freight trains with a "quick action" brake; but while it enabled even the longest freight trains to stop in half the time and half the distance previously occupied, there remained difficulties which required further devices to give to the invention the perfect success which it has now attained.

Being of the character so described as a pioneer, the patent in suit is entitled to a broad or liberal construction. In other words, the invention is not to be restricted narrowly to the mere details of the mechanism described as a means of carrying the invention into practicable operation.

I cannot assent to what is, perhaps, rather intimated than decided in the opinion of the court that what is called a "process in order to be patentable must involve a chemical or other similar elemental action." The term "process" or "method," as describing the subject of a patent, is not found in the statutes. No reason is given in the authorities, and I can think of none in the nature of things, why a new process or method may not be patentable, even though a mechanical device or a mechanical combination may be necessary to render the new process practicable. It seems to be used by the courts

as descriptive of an invention which, from its novelty and priority in the art to which it belongs, is not to be construed as inhering only in the particular means described, in the letters patent, as sufficient to exemplify the invention and bring it into practical use.

Thus in the case of *Winans* v. *Dormead*, 15 How. 330, 341, the patent was for a new form of the body of a car for the transportation of coal, thus avoiding certain practical difficulties or disadvantages in such cars as previously made. To the argument on behalf of the infringer, that the claim of the patent was confined to a single form, and only through and by that form to the principle which it embodies, this court said, per Mr. Justice Curtis:

"It is generally true that when a patentee describes a machine, and then claims it as described, he is understood to intend to claim, and does by law actually cover, not only the precise form he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportions. . . . It is not sufficient to distinguish this case to say that here the invention consists in a change of form, and the patentee has claimed one form only. Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result. And in the numerous cases in which it has been held that to copy the patentee's mode of operation was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course, it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of inventors would be valueless

if it were enough for the defendant to say: Your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.

"The answer is: My infringement did not consist in a change of form, but in the new employment of principles or powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form. . . . Where form and substance are inseparable it is enough to look at the form only. Where they are separable — where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention — for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found there is an infringement; and it is not a defence that it is embodied in a form not described and in terms claimed by the patentee. Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words."

McCormick v. *Talcott*, 20 How. 402, 405, was also a case of a mechanical patent, and it was said by Mr. Justice Grier, who delivered the opinion of the court: If the patentee "be the original inventor of the device or machine, called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle and performing the same functions by analogous means or equivalent combination, even though the infringing machine may be an improvement of the original and patentable as such."

In *Morley Sewing Machine Co.* v. *Lancaster*, 129 U. S. 263, there was also a question of an alleged invention of a primary character, and wherein the invention was embodied in a mechanical combination; and it was held that, in a pioneer patent, such as that of Morley, the patentee, the special devices set forth by Morley were not necessary constituents

of the claims; that his patent was to receive a liberal construction, in view of the fact that he was a pioneer in the construction of an automatic button sewing machine, and that his patent was not to be limited to the particular devices or instrumentalities described by him.

In that case extended and approving reference was made to the case of *Proctor* v. *Bennis*, 36 Ch. Div. 740, which was a case of an invention embodied in a mechanical contrivance, and the following language of Lord Justice Bowen was quoted:

"Now I think it goes to the root of this case to remember that this is, as was described by one of the counsel, really a pioneer invention, and it is by the light of that, as it seems to me, that we ought to consider the question whether there have been variations, or omissions, and additions, which prevent the machine which is complained of from being an infringement of the plaintiff's. . . . With regard to the additions and omissions, it is obvious that additions may be an improvement, and that omissions may be an improvement, but the mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance and essence of the invention."

These were cases wherein the discovery or invention was made effective through machines or mechanical combinations, and wherein it was held that the merit of the process or method was not to be confined, in the case of a pioneer patent, to the mere form described in the specification as sufficient to make the invention practically operative.

Neilson's patent, Web. P. C. 275, was a noted case, in which the true distinction was drawn between a mere principle, as the subject of a patent, and a process by which a principle is applied to effect a new and useful result. The Court of Exchequer, in answering the objection that Neilson's patent was for a principle, said:

"It is very difficult to distinguish it from the specification

of a patent for a principle, and this at first created in the minds of some of the court much difficulty; but after full consideration, we think the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention consists in this — by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace."

And when the case came before the House of Lords, Lord Campbell said:

"After the construction first put upon the patent by the learned judges of the Exchequer, . . . I think the patent must be taken to extend to all machines, of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast furnace. That being so, the learned judge was perfectly justified in telling the jury that it was unnecessary for them to compare one apparatus with another, because, confessedly, that system of conduit pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast furnace, and, therefore, it was an infringement of the patent." Web. Pat. Cas. 715.

Very applicable to the present case is the doctrine of *Tilghman* v. *Procter*, 102 U. S. 707. It was there held, overruling the case of *Mitchell* v. *Tilghman*, 19 Wall. 287, that a patent may be validly granted for carrying a principle into effect; and if the patentee suggests and discovers not only the principle, but suggests and invents how it may be applied to a practical result by mechanical contrivances and apparatus, and shows that he is aware that no particular sort or modification of form of apparatus is essential to obtain benefit from the principle, then he may take his patent for the mode

of carrying it into effect, and is not under the necessity of confining himself to one form of apparatus.

Having discussed the previous cases, particularly that of *Neilson* and of *O'Reilly* v. *Morse*, 15 How. 62, Mr. Justice Bradley said:

"'Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means.' But everything turns on the force and meaning of the word 'means.' It is very certain that the means need not be a machine, or an apparatus; it may, as the court says, be a process. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye — an object of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing a useful result. . . . Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

The Telephone cases, 126 U. S. 1, 532, 533, 535, contain an apt illustration of these principles. Mr. Chief Justice Waite in discussing the case, said:

"In this art, or, what is the same thing under the patent law, this process, this way of transmitting speech, electricity, one of the forces of nature, is employed; but electricity, left to itself, will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could be done by gradually changing the intensity of a continuous electric current, so as to make it

correspond exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of density could be made and speech actually transmitted. Thus his art was put in a condition for practical use. In doing this, both discovery and invention, in the popular sense of those terms, were involved; discovery in finding the art, and invention in devising the means of making it useful. For such discoveries and such inventions the law has given the discoverer and inventor the right to a patent — as discoverer, for the useful art, process, method of doing a thing he has found; and as inventor, for the means he has devised to make the discovery one of actual value. . . . The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means, in the specification or descriptive portion of the patent, is only necessary to show that the art can be used; for it is only useful arts — arts which may be used to advantage — that can be made the subject of a patent. The language of the statute is that 'any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter,' may obtain a patent therefor. Rev. Stat. § 4886. Thus, an art — a process — which is useful, is as much the subject of a patent, as a machine, manufacture or composition of matter. . . . But it is insisted that the claim cannot be sustained, because when the patent was issued Bell had not in fact completed his discovery. While it is conceded that he was acting on the right principles, and had adopted the true theory, it is claimed that the discovery lacked that practical development which was necessary to make it patentable. In the language of counsel, 'there was still work to be done, and work calling for the exercise of the utmost ingenuity, and calling for the very highest degree of practical invention.' It is quite true that when Bell applied for his patent he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe, accurately and with admirable clearness, his process, that is to say, the

exact electrical condition that must be created to accomplish his purpose, and he also described with sufficient precision to enable one of ordinary skill in such matters to make a form of apparatus which, if used in the way pointed out, would produce the required effect, receive the words, and carry them to and deliver them at the appointed place. The particular instrument which he had and which he used in his experiments did not, under the circumstances in which it was tried, reproduce the words spoken so that they could be clearly understood, but the proof is abundant and of the most convincing character that other instruments, carefully constructed and made exactly in accordance with the specification, without any additions whatever, have operated and will operate successfully. . . . The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. . . . Surely a patent for such a discovery is not to be confined to the mere means he improvised to prove the reality of his conception."

The conclusion justified by the authorities is that whether you call Westinghouse's discovery, that "quick action" may be accomplished by the coöperation of the main pipe air and that from the car reservoir, a process, or a mode of operation, yet if he was the first to disclose it and to describe a mechanical means to give practical effect to the invention, he must be regarded as a pioneer inventor, and as entitled to protection against those who, availing themselves of the discovery, seek to justify themselves by pointing to mere differences in form in the mechanical devices used.

Much stress was laid in the argument on an alleged disclaimer by the patentee while the application was pending in the Patent Office, whereby it is said Westinghouse must be understood to have abandoned the second claim, or, at any rate, to have consented that that claim should be interpreted

by the courts as if it contained an auxiliary valve as a material element in the claim.

There are cases, no doubt, in which it has been held that when a claimant has, under objection in the Patent Office, withdrawn certain claims, or has modified them by adding or striking out terms or phrases, and accepts a patent which does not grant the abandoned or unmodified claims, he cannot be heard to insist upon such a construction of the allowed claims as would cover what had been previously rejected. *Shepard* v. *Carrigan*, 116 U. S. 593; *Roemer* v. *Peddie*, 132 U. S. 313; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.*, 150 U. S. 38.

An examination of the cited cases, however, will disclose, as I think, that they turned upon matters of construction. In other words, were cases where it was questionable what the patent, as actually granted, meant. In such cases, as in other cases of ambiguity, it may be allowable to consult the application and file wrapper, and possibly written communications, which may throw light upon claims that are ambiguous or capable of different constructions.

But where the claims allowed are not uncertain or ambiguous, the courts should be slow to permit their construction of a patent, actually granted and delivered, to be affected or controlled by alleged interlocutions between the officers in the Patent Office and the claimant. No doubt, in proceedings to revoke or cancel a patent granted by inadvertence or by fraudulent representations, it would be competent to show what had taken place in the Patent Office pending the application. But when we consider that often the employés in the Patent Office are inexperienced persons, and that the mass of the business is so vast that it is impossible for the Commissioner or the Chief Examiner to review it, except in a perfunctory way, it can be readily seen how dangerous it would be to modify or invalidate a patent, clear and definite in its terms, by resorting to such uncertain sources of information.

However this may be, I do not perceive that the matters alleged in the present case are entitled to any weight in the construction of the patent. Even if the letter of the claimant's attorney, written on January 19, 1887, can be looked to

as helping us to understand the meaning of a patent granted on March 29, 1887, it only appears to be an argument as to the meaning or legal effect of the language used in the claims, and does not amount to a withdrawal or modification of them.

Accordingly the second claim of the patent is before us for construction on its own terms, and, to avoid protracting this discussion, the opinion of Judge Morris in the Circuit Court is referred to and adopted as a sound construction of that claim. 66 Fed. Rep. 997. This claim is not, as I read it, open to the objection that it aims to patent a principle. It sets forth the discovery that by a coöperation of the air from the auxiliary reservoir and that from the main air-pipe, the action of the brakes is quickened and the air vented from the main air-pipe directly to the brake-cylinder.

But, even if the second claim must, as argued in the opinion of the court, be read, by reason of the letter of the claimant's attorney, as if it called for the auxiliary valve described in the first and fourth claims, and even if, when not so read, it can be regarded as void because simply for a function or principle, nevertheless the invention, as described in the other claims and specifications, is clearly set forth, and, under the evidence as to the state of the art, is entitled to be regarded as a pioneer. Regarding the second claim as a mere statement of the idea or invention and the other claims as describing a form or combination of mechanism which embodies the invention and renders it operative, all the requisites of the law are sufficiently complied with.

The only remaining question is that of the infringement, and that is readily disposed of. For it is conceded in the opinion of the majority of the court that, if the patent in suit is entitled to a broad construction as a pioneer, embodying a new mode of operation, not limited to the particular means described in the specification, then the defendant's device is an adoption of the idea or principle of the Westinghouse patent with a mechanical equivalent or substitute for the auxiliary valve.

Upon the whole I am of the opinion that the decree of the

Circuit Court of Appeals should be reversed and that the cause should be remanded with directions to restore the decree of the Circuit Court.

Mr. Justice Gray and Mr. Justice McKenna also dissented from the opinion and from the decision of the court.

FINK *v.* UNITED STATES.

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

No. 120. Argued April 28, 1898. — Decided May 23, 1898.

Muriate of cocaine is properly dutiable under paragraph 74 of the tariff act of October 1, 1890, and not under paragraph 76 of that act.

The case is stated in the opinion.

Mr. Albert Comstock for appellants.

Mr. Assistant Attorney General Hoyt for appellees.

Mr. Justice White delivered the opinion of the court.

This record presents for consideration certain questions of law certified to this court by the Court of Appeals for the Second Circuit. The certificate and questions therein stated are as follows:

"A judgment or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered February 4, 1895, by which it was ordered, adjudged and decreed that there was no error in certain proceedings herein before the board of United States general appraisers, and that their decisions herein be, and the same are hereby, in all things affirmed, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for

hearing and argument in this court, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which such questions arose are as follows:

"The firm of Lehn & Fink imported into the port of New York, on April 6, 1894, certain parcels of muriate or hydrochlorate of cocaine in crystals, on which duty was exacted at twenty-five per cent, ad valorem, under paragraph 76 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, as a chemical salt. The importers duly and seasonably protested against such exaction, upon the ground that the merchandise was dutiable at fifty cents per pound under paragraph 74 of the same act as a medicinal preparation in the preparation of which alcohol is used. After decisions by the board of general appraisers and by the United States Circuit Court of New York the question duly came by appeal from the decision of the Circuit Court to this court.

"Paragraphs 74 and 76 of said act are as follows:

"'74. All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound.'

"'76. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem.'

"Muriate of cocaine is an alkaloidal salt and is a chemical salt produced by combination of the alkaloid cocaine and muriatic acid. Salts are either alkaloidal or alkaline, produced by combination of either alkaloid or alkalies with acids. In its preparation alcohol is necessarily used as a solvent. Muriate of cocaine is a medicinal preparation and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890. The term 'salts' or 'chemical salts' is a generic term and includes a commercial class of articles known by chemists and by phar-

macists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine. The commercial meaning of the term 'medicinal preparation' is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease. Muriate of cocaine is dispensed in the form in which it is imported, or more often reduced therefrom to a powder by means of a mortar and pestle, or diluted in water or admixed with inert or neutral matter.

"The number of chemical salts is excessively large. A very small proportion of this number is used in medicine or as medicinal preparations. There is no adequate testimony in regard to the relative number of imported or importable medicinal preparations in the preparation of which alcohol is used, and of imported or importable chemical salts. The testimony does not disclose which paragraph includes the greater number of articles.

"Upon the foregoing facts the questions to be certified are:

"1. Is muriate of cocaine properly dutiable under paragraph 74 of the tariff act of October 1, 1890?

"2. Is muriate of cocaine properly dutiable under paragraph 76 of the tariff act of October 1, 1890?

"And to that end this court hereby certifies such questions to the Supreme Court of the United States."

There can be no doubt that the article in question from some points of consideration might be classified under either of the paragraphs of the statute referred to in the certificate. Thus, within the purview of paragraph 74, it is obviously a medical preparation, in the preparation of which alcohol is used. It is also equally clear that it is likewise, chemically speaking, a salt, and hence within the reach of paragraph 76. It would then follow that if either of the paragraphs stood alone in the statute, disembarrassed of the provisions found in the other, the preparation might properly come under the head of either. Being reached, then, in some of its aspects by some of the provisions found in both paragraphs, the question is, which, if either of the two, is so dominant in its con-

trol of the article in question as to exclude the operation thereon of the other. The rule is that this, if possible, is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than is the other. *Isaac* v. *Jonas*, 148 U. S. 648; *Bogle* v. *Magone*, 152 U. S. 623. Being a medicinal preparation, made as such and solely used as a medicine, the language of paragraph 74 clearly more definitely applies to it than does the generic provision "of chemical compounds and salts" found in paragraph 76. *Magone* v. *Heller*, 150 U. S. 70; *Robertson* v. *Salomon*, 130 U. S. 412. The fact that the certificate states that "muriate of cocaine is a medicinal preparation, and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890," becomes a factor, adding cogency to the demonstration that the article falls with more definite certainty under the classification of a medicinal preparation than it does under that of a chemical salt. *De Jonge* v. *Magone*, 159 U. S. 562; *Berbecker* v. *Robertson*, 152 U. S. 373; *Robertson* v. *Salomon*, 130 U. S. 412. And the force of this view is not weakened by the statement in the certificate that the term "'salts,' or 'chemical salts' is a generic term, and includes a commercial class of articles known by chemists and by pharmacists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine." In reason, the result of the certified facts is simply this, that muriate of cocaine is in its narrow aspect a medicinal preparation, in its wider a chemical salt, and hence that chemical salt is a generic term designating all articles of that character, and hence embracing muriate of cocaine as the genus, must as a matter of course contain within itself the species which are embodied in it. In its ultimate analysis, therefore, the question asked is only this: Is the genus, chemical salt, more comprehensive than the species, muriate of cocaine?

Thus understood, it becomes of course necessary to answer the first question in the affirmative and the second in the negative, and it is so ordered.

WAGONER *v.* EVANS.

EVANS *v.* WAGONER.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Nos. 252, 262. Submitted April 29, 1898. — Decided May 23, 1898.

Thomas v. *Gay*, 169 U. S. 264, affirmed and followed to the point that "the act of the legislative assembly of the Territory of Oklahoma of March 5, 1895, which provided that 'when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes,' was a legitimate exercise of the Territory's power of taxation, and when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States."

Prior to the passage of that act there existed no power in the authorities of Canadian County to tax property within the attached reservation; and, as such authority was first given by that act, it could only be validly exercised on property subjected to its terms after its enactment.

Taxes, otherwise lawful, are not invalidated by the fact that the resulting benefits are unequally shared.

In November, 1895, D. Wagoner, W. T. Wagoner and S. B. Burnett filed in the district court of Canadian County, Territory of Oklahoma, a petition against Neil W. Evans, as treasurer, and I. M. Cannon, as sheriff, and Osborn, Hutchinson and Vasey, as county commissioners of Canadian County, asking to enjoin the said defendants from levying or collecting certain taxes upon herds of cattle and horses belonging to the complainants, and by them kept and grazed on the Kiowa and Comanche Indian reservation which is a part of the Territory of Oklahoma, but not embraced in any organized county of that Territory. In pursuance of the act of Congress of May 2, 1890, c. 182, 26 Stat. 81, that Indian reservation was attached to Canadian County for judicial purposes, and by an act of March 5, 1895, of the territorial legislature, the authorities of any county to which any reservation had been

Counsel for Wagoner.

attached for judicial purposes were authorized to assess taxes upon any cattle or other personal property kept or situated within such reservation. The petition alleged that, in pursuance of the said act, the defendants were proceeding to assess and collect taxes for the years 1892 to 1895, both inclusive; that, for several reasons set forth in the petition, the said act of March 5, 1895, was invalid, and that said defendants were proceeding without warrant of law. To this petition a demurrer was filed, which was overruled, and thereupon the defendants filed answers, admitting that they were proceeding to levy and collect taxes as complained of in the petition, and alleging that their action in the premises was in pursuance of a valid statutory enactment of the territorial legislature.

An agreed statement of the facts was filed, and the cause was submitted to the court upon the petition, answer and statement of facts, and thereupon the court found that the defendants were fully authorized by the laws of Oklahoma Territory to collect from the petitioners taxes for territorial and judicial purposes for the year 1895 only, but that they were without authority to collect from the petitioners taxes for county, township or other than the territorial and judicial purposes. It was, therefore, decreed by the court that the defendants were authorized and permitted to collect those parts of the tax which were for territorial and judicial purposes for the year 1895 only, and enjoined them from collecting any part of the taxes which were for county, township or other than territorial or judicial purposes, and no taxes whatever for the years 1892, 1893 and 1894.

From this decree both parties appealed to the Supreme Court of the Territory of Oklahoma, which, on September 4, 1896, affirmed the decree of the District Court.

From that decree of affirmance both parties were allowed an appeal to this court by the Chief Justice of the Supreme Court of the Territory.

Mr. A. H. Garland and *Mr. R. C. Garland* for Wagoner and others.

Mr. Fred. Beall, *Mr. Amos Green* and *Mr. C. M. Green* for Evans and others.

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

The appeal of Wagoner and others, owners of cattle kept by them on the Indian reservation attached to Canadian County, brings up the same questions which were considered and determined by us at the present term in the case of *Thomas* v. *Gay*, 169 U. S. 264.

That was an appeal from the Supreme Court of the Territory of Oklahoma, involving the validity of the territorial act of March 5, 1895, c. 43, which subjected cattle, kept and grazed in any unorganized country, district or reservation, to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and it appears in the present record that the Supreme Court of the Territory regarded that case as identical in principle with the present one. Our examination of the records in the two cases has brought us to the same conclusion.

We therefore deem it unnecessary to again discuss at length questions so recently disposed of. The main contentions are that by reason of the treaty relations existing between the United States and the Indian tribes resident on the reservations it is not competent for the territorial legislature of Oklahoma to subject cattle within those reservations to taxation, even although such cattle are owned by persons other than Indians; and that the legislature of Oklahoma cannot validly empower the authorities of an organized county to tax personal property situated in a reservation attached to such county for judicial purposes.

In *Thomas* v. *Gay* it was held that there was nothing in the treaties between the United States and the Indians occupying these reservations which disabled the United States from bringing the reservations within the limits of the Territory of Oklahoma; that taxing personal property of persons other than Indians, and situated within the reserva-

tion, did not impair the rights of person or property pertaining to the Indians; and that the taxation of cattle kept for grazing purposes upon the reservations, under leases duly authorized by act of Congress, was not a violation of the rights of the Indians, nor an invasion of the jurisdiction and control of the United States over them and their lands.

No additional fact is presented to distinguish the present case from that one, in the particular now under consideration, except that the United States authorities made it a condition on which the owners of cattle should have a right to obtain grazing leases from the Indians that they should employ Indians in herding their cattle. It is said that the purpose of that condition was to alienate the Indians from their tribal relations and to incline them to peaceful pursuits. Such may have been the object, but we are unable to see that such a clause in these grazing leases has any bearing on the power of the Territory to exercise the power of taxation. It is, indeed, contended that to permit the Territory to tax the cattle would tend to discourage the making of such leases, and thus deprive the Indians of the advantages coming to them. This seems to us too indirect and far-fetched an incident to affect our conclusions.

In *Thomas* v. *Gay* it was further held that the power to legislate delegated to the territorial legislature included the right to pass and enforce laws for the assessment and collection of taxes; that the act of March 5, 1895, was a valid enactment, under which it was competent for the taxing authorities of an organized county to levy and collect taxes on personal property situated within the attached reservations, and belonging to other persons than Indians.

These considerations cover and dispose of the contentions urged on behalf of the owners of the property taxed, and their appeal is accordingly dismissed.

It remains to consider the appeal of the taxing authorities of Canadian County.

They object, in the first place, to that portion of the decree below which restrains them from the collection of taxes for the years 1892, 1893 and 1894. They point to a provision

contained in the act of March 5, 1895, enabling the special assessor to assess or reassess property that at any time has, by oversight or negligence, or for any other cause, escaped taxation; and they contend that the act of 1895 was an amendatory statute, and intended to cure a supposed defect in the then existing laws, and cases are cited in which it has been held that such curative statutes can have a retrospective effect, and enable the authorities to assess and collect taxes on property which should have been theretofore assessed.

It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed no power in the authorities of Canadian County to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment.

Another objection on behalf of the county officers to the decree below appears to us to be well taken. It respects that feature of the decree which restricts the collection of taxes for the year 1895 to those imposed only for territorial and judicial purposes, and forbids the collection of taxes imposed for county purposes.

The same question arose in the case of *Thomas* v. *Gay*, and the conclusion there reached, upon an examination of the authorities, both state and federal, was, that it cannot be maintained that those whose cattle are within the protection of the laws of Oklahoma, but are situated on a reservation, receive no benefit from the expenditures of public moneys in the organized county to which the reservation is attached. Cases cited, wherein the power of municipal organizations to tax property outside of their boundaries has been denied, are not applicable when the power is conferred by a general law, enacted by a legislature having jurisdiction over the subject. Nor are taxes, otherwise lawful, invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.

The appeal is sustained in this particular, and the decree of the Supreme Court of the Territory is reversed, and the cause remanded to that court with directions to reverse

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the decree of the District Court in so far as it restrains the county authorities from collecting taxes for county purposes for the year 1895, *and to affirm the rest of that decree. The costs in No.* 252 *to be paid by the appellants, and in No.* 262 *by the appellees.*

PROVIDENT LIFE & TRUST COMPANY *v.* MERCER COUNTY.

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

Argued April 29, May 2, 1898. — Decided May 23, 1898.

The transactions with the county of Mercer, which resulted in the delivery of the bonds of the county to the railroad company, were had in the utmost good faith.

Barnum v. *Okolona*, 148 U. S. 393, reaffirmed to the point "that municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act." But when the good faith of all the parties is unquestionable, the courts will lean to that construction of the statute, which will uphold the transaction as consummated.

The provision in the act authorizing the issue of Mercer County bonds to the Louisville Southern Railroad Company, when its railway should have been so completed "through such county that a train of cars shall have passed over the same, was fully complied with when the railroad was so completed, from the northern line of the county to Harrodsburg, that a train of cars passed over it; but, even if this construction be incorrect, it must be held that when the trustee, in whose hands the county bonds were placed in escrow, adjudged that the condition prescribed for their delivery had been complied with, and delivered the bonds to the railroad company, the company took such a title as, when the bond was transferred to a *bona fide* holder, would enable him to recover against the county, even if the condition had in fact not been performed.

On May 15, 1886, the general assembly of the Commonwealth of Kentucky passed an act, c. 1159, Private Acts,

entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," the first section of which is as follows:

"SEC. 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may pay therefor, in the negotiable coupon bonds of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein."

The second and third sections contain provisions in detail in respect to a vote of the people of the county, the subscription to the stock of the company and the execution of the bonds. The fourth section reads:

"SEC. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

In pursuance of this act an election was held in the county, resulting in favor of making the subscription and issuing the bonds. The subscription was made and the bonds executed. The bonds were, omitting a provision for repayment, in the following form:

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"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A.D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10, A.D. 1887.

* * * * *

"In witness whereof, the County of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county, with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A.D. 1887.

"THE COUNTY OF MERCER, [SEAL.]

"BY JOHN W. HUGHES, *County Judge.*

"Attest: BEN. C. ALLIN, *Clerk.*"

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On February 7, 1887, the county court appointed D. L. Moore trustee, as prescribed by section 4 of the act. Moore accepted the trust and gave bond with good surety, as required, and on March 3, 1887, the bonds were deposited with him.

Prior to June 1, 1888, the railroad was completed from Louisville, in Jefferson County, via Shelbyville, in Shelby County, and Lawrenceburg, in Anderson County, south through Mercer County to the depot of the Southwestern Railroad in Harrodsburg, the county seat; there it connected with a short line of road constructed by the Southwestern Railroad Company, and extending from Harrodsburg to Burgin, on the Cincinnati Southern Railroad; the Southern Company owned all the stock of the Southwestern Company, had possession of its road, and subsequently the two companies were consolidated and the latter merged in the former company. On said first day of June, 1888, a train of cars, moved by an engine, passed over the road from Louisville through Harrodsburg to Burgin and then returned to Louisville, and from that time the railroad from Louisville to Burgin has been continually operated as the Louisville Southern Railroad. The distance from the northern line of Mercer County to Harrodsburg is fifteen miles, from Harrodsburg to Burgin, 4.72 miles. Burgin is three miles from the south line of Mercer County and 4.74 miles from the east line. The nearest point that the road runs to the south line of Mercer County is two miles.

On July 3, 1888, Moore resigned his position as trustee, and Isaac Pearson was appointed in his place. He gave security to the county, as required by the act, and received from the prior trustee all the bonds and coupons in his hands. About the first of June, 1888, the time of the passage of a train of cars from Louisville to Burgin and back, as hereinbefore stated, there arose a question whether the condition precedent to the delivery of the bonds had been complied with by the railroad company, and it was in view of this difference of opinion and the doubts of the trustee Moore that he resigned his position. This question was publicly and generally discussed, and while the discussion was going on, and before Pearson, the trustee, had determined that the condition precedent had been per-

formed and that he would deliver the bonds, the railroad company prepared to extend its road toward and to the town of Danville, in Boyle County, which was 7.47 miles distant from Harrodsburg, and with one exception acquired all the rights of way to the southern line of Mercer County. A movement was made in the county to have the court of claims of the county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of peace of his county, met on June 26, 1888, and the question was fully discussed before them. After argument they declined to instruct the trustee as to his action, but, upon motion of one of the justices, passed and spread upon the records this resolution:

"At a county court of claims for Mercer County, at the court house in Harrodsburg, on Tuesday, the 26th day of June, 1888.

"Present: John W. Hughes, J. P. M. C. C., and M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, E. I. Massie, N. Harris, G. J. Johnson, B. O. Jones, A. Johnson, J. C. McIntire and John T. Pankey, justices of the peace of Mercer County.

"G. J. Johnson, as justice of the peace of this county, offered into the court the following motion, which is ordered to be noted of record, and is as follows:

"'The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle County line.'

"And said motion being seconded, the ayes and nays were taken, and resulted as follows:

"Ayes, 12, as follows: M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, N. Harris, G. J. Johnson, B. O. Jones, J. C. McIntire and John T. Pankey.

"Nays, none; not voting, two, as follows: W. I. Massie and A. Johnson."

Counsel for the Provident Life and Trust Company.

After this, Pearson, the trustee, decided that the conditions had been performed, and on the — day of August, 1888, in the presence of the county judge of the county, delivered the bonds, first cutting off and burning the past due coupons. At the same time the Louisville Southern Railroad Company delivered to the county its certificate for an equal amount of its capital stock. The stock was accepted by the county and voted by the county judge at a stockholders' meeting on at least two occasions, one on December 18, 1888, and another on May 26, 1890, and the stock certificate is still held by the county of Mercer and has never been tendered to the railroad company, or any one representing it. At these two meetings Mercer County voted its shares in support of certain resolutions materially affecting the business affairs of the railroad company and also accepting a legislative amendment to its charter, as well as in the election of directors. The county regularly levied an annual tax to meet the semi-annual interest on the bonds, and paid such interest for the years 1889, 1890, 1891 and January 1, 1892. Since then it has paid no interest. The Provident Life and Trust Company is a *bona fide* purchaser of $100,000 of the bonds, and on default in payment of the coupons it commenced this action on November 3, 1892, in the Circuit Court of the United States for the District of Kentucky. The pleadings having been perfected, the case was tried before the court without a jury. Special findings of facts were made, and upon them judgment was on April 30, 1895, rendered in favor of the plaintiff. From this judgment the county took the case on error to the Court of Appeals for that circuit. That court, on March 3, 1896, filed an opinion holding the bonds void, 43 U. S. App. 21, and entered a judgment reversing the judgment of the Circuit Court and remanding the case with instructions to enter a judgment in accordance with the opinion. Thereupon, on October 20, 1896, the case was brought to this court on certiorari.

Mr. Thomas W. Bullitt and *Mr. Samuel Dickson* for the Provident Life and Trust Company.

Opinion of the Court.

Mr. John B. Thompson and *Mr. Alexander Pope Humphrey* for Mercer County. *Mr. George M. Davie* was on their brief.

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

No one can read the facts above stated, as found by the Circuit Court, without being impressed that the transactions between the county and the company, culminating in the delivery of the bonds to the latter, were had in the utmost good faith. There was no misrepresentation, concealment or fraud. The work done by the company in constructing the railroad was obvious and satisfactory. The question whether that work was a compliance with the terms of the subscription was publicly discussed, was fully considered at a meeting of the county court of claims, whose opinion was, and was so expressed, that the contract had been fully complied with, and that the bonds ought to be delivered. Prior to the time that such conclusion was reached the company, in view of the question, commenced its preparations to construct the road to the south county line, and had obtained, with a single exception, the necessary right of way therefor. When advised by the opinion of the court of claims that the construction of the additional two miles of road was unnecessary, and the judgment of the trustee was announced that he considered the contract of subscription fully complied with, the company desisted and took the bonds. The county accepted the stock issued by the company, voted upon it at stockholders' meetings, and has ever since retained it. For three years and a half it paid the interest on the bonds, without questioning their validity. So that if good faith on the part of all concerned was the sole condition of the validity of these bonds, no question could be made concerning it.

We do not mean to imply that good faith is the only requisite, or that a condition plainly prescribed by the legislature can be ignored by a county, even with the best of intentions. On the contrary, we reaffirm the proposition laid down in *Barnum* v. *Okolona*, 148 U. S. 393, 395:

"That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. *Sheboygan County* v. *Parker*, 3 Wall. 93, 96; *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Young* v. *Clarendon Township*, 132 U. S. 340, 346."

At the same time when the good faith of all the parties is unquestionable the courts will lean to that construction of the statute which will uphold the transaction as consummated. Especially will that be so in a case in which the question of construction having been raised the one party commences preparations to perform work which will put the matter beyond question and desists therefrom only upon the representations of the other party that it is satisfied the work has been completed according to the terms of the contract. As said in *Andes* v. *Ely*, 158 U. S. 312, 321:

"While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity."

See also *Mercer County* v. *Hacket*, 1 Wall. 83; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Ray County* v. *Vansycle*, 96 U. S. 675.

With these preliminary observations, we pass to a consideration of the questions presented; and in the first place it must be noticed that no matter of constitutional limitation is involved. The only inquiry is whether the conditions prescribed in the statute have been fully complied with, and, if not, whether the county is in a position to avail itself of the non-compliance. The statute in terms authorizes the issue of negotiable bonds. The bonds are negotiable, and issued by the proper county officers; carry on their face recitals that they have "been issued pursuant to the authority conferred" by an act of the legislature, which is named, and "pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock" of the railroad company. By a long series of decisions such recitals are held conclusive in favor of a *bona fide* holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a *bona fide* holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to these in the bonds before us. See among other cases *Coloma* v. *Eaves*, 92 U. S. 484; *Warren County* v. *Marcy*, 97 U. S. 96; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Bernards Township* v. *Morrison*, 133 U. S. 523; *Citizens' Savings Ass'n* v. *Perry County*, 156 U. S. 692; *Andes* v. *Ely*, 158 U. S. 312.

But it is said that the recitals in this case can be held conclusive only as to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election,

etc., because by section 4 of the statute the bonds, when executed, were to be deposited with a trustee, to be held in escrow and delivered only upon the performance of a certain condition — a condition to be performed subsequently to the execution of the bonds. Assuming, without deciding, that such limitation must be placed upon the recitals, we pass to inquire whether that condition was in fact performed, and if not, whether after delivery by the trustee the county can be permitted to raise the question as against *bona fide* holders. That condition is that the bonds shall not be binding "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." It is contended that the word "through" means clear through the county from one end to the other; and that while the railway enters on the north line of the county, and runs within the county limits a distance of nearly twenty miles, it does not touch the south county line, nor come within a nearer distance of it than two miles. So it is said the railway does not run through the county, and therefore the condition upon which the bonds could become binding and valid obligations did not and does not exist. It is true the primary meaning of the word "through" is from end to end, or from side to side, but it is used in a narrower and different sense. Its meaning is often qualified by the context. Thus, if one should say that he had spent the summer travelling through New England it would not be understood as carrying an affirmation that he had been from one side clear to the other or from one end clear to the other, but that his travels had been within the limits of New England. That book which is said to have had a wider circulation than any except the Bible, Bunyan's Pilgrim's Progress, opens with this sentence: "As I walked through the wilderness of this world, I lighted on a certain place where there was a den, and laid me down in that place to sleep." Does the writer mean that he passed from one end of the wilderness to the other, and at the further end found the den, or simply that as he travelled in the wilderness he lighted on the den? Obviously the latter. Many similar illustrations might

be cited. They show that "through" does not always mean from end to end, or from side to side, but frequently means simply "within." Now, the language here is "so completed through such county that a train of cars shall have passed over the same." Obviously, the primary thought is not the extent of the line, but the extent to which the work shall be completed. In other words, the principal thing is not that a railroad shall be partially completed from one end of the county to the other, but that a railroad shall be so completed within and substantially through the county that a train of cars passes over it. It may well be believed that, inasmuch as the company's road was to commence at Louisville, on the northern border of the State, and its principal city, the purpose was to connect the county with that city, and that the road should be so fully completed as to permit the moving of trains over it, *i.e.*, be in a condition for actual use, and not that a road, no matter how far constructed, should be extended from one end of the county to the other. This view of the intent of the legislature is sustained by the last clause of the section, which provides "that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." This contemplates that the line coming from the north shall enter the county and pass through it so far as to reach the corporate limits of the town of Harrodsburg, that town being the county seat. The proviso is not that the road in passing through the county shall touch or pass through the town of Harrodsburg, but simply that it shall pass to or through that town, and either is sufficient. It seems not an unreasonable construction of this statute that the condition of subscription was fully complied with when the railroad was so completed from the northern line of the county to Harrodsburg, the county seat, that a train of cars passed over it. If that be the correct construction, then of course we need inquire no further; and, on the other hand, if though not correct, it be not an unreasonable construction, the court should, in view of the unquestioned good faith of both parties, of the fact that it was adopted by the authorities of the county, and that

by reason thereof the company desisted from further work — accept, if possible, the interpretation placed by the parties as correct. This view is certainly persuasive.

But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a *bona fide* holder. It is said that the bonds were placed in escrow, and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

"It is generally agreed that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the *bona fide* transferee for value and before maturity." *Long Island Loan & Trust Co.* v. *Columbus &c. Railway*, 65 Fed. Rep. 455, 458.

In *Fearing* v. *Clark*, 16 Gray, 74, 76, Chief Justice Bigelow thus states the law:

"The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was entrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences, which follow from the negotia-

tion of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are entrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on the innocent holders who have taken it for value without notice."

In *Burson* v. *Huntington*, 21 Michigan, 415, 433, it is said:

"If the maker or endorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, . . . and the person to whom it is thus entrusted violate the confidence reposed in him, and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a *bona fide* holder for value, and the maker or endorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder."

See also *Vallett* v. *Parker*, 6 Wend. 615, 620; *Chase National Bank* v. *Faurot*, 149 N.Y. 532; *Graff* v. *Logue*, 61 Iowa, 704.

Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as, transferred to a *bona fide* holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give "bond, with good surety, approved by the county judge, for the faithful performance" of his duty. If in case the condition was not performed the county had a perfect defence to the bonds, even in the hands of a *bona fide* holder, there were little need of requiring the trustee to give any security.

Another significant feature in this connection is the fact that by statute the bonds were to be negotiable. Counsel for the county suggest that this provision of the statute can be satisfied by giving to the bonds the benefit of negotiability as between successive holders, but we know of no reason why the general significance of the word "negotiable" should be

so limited. The third of the three peculiar and distinguishing characteristics of negotiable instruments, as stated in 1 Daniel on Negotiable Instruments, sec. 1, is respecting the consideration, and the author says:

"As between immediate parties, the true state of the case may be shown and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a *bona fide* holder for value and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosesoever hands it may go."

To hold that by this provision the legislature intended that the quality of negotiability should inhere in the instruments only as between the successive holders, and not between the maker and any *bona fide* holder, cannot be justified by any reasonable construction of the language used.

It follows from these considerations that these bonds in the hands of the Life and Trust Company, a *bona fide* holder, must be adjudged the valid obligations of the county.

The judgment of the Court of Appeals is therefore reversed and the judgment of the Circuit Court is affirmed.

LEDBETTER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 196. Submitted April 12, 1898. — Decided May 23, 1898.

An indictment for a violation of the provisions of section 16 of the act of February 8, 1875, c. 36, forbidding the carrying on of the business of a rectifyer, wholesale liquor dealer, etc., without first having paid the special tax required by law, which charges the offence in the language of the statute creating it, is sufficient; and it comes within the rule, well settled in this court, that where the crime is a statutory one, it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the

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cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and of the court, of the exact offence intended to be charged.

Properly speaking, the indictment should state not only the county, but the township, city or other municipality within which the crime is alleged to have been committed; but the authorities in this particular are much less rigid than formerly.

THIS was a writ of error to review the conviction of the plaintiff in error upon an indictment found against him by the grand jury for the Southern District of Iowa, April 28, 1896, for a violation of section 16 of the act of February 8, 1875, c. 36, 18 Stat. 307, in carrying on the business of a retail dealer in liquors without the payment of the special tax required by law.

Defendant was convicted upon the first count in the indictment, which reads as follows:

"The grand jurors of the United States of America duly empanelled, sworn and charged to inquire in and for the body of said Southern District of Iowa, at a term of the United States District Court begun and held at Keokuk, in said district, on the 14th day of April, A.D. 1896, in the name and by the authority of the United States of America, upon their oaths do find and present that Lewis Ledbetter, late of said district, heretofore, to wit, on the — day of April, A.D. 1896, in the county of Appanoose, in the Southern District of Iowa, and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided, and against the peace and dignity of the United States of America."

After his conviction defendant moved for an arrest of judgment upon the insufficiency of the indictment. This motion was overruled, and the defendant sentenced to pay a fine of $250 and costs of prosecution.

Defendant thereupon sued out a writ of error from this court, assigning as error that the indictment did not state facts constituting an offence against the laws of the United

States, (1) because it did not set forth that the defendant sold or offered for sale foreign or domestic spirituous or malt liquors otherwise than as provided by law; (2) that he was not informed with sufficient particularity as to the time and place and means so as to apprise him of the crime of which he was charged; and (3) that the indictment did not allege that any crime had been committed at a date prior to the finding of the indictment.

Mr. H. Scott Howell and *Mr. William C. Howell* for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error.

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

Defendant did not demur to the indictment, nor move to quash, nor take advantage of its alleged insufficiency upon the trial, but after conviction moved in arrest of judgment upon the ground that it failed to aver with sufficient particularity the details of the offence, and the time and place of its commission.

1. The principal alleged defect in the indictment is set forth in the third, fourth and fifth assignments of error, which charge that the indictment did not state facts which would constitute an offence against the laws; in that it did not allege that the defendant sold or offered for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as provided by law, or any of said liquors, or to whom said liquors were sold or offered for sale, and because it did not allege that defendants had sold or offered for sale any of said liquors in quantities less than five wine gallons at the same time, and because the indictment did not allege that the defendant had not paid $25, the amount of the tax provided by the statute, and generally, because the allegations of the indictment are only a legal conclusion, unsupported by

the primary and individualizing facts which constituted an offence, etc.

By section 16 of the act of February 8, 1875, c. 36, 18 Stat. 307, 310, under which defendant was convicted, it is provided that "any person who shall carry on the business of a . . . retail liquor dealer . . . without having paid the special tax as required by law . . . shall, for every such offence, be fined, etc.," and the first count of the indictment charged in the very words of this section that the defendant "did then and there wilfully, unlawfully and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided and against the peace and dignity of the United States of America."

Defendant insists that it was not sufficient to charge him with the offence in the language of the statute, but that the indictment should have set forth the particular facts which showed that he was a retail liquor dealer, and should also have averred that he had not paid the tax of $25 provided by law.

By section 18 of the same act retail dealers in liquor are required to pay a special tax of $25, and "every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

The question presented for our consideration is whether it is sufficient to charge the offence in the language of the statute creating such offence and fixing the punishment therefor, or whether it is necessary to charge it in the language of the statute defining the business of a retail liquor dealer, averring that the defendant had done the acts therein stated without payment of the special tax, and had therefore rendered himself amenable to the punishment provided by the former section.

We do not undertake to say that the latter would not be a proper course, but we think an allegation in the language of the statute creating the offence is sufficient. We have no dis-

position to qualify what has already been frequently decided by this court, that where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged. *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hess*, 124 U. S. 483; *Pettibone* v. *United States*, 148 U. S. 197; *Evans* v. *United States*, 153 U. S. 584.

But we are of opinion that the statute in this case (section 16) does define the offence with the requisite precision, and that the pleader has chosen the safer course in charging it in the language of this section. The offence does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person was, at least, *prima facie* evidence of criminality, the real offence consists in carrying on such business, and if only a single sale were proven it might be a good defence to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor. *United States* v. *Jackson*, 1 Hughes, 531; *United States* v. *Rennecke*, 28 Fed. Rep. 847. It is quite evident that an indictment averring in the language of section 18 that the defendant sold or offered for sale the liquors named, without averring that he made this a business, and that he had not paid the special tax required by law, would be insufficient.

In addition to this, however, section 18, in defining retail dealers in liquors, declares that "every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors, *otherwise than as hereinafter provided*, in less

quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." The statute, by the use of the words "otherwise than as hereinafter provided," thus introduces an exception into the general words of the definition, and it might be open to doubt whether an indictment which charged only the selling or offering for sale in the language of this section should not also negative the fact that the sale was not within such exception. The general rule is that while the pleader is not bound to negative a a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute. *United States* v. *Cook*, 17 Wall. 168; *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S. 586, 604; *State* v. *Haden*, 15 Missouri, 447; *State* v. *Walsh*, 14 R. I. 507; *State* v. *Sommers*, 3 Vermont, 156, 157; *State* v. *Munger*, 15 Vermont, 290; *Thompson* v. *State*, 37 Arkansas, 408; *State* v. *O'Brien*, 74 Missouri, 549. The words "otherwise than as hereinafter provided" in this section probably refer to wholesale liquor dealers in distilled spirits, wholesale and retail dealers in malt liquors, brewers and others who are either exempt from taxation or pay a different tax, and if it were necessary to aver that the defendant was not within either of these exceptions, the indictment might be drawn out to an intolerable length. Upon the other hand, when it is averred in the language of section 16 that the defendant carried on the business of a retail liquor dealer without payment of a special tax, the description, though brief, is comprehensive, although section 18 may be referred to as defining the offence with more particularity. But we do not think it necessary to charge the offence in the language of the definition. If Congress had not defined a retail liquor dealer it would be proper to resort to a dictionary for a definition of this term; but it is no more necessary in one case than in another to charge the offence in the language of the definition.

The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offence, as in

United States v. *Carll*, 105 U. S. 611, where a statute against passing counterfeit money failed to aver the scienter; but where the statute sets forth every ingredient of the offence, an indictment in its very words is sufficient, though that offence be more fully defined in some other section. *United States* v. *Gooding*, 12 Wheat. 460, 473; *United States* v. *Wilson*, Baldwin, 78, 119; *Hess* v. *State*, 5 Ohio, 5; *Harrington* v. *State*, 54 Mississippi, 490, 494.

Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offence the offence may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offence. Where the statute completely covers the offence, the indictment need not be made more complete by specifying particulars elsewhere obtained. *Whiting* v. *State*, 14 Connecticut, 487; *Simmons* v. *State*, 12 Missouri, 268; *State* v. *Smant*, 4 Rich. (S. C., 356; *Parkinson* v. *State*, 14 Maryland, 184.

2. The only allegation of time and place in this indictment is that the offence was committed "on the — day of April, A.D. 1896, in the county of Appanoose, in the Southern District of Iowa."

Good pleading undoubtedly requires an allegation that the offence was committed on a particular day, month and year, but it does not necessarily follow that the omission to state a particular day is fatal upon a motion in arrest of judgment. Neither is it necessary to prove that the offence was committed upon the day alleged, unless a particular day be made material by the statute creating the offence. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient. *Armstrong* v. *State*, 145 Indiana, 609; *Gratz* v. *Commonwealth*, 96 Kentucky, 162; *United States* v. *Conrad*, 59 Fed. Rep. 458; *Fleming* v. *State*, 136 Indiana, 149; *State* v. *McCarthy*, 44 La. Ann. 323.

In the case under consideration the indictment was found on the 28th day of April, 1896, and the allegation is that the crime was committed "on the — day of April, 1896," which

must necessarily have been a day preceding the finding of the indictment. Under such circumstances, the defendant could not possibly have been misled by the allegation, particularly in view of the fact that the carrying on of a business is in the nature of a continuing offence; and while it is true that a business can be carried on only for a single day, the ordinary inference would be that it was carried on for a longer period. It would seem illogical to hold that, if the offence had been charged to have been committed upon a particular day in April, evidence could have been given of any day within the statute of limitations, and yet to hold that the defendant could be misled by an averment that the offence was committed on the — day of the month in which the indictment was found.

3. Much the same observations may be made with respect to the averment of place, which was simply "in the county of Appanoose, in the Southern District of Iowa, and within the jurisdiction of this court."

Properly speaking, the indictment should state not only the county, but the township, city or other municipality within which the crime is alleged to have been committed. But the authorities in this particular are much less rigid than formerly. Under the early English law, where the jurymen were also witnesses and were summoned from the vicinage, it was necessary that the locality of the crime should be stated with great particularity in order that the sheriff might be informed from what vicinage he should summon the jury. But this requirement was long since abolished in England by statute, and it is not now necessary there "to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment." 1 Bish. Crim. Procedure, sec. 368.

While in this country it is usual to state the town as well as the county, it has not been generally deemed necessary to do so, and most of the authorities assume that an allegation is sufficient after verdict which shows it to have been done within the jurisdiction of the court. *Heikes* v. *Commonwealth*, 26 Penn. St. 513; *United States* v. *Wilson*, Baldwin, 78;

Carlisle v. *State*, 32 Indiana, 55; *State* v. *Goode*, 24 Missouri, 361; *State* v. *Smith*, 5 Harr. 490; *Barnes* v. *State*, 5 Yerg. 186; *Covy* v. *State*, 4 Port. 186; *Wingard* v. *State*, 13 Georgia, 396; *State* v. *Warner*, 4 Indiana, 604. Indeed, an indictment charging the offence to have been committed in one town is supported by proof that it was committed in a different town within the same county, and within the jurisdiction of the court. *Commonwealth* v. *Tolliver*, 8 Gray, 386; *Commonwealth* v. *Creed*, 8 Gray, 387; *Carlisle* v. *State*, 32 Indiana, 55; *Commonwealth* v. *Lavery*, 101 Mass. 207; *People* v. *Honeyman*, 3 Denio, 121.

We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient.

The judgment of the court below is

Affirmed.

NEW YORK INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Announced May 23, 1898.

The judgment and mandate in this case, 170 U. S. 1, are amended.

In this case it is ordered that the judgment and mandate be amended so as to read as follows:

"The judgment of the Court of Claims is therefore reversed and the cause remanded with instructions to enter a new judgment for the net amount actually received by the Government for the Kansas lands, without interest, less any increase in value attributable to the fact that certain of these lands were donated for public purposes, as well as the net amount which the court below may find could have been obtained for the lands otherwise disposed of if they had all been sold as public lands, less the amount of lands upon the basis of which settle-

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ment was made with the Tonawandas, and less the 10,240 acres allotted to the thirty-two New York Indians, as set forth in finding twelve, together with such other deductions as may seem to the court below to be just, and for such other proceedings as may be necessary and in conformity with this opinion."

HOLLOWAY *v.* DUNHAM.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 247. Argued May 4, 1898. — Decided May 23, 1898.

On an appeal from the judgment of the Supreme Court of a Territory, the findings of fact are conclusive upon this court.

One general exception to thirteen different instructions cannot be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct.

This action was brought in a district court of the Territory of Oklahoma to recover the value of certain goods sold and delivered by the plaintiffs (defendants in error here) to the defendant below, amounting to the sum of $5004.58, the sales having been made between the 1st of November, 1890, and the 10th of March, 1891, and the defendant at the time of the sales being a resident of Fort Worth in the State of Texas. At the time of the commencement of the action plaintiffs also commenced attachment proceedings against the defendant on the ground that he was at that time a non-resident of the Territory of Oklahoma, and also on the ground that he was about to sell, convey and otherwise dispose of his property subject to execution, with a fraudulent intent to cheat, hinder and delay his creditors.

The defendant filed an answer, denying the plaintiffs' complaint, and also one denying each and every material allegation contained in the plaintiffs' petition and affidavits for an attachment.

Counsel for Parties.

Under the practice in Oklahoma there were two issues thus made: one in regard to the existence and amount of defendant's indebtedness to the plaintiffs, and the other as to the facts upon which the attachment could be sustained. These two separate issues came on for trial on the 16th of June, 1892, before the district court and a jury, and after the evidence was in the court submitted to the jury the two issues, and directed a separate verdict to be returned in regard to each issue. The jury returned the following verdicts:

"We, the jury, duly empanelled and sworn in the above case, find for the plaintiff on the attachment issue.

"EUGENE WALKER, *Foreman.*"

"We, the jury, duly empanelled and sworn in the above-entitled case, find for the plaintiffs and assess their damages at $5434.61.

"EUGENE WALKER, *Foreman.*"

At the request of the defendant the court also submitted to the jury the following questions in writing:

(1) "Was J. R. Holloway, on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors?"

(2) "Was J. R. Holloway, on the 31st day of October, 1891, a non-resident of Oklahoma Territory?"

The jury returned an affirmative answer to each question. Judgment was entered for the amount of the verdict.

The defendant appealed to the Supreme Court of the Territory where the judgment was affirmed, and thereupon he obtained a writ of error from this court, and the record is now here for review.

Mr. Fred Beall for plaintiff in error. *Mr. Amos Green* and *Mr. C. M. Green* were on his brief.

Mr. Selwyn Douglas for defendants in error. *Mr. McGregor*

Douglas, *Mr. W. W. Dudley* and *Mr. P. T. Michener* were on his brief.

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

This is a very confused record. There would seem to be two bills of exceptions, one containing the evidence and the other reciting certain exceptions, but containing no part of the evidence taken upon the trial. Both seem to have been signed by the judge who tried the case, while neither purports to have been signed by him until months subsequent to the day of trial.

The bill of exceptions containing the evidence is the first bill set forth in the record, and the other bill follows it. It is not material here which bill may be regarded as the regular one, because on an appeal from the Supreme Court of a Territory we cannot examine the evidence as to its weight or sufficiency, and the findings of fact are conclusive upon this court. *Harrison* v. *Perea*, 168 U. S. 311, and cases cited.

There are left only the exceptions to rulings on the admission or rejection of evidence and those taken to the instructions of the court to the jury. The former are not particularly urged, and the latter are substantially confined to two. They arise upon the instructions of the court to the jury in regard to what is sufficient proof of non-residence, and also as to the number of the jury necessary to agree upon a verdict.

The jury found for the plaintiffs on the attachment issue, and also for the plaintiffs in the main action, and assessed their damages at $5434.61. In addition to that the jury found that the defendant on the 31st of October, 1891, was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors, and also that on the 31st day of October, 1891, he was a non-resident of Oklahoma Territory.

Without at this moment considering whether the exceptions taken to the charge of the judge were sufficiently and

properly taken, we think it is not material now to inquire as to the correctness of the charge of the court in relation to the question of defendant's non-residence. If he were a non-resident when the attachment was issued it could be sustained on that ground. But it could also be sustained if at the time it was issued the defendant was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors. So there were two facts entirely separate and distinct from each other, either of which being found to exist would justify and support the attachment.

The jury having found that the defendant at the time the attachment was issued did intend to convey his property, and thus cheat his creditors, that fact is conclusive upon this court, and, being in itself sufficient to uphold the attachment, without reference to the other fact of the defendant's non-residence, a complete answer is furnished to any alleged error in the instruction of the court as to what constitutes a non-resident.

Whether the court erred in charging the law in relation to non-residence is therefore immaterial. There is no such connection between the two grounds upon either of which the attachment could be supported, that an error in the charge of the court in regard to one can be said to affect the other, and thus furnish cause for a new trial.

The other error complained of relates to the instruction of the court that the jury need not be unanimous in their verdict, and that nine could determine it.

The record does not show that the verdict was returned by a less number than twelve jurors nor does the statute require the verdict to be signed by all the jurors. At the time when the verdict was rendered the jury was not polled. It does not therefore affirmatively appear that this verdict was a verdict of less than twelve jurors. If, however, the instruction to the jury had been properly excepted to, the judgment would have to be reversed under our ruling in *American Publishing Company* v. *Fisher*, 166 U. S. 464, and *Springville* v. *Thomas*, 166 U. S. 707. We are of opinion, however, that no proper and

sufficient exception was taken by the defendant to the instruction of the judge to the jury on this question.

The record shows that the court gave some thirteen different instructions to the jury, the thirteenth being the one relating to the number necessary to find a verdict. All of the instructions are set forth at length. Many of them contain more than one proposition of law or fact. At the end of the instructions is the signature of the judge. Following the signature the record contains this further statement:

"The questions hereto attached you will answer in writing, after each question, the word 'yes' or 'no.' You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

"Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

"JOHN G. CLARK, *Judge.*"

Then follow "the questions hereto attached," which were the special questions submitted to the jury and already mentioned, to which affirmative answers were made and signed by the foreman. Then follows this general statement:

"To the giving of which instructions and each of them the defendant at the time excepted."

On the same day that the verdict was rendered the defendant moved for a new trial on the grounds therein stated. The grounds are mentioned in great detail.

No mention is made of the thirteenth instruction to the jury, and it is nowhere alleged as ground for a new trial that there was any error in stating to the jury that nine of their number might find a verdict.

The statement in the record in regard to the manner in which the defendant took exceptions to the charge of the judge leaves the fact quite plain that those exceptions were taken generally and in a lump, and were not in reality taken separately or applied specifically to any particular instructions. It was a general statement that the whole charge of the judge was specifically excepted to. No specifications

were given, nothing was said in the way of calling the attention of the judge to any particular portions of his charge which the defendant objected to. When we look at the instructions contained in these various paragraphs, we see that in many of them there are two or more different propositions of law, and that a general exception taken to any of such paragraphs would be insufficient if one of the several propositions were correct. Should one general exception to thirteen different instructions be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct? We think not. The wholesale manner of taking exceptions is unfair, both to the judge and the opposite party. After a judge has given a long charge to the jury, consisting of many different propositions of law and fact involved in the trial, a general exception noted at the end of the charge to each proposition separately of law or fact announced therein is not sufficient if any proposition of law contained in the charge is correct. Those propositions in regard to the correctness of which there is a real controversy should be at least called to the attention of the judge, so that if he thought it proper he might correct, modify or explain them. It is evident the defendant's counsel had no reference in his exceptions to the charge, to many of the propositions therein contained, for they were favorable to the defendant. And it is equally plain that he had in fact no reference to the instructions as to the number necessary to find a verdict. This is shown by the motion for a new trial and the grounds therein mentioned. It would not conduce to the fair administration of justice to permit such an exception to be regarded as sufficient to raise the question herein sought to be reviewed.

Some other questions were made in the brief of the counsel for plaintiff in error, all of which we have carefully examined, but do not find any error which would lead to a reversal, and the judgment must therefore be

Affirmed.

Mr. Justice Brewer dissented.

UNITED STATES *v.* SALAMBIER

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

No. 117. Submitted May 6, 1898. — Decided May 23, 1898.

A protest by an importer, addressed to the collector and signed by the importer saying, "I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91. Import entry 96,656. — M. S. No. 52/53, I claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal. I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded," is, in form and substance a sufficient compliance with the requirements of section 14 of the act of June 10, 1890, c. 407, 26 Stat. 131, 137.

A JUDGMENT or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered on the 4th day of January, 1895, by which it was ordered, adjudged and decreed that there was no error in certain proceedings before the board of United States general appraisers, and that their decision be in all things affirmed, and an appeal having been duly taken from said judgment or decree to the Circuit Court of Appeals by the United States, and the cause having come on for argument in that court, a certain question of law arose concerning which that court desired the instruction of the Supreme Court of the United States for its proper decision.

The facts out of which the question arose are as follows:

Certain merchandise consisting of sweetened chocolate in the form of small cakes or tablets manufactured from cocoa sweetened with sugar, known commercially as sweetened chocolate, was imported and entered for consumption by the appellee, M. Salambier, from a foreign country into the port of New York on June 23, 1891, which merchandise was classified for customs duties at fifty per cent ad valorem by the collector of the port of New York under the provisions of paragraph 239 of the tariff act of October 1, 1890, and the duty was liquidated accordingly.

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The importer and appellee protested against this exaction and duly filed the following protest:

"New York, *July* 26, 1891.

"Hon. Joel B. Erhardt, *Collector.*

"Sir: I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23/91. Import entry 96,656. — M. S. No. 52/53.

"I, claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded.

"Very respectfully, M. Salambier,
"J. H. Dumont, *Atty.*"

The collector of the port of New York thereupon transmitted the said protest with the invoice and entry to the board of three general appraisers on duty at the port of New York, and said board on December 10, 1892, rendered their decision reversing the decision of the collector, and holding that the said merchandise was dutiable at 2 cents per pound under paragraph 319 of the tariff act of October 1, 1890, and that the importer should not be deprived of his remedy by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319.

From this decision of the board of United States general appraisers the United States appealed to the Circuit Court of the United States for the Southern District of New York, by petition, praying for a review of said decision pursuant to section 15 of the act of June 10, 1890, claiming in their petition, among other things, that the said board were in error in failing to hold that the protest in question was insufficient and invalid, inasmuch as it did not set forth distinctly and specifically the reasons for the importer's objection to the collector's decision as to the rate and amount of duties charged upon the merchandise according to the provisions of law; also

in deciding an issue not raised by the protest or arising in the case; also in entertaining said protest and in failing to find the issue of law with the collector of customs; also in reversing the decision of the collector aforesaid in the premises.

The said Circuit Court, upon said petition, ordered the board of United States general appraisers to return to the Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, pursuant to section 15 of the act of June 10, 1890, and the said board of general appraisers thereafter made such return in conformity to the order of the court.

The case thereafter came on to be tried upon the record as above set forth and upon the invoice and entry, before Hon. Hoyt H. Wheeler, District Judge holding the said Circuit Court. The Circuit Court affirmed the decision of the board of general appraisers herein and judgment was thereupon made and entered as above set forth, from which judgment the present appeal was taken by the United States to this court.

Upon these facts that court desired instruction upon the following question of law for the proper decision of said cause, namely:

"Was the protest herein above set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of sweetened chocolate, under the tariff act of October 1, 1890?

"And to that end that court hereby certifies such question to the Supreme Court of the United States."

Mr. Assistant Attorney General Hoyt for the United States.

Mr. Edwin B. Smith for Salambier.

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

It was decided by the United States Circuit Court of Appeals for the Second Circuit, in *United States* v. *Schilling*, 11 U. S.

App. 603, that "sweetened chocolate" was dutiable under paragraph 319 of the tariff act of October 1, 1890, at the rate of two cents per pound, as "cocoa, prepared or manufactured, not especially provided for in the act."

From that decision the United States took no appeal. In the present case, the board of general appraisers held that "sweetened chocolate" was dutiable at the rate of two cents per pound under said paragraph 319. The United States appealed from the decision of the board of appraisers to the Circuit Court of the United States for the Southern District of New York, not on the ground that the merchandise in question was not properly dutiable, under paragraph 319, at two cents per pound, but claiming that the protest made by the importer against the decision of the collector, who had assessed the sweetened chocolate, under paragraph 239 of said act, at fifty per cent ad valorem, was not a sufficient protest under existing law. From the judgment of the Circuit Court affirming the decision of the board of general appraisers an appeal was taken by the United States to the Circuit Court of Appeals, and that court has certified to us the single question of the legal sufficiency of the protest which, omitting unnecessary words and figures, was as follows:

"I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23, '91. . . . I, claiming that the said goods under existing laws are dutiable at two cents per pound, and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods and claim to have the amount unjustly exacted refunded."

By the fourteenth section of an act approved June 10, 1890, 26 Stat. 131, entitled "An act to simplify the laws in relation to the collection of the revenues," Congress enacted —

"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."

The three paragraphs concerned are as follows :

239. "All other confectionery, including chocolate confectionery, not specially provided for in this act, fifty per centum ad valorem."

318. "Chocolate, (other than chocolate confectionery and chocolate commercially known as sweetened chocolate,) two cents a pound."

319. "Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound." 26 Stat. 584, 588.

It is not claimed on behalf of the Government in the present case that the protest was not made in writing by a person entitled to do so; or that it was not made within due time; or that the requisite payment under protest has not been duly made. In other words, it is conceded that the importer, within the time prescribed in the statute, and having paid the full amount of the duties exacted, gave notice in writing to the collector that he was dissatisfied with his decision, and gave certain reasons for his objections thereto.

What is claimed by the Government is that the nature of the importer's objections to the decision of the collector was not set forth with the distinctness and with the minuteness of specification required by the statute.

It does not appear that the collector deemed the protest insufficient in form or unintelligible. Not complaining of any want of distinctness in the protest, he adhered to his decision as to the nature of the merchandise and the amount of the duty, and, in pursuance of the statute, transmitted the protest

with the invoice and entry to the board of general appraisers. The board regarded the protest as sufficient in respect to form and distinctness, reversed the decision of the collector and held that the merchandise was dutiable at two cents per pound under paragraph 319 of the tariff act.

As already stated, it is admitted by the Government that the collector was wrong in his classification of the imported article, and that the duty assessed by the board of general appraisers is the one that should have been exacted from the importer. Still, it is contended that the importer has lost his remedy by reason of having failed to specifically claim classification of the imported merchandise as a manufacture of cocoa under said paragraph 319.

Apart from the authorities cited, and which we shall presently examine, we have no difficulty in agreeing with the board of appraisers, and with the Circuit Court, that the protest was, in form and substance, a reasonable compliance with the law. The object of the statute, in requiring a protest, was to distinctly inform the collector of the position of the importer. In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act, at fifty per cent ad valorem, was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound.

The conclusion thus reached is consistent with the authorities to which our attention has been called in the briefs of the respective parties:

"We are not disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his

design to make it the foundation for a claim against the government." *Greely's Administrator* v. *Burgess*, 18 How. 413.

"Persons importing merchandise are required to make their protests distinct and specific, in order to apprise the collector of the nature of the objection, before it is too late to remove it, or to modify the exaction, and that the proper officers of the Treasury may know what they have to meet, in case they decide to exact the duties as intimated, notwithstanding the objection, and to expose the United States to the risk of litigation." *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461.

"The object of the requirement is to prevent a party, if he suffers a mistake or oversight to pass without notice, from taking advantage of it when it is too late to make the correction, and to compel him to disclose the grounds of his objection at the time when he makes his protest. . . . Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." *Davies* v. *Arthur*, 96 U. S. 148.

"A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the Government the practical advantage which the statute was designed to secure." *Arthur* v. *Morgan*, 112 U. S. 495.

"A protest which indicates to an intelligent man the ground of the importer's objection to the duties levied upon the articles should not be discarded because of the brevity with which the objection is stated." *Schell's Executors* v. *Fauché*, 138 U. S. 562; *Heinze* v. *Arthur's Ex'rs*, 144 U. S. 28.

In *Herrman* v. *Robertson*, 152 U. S. 521, a protest was held insufficient, in that it failed to point out, or suggest in any way, the provision which actually controlled, and in effect only raised a question which of two clauses, under one or the

other of which it was assumed that the importation came, should govern as most applicable.

Under these and other authorities which we have examined, we conclude that the notice was sufficient, and accordingly answer the question certified to us by the Circuit Court of Appeals in the affirmative, and it is so ordered.

UNITED STATES *v.* LIES.

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

No. 235. Argued April 26, 1898. — Decided May 23, 1898.

When the Government takes no appeal from the action of the board of appraisers upon an importer's protest, made under the act of June 10, 1890, c. 407, it is bound by that action; and in case the importer appeals from that action, and subsequently abandons his appeal, the Government cannot claim to be heard, but it is the duty of the court to affirm the decision of the appraisers.

THIS case comes here by virtue of a writ of certiorari, issued to the Circuit Court of Appeals for the Second Circuit. It arose out of a conflict of views between the collector and the importers as to the manner of classification and the rate of duty to be imposed upon an importation of tobacco.

The importers had imported through the port of New York a certain amount of leaf tobacco, which was classified for duty by the collector of that port, a portion at 75 cents and another portion at 35 cents per pound, under paragraphs 246 and 247 of schedule F of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 503. As the decision herein does not turn upon those provisions, they are not set forth.

The importers were dissatisfied with the matter of classification and with the duties imposed, and therefore, pursuant to section 14 of "An act to simplify the laws in relation to the collection of revenues," approved June 10, 1890, c. 407, 26 Stat. 131, 137, gave notice in writing to the collector, setting

forth therein, by way of protest, distinctly and specifically, the reasons for their objections. Section 15 of the same act provides for a further review.

The sections of the act, so far as material, are set forth in the margin.[1]

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[1] SEC. 14. 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 . . . 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 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 accordingly, 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.

SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the collector, or the Secretary of the Treasury*, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee or agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said Circuit Court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court

The protest made by the importers was a detailed and comprehensive statement, and it was evidently intended to cover all possible objections and claims upon the subject of the proper duties to be collected from and the classification of the tobacco.

The board of appraisers on the 18th of July, 1893, decided the various questions raised by the protest of the importers, and held, among other things, that the bales of tobacco had been properly opened and examined by the appraiser, although only one bale in ten had been examined; that a fair average had been made under section 2901 of the Revised Statutes, and while the examination might not have furnished a precise description of the goods, the board held there was no reason to suppose that it was not as favorable to the importer as to the Government. All the questions were decided against the importer with the exception that the decision of the board closed as follows: "In the absence of the merchandise and of any evidence to impugn the returns of the appraiser, or to show the character of the tobacco, we find that the returns were correct, and in accordance therewith we hold that in the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per

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such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said Circuit Court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision, etc. (The balance of the section is rendered obsolete by the act of 1891 providing a Circuit Court of Appeals to which such appeals now go instead of to this court. 26 Stat. 826; Supplement to R. S., pages 901, 903, sec. 6.)

cent or less of wrapper tobacco. To this extent the protests are sustained; otherwise the decisions of the collector are affirmed."

It is now claimed by the Government that the direction in regard to the reliquidation, as above quoted and which was favorable to the importer, was erroneous, and that the result of prorating, as directed in the decision, will be to reduce the amount of the duties to be collected on account of the tobacco.

The importers were dissatisfied with the decision of the board in overruling their protest as to the rate and amount of duty chargeable on the tobacco, and therefore, on August 15, 1893, they applied to the Circuit Court of the United States, sitting in the city of New York, for a review of the questions of law and fact involved in such decision. The Government made no application of any kind, although the order of the board showed upon its face that, in respect to prorating, it altered the decision of the collector and to the extent of the alteration it was favorable to the importers. The Circuit Court upon reading and filing the application of the importers made an order that the board of appraisers should return to that court the record, together with a certified statement of facts in the case and their decision thereon, and in pursuance of that order the board made return of the record, etc., and after such return had been made the importers filed a petition stating their desire to present further evidence in the matter, and an order was entered that it be referred to General Appraiser Sharpe to take and return to the court such further evidence as might be offered.

The only evidence taken before the general appraiser was "the entry in this case by the Rotterdam, June 30, 1890, entry number 104,642, and the invoice and other papers accompanying the same or thereto attached, with the exception of the protest."

No further proceedings were taken in the Circuit Court until the 19th of December, 1895. At that time the importers had become convinced that they could not succeed upon their appeal, and, as appears from the order of the court when the case came on for hearing and determination before it, they

"conceded in open court that there was no error in said decision of the board of general appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the board of general appraisers should be reversed for manifest error therein;

"And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the board of general appraisers, because they had not proceeded under the statute to seek a review of such decision of the said board of general appraisers;

* * * * *

"It is ordered, adjudged and decreed that the decision of the board of general appraisers be and the same is hereby in all things affirmed."

It appeared in the record that no application, pursuant to section 15 of the act above mentioned, for a review of the decision of the board of general appraisers, had been made by the collector or the Secretary of the Treasury.

An appeal having been taken, by the Government, to the United States Circuit Court of Appeals for the Second Circuit from the judgment of the Circuit Court, the judgment appealed from was in all things affirmed. 38 U. S. App. 655. Upon the application of the Government a writ of certiorari from this court was issued, and the case brought here for review.

Mr. Solicitor General for the United States.

Mr. W. Wickham Smith for Lies & Co. *Mr. Charles Curie* was on his brief.

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

The Circuit Court of Appeals held that the Circuit Court was right in refusing the request of the Government to reverse the order of the board of general appraisers. The ground of the refusal of the Circuit Court was that the United

States had not proceeded in accordance with the provisions of section 15 of the act above quoted in order to have the right to ask for such reversal, and that when the importers, who had sought the review pursuant to the statute, conceded the correctness of the decision of the board of general appraisers and withdrew further opposition, it was the duty of the court to affirm the decision of the board, and the Government could not be heard to ask for a reversal of the order in the absence of an appeal by it.

The act of 1890 (above cited), under which reviews in relation to revenue decisions are to be taken, was passed "to simplify the laws in relation to the collection of the revenues." It provides a particular system of procedure for obtaining a review of the decisions of the collector and of the board of general appraisers in revenue matters. Compliance with the provisions of the act is necessary in order that a review may be had on the part and for the benefit of the Government as well as on that of the importers.

Under section 14, the decision of the collector is final and conclusive unless the owner, if dissatisfied with the decision, give notice in writing to the collector setting forth therein distinctly and specifically his objections. If such notice be given, the collector transmits the invoice and all the papers and exhibits connected therewith to the board of general appraisers, which then examines and decides the case thus submitted, and the decision of the board, or that of a majority, is final and conclusive upon all persons interested therein, except in cases where an application is filed in the Circuit Court, within the time and in the manner provided for in the following (fifteenth) section.

In that section, provision is made not only for a review by the importer, but it expressly includes the case where the collector or the Secretary of the Treasury shall be dissatisfied with the decision of the board, and it provides that the importer or the collector, or the Secretary of the Treasury, may, within thirty days after the decision, and not afterwards, apply to the Circuit Court of the United States for a review of the questions of law and fact involved in such decision.

The section provides further that the application shall be made by filing in the office of the clerk of the Circuit Court a concise statement of the errors of law and fact complained of, and by serving a copy of such statement on the collector in the case of a review on the part of the importer, and in case of a review on the part of the collector this copy is to be served on the importer, consignee or agent, as the case may be.

If therefore the Government, through the collector or the Secretary of the Treasury, seeks to review a decision made by the board of general appraisers because either of such officers may think such decision is in any or all of its provisions too favorable to the importer, the section (15) provides the way and the only way in which that review is to be obtained. If neither officer should take the proceedings so provided for, by applying for a review and filing with the clerk the statement of the errors of law and fact of which he complains and by serving a copy upon the importer, then the officer could not ask for a reversal of the decision, for it is clear that the appeal on the part of the importer would not give the Government that right. What would be the purpose of the provision for filing and serving this paper defining the errors of law and fact complained of, if, without it, the decision or any part of it made by the board could be reversed upon the application of the Government made on the appeal of the importer? The plan of the statute evidently contemplates action by both parties if both are dissatisfied.

We do not think the act can be fairly construed as meaning that where one party takes an appeal and files his statement of the errors of law and fact complained of by him and serves the same upon the opposite party, the latter can without himself making any application for a review, and, without filing or serving any statement of errors complained of, seek a reversal of the decision of the board upon any ground whatever. The fact that one party appeals furnishes no reason for holding that the other can obtain all the benefits of an appeal himself, without complying in any particular with the statute giving an appeal. There would be no reason

or fairness in so providing, and we are of opinion the statute properly construed does not so provide.

When therefore the case is before the Circuit Court upon the sole application of the importer, and he then admits that his appeal cannot be supported in law, and concedes that the decision of the board of general appraisers should be affirmed, the court ought to affirm that decision, and the Government cannot be heard to claim that the decision of the board or any part thereof should be reversed.

It is said that the Circuit Court, when the case was called and the importer conceded that the decision of the board of general appraisers was right, should have dismissed the case, and that it ought not to have affirmed the judgment of the board. The proceedings up to the time when the case was called in the Circuit Court had been regular, and the case was properly pending in that court for the purpose of a review upon the appeal of the importer. It lost no jurisdiction to proceed because of the confession of the importer that his appeal was without merit, but, on the contrary, when the confession was made, it amounted to the same thing as if after opposition the court had so decided, and, in that case, of course, the judgment would be affirmed.

When section fifteen provides that the Circuit Court shall "proceed to hear and determine the questions of law and fact involved in such decision," it means the decision of the board of general appraisers, which was properly brought before the court by virtue of an application regularly filed to obtain such review by the party against whom the decision was made, and we do not think it was ever intended to permit the court to reverse the decision at the instance of a party who had asked for no review and taken no proceedings to obtain it. This would be neither just nor fair, and it would result in erasing from the statute the provision for filing and serving the statement of the questions of law and fact complained of and a review of which was the object of the application. The statute ought not to be so construed as to permit such a review unless its language plainly demands it, which is not the case in this instance.

In the case of *In re Crowley*, 50 Fed. Rep. 165, the Circuit Court for the Southern District of New York decided this principle, only in that case it was against the importer. The collector sought a review of the decision of the board of general appraisers and the court affirmed the decision as made, but declined the importer's request to examine the question whether the board had correctly determined certain other matters, for the reason that the importer had made no statement of any error of law or fact complained of touching that decision, and had made no application for a review of the decision in that particular. We think the same rule applies here.

Whether the collector has any right to reliquidate for the purpose of assessing higher duties under some sections of the Revised Statutes, where an error is alleged to have been discovered in the original liquidation, it is not necessary to here determine. He has no right under this statute to a reversal of the decision of the board of general appraisers.

The cases cited by the learned counsel for the Government in relation to the California land titles, *United States* v. *Ritchie*, 17 How. 525, and *Grisar* v. *McDowell*, 6 Wall. 363, we think have no application, and do not aid in the proper construction of the act before us.

Although the Circuit Court has, upon the application of the parties, power to take further testimony after the case is brought before it, and to that extent it may be regarded as something in the nature of a new proceeding, yet the proper procedure in deciding the appeal is in nowise altered thereby, and unless a party has appealed, and filed and served his statement as above mentioned, the court ought not to reverse on his motion.

It is immaterial that the application is not named an appeal. It is such in substance, and the grounds and reasons for the appeal are to be stated. Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed.

If the Government desire to review any decision of the

board, it can do so by complying with the statute and stating wherein it complains of such decision. If it make no complaint, it may be regarded as satisfied with the decision as made.

As the Government in this case took no proceedings to review the decision of the board of general appraisers, it cannot be heard to object to an affirmance of such decision.

The judgment of the Circuit Court of Appeals must be

Affirmed.

HAYES *v.* UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 29. Argued January 28, 1897. — Decided May 23, 1898.

In the spring of the year 1825, when the grant of public land in controversy in this suit was made, the territorial deputation of New Mexico had no authority to make such grant.

This action was begun by appellant Hayes to obtain the confirmation of an alleged complete and perfect title to a tract of land of the area of 130,138.98 acres, situated in the county of Socorro, Territory of New Mexico.

In his petition Hayes averred that his alleged title was derived by mesne conveyances through one Antonio Chavez, to whom, on March 3, 1825, while the land was a part "of the public domain *of the Republic of Mexico*," a grant was made of the tract in question by the governor and departmental assembly "of the *Territory* of New Mexico." The exhibits attached to the petition, however, show, and counsel for the appellant admits in his brief, that the correct designations of the officials intended to be referred to were, respectively, the "political chief" and "territorial deputation."

Statement of the Case.

The *testimonio* furnished Chavez, as translated from the original Spanish, is reproduced in the margin.[1]

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[1] *Testimonio.*

Office of Secretary of the most excellent provincial deputation of the Territory of Santa Fé, of New Mexico.

Public session of the 16th day of February and 3d day of March, 1825.

I, the undersigned, secretary of the most excellent provincial deputation of the territory of Santa Fé, of New Mexico, do certify that in book second, wherein appears recorded the journal of the proceedings of its excellency, on page 41 of the book, it appears there was report made to said honorable body upon a petition, the tenor whereof, copied letter for letter, is as follows:

"Most Excellent Sir: I, Antonio Chavez, a republican citizen of the United Mexican States, and a resident of the town of our Lady of Belem, jurisdiction of this province of New Mexico, in the most ample and due legal form appear before your excellency and state, that finding myself very much crowded in the possession of my property and its appurtenances, as well in the pasturing of my stock as in the extension of agriculture, and desiring to remove to another place of greater capacity, with the honest purpose of enlarging both businesses, I apply to the superior wisdom of your excellency, to the end that, if such should be your high pleasure, you may deign to assign and adjudge me the tract called the San Lorenzo Arroyo, whose description and boundaries are: On the south the ranche of Pablo Garcia; on the north the little tableland of the Alamillo; on the east or west the Jara spring; and on the west or east the river known as the Del Norte; and the said land referred to in my petition being so uninviting, uncultivated, desolate and bleak, I earnestly believe, from your superior discernment, that your excellency, having in view and considering the matter, will have presented to you no obstacle to the granting, the adjudging and the assigning of the same to me; for, besides its contributing by cultivation and improvement to the benefit and security of the surrounding individuals, there will result to the province in general a great assistance and relief, inasmuch as at this point will be frustrated and prevented the incursions, ambushes and assaults of the enemies of our quietude and peace, who often invade and attack; and it will stop the exportation, deterioration and decrease of the little live stock they have left for the subsistence of the inhabitants and families of this needy province; wherefore I ask and pray that your excellency grant me what I pray for, whereby I will receive favor, grace and justice. I declare not to act with dissimulation, and as may be necessary, etc.

"Antonio Chavez."

Session of the 16th day of February, 1825.

This document will pass to the honorable the political chief of this territory in order that, in continuation, he report whether the land that this

Statement of the Case.

The juridical act evidencing the delivery of possession was read in evidence from a duly certified copy of the record thereof made on the records of the probate court

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party asks for pertains to that of the settlements of Socorro and Seviletta, and whether it is embraced in the same, and also whether, though it pertain to the settlements, it may, on account of their great extent, be granted to the petitioner without injury to a third party.

ANTONIO ORTIZ, *President.*
JOSE FRANCISCO BACA.
JOSE FRANCISCO ORTIZ.
PEDRO BAUTISTA PINO.
JUAN BAUTISTA VIGIL, *Secretary.* MATIAS ORTIZ.

MOST EXCELLENT SIR: It is certain that the application of Antonio Chavez, a resident of Belem, refers to a part of the tract of Socorro and a portion of that which belongs to Seviletta, but it is also certain that on account of the great extent of both tracts and it being where their possessions separate, far from being injurious to those settlements, there results to them a benefit, for the reasons which I will proceed to state, as follows: The first and most important is the increase of the population to such a degree that it will afford means to the said settlements of Socorro and Seviletta by guarding a portion of the entrances and exits of the savages, who, though at peace, come to rob as those at war endeavor to harass the same settlements or those surrounding or near them. The second, that to the residents of the said new settlements there remain most ample lands for pastures, fields, uses and transits, so that the land which may be granted to Chavez will cause them not the least scarcity, as on another occasion that granted to Sabinal did not to Belem, or even to Seviletta itself, though it was an appurtenance of the first. The third, that making to the said Chavez the grant he asks would produce the emulation desired, so that the desirable vacant lands of the Bosque del Apache and San Pascual may be settled, which lands upon the one and the other bank present the greatest advantages to stock raisers and farmers, for, although they may have lands in the centre of other settlements, these from their age are full of locusts and worn out by constant cultivation. Fourth. That the petition of Antonio Chavez has in it more of necessity than of effectation or covetousness, inasmuch as from that individual the Navajo tribe has taken the greater part of his live stock, and he requires a tract from which, through its productiveness, to reëstablish himself from the losses he has suffered during the war with the said tribe. Fifth, that the slightest damage not resulting to Socorro and Seviletta from the grant which Chavez asks, it is very probable that the people there, for their poverty is well known, will have a place where they may get employment which may furnish them subsistence and which (like their neighbors, who are subject to the same, almost, deplorable condition) they lack.

of the county of Socorro, and is also reproduced in the margin.[1]

It was averred that after receiving possession as aforesaid,

[1] For all these reasons and many others, which I omit in order not to trouble your excellency, I am of opinion that the petition of Antonio Chavez may be acceded to at once, to which the people of the settlements aforesaid will make no objection, unless some peevish person or other enemy of the welfare of his fellow-creatures should unjustly persuade them with pretexts which never lack against that which is not wanted. This is what I can report to your excellency in compliance with what was resolved and in accordance with the practical knowledge I have in the matter. God preserve your excellency many years.

Santa Fé, 25th of February, 1825. BARTOLOME BACA.

Session of the 3d day of March, 1825.

Book two of the journal of the most excellent territorial deputation of New Mexico, on the 43d page thereof, says the reading of two reports was proceeded with, which his excellency the political chief then presented upon the petitions of Antonio Chavez and Pedro Jose Perea for lands, and this honorable body being advised thereof resolved that there be adjudged to the two individuals the land they ask, filing in the office of the secretary of this honorable body the original expedients, as is provided, ordered and customary in similar cases and furnishing the parties interested the corresponding *testimonio*, which will serve them as title, and with which Antonio Chavez will present himself to the alcalde of Socorro that he may place him in possession, and Pedro Jose Perea to Juan Esteban Pino, esquire, for the same action.

This agrees faithfully and legally with the original from which, as due testimony and by direction of the most excellent territorial deputation of New Mexico, I have taken the present copy, of which there has been furnished the parties interested the corresponding *testimonio*, which will serve them as title.

Santa Fé, March 5, 1825. JUAN BAUTISTA VIGIL, *Secretary*.
(Vigil's Rubric.)

Fees for all that has been done, twenty dollars.

I, Juan Francisco Baca, citizen and constitutional alcalde of the jurisdiction of San Miguel del Socorro, under the authority conferred upon me in the premises, proceeded on the twentieth of April, of the year one thousand eight hundred and twenty-five, to place in possession the citizen Anto. Chavez upon the land that he applies for; and in obedience to the order which, under date of the fifth of March of the said year, said Chavez, a resident of the district of Santa Maria de Belem, presented me, borne upon the grant he exhibited to me from the most excellent provincial deputation of this Territory of New Mexico, with a report of the political

Chavez resided upon and cultivated the lands, and held and claimed the same as his private property in "fee simple absolute," free from all conditions or charges, "occupying the same openly, continually, notoriously, peaceably and exclusively" until his death, the date of which is not stated, when his widow succeeded to the title, and similarly possessed and occupied the tract until October 26, 1850, "when she duly conveyed all and singular the said tract of land upon a pecuniary consideration to Rafael Luna, Anastacio Garcia and Ramon Luna." Similar allegations as to possession, claim of ownership and cultivation were made concerning the subsequent conveyances in the claim of title.

It was averred that two reports upon the Chavez grant — the earlier favorable, the other unfavorable — were communicated to Congress by surveyors general for New Mexico; and it was further averred that prior to the making of the second report a committee of the House of Representatives reported

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chief, which accompanies said grant, directing me to proceed to place Chavez in possession of the land he asks; in consideration whereof, I should proceed, and I did proceed, with two aldermen of this ayuntamiento, and two residents of this district, to whom I caused to be exhibited the order and the grant, the former being Anselmo Tafoya and Marcos Baca, and the latter being the citizens Jose Lionicio Silva and Augustin Trugillo, and as such alcalde did place the citizen Antonio Chavez in possession on the said land which he applies for, performing the ceremonies the laws require of me, assigning him for landmarks on the north, where the small tableland of the Alamillo begins; on the east, the del Norte River; on the south, a small forked cedar tree in the middle of the bend of the Pablo Garcia ranch, commonly so called, this little cedar being on the same side with the main road which is travelled toward said Socorro, on the side of the meadow; on the west, the spring known as the Jara spring. As alcalde aforesaid, in pursuance of direction, and in virtue and in form of law, I took the said Chavez by the hand and led him over his land, and he, in observance of the customary ceremonies, shouted, "Long endure the nation and our independence, and long live the sovereign," and he shouted and plucked up herbs, cast stones, and they praised the name of God, and by authority I left the party interested in peaceable possession, and I, under the authority which is conferred on me, authenticated and signed this, with two witnesses in my attendance, to which I certify on said day, month and year. JUAN FRANCISCO BACA.

Attending: VINCENTE SILBA.

Attending: JULIAN ORCANA. (X.)

Counsel for Parties.

back to that body a bill to confirm the claim, with a recommendation that it pass as amended. What, if any, action was taken thereafter by Congress, is left to conjecture.

It was also averred that the grant had been correctly surveyed by the United States, under the direction of the surveyor general for New Mexico, and a map showing the extent and boundaries of the tract was filed with the petition. About 20,000 acres of the land lying in the eastern portion of the tract delineated on the map was formerly appurtenant to the towns of Sorocco and Seviletta, referred to in the report of the political chief set out in the *testimonio*.

In substance, the answer of the United States averred that the grant to Chavez was void for want of authority in the granting body, and, further, that if the grant was valid, the survey did not correctly show the western boundary, and the area of the tract was much less than was claimed in the petition.

The Government also denied that the land granted was possessed, cultivated and occupied by Chavez and those claiming under him, as averred in the petition. An answer was also filed on behalf of the Atlantic and Pacific Railway Company, in which it set up title under its charter to odd-numbered sections of land within the limits of the premises described in the petition, and prayed that the petition of plaintiff be dismissed as to such sections.

Testimony was taken in the cause, and, after hearing, the Court of Private Land Claims entered a decree rejecting the grant and dismissing the petition. An application for a rehearing having been refused, an appeal to this court was allowed. The transcript of record contains a stipulation on behalf of the United States, admitting that on the trial "the petitioner proved sufficient proprietary interest in the subject-matter of this litigation to enable him to present and prosecute his petition herein."

Mr. John H. Knaebel for appellant.

Mr. Matthew G. Reynolds for appellees. *Mr. Solicitor General* was on his brief.

Opinion of the Court.

MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The main question presented by the contention of the parties is as to the power of the territorial deputation of New Mexico, in the spring of 1825, to make grants of public lands situated within the boundaries of that territory. We therefore pretermit an examination of the controverted issues as to possession in order to first address ourselves to the fundamental legal question upon which the decision of the cause substantially depends. To understand the issue to be considered it is necessary to recall a few facts connected with the overthrow of the dominion of Spain in Mexico and the establishment in the latter country of an independent government.

After the successful revolution by which Mexico was severed from the control of the crown of Spain, and following the deposition of the Emperor Iturbide, a representative body was assembled, which was known as the constituent Congress of Mexico, and this body adopted, on January 31, 1824, what is termed the constitutive act. In that instrument New Mexico was recognized as a state of the federation, and in article 7 it was provided that the territories of the federation should be directly subject to the supreme power which, in article 9, was divided into legislative, executive and judicial. 1 White New Rocopilacion, p. 375; Reynolds' Spanish and Mexican Laws, p. 33.

Under the provisions of the constitutive act what has been styled the general constituent Congress was elected, and on July 6, 1824, it was decreed that "the province of New Mexico remains a territory of the federation." Reynolds, p. 117. Subsequently, on August 18, 1824, the same Congress adopted a general colonization law which, in articles 11 and 16, vested the supreme executive power with sole authority to regulate and control the disposition of public lands in the territories. On October 24, 1824, the general constituent Congress adopted a permanent constitution, which, in article 5, enumerated, as one of the parts of the federation, the "territory of Santa Fé of New Mexico." Reynolds, p. 124.

It is manifest that the necessary effect of the decree of July 6, 1824, the colonization law of 1824, and of the constitution of October 24, 1824, was to deprive the officials of a territory of the power to dispose of the public lands, even though it be *arguendo* conceded that such power had theretofore been possessed by the officials who exercised authority within the area which was made a territory by the constitution.

But it is earnestly and elaborately argued that, as by the constitutive act New Mexico was recognized as a state of the federation, the Congress could not subsequently constitutionally reduce New Mexico to the rank of a mere territory, and that this court, in disposing of this case, must therefore disregard the Mexican constitution and hold that, as a state, New Mexico succeeded to the sovereignty and dominion of all the lands within its borders which formerly belonged to the king or crown of Spain, and, further, that we must in substance assume the acts of the officials who made the grant in question to have been those of state officials. The position thus taken, however, is so utterly in conflict with the facts and is so inconsistent with the case made by the petition as hardly to be entitled to serious notice.

Not only, as we have stated, had New Mexico been declared a territory prior to the passage of the colonization law of August 18, 1824, but such status has been reiterated in the fifth article of the Constitution of October, 24, 1824. Moreover, it is averred in the petition that the grant for which confirmation is sought was made by the "Republic of Mexico," through the territorial deputation of New Mexico, and it is specifically alleged that the land granted was prior to the making of the grant part of the public domain of the republic. And the muniments of title to the original grantee, put in evidence on behalf of the petitioner, support these averments, and clearly show a recognition of and execution by New Mexico of its status as a territory imposed by the decree of July 6, 1824, and the constitution of the following October. Thus, in the preamble of the *testimonio*, it is recited that the official who certifies to it, his certificate being

dated March 5, 1825, is "secretary of the most excellent provincial deputation of the territory of Santa Fé of New Mexico," and it will be remembered that this was the exact designation of the territory employed in the Constitution of October 4, 1824. On February 16, 1825, in referring the petition to the political chief for report, the territorial deputation alluded to that official as the political chief of the "territory." Again, in the extract from the journal of March 3, 1825, the record is referred to as "book two of the journal of the most excellent territorial deputation of New Mexico;" and in the juridical act the deputation is styled the "provincial deputation of this territory of New Mexico."

In this condition of the record there can be no reason suggested for our entering upon an inquiry as to whether New Mexico might, in 1825, have rightfully insisted that it was a state and not a territory of the federation, nor are we at all concerned with the question as to what, if any, rights in public lands were vested in a Mexican state in the year mentioned. The grant upon which, if at all, petitioner was entitled to relief in the court below was not made by state officials, did not purport to be a grant from a state, and was manifestly intended not to be such.

The lands covered by the grant being public lands of the nation, and not being subject to grant by the authorities of the territory of New Mexico, it follows that the title upon which the claimant relies vested no right in him and was clearly not within the purview of the act of Congress conferring jurisdiction on the Court of Private Land Claims, for obviously it cannot be in reason held that a title to land derived from a territory which the territorial authorities did not own, over which they had no power of disposition, was regularly derived from either Spain or Mexico or a state of the Mexican nation.

The contentions by which the plaintiff in error seeks to avoid the controlling effect of the foregoing considerations are as follows: 1st. That the territorial government of New Mexico had power to dispose of the public lands of the nation because it is not affirmatively shown that the colonization law

of the 18th of August, 1824, had been promulgated in New Mexico at the time the grant in question was made. 2d. Because even if it be conceded that the authorities of the territory were without inherent legal power to have made the grant, nevertheless there is a presumption that they were authorized to make it by the chief executive power of the Mexican nation, or that their action in making it was subsequently ratified by the like authority. 3d. That any defect in the title of the plaintiff in error is barred by prescription. 4th. That whatever may be the want of title in the plaintiff in error as to all the lands embraced in the grant except the portions thereof taken from lands appurtenant to the towns of Socorro and Seviletta, as to such lands there clearly is no want of title, because it is certain that as to such lands there was power vested in the authorities of the territory to make grant of the same, and hence, at least to the extent that lands of this character were embraced within the grant, there should be a confirmation. We will consider these contentions in the order stated.

1st. Whilst it is true the record does not affirmatively show that the colonization law of 1824 had been promulgated in the territory of New Mexico at the time the grant in question was made, it by the strongest implication gives rise to the inference that it had been. Besides, the legal presumption of promulgation arises in the absence of proof to the contrary. The granting papers show on their face that the constitution adopted subsequent to the colonization law had been promulgated in New Mexico, and the inference of fact is fairly deducible that such also was the case as to the earlier law of 1824. The constitution of Mexico in article 16, paragraph 13, made it the duty "of the supreme executive power to cause to be published, circulated and observed, the laws and the general constitution." 1 White New Rec. 398. In the absence of proof the presumption of *omnia rita* creates the inference that the duty was performed. But the question of promulgation is an immaterial one. By the constitution New Mexico was a territory. The grant itself, as we have seen, discloses this to be the fact, and describes the lands as

those of the nation. Whatever may be the foundation for the claim that the states of the Mexican nation in virtue of their autonomy succeeded to the right of disposition of the public lands of the nation, as to which we express no opinion, clearly such power did not obtain as to the territories, and therefore whether or not the colonization law was promulgated becomes irrelevant, since the imposing of a territorial status on New Mexico by the constitution operated to restrict that territory to such powers alone as a territory might lawfully exercise, and therefore had the effect of depriving it of the power to alienate the national domain.

2d. The claim that because by the colonization law of 1824, the chief executive was authorized to dispose of the public domain, and by the regulation of 1828, adopted to carry out the law of 1824, the executive delegated to certain territorial officers power to grant lands, therefore the presumption must be deduced that the act of the territory in granting the public lands in question was either sanctioned by the executive at the time of the grant or at a date subsequent thereto, was duly ratified by such authority, is without merit.

By the first subdivision of the thirteenth section of the act creating the Court of Private Land Claims that court and this court on appeal are expressly prohibited from allowing any claim under the act "that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land." This manifest limitation upon the power of the court in passing upon the validity of an alleged complete grant requires that the court shall not adjudge in favor of validity unless satisfied from the inherent evidence contained in the grant, or otherwise, of an essential prerequisite to validity, viz., the authority of the granting officer or body to convey the public domain.

In this respect the act of 1891 is materially different from the statutes construed in the *Arredondo case*, 6 Pet. 691. That case concerned a grant by the king of Spain of land in Florida. The statutes under which the court exercised juris-

diction enjoined, among other things, as guides or rules of decision in passing upon a claim, "the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto;" etc. In view of provisions of this character, the court, beginning on page 722, devoted much attention to the question, "Whether the several acts of Congress relating to Spanish grants do not give this grant, and all others which are complete and perfect in their forms, 'legally and fully executed,' a greater and more conclusive effect as evidence of a grant by proper authority." Reviewing such acts, the conclusion was reached that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the officials executing a public grant, but that the court should, in deciding upon a claim, assume as a settled principle that a public grant is to be taken as evidence that it issued by lawful authority. (P. 729.) And in the *Peralta case*, 19 How. 343, in a proceeding under the act of March 3, 1851, relating to lands in California, the doctrine of the *Arredondo case* was applied.

But in the act of 1891 the court is required to be satisfied not simply as to the regularity *in form*, but it is made essential before a grant can be held legally valid that it must appear that the title was "lawfully and regularly *derived*," which imports that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified.

Controlled, as we are, by the grant of power conferred by the act of Congress, we are unable when the record discloses that the grant was not "lawfully and regularly derived . . . from any state of the Republic of Mexico having authority to make grants," to hold that it should nevertheless be confirmed because, although the proof convincingly shows that the grant does not conform to the requirements of the act of Congress, the grant yet must be held valid because of a supposed legal presumption. Indeed, if a legal presumption on the subject could be indulged in, the granting papers would

not authorize it to be invoked. They make no reference whatever to the colonization law, contain no allusion to the quantity of land contained in the tract granted, and if its area was as now claimed the tract contained nearly three times the maximum quantity of land designated in the twelfth article of the colonization law of 1824, or which was authorized by the regulations of 1828. If the grant made in 1825 could be measured by the power for the first time conferred on territorial officers in 1828, such an unreasonable and retroactive rule would not help the grant. It was not in accord with the regulations of 1828, and hence finds no support from those regulations. *United States* v. *Vigil*, 13 Wall. 449, 452. Further, while it is reasonable to presume that any order or decree of the supreme executive of Mexico conferring authority to alienate the territorial lands or ratifying an unauthorized grant to the extent authorized by law was made matter of official record, the petition does not aver, and the grant does not recite, nor was there any evidence introduced showing a prior authorization or subsequent ratification. In fact, it was not even shown that at or about the time of the grant the territorial deputation habitually assumed to grant lands, particularly under circumstances which would justify an inference that the supreme executive was informed of such procedure.

3d. The contention that the land has been acquired by prescription is based upon the theory that the time for prescription ran against the government of Mexico, and to support this claim it is said that under the Spanish law, whilst prescription did not run against the king on subjects relating to his prerogative or inherent governmental authority, that with reference to the mere ownership of the public domain, the king, the Spanish nation and the national government of Mexico as their successor, were subject to the bar of the statute of limitations like any private individual. But a decision as to the soundness of this proposition is wholly unnecessary for the purposes of this cause. By the Spanish law prescription was divided into ordinary and extraordinary. The term of the ordinary prescription as to immovable prop-

erty was ten years, (Partidas 3, Law 18, Title 29,) and the term for immovable property by the extraordinary prescription was thirty years. (Partidas 3, Law 16, Title 29.) But the requisites for the ordinary prescription were, 1st, good faith; 2d, just title; 3d, continued and uninterrupted possession for the time required by law. (Hall, p. 30; 2 White, 83; Orozoco, Legislation and Jurisprudence on Public Lands, Mexico, 1895, vol. 1, p. 300.) The just title required did not include a title which was absolutely void and derived from one who by operation of law had no power whatever to dispose of the property. (Partidas 3, Law 11, Title 20.) In speaking on these provisions of the Partidas, Schmidt, in his Civil Law of Spain and Mexico (p. 290), says: "It is also necessary that the contract by which the property was acquired should be a valid contract. Hence, a thing acquired by purchase, donation or any other contract made with an insane person cannot be acquired by prescription; nor property obtained from a minor or any other mode which the law holds invalid; but even in such cases the prescription of thirty years applies as is explained in paragraph 1 of the next section."

The provisions in the Partidas as to the distinction between the ordinary and the extraordinary prescription and the requirements essential to the former were substantially common to the civil law countries. Their practical equivalent was found in the Roman law. L. 24, C. *de rei Vindicat.*, L. 4, C. *de præscript. Longi temp.* They obtained in the intermediary law. They were reproduced in the Code Napoleon, Art. 2265. They are also adopted in the Louisiana Code. La. C. C. 3478 *et seq.* to 3484. Under all these systems, in interpreting the meaning of what is meant by just title, it has invariably been held that they do not embrace a title made by one who by operation of law had absolutely no power to convey. In speaking on this subject in *Francoise* v. *Delaronde*, 8 Martin, (La.) 619, where it was claimed that a sale, made at a time when the Spanish law was dominant, of a minor's property by a tutor, when by law the tutor had no authority to sell, could be the basis of the ten years' prescription because the purchaser

was in good faith and the deed was a "just title," the court, speaking through Matthews, J., said:

"From the order of the judge, it is presumable that the defendant believed that he gained a just and legal title to the lot, under the act of sale, supposing that all the formalities required by law had been complied with. In this he mistook the law: for the manner of sale and forms required by law were not pursued; *et nunquam in usucapionibus, juris error possessori prodest.* ff. eod. lib. 3, 31.

"However much the commentators of the Roman law have differed the one from the other, and the same person from himself at different periods, on the subject of mistakes of law, they seem to agree in this, that *juris error* is never a good foundation for acquiring property. 2 Evans' Pothier, 409, d'Aguesseau's dissertation, 2."

Pothier, in his treatise on Prescription (No. 85), says:

"In order that a possessor can acquire by prescription the thing which he possesses (speaking of course of the short or ordinary prescription) it is essential that the title from which his possession proceeds should be a valid title. If his title is void, a void title being no title, the possession which proceeds from it is a possession without title which cannot operate prescription."

In referring to the opinion of d'Argentrée, that a title absolutely void for want of legal power could not be the basis of a ten-year prescription, Troplong, in his treatise on Prescription, says, vol. 2, p. 905:

"This truth is so palpable that it cannot be contested. It has been acceded to by all the writers, whether civilist or canonist. It stands out plainly in the exposition of the reasons for the adoption of the title of prescription (in the Code Napoleon) given by M. Bigot de Preameneu. No one, said he, can believe in good faith that he possesses as owner, if he has not a just title; that is to say, a title which would in its nature be translative of the right of property, *and which is otherwise valid.* It would not be valid if it was contrary to law, and even although it be void only for a defect of legal form, it could not authorize prescription."

And this reasoning at once suggests the necessary relation between the requirement of good faith and that of just title. In the Roman law the latter was substantially a mere resultant of the former. Marcadé Prescription, p. 194; Ducaurroy Inst., t. 1, p. 382 *et seq.*

Where the want of just title is the result of a legal incapacity on the part of the seller, such a cause not only operates to render the title not just in legal intendment, but deprives the contract of the essential ingredients of legal good faith. "If then," says Marcadé (p. 201), "believing your vendor to be the owner when he was not, you knew he was a minor, an interdict, or otherwise incapable of selling, you could not then buy from him with the conviction that the contract was true and regular, and you could not therefore prescribe by ten years." . . .

But here the deed on its face purported to be a conveyance of the domain of the nation by a territory thereof. The want of power in the territory was the resultant of the constitution and laws of the nation, and was therefore an incapacity by operation of law, with knowledge of which the grantee was chargeable. Thus, not only did the just title not arise, but the essential element of legal good faith was wanting. And these twofold consequences, that is, want of legal good faith and the absence of just title which necessarily arise where a sale is made of the public domain, by one wholly without authority to make it, is clearly stated by Orozoco:

"The title is lacking, because a void title cannot be alleged nor be made to serve to prove the just cause of possession. *Quod nullum est nullum producit effectum.* For, as Pothier says, 'in order that a possessor may acquire, by prescription, the thing he possesses, it is indispensable that the title from which the possession proceeds be a legitimate title.' If his title is void, a void title cannot be considered a title, and the possession that proceeds from the same is a possession without title, which cannot produce prescription.

"The just cause is lacking, because this is nothing else than a proper title to transfer dominion, and a void title does not transfer it.

"Finally, good faith is lacking, because this is based not on an error of fact, which may be excusable in us, but we can never take advantage of error as against law. *Nunquam in usucapionibis juris error possessori prodest. Juris ignorantiam in usucapione negatur prodesse: facti vero ignorantiam prodesse constat.*"

As the ordinary prescription could not apply, and as the necessary time for the extraordinary prescription under the Spanish law had not run at the time of the acquisition of the territory by the United States, and as, clearly, whatever may have been the rule as to the operation of prescription against the Spanish or Mexican governments, it did not run after the treaty against the United States, it follows that the claim of prescription is without foundation. We have discussed this question upon the hypothesis that the record showed such possession prior to the cession to the United States as would have authorized the running of prescription if there had been good faith and a just title, but because we have done this we must not be considered as so deciding or even so intimating.

4th. Nor is there merit in a contention made with respect to the portions of the land granted which were carved out of lands appurtenant to the towns of Socorro and Seviletta. It is asserted that, at least as to these lands, the power to grant existed in the territorial deputation. This claim proceeds on the hypothesis that a land law of the Spanish Cortes of January 4, 1813, (Reynolds, p. 83,) was in force in New Mexico in March, 1825. This law looked to the reduction to private ownership of "all public or crown lands, and those of the municipal domains and revenues, . . . except the necessary commons of the town."

One half of the public and crown lands of the monarchy, excepting town commons, were reserved, in article VI, for *lucrative* alienation; while provision was made in clauses IX *et seq.* for disposition of the remaining public and crown lands, or of the farming lands of the municipal domain, in small tracts, the grants to be made by the common councils of such towns, subject to the approval of the provincial deputation. While counsel contends that this law empowered the legis-

lative bodies of the province, known as the provincial deputations, to dispose of the surplus lands of towns, that law does not expressly confer such authority. Article 4, which is relied upon, merely requires the deputations to make report to the Cortes as to the time and manner of carrying out the provisions of the law, to aid the Cortes in deciding what is best. Besides, this law of 1813 was held in *United States* v. *Vallejo*, 1 Black, 541, to be inoperative in Mexico after the enactment of the colonization law of 1824, and we are clearly of opinion that, as applied to a Territory, if entitled to the construction claimed for it by counsel for plaintiff in error, it was obviously repugnant to and inconsistent with the supreme power over the Territories reserved to the national government, particularly with the sweeping powers over lands in the Territories vested by the law of 1824 in the supreme executive power of the republic.

Moreover, if the town lands could have been granted under the supposed authority of the law of the Cortes of January 4, 1813, that law treated such lands as in the category of crown lands. The granting papers in evidence also warrant the inference that the lands were so regarded. Even then, though they were appurtenant to towns, they were subject to the disposition of the Spanish crown as part of the public domain, and authority to sell was not within the scope of territorial authority. *United States* v. *Sante Fé*, 165 U. S. 675, 708; *United States* v. *Sandoval*, 167 U. S. 278; *Rio Arriba Land and Cattle Co.* v. *United States*, 167 U. S. 298. Lands of this character being a part of the public domain they were subject necessarily to the authority of the Mexican nation, and the territorial officers were as absolutely void of right to sell them as they were to sell any other part of the public lands of the nation.

Of course the fact, if it be such, that the present claimant was a *bona fide* purchaser in good faith, who, in reliance upon the action of Congress with reference to similar grants, expended large sums of money on the faith of the validity of the title which he supposed he had acquired, cannot influence the action of this court. As said in *Crespin* v. *United States*, 168 U. S. 208, 218:

Statement of the Case.

"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."

The decree of the court below is

Affirmed.

Mr. Justice Shiras dissented.

Mr. Justice McKenna, not having heard the argument, took no part in the decision.

THE CARIB PRINCE.[1]

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

No. 45. Argued March 7, 8, 1898. — Decided May 23, 1898.

Under the settled doctrine of this court, that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous, this court accepts as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question in this case, by reason of the defect in the tank referred to in its opinion.

The condition of unseaworthiness so found to exist was not within the exceptions contained in the bill of lading, and, under the other facts disclosed by the record, the ship owner was liable for the damages caused by the unseaworthy condition of his ship; and there is nothing in the act of February 19, 1893, c. 105, 27 Stat. 445, commonly known as the Harter act, which relieved him from that liability.

The provision in that act exempting owners or charterers from loss resulting from "faults or errors in navigation or in the management of the vessel," and from certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent, the law has thereby also relieved him from the duty of furnishing a seaworthy vessel.

The Carib Prince, an iron and steel steamer, was built in England in the spring of 1893, for the carriage of passengers

[1] The docket title of this case is "*Josephine W. Wupperman* v. *The Steamship Carib Prince, her engines &c., Ernest Legge, Claimant.*"

and freight. She was fitted with a peak tank, triangular in shape, extending from the bottom of the ship to the between decks, the tank being intended to hold water to be used as ballast in trimming the ship. The sides of the tank were the sides of the ship; the after end of it was the collision bulkheads. It was twenty-four feet deep, and had a capacity of eighty-three tons of water. The angle irons, beams, strengthening bars, etc., which enabled the collision bulkhead to sustain the strain of the water against it, were on the inside of the tank, the face of the bulkhead showing in the No. 1 hold being smooth, except that the plates were lap-jointed. The strengthening bars were fastened to the bulkhead by a series of horizontal rivets, the heads of the rivets, inside No. 1 hold, being situated three or more feet above the floor of the hold.

On September 14, 1892, the Carib Prince was chartered to the Trinidad Direct Line Steamship Company for the period of four years. On August 31, 1893, while the vessel was in the possession of the charterers, and lying in the port of Trinidad, loading for a voyage to New York, a number of cases of bitters were delivered on board, consigned to J. W. Wupperman. They were placed in the No. 1 hold. The bill of lading delivered to the consignor contained the following exceptions:

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect or default whatsoever, of pilots, masters or crew in the management or navigation of the ship, quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted."

The ship left Trinidad on August 31, 1893, stopped for a short time at Grenada, just north of the Island of Trinidad, and from the latter port proceeded direct to New York. After leaving Grenada, and on the night of the 3d of September, by direction of the captain, the peak ballast tank referred to, and which adjoined the compartment in which the cases of bitters

Counsel for Parties.

were stored, was filled with sea water. This was done for the purpose of trimming the ship, which was several feet lower at the stern than she was forward. The next morning, or the second morning after, it was discovered that the water from the peak tank was escaping through a rivet hole into the No. 1 hold, the head of one of the rivets having been forced off. To recover the damage occasioned to the goods in question by the water which had thus gotten into the No. 1 hold, Mrs. Wupperman filed her libel in the United States District Court for the Eastern District of New York. Ernest Legge, master, on behalf of the owner, appeared and filed an answer, in which, after denying the material allegations of the complaint, the exceptions contained in the bill of lading were pleaded as a defence, and it was averred that said exceptions were valid in the port where the bills of lading were issued. It was also averred "that the owner and charterer used all due diligence to have her (the vessel) properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and alleged that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause."

The case was tried in June, 1894, and a final decree was entered in October following, dismissing the libel. 53 Fed. Rep. 266. From that decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the decree of the District Court. 35 U. S. App. 390. A writ of certiorari being allowed, the cause was brought here for review.

Mr. Harrington Putnam for appellant.

Mr. J. Parker Kirlin for appellee. *Mr. Everett P. Wheeler* filed a brief for appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

It was averred, in the answer, that the damage to the property of the libellant "was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage." The District Court and the Circuit Court of Appeals held that the sole cause of the accident was a latent defect in a rivet from which the head had come off, leaving the hole through which the water poured in and upon the merchandise of the libellant. This defective condition of the rivet was found to have been caused by the fact that the quality of iron had been injured during the construction of the vessel by too much hammering, so that it became brittle and weak, rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, and consequently causing the vessel to be unseaworthy at the time the bills of lading were issued and the goods were received on board. The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. *Compania La Flecha* v. *Brauer*, 168 U. S. 104, and cases there cited; *Stuart* v. *Hayden*, 169 U. S. 1; *Baker* v. *Cummings*, 169 U. S. 189, 198. As, after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to.

Upon this premise of fact, the first question which arises for solution is this: Did the exceptions in the bill of lading exempting the ship owner "from loss or damage from . . . accidents to or latent defects in hull, tackle, boilers and machinery or their appurtenances," operate to relieve him from damages caused by the state of unseaworthiness existing at

the inception of the voyage and at the time the bill of lading was signed? This question is no longer open, as it is fully answered in the negative by the decision in *The Caledonia*, 157 U. S. 124. In that case the damage sought to be recovered had been caused by the breaking of the shaft of the steamer by reason of a latent defect which existed at the commencement of the voyage. The exemption from liability, which was there asserted to exist, was predicated on a provision in the bill of lading, relieving the owner from "loss or damage . . . from delays, steam boilers and machinery or defects therein." It was held that the clause in question operated prospectively only and did not relate to a condition of unseaworthiness existing at the commencement of the voyage, and that it must be construed as contemplating only a state of unseaworthiness arising during the voyage. The principle upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The rule thus announced in *The Caledonia* but expressed the doctrine stated by Lord Selborne in *Steel* v. *State Line Steamship Co.*, L. R. 3 App. Cas. 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive "a construction not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken." The fact that the exempting clause in the present case refers to latent defects, whilst that passed on in *The Caledonia* embraced defects generally, does not take this case out of the control of the general rule laid down in *The Caledonia*. The decision in *The Caledonia* was based, not on the particular character of the defects there referred to, but on the general ground that, unless there were express words to the contrary, the language of the exempting clause would not be held to apply to defects, whether patent or latent, existing when the voyage was commenced. In other words, that where the owner desires the

exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract. An illustration of such contract was found in *The Laertes*, 12 Prob. Div. 187, referred to in the opinion in *The Caledonia*. In that case the bill of lading stipulated, not merely against latent defects, but against all such defects existing at the time of the shipment.

The condition of unseaworthiness found to exist not being then within the exceptions contained in the bill of lading, it remains only to consider whether under the facts disclosed by the record, aside from the exceptions in the bill of lading, the ship owner was liable for the damages caused by the unseaworthy condition of the ship. The contention is that, as the owner exercised due diligence to make the ship seaworthy, he was consequently not liable, because, under the present state of the law, a ship owner is no longer under the obligation to furnish a seaworthy ship, but only to exercise due diligence to do so. The radical change in the duties and obligations of ship owners which this proposition involves is asserted to arise from the statute of February 13, 1893, c. 105, 27 Stat. 445, commonly described as the Harter Act. The proposition rests on the assumed meaning of the second and third sections of that act. The second section is as follows:

"SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided."

Now, it is patent that the foregoing provisions deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by

contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied on consists in assuming that because the statute has forbidden the ship owner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, that thereby the statute has declared that without contract no obligation to furnish a seaworthy ship obtains in the event due diligence has been used. And the same fallacy is involved in the contention that this construction is supported by the third section of the act. The third section is as follows:

"SEC. 3. 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 in 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, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The exemption of the owners or charterers from loss result-

ing from "faults or errors in navigation or in the management of the vessel," and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, when due diligence has been used, cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship. These considerations dispose of all the questions arising on the record.

The decrees rendered both in the Circuit Court of Appeals and in the District Court must be reversed, and the case be remanded to the District Court for further proceedings in conformity with this opinion. And it is so ordered.

Mr. Justice Brown, with whom concurred Mr. Justice Brewer, dissenting.

For the reasons stated by me in *The Caledonia*, 157 U. S. 124, 140, I am compelled to dissent from the opinion of the court in this case. The accident in that case occurred by the breaking of a propeller shaft, owing to its having been weakened by meeting with extraordinarily heavy seas on previous voyages. No defect in the ship was visible, or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined.

The minority of the court, conceding the general principle that, in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of the beginning of the voyage, was of opinion that the Caledonia was exempt from the losses claimed by the exception in the bill of lading "of loss or damage from . . . machinery or defects therein." It was argued that

this exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, it would be subject. It evidently was not intended to be limited to mere breakages of machinery which should occur after the voyage began, since the breaking of sound machinery through the stress of weather is treated as an inevitable accident or peril of the sea, for which the ship would not be liable, whether there were an exception or not, and the following cases were cited as sustaining this proposition: *The Virgo*, 3 Asp. Mar. Law, 285; *The William Lindsay*, L. R. 5 P. C. 338; *The Miranda*, L. R. 3 Ad. & Ec. 561; *The Cargo ex Laertes*, 12 P. D. 187; *The Curlew*, 51 Fed. Rep. 246.

In the case under consideration the exception is more specific, and exempts the ship "from loss or damage from . . . accidents or latent defects in hull, tackle, boilers and machinery, or their appurtenances." It was admitted that the sole cause of the accident was a latent defect in a rivet from which the head had come off; that this defective condition of the rivet was caused by the fact that the quality of the iron had been injured during the construction of the vessel by too much hammering, so that it had become brittle and weak, thus rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea.

It was further found by the courts below that abundant diligence had been used in the construction of the vessel; that the defect in the rivet was a latent one which occurred at the time she was built; that it was not discovered and was not discoverable at that time or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed.

The question then arises as to what was meant by the exception of "latent defects." It evidently was not intended to refer to defects which became such after the beginning of the voyage through stress of weather or other perils of the sea, since the ship would not be liable for such defects or breakages, whether excepted or not in a bill of lading. A ship is never liable for an accident or breakage of machinery occasioned by perils of the sea, and the word "defects" is

never used in that connection. The words "latent defect," as ordinarily understood, apply to something existing at the time the ship or other vehicle was constructed, and such as was not discovered and could not be discovered by ordinary methods of examination. To exempt a vessel from the consequences of such a defect is neither unreasonable nor unjust, and most of the modern bills of lading contain a stipulation to that effect.

The case of the *Cargo ex Laertes*, 12 P. D. 187, is in point. Bills of lading, under which the cargo was shipped, contained, among other excepted perils, the clauses "warranted seaworthy only so far as ordinary care can provide," and "owners not to be liable for loss, detention or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, . . . even existing at time of shipment." The Laertes broke down from a latent defect which could not have been discovered by the exercise of all reasonable care, and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage. I do not regard the words "even existing at time of shipment" as adding anything to the words "latent defects," since in our view of those words, as ordinarily understood, they must have existed at the time of shipment.

The hardship of the ruling in the case under consideration appears the more manifest from the fact that the Carib Prince was a British steamer, and that the bill of lading was signed at Trinidad, a port governed by the English law.

I agree with the majority of the court that the Harter Act cuts no figure in this case. While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence had been used to make them seaworthy, it must be conceded that the language of the third section does not express such intent, since it only exonerates them from loss or damage resulting from faults or errors in navigation or management. But I think that recent cases in this court have

imposed a most severe and impracticable measure of liability — one which operates with great hardship upon the prudent and careful owner, and one which is calculated to invite further legislation in the direction of the Harter Act.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* ARCHIBALD.

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

No. 207. Submitted April 15, 1898. — Decided May 23, 1898.

It is the duty of a railroad company to use reasonable care to see that the cars employed on its road, both those which it owns and those which it receives from other roads, are in good order and fit for the purposes for which they are intended, and this duty it owes to its employés as well as to the public.

An employé of a railroad company has a right to rely upon this duty being performed, as, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished.

THE case is stated in the opinion.

Mr. John F. Dillon, *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* for plaintiff in error.

Mr. James Turner and *Mr. J. Henry Shepherd* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This suit, commenced in a state court, was removed to the Circuit Court of the United States for the Eastern District of Texas, on the ground that the defendant was incorporated under the laws of the United States. The object of the

action was to recover damages for a personal injury suffered by the plaintiff whilst engaged as a switchman in the employ of defendant. On the trial by a jury there was a verdict in favor of the plaintiff, and the judgment of the trial court entered on such verdict was subsequently affirmed by the Circuit Court of Appeals for the Fifth Circuit. (41 U. S. App. 567.) To that court error was prosecuted.

The errors assigned are based entirely on the theory that the trial court erred in refusing to give to the jury certain instructions asked by the defendant, and that the Court of Appeals also fell into error in affirming the action of the trial court. To clearly understand the contentions of the plaintiff in error it becomes essential to outline the facts.

The Texas Pacific and the Cotton Belt Railway Companies both had tracks entering the city of Shreveport. These tracks of the two companies were connected. A short distance off the line of the Texas Pacific there was a cotton seed oil mill, which was united by a spur track with the main line of railroad, as it ran through a railway yard. The Cotton Belt delivered to the Texas Pacific two oil tank cars in order that they might be by the latter delivered to the oil mill, where they were to be filled and then redelivered by the Texas Pacific to the Cotton Belt to be carried to their point of destination over its line. The tank cars were placed by the Texas Pacific near the oil mill on the spur track leading thereto. At a subsequent time — there being conflict in the testimony as to how long a period intervened — one of the tank cars having been filled with oil, the mill company requested that the loaded car be moved and the empty car be left on the spur track so that it might also be filled. To accomplish this purpose an engine, with a box car, moved down the spur track to couple to the oil cars, so as to place the loaded one on the main track preparatory to delivering it to the Cotton Belt. The plaintiff, a switchman, was ordered to uncouple the loaded from the empty tank car. These cars were both fitted with an appliance by which, if in good order, the coupling pin could be removed by a lever without the necessity of the switchman going between them. This appli-

ance, however, on the cars in question, when the switchman sought to use it, was found to be out of order, and he was therefore compelled to lean in between the two cars to draw out the coupling pin for the purpose of uncoupling, an operation shown to be usually resorted to when necessary. As he was making this movement his feet became entangled, and he was thereby suddenly exposed to the risk of being thrown between the cars and to the danger of being crushed to death. The entanglement of the feet of the switchman was caused by a broken brake rod, with links of chain attached to it and a hook at its end, which was hanging down under one of the cars, and which, in the movement of the car, was projected out into the space between the two cars, and caught the feet and legs of the switchman as he leaned between the cars for the purpose of doing the uncoupling. In his effort to escape being thrown between the slowly moving cars the right arm of the switchman was caught between the drawheads of the cars and was so badly crushed at the elbow that amputation was rendered necessary.

There was proof tending to show that the Texas Pacific inspected the cars in use on its road, not only those belonging to it but those delivered to it from other roads, and that where a car was found out of order the inspector marked upon it the nature of the defect found to exist, thereby giving warning on the subject to those who might handle it. The uncontradicted proof was that there were no marks on the cars in question calling attention to any defect. There was proof tending to explain the absence of a mark or marks calling attention to the defective condition, by showing that the car inspector of the Texas Pacific performed his duty at a point called the junction, which was outside of the place where the tracks of the Texas Pacific and Cotton Belt were connected, and hence that where a car was delivered by the Cotton Belt to the Texas Pacific by means of the connecting track inside of the junction no inspection of such cars was made by the Texas Pacific. The proof tended to establish that this was only necessarily the case where the car delivered by the Cotton Belt to the Texas Pacific, was by the

Texas Pacific redelivered to the Cotton Belt by means of the connecting tracks between the two roads, because when a car was so redelivered it was not carried by the Texas Pacific over its main track to the junction where the car inspector was presumed to discharge his duties. In case of cars delivered as above stated, and which were not therefore inspected by the Texas Pacific, there was proof giving rise to the inference that that company, in view of the fact that the cars were not intended to go out over its line, relied on the inspection which it presumed had been made by the Cotton Belt. The tendency of the proof on the foregoing subject was not, however, entirely concordant, as there was some proof tending to show that the duties of the car inspector of the Texas Pacific extended not only to the inspection of cars at the junction, but also to the inspection of cars received within that point under conditions similar to those under which the oil tank cars were received.

There are six assignments of error, the first of which may be at once dismissed from view, as it simply avers that the Court of Appeals erred in affirming the judgment of the trial court, without any specification of any particular error committed. The remaining five we will consider in their logical sequence, rather than in the order in which they are pressed in the brief of counsel. The consideration of the fourth and fifth assignments involves substantially the same legal contention. The fourth rests upon the refusal of the trial judge to give the following instruction:

"The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

The fifth upon a like refusal to give this instruction:

"It is the duty of a railroad company to use ordinary care in keeping the cars which their employés are called on to handle in repair, so as not to expose their employés to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over

their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of the defendant, because, in the first place, the car is to be handled only by switchmen, who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employés had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as foreign cars, is also settled. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 157 U. S. 72, 91. Said the court in that case (p. 91): "Sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employés to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted to its train." This general duty of reasonable care as to the safety of its appliances resting on the railroad, the instructions in question proposed to limit by confining its performance solely to such foreign cars as are received by a railroad "for the purpose of being hauled over its own road." In other words, the proposition is that where a car is received by a railroad only for the purpose of being locally handled, the railway as to such local business is dispensed from all duty of looking after the condition of the cars by it used, and may with complete legal impunity submit its employés to the risk arising from its neglect of duty. To

this length the proposition plainly goes, as is shown by its context, and is additionally illustrated by the argument at bar.

The argument wants foundation in reason and is unsupported by any authority. In reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated, and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation. The contention is without support of authority, since the cases cited to sustain it are directly to the contrary. They are: *Baltimore & Potomac Railroad Co.* v. *Mackey*, *supra*, and two New York cases, *Gottlieb* v. *N. Y., Lake Erie &c. Railroad*, 100 N. Y. 462, *Goodrich* v. *New York Central &c. Railroad*, 116 N. Y. 398, both of which were cited approvingly in the *Mackey case*. The theory upon which in the argument at bar it is claimed that the cases cited overthrow the very doctrine which in truth they announce, is based upon the use of the words in the *Mackey case*, "admitted into its train." Taking this as a premise, it is said the duty of a railroad to exercise reasonable diligence to furnish safe appliances exists only as to cars "admitted into its train," that is, cars which it receives and transports in one of its trains, and does not obtain as to cars which it receives and handles in its yards for local purposes only. It is obvious from a mere casual reading of both the *Mackey case* and the New York cases relied upon that the duty on the part of the railroad which they inculcate applies to all cars used by the road in its business. In addition, the case of *Flanagan* v. *Chicago & Northwestern Railway*, 45 Wisconsin, 98, is cited. But that case

gives no support whatever to the proposition. There a car, which had been broken and damaged, was put upon a spur track. To repair it, it became necessary to move it, and with the knowledge that the car was broken employés of the road took charge of it to remove it to the repair shop. The ruling was that under such circumstances the employé could not recover because of the defective condition of the car, and the case therefore but illustrates the general rule already referred to.

The second and third requests to charge were as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads on to defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew *or by the exercise of ordinary care could have known* that it was the custom of the defendant company not to inspect cars that were brought in, as they were, to be returned, then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover.

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom *or could have known it by the exercise of ordinary care*, then he assumed the risk of being injured by any defect in said car, and cannot recover."

These requests the court gave, except in the first it omitted the words therein italicized, that is, "by the exercise of ordinary care could have known," and the second, "or could have known it by the exercise of ordinary care." The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to fur-

nish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for and no authority exists supporting the contention that an employé, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer on the one hand may rely on the fact that his employé assumes the risks usually incident to the employment. The employé on the other has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employé is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject of course to the exception which we have already stated, by which where an appliance is furnished an employé, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues

to use it. In assuming the risks of the particular service in which he engages the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In *Davidson* v. *Cornell*, 132 N. Y. 228, the court said:

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. *Gibson* v. *Erie Railway Co.*, 63 N. Y. 449; *De Forest* v. *Jewett*, 88 N. Y. 264; *Sweeney* v. *Berlin & Jones Envelope Co.*, 101 N. Y. 520; *Hickey* v. *Taaffe*, 105 N. Y. 26; 12 N. E. Rep. 286; *Williams* v. *Delaware, Lackawanna &c. Railroad*, 116 N. Y. 628. Those not obvious assumed by the employé are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures or appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. *Kain* v. *Smith*, 89 N. Y. 375; *McGovern* v. *Central Vermont Railroad*, 123 N. Y. 280."

In *Missouri Pac. Railway* v. *Lehmberg*, 75 Texas, 61, 67, the court considered a refusal to give a requested instruction, that if there were "any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known of same, and said defects caused or contributed to the

injuries complained of, the jury should find for defendants." The court said:

"Without now considering the question whether the rule in this respect charges an employé with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employé to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employé knew or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles. The remaining assignment, the sixth, but presents, in a changed form, the questions which we have disposed of.

Affirmed.

Mr. Justice Brewer dissented.

KINGMAN v. WESTERN MANUFACTURING COMPANY.

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

No. 248. Submitted May 4, 1898.—Decided May 23, 1898.

A judgment is not final, so that the jurisdiction of the Appellate Court may be invoked, while it is still under the control of the trial court, through the pendency of a motion for a new trial.

THE Western Manufacturing Company, a corporation of the State of Nebraska, brought its action against Kingman & Company, a corporation of the State of Illinois, in the Circuit Court of the United States for the District of Nebraska, seeking a recovery of various amounts, on four causes of action, and demanding judgment in the aggregate for the sum of $18,990. Such proceedings were had that the cause duly came on for trial before a jury at the May term, 1895, of said court, which resulted in a verdict on June 4, 1895, one of the days of that term, against Kingman & Company for the sum of $1996.66. On the coming in of the verdict, the court, according to the practice in that jurisdiction, at once rendered judgment on the verdict. On June 6, 1895, it being still the May term, Kingman & Company filed its motion to vacate and set aside the judgment and for a new trial of the cause, for various reasons therein stated. The motion was heard, and on December 11, 1895, being one of the days of the November term, 1895, of the court, was overruled by an order entered that day in the following terms: "This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties; whereupon, after careful consideration thereof and being fully advised in the premises, it is now on this day considered, ordered and adjudged by the court that said motion be, and the same is hereby, overruled, and

that the judgment heretofore entered herein be and remain absolute."

On the next day, December 12, one of the days of the November term, an order was entered giving Kingman & Company thirty days from that date "in which to prepare and present its bill of exceptions herein."

The bill of exceptions was duly served on the attorneys for the Western Manufacturing Company, and was by them endorsed: "Dec. 30, 1895. Returned without amendment;" was presented to the trial judge for his signature, and was by him duly allowed, signed and filed, January 11, 1896. The petition of Kingman & Company for writ of error and an assignment of errors was filed, the writ of error duly allowed and issued, bond approved and filed, and citation signed, all on January 20, 1896. The citation was served January 21 and returned, and filed January 22. The record was filed in the Circuit Court of Appeals for the Eighth Circuit March 14, 1896, and was printed. On the first day of May, 1896, the Western Manufacturing Company filed its motion in the Circuit Court of Appeals to dismiss the appeal because the court had no jurisdiction of the cause; and because more than six months had intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out the writ of error; of the filing of the petition for the writ of error; of the filing of the assignment of errors; of the filing of the bond; and of the service of the citation. This motion was sustained and the writ of error dismissed, with costs, for want of jurisdiction. A petition for rehearing was denied, and, thereafterward, a writ of certiorari was issued removing the cause to this court.

Mr. Walter J. Lamb for the Western Manufacturing Company.

Mr. James H. McIntosh for Kingman.

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

Opinion of the Court.

In *Aztec Mining Company* v. *Ripley*, 151 U. S. 79, it was held that this court had jurisdiction by appeal or writ of error to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question whether their judgments were made final by section six of the act of March 3, 1891, c. 517, 26 Stat. 826. The present case was one of the classes of cases in which the judgments of the Circuit Courts of Appeals were made final, and, therefore, the remedy was properly sought by certiorari.

By section eleven of that act it is provided that "no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

By section six the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit Courts, except where cases are carried, under section five, directly to this court, but by the seventh section, as amended by the act of February 19, 1895, c. 96, 28 Stat. 666, jurisdiction is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. *Kirwan* v. *Murphy*, 170 U. S. 205.

This provision is an exception to the general rule, and while the language of section eleven refers to the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees.

The question is, then, whether the judgment of which Kingman & Company complained became final for the purposes of a writ of error six months before the writ was sued out.

By section 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials "for reasons for which new trials have usually been granted in the courts of law;" and by section 987 provision is made where judgment had been entered on a verdict, or a finding of the court on the facts, for stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within that time, execution

was further stayed as of course; and "if a new trial be granted, the former judgment shall thereby be rendered void." These sections were brought forward from sections seventeen and eighteen of the original judiciary act of September 24, 1789, and the latter section is supplementary and additional to the other.

At common law motions for new trial were made before judgment, but under the statutes of many of the States judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.

By section 5889 of the Compiled Statutes of Nebraska applications for new trial must be made at the term when the verdict is rendered, (except on the ground of newly discovered evidence,) and within three days after verdict unless unavoidably prevented.

The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Manufacturing Co.*, 151 U. S. 135; *Brockett* v. *Brockett*, 2 How. 238, 249; *Texas and Pacific Railway* v. *Murphy*, 111 U. S. 488; *Memphis* v. *Brown*, 94 U. S. 715; *Northern Pacific Railroad* v. *Holmes*, 155 U. S. 137. In *Memphis* v. *Brown* the judgment was in mandamus, and a motion had been made to set it aside, which was denied, and thereupon the judgment was reëntered. The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably sued out within

section 1007, Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a supersedeas." No reference was made to any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed section 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial.

The subject was much considered by Judge McCrary in *Rutherford* v. *Penn Mutual Life Insurance Company*, 1 McCrary, 120, where he held that "a writ of error will operate as a supersedeas if duly served within sixty days, Sundays excluded, after a motion for new trial has been overruled," and by Judge Sabin in *Brown* v. *Evans*, 18 Fed. Rep. 56, where the same conclusion was reached, and it was held that where a motion for a new trial had been made and entertained, the judgment in the case did not become final and effectual for purposes of review until the date of the order of court overruling such motion. And see *Alexander* v. *United States*, 15 U. S. App. 158, 169; *Scott's Administrator* v. *Stockton*, 41 U. S. App. 579; *Andrews* v. *Thum*, 33 U. S. App. 430.

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error," said Chief Justice

Waite in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

And in *McLish* v. *Roff*, 141 U. S. 661, 665, it was observed by Mr. Justice Lamar: "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, (with the single exception of the provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The Circuit Courts of Appeals are governed by the same principles.

Unquestionably it is the general rule that after the expiration of the term all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control unless steps be taken during that term by motion or otherwise, to set aside, modify or correct them. *Hickman* v. *Fort Scott*, 141 U. S. 415. But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception.

It is true that a writ of error does not lie from this court or the Courts of Appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and, having power to grant the motion, the judgment is not final for the purpose of taking out the writ. The effect of a judgment, entered at once on the return of the verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial. We

do not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled.

The judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings.

UNITED STATES *v.* COE.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 8. Argued March 14, 15, 1898. — Decided May 23, 1898.

After a careful examination of all the acts of the Mexican authorities upon which the appellee claims that his title to the grant in question in this case is founded, the court arrives at the conclusion that the officers who made the grant had no power to make it; and the decree of the Court of Private Land Claims establishing it is reversed, and the case is remanded for further proceedings.

This suit was originally instituted February 2, 1892, by the Algodones Land Company, under provisions of an act entitled "An act to establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain States and Territories," approved March 3, 1891, c. 539, 26 Stat. 854.

Pending the litigation, the Algodones Land Company conveyed the property to Earl B. Coe, and upon motion the action was revived in his name.

The basis of the claim is an alleged grant, which shows: That one Fernando Rodriguez, on January 4, 1838, at Hermosillo, presented a petition to the treasurer general of the state of Sonora, Mexico, stating that he had sufficient means to settle and cultivate a tract of vacant desert land, on the northern frontier of the state, situated between the Colorado and Gila rivers, said lands including the tract from the southern side of the Gila River, in front of the junction of the same with the Colorado River, as far as the crossing (paso) of the Algodones,

and from said point following the eastern margin of the Colorado River as far as the junction of the same with the Gila, a distance of five leagues.

"Wherefore, in the name of the sovereign authority of the state," he formally registered the same and asked that a person be appointed to make the measurements and valuation and the necessary publications, "as required by law."

He also offered at the proper time to furnish satisfactory evidence as to his ability to pay the just taxes (derecho) into the public treasury —

"It being understood, señor treasurer, that the registry that I now make is under the condition that the settlement and occupation of the said vacant lands by me shall be when the notorious condition and circumstances of the region of the country in which said lands are situated may permit the same to be done; since the said vacant lands are situated in a country desert and uninhabitable on account of the hostility of savages; it being well known that a settlement made by the Spanish government in the desert country of Colorado was entirely destroyed in a short time by the Yuma Indians and other savages, etc."

Thereupon a commissioner was appointed by the treasurer general, who was directed to ascertain whether the grant would conflict with the rights of any other parties; also to survey and appraise the lands and offer the same for sale under the provisions of certain designated laws of the state.

This commissioner, in the performance of the duties assigned him, caused the land to be appraised and surveyed, and thereafter offered the same for sale at public outcry on each day for thirty consecutive days.

In his petition Rodriguez offered to pay for the land the amount at which it should be appraised, and no other person having bid at any of the public offers, the record of the proceedings was returned to the treasurer general for final action. That officer thereupon referred the matter to the promoter fiscal of the public treasury, who upon a review of the proceedings, declared that Rodriguez ought to be admitted to a composition with the treasury of the state for said lands, and

recommended that three public offers be made, closing his report with the following language:

"This is the report of the undersigned fiscal. Your honor (the treasurer general) will do what is proper in the premises."

The treasurer general thereupon ordered that three public offers of sale be made of said lands in the manner established by law. The "junta de almoneda," or board of sale, thereupon proceeded to make three public offers of sale on consecutive days, and on the third offer declared Rodriguez to be the purchaser.

Thereafter the treasurer general executed a formal instrument in writing, in which, after referring to the proceedings thereto had, he recites as follows:

"Wherefore in the exercise of the faculties conceded to me by the laws, decrees and regulations and the superior existing orders in relation to lands, by these presents, and in the name of the free, independent sovereign state of Sonora, as well as that of the august Mexican nation, I concede and confer upon, in due form of law, the Señor Don Fernando Rodriguez, . . .

"The five square leagues, and adjudicate the same to him under the conditions which have been admitted as equitable and just by interested party, the Señor Don Fernando Rodriguez, that is, that he shall settle and cultivate said lands so soon as the circumstances surrounding that distant and desert portion of the state may permit him to do so, in view of the imminent risk and danger there is on account of the savages, but when the said lands shall once be settled and cultivated, they shall be kept in condition, and that they shall not be unoccupied and abandoned for any time; and if the same shall be abandoned for the space of three consecutive years, and any one else denounce said lands, in that event, after the necessary proceedings, they shall be adjudicated anew to the highest bidder; excepting as is just, those years in which the abandonment was occasioned by the invasion of the enemies, and this only for the time that this condition of things exists," etc.

The "junta de almoneda," or board of sale, consisted of

certain officers, among whom was the treasurer general. The powers of the board with reference to the sale of public lands were conferred and defined by the laws of the central Mexican government.

Mr. Matthew G. Reynolds, special assistant to the Attorney General for appellant. *Mr. Solicitor General* was on his brief.

Mr. A. M. Stevenson for appellee. *Mr. S. L. Carpenter* and *Mr. Frederick Hall* were on his brief.

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

We shall assume the genuineness of the title papers. It was so found by all the judges of the court below and, notwithstanding some irregularities in them, we are disposed to concur in the finding. The question which remains is, did the officers who made the grant have the power to do so?

Section 4 of the act establishing the Court of Private Land Claims provides that the petition of petitioners "shall set forth fully the nature of their claims to the lands, and particularly state the date and form of the grant, concession, warrant or order of survey under which they claim, by whom made, . . . and pray in such petition that the validity of such title or claim may be inquired into and decided."

In conformity to the act the petition in this case, after alleging ownership of the land, proceeds as follows:

"Your petitioner further represents that it owns, holds and possesses said land under and by virtue of a certain instrument of writing, now and hereafter designated as a grant title, bearing date the 12th day of April, 1838, duly made and executed by and on behalf of the state of Sonora, in the republic of Mexico, under and by virtue of article two (2) of the sovereign decree, number seventy (70) of the 4th of August, 1824, therein conceding to the state the revenues

(rentas) which by said law are not reserved to the general government, one of which is the vacant land in the respective districts pertaining to the same; and thereunder the honorable constituent congress of Sonora and Sinaloa passed a law, being a law numbered thirty (30), bearing date 20th of May, 1825, and whereunder there was subsequent legislation passing other decrees, considering the same matter, and being embodied in sections 3, 4, 5, 6 and 7 of chapter ninety of the organic law of the treasury, being law numbered twenty-six (26) of the second of July, 1834."

The source of the title is therefore alleged to be in the state of Sonora, and the basis of its authority is explicitly given.

(1.) Article two of the sovereign decree number seventy of the 4th of August, 1824.

(2.) A law passed by the constituent congress of Sonora and Sinaloa, being number thirty and bearing date 20th of May, 1825.

(3.) Other decrees, being embodied in sections 3, 4, 5, 6 and 7 of chapter ninety of the organic law of the treasury, being law numbered twenty-six of the 2d of July, 1834.

The petition then proceeds to allege, that under and by virtue of said laws and decrees such proceedings were thereunder regularly and lawfully had as that the government of the state of Sonora, by its officers duly authorized by the laws aforesaid, and of said state, duly and regularly and for a good and valuable consideration, to wit, the sum of four hundred dollars, ($400,) in the lawful money of the state, and for other good and valuable considerations, in said grant title set forth and described, did on the 12th day of April, 1838, sell and convey to one Señor Don Fernando Rodriguez the land hereinbefore mentioned, and more particularly hereinafter described.

The allegation or claim then is a grant from the state of Sonora. There is no claim of a grant from the Mexican government. The grant, however, recites that it is done "in the name of the free and independent sovereign state of Sonora as well as of the august Mexican nation."

It is conceded that the ownership of the public lands was in

Spain and passed to Mexico upon its independence, and afterwards vested in the Mexican confederation or republic.

In *Republic of Texas* v. *Thorn*, 3 Texas, 499, 504, Justice Hemphill said:

"That the right of eminent domain over the public lands was originally vested in the federal government of Mexico is, perhaps, not now subject to question. The confederacy of the Mexican states was not formed, originally, by a constitutional compact between the several separate independent states, nor by a grant of powers originally vested in the several provinces, which afterwards constituted the states of the union. The public lands of the United States of the north, before the acquisition of Louisiana and Florida, belonged originally to the several States, and became Federal property by purchase, or voluntary cession from the States. But, in the Mexican union, the general government claimed, originally, the property in the public domain. It is true that under former governments the provincial authorities had exercised certain powers of control over the public lands, but this was in subordination to the central or supreme authority of the country, whether vested in the crown, or represented by the vice royalty of New Spain, or in the sovereign provincial governing juntas, in the Emperor Iturbide, or the other authorities which succeeded, before the assemblage of the constituent congress which finally adopted the federal system, and out of the municipal subdivisions of the territory formed the states of the confederation."

If the title was in the Mexican union, how did it get into the states? There was no law explicitly conveying it. It is claimed, as alleged in the petition, by virtue of the sovereign general decree numbered seventy of the 4th of August, 1824, and the recital of the grant is:

"Whereas article II of the sovereign general decree No. 70, of the fourth of August, 1824, conceded to the states the revenue (rentas) which by said law are not reserved to the national government, one of which is the vacant land in the respective districts pertaining to the same, in consequence of which the honorable constituent congress of Sonora and Sinaloa passed

the law, No. 30, of the twentieth of May, 1825, and also subsequent legislations passed other decrees concerning the same matter, which dispositions have been embodied in sections 3, 4, 5, 6 and 7 of chapter 90 of the organic law of the treasury No. 26, of the 11th of July, 1834."

The decree of August 4, 1824, seems to be a revenue measure simply. We quote part of it, including sections 9 and 11, upon which special stress is laid:

"DECREE OF AUGUST 4, 1824.

"*Classification of general and special revenues.*

"The sovereign general constituent congress of the United States of Mexico has deemed it proper to decree:

"1. That import and export duties already fixed, and those which may be hereafter fixed under any denomination in the ports and on the frontiers of the republic, pertain to the general revenues of the federation.

"2. The import duty of fifteen per cent which shall be collected at the said ports and frontiers upon the tariff valuation, augmented by one fourth part upon foreign goods, which, on account of this duty, shall be free from local tax (alcabala) in the interior.

"3. The duty on tobacco and gunpowder.

"4. The local tax (alcabala) on tobacco at the places where it is raised.

"5. The revenue from the post offices.

"6. The revenue from the lottery.

"7. The revenue from salt mines.

"8. The revenue from the territories of the federation.

"9. The national property, in which are included that of the inquisition and the temporalities, and all other rural and urban estates which now belong, or which may hereafter belong, to the public treasury.

"10. The edifices, offices and lands attached to these, which now belong, or which formerly belonged, to the general revenues, and those which have been paid for for two or more of those which formerly were provinces, are subject to the disposal of the federal government.

"11. The revenues which are not included in the foregoing articles belong to the states."

This law was passed between the dates of the constitutive act and the adoption of the constitution, the latter event taking place in October. It is claimed that nothing is said in the provisions of the decree preceding the eleventh article regarding the public lands, and that hence it is asserted that they are assigned to the states by that article. It is besides contended that the colonization act of August 18, 1824, confers the right on the states to dispose of the vacant lands within their borders. This contention is supported by *Goode* v. *McQueen's Heirs*, 3 Texas, 241; *Chambers* v. *Fisk*, 22 Texas, 504; *Wilcox* v. *Chambers*, 26 Texas, 180.

But if it be true that the state had rights in and powers of disposition of the public lands, these rights and this power could be surrendered, and it is contended by the appellant that they were surrendered by the constitution of 1836. Preceding this constitution, October 3, 1835, a law was passed abolishing state legislatures, and establishing departmental councils. (Reynolds, 195.) This law contained the following provision:

"5. All the subordinate employés of the states also shall continue for the present, but the places now vacant or that shall become vacant shall not be filled, and they as well as the offices, revenues and branches of the service they manage are subject to and at the disposal of the supreme government of the nation, through the proper governor."

On the same day and as part of the same law the President made regulations, articles 10, 12 and 13 of which are as follows:

"10. In everything relating to the department of the treasury the governors and the respective officers shall proceed in accordance with the laws, regulations and orders of each state, in so far as may be compatible with the new organization of said revenues for the future.

* * * * *

"12. Said governors, in matters relating to the revenues, shall communicate directly with the supreme government

through the secretary of the treasury, to whom they shall forward all documents and statements and consult when they consider necessary, being careful to cite the laws, orders and proceedings (expedientes) there may be on the matter.

"13. Until the attributes of the government and departmental boards in what relates to the treasury are declared by law, said governors shall make no sales of land (fincas) or property (bienes), nor contracts nor extraordinary expenses for said department, without the previous approval of the supreme government."

Certainly, as far as this law could affect it, there could be no sales "without the previous approval of the supreme government."

Following this law and these regulations a law was enacted establishing bases for a new constitution. The provisions which are pertinent to our inquiry are as follows:

"8. The national territory shall be divided into departments on the bases of population, locality and other contributing circumstances. Their number, extent and subdivision shall be given in detail in a constitutional law.

"9. For the government of the departments there shall be governors and departmental boards; the latter shall be elected by popular vote in the manner and number the law shall provide, and the former shall be appointed periodically by the supreme executive power, upon nomination by said boards.

"10. The executive power of the departments shall reside in the governors in subordination to the supreme executive of the nation. The departmental board shall be the council of the governor; they shall be charged with determining and promoting whatever conduces to the welfare and prosperity of the departments, and shall have the economic, municipal, electoral and legislative powers the special law for their organization shall provide, being in the matter of the exercise of the latter class subordinate and responsible to the general congress of the nation.

* * * * *

"14. A law shall systematize the public exchequer in all

its branches; shall establish the method of accounts; shall organize the tribunal for the revision of accounts and regulate the economic and contentious jurisdiction in this department."

The constitution of 1836 has no provision in regard to the public lands, nor does it define the duties of the minor administrative officers. As to divisions into departments it enacts as follows:

"SIXTH LAW. — Divisions of the territory of the republic and internal government of its towns.

"ART. 1. The republic shall be divided into departments according to the eighth law of the organic bases. The departments shall be divided into districts, and the districts into partidos.

"ART. 2. The divisions into departments shall be made by the first constitutional congress during the months of April, May and June of the second year of its sessions; and it shall do so by a law that shall be a constitutional one.

"ART. 3. During the remaining portions of that same year the departmental assemblies shall divide their own departments into districts, and the districts into partidos. They shall report to congress for approval of the same. Until the divisions stated in the two foregoing articles shall be made, the territory of the republic shall be temporarily divided by a secondary law."

By Art. 1 of Law No. 1807, December 3, 1836, the Mexican territory was divided into as many departments as there were states, with certain modifications which did not affect Sonora. 3 Mexican Statutes, 258. The effect of the constitution and laws necessarily was the destruction of the states as such. The government then ceased to be federal in form, and became centralized in character. The power of Sonora as a state, therefore, was extinguished. We have said that the constitution of 1836 has no provision in regard to the public lands, but the laws passed under it deal with them in such manner as to preclude the further rights of the states as such over them.

On January 17, 1837, a law was passed (Reynolds, 210)

establishing a national bank and creating a fund for redeeming certain currency.

Articles two and three are as follows:

"2. The government, without loss of time, shall establish and provide regulations for a national bank, with the principal object of redeeming copper coin, the management of which shall be entrusted to persons elected by the different classes of society, in the manner said regulations shall provide, and who shall not be dependent on the government other than to render thereto an annual report of their administration.

"3. There are adjudicated to the bank for a redemption fund:

"First. All the real property of the nation that exists in all the territory of the republic."

On April 12, 1837, a law was passed (Reynolds, 223) the seventh article of which is as follows:

"Art. 7. For greater security in the payment of the capital and interest of the consolidated fund, the government of Mexico especially mortgages, in the name of the nation, 100,000,000 acres of public lands in the departments of California, Chihuahua, New Mexico, Sonora and Texas, as a special guaranty of said fund, until the total extinction of the credits; but if any sale of these mortgaged lands should be made, it shall be, at least, at the rate of said four acres to the pound sterling, and the proceeds thereof shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the corresponding warrant, and the latter shall employ the proceeds of the same to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands at the current price of said bonds in the market."

On April 17, 1837, a decree was promulgated (Reynolds, 224) creating the office of superior chief of the treasury, and providing for the manner of making purchases, sales and contracts on behalf of the nation, articles 1, 2, 4, 37, 73, 76 and 92 of which are as follows:

"Article 1. Until the general congress establishes the

revenues that are to form the national exchequer of Mexico, the revenues, taxes and property of which the supreme government is in possession, and the revenues, taxes and property which the departments established or acquired under the federal system, and which existed at the time of the publication of the decree of October 3, 1835, shall continue.

"2. The revenues, taxes and property which by the law of the 17th of last January were assigned to the national bank are excepted from the provisions of the last article until it fulfils its object."

"4. Superior chiefs of the treasury shall be located in each department with the powers designated in this decree. All the employés of the treasury in their respective districts, in the instances and manner which shall be designated, shall be subordinate to them."

* * * * *

"37. It is the duty of the departmental treasurers:

"To muster the troops that may be in the capital, to issue to them their vouchers, to make abstracts of the muster and estimates, and to discharge, in the department of war, the powers given to the commissaries general and auditors of the treasury by the regulations of July 20, 1831, which for the present remain in force in all that is not opposed to this decree and subsequent laws."

* * * * *

"73. All the purchases and sales that are offered on account of the treasury and exceed $500 shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the superior chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury for such purposes as may be necessary and to enable him to make a report to the supreme government."

* * * * *

"76. The minutes of the board shall be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme government when the case requires it."

* * * * *

"92. The powers that by various laws are given to the commissaries general and the subcommissaries shall be exercised in future by the superior chiefs of the treasury and their subordinates, in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed."

The regulations of July 20, 1831, referred to, provide for the organization of the boards of public sales, "junta de almoneda," and its powers. Sections 131, 132 and 133 are as follows:

"ART. 131. But in order to hold such meetings it is necessary that the sales or purchases to be made must be announced to the public, at least eight days before, by means of placards to be posted at prominent and conspicuous places, having their contents published also in newspapers having the largest circulation, if there be any such papers in the place, the commissaries being careful that in said notices both the more essential circumstances and the necessary instructions pertaining to the matter be inserted."

Article 132, which prescribes the manner in which the sale shall be conducted, which said article is as follows:

"ART. 132. Once that the meeting shall be opened and the corresponding proclamations made by the public crier, bids legally made shall be admitted until the closing day of the sale, when it shall be declared in favor of the highest bidder by a majority of the meeting. This act, together with whatever else took place at the auction sale, will be placed on record in a book kept by the commissaries or subcommissaries for that purpose, all the members signing therein, together with the attending witnesses, or with a notary, who (the notary) shall moreover write the other deeds connected with the transaction. In case there be no notary in the place, then

a clerk, brought for the purpose by the commissary general, shall reduce to record the act and decision of the meeting."

Article 133, which is as follows:

"ART. 133. When the term prescribed by law expires the commissaries or subcommissaries shall send the expediente, together with an accompanying report, to the supreme government, without whose approval the sale, purchase or contract cannot be carried into effect."

If the title to the vacant lands or the right to dispose of them belonged to the State of Sonora, the junta de almonedas had no function to perform in regard to them; in other words, it was a national instrumentality, not a state instrumentality. If, however, the vacant lands became the property of the national government by the constitution of 1836, and could be disposed of by or through the junta de almonedas, the procedure required by the law creating it would have to be followed. This law provided that sales and purchases made by the board (junta) should be published for at least eight days beforehand, and by placards which shall be posted in the most public and frequented places, and shall be inserted in the newspapers of the greatest circulation, if there be any in the place, the notice to contain the more essential circumstances and the necessary instructions pertaining to the matter. These provisions are not shown to have been complied with, and the record precludes any presumption that they were.

There are other laws of the national government which are inconsistent with the rights of the states after 1836, to dispose of the public lands. That of December 7, 1837, is of that character; also that of September 15, 1837. The law of December 7, 1837, provides as follows:

* * * * *

"First. To witness or vise, in person in the capitals and by the civil authority in each one of the other places in the department, the monthly and annual cash statements made by the several chiefs of the offices of the treasury and to report without delay to the supreme government the omissions and abuses they may observe,

"Second. To preside over the boards of sale and of the treas-

ury, with power to defer the resolutions of these latter until, in the first or second session thereafter, the matter under consideration is more thoroughly examined into."

The law of September 15, 1837, provided for a convention between English bondholders of Mexican bonds and the Mexican government, (Reynolds, 227,) section seven of which reads as follows:

"7. For greater security in the payment of the principal and interest of the consolidated fund, the Mexican government, in the name of the nation, specifically mortgages 100,000,000 acres of public lands in the departments of the Californias, Chihuahua, New Mexico, Senora and Texas, as a special guarantee of said fund until a total extinction of the credits; but if any sale of the mortgaged lands should be made it shall be made at least at the rate of said four acres to the pound sterling, and the proceeds shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the corresponding inscriptions, and they shall use the proceeds of the sale to redeem the bonds of the new consolidated fund, which may also be received in payment of said lands at the price said bonds have in the market.

"The Mexican government, besides the general mortgage contained in this article, expressly reserves, by a public decree, 25,000,000 acres of the lands of the government in the departments of closest communication with the Atlantic, and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds, in case it is desired to exchange them for lands, and, if the government sell them, the proceeds therefrom shall be devoted to the redemption of said bonds."

On June 1, 1839, a law was passed approving the above-named convention, (Reynolds, 232,) and article 3 of this law is as follows:

"3. With respect to the colonies that may be established by virtue of the convention, the government shall see that the existing laws on colonization, or those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself."

It is not clear from the brief of appellee that he claims that the state had the power of disposition of the lands under the colonization laws. The petition does not claim it, nor is the grant in words based upon it. By the law of August 18, 1824, there was reserved to the general congress a power to prohibit colonization "to the individuals of some particular nation." This no doubt was directed to "individuals" from the United States. In pursuance of this power the general congress promulgated a law dated April 25, 1835, article two of which was as follows:

"ART. 2. In the exercise of the powers reserved to the general congress in article 7 of said law of August 18, 1824, the frontier and littoral states are prohibited from alienating their vacant lands for colonization until the regulations to be observed in carrying it out are established."

Between the date of the law and the grant in this case no regulations to be observed in carrying out colonization were established. On the contrary, by a law passed April 4, 1837, all colonization laws were certainly modified and may be repealed. The law was as follows:

"The government, in concurrence with the council, shall proceed to make effective, the colonization of the lands that are or should be the property of the republic, by sales, leases or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of independence, and for the remuneration and gifts congress may grant to Indian tribes and nations, and those who assisted in the restoration of Texas, and it shall not be compromised by the laws heretofore enacted on colonization, which enactments are all repealed in so far as they conflict with this law, but the prohibition of article 11 of the law of April 6, 1830, shall remain in force."

As has already been stated, the grant recites that it was made "in the name of the free and independent and sovereign state of Sonora as well as that of the august Mexican nation." This, it is contended, authenticates the power of the granting

officer, and Chief Justice Marshall in *Delassus* v. *United States*, 9 Pet. 117, 134, is quoted:

"A grant or concession made by that officer, who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power. No excess of them, or departure from them, is to be presumed. He violates his duty by such excess, and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it."

So also it was said by this court in *Strother* v. *Lucas*, 12 Pet. 410, that —

"Where the act of an officer to pass the title to land according to Spanish law is done contrary to the written order of the king, produced at the trial without any explanation, it will be presumed that the power has not been exceeded, and that it was done according to some order known to the king and his officers, though not to the subjects, and courts ought to require very full proof that he had transcended his powers before they so determine it."

These principles were asserted of Spanish titles in the Territories of Louisiana and Florida. They are disputable in their application to titles under the Mexican laws. *United States* v. *Cambuston*, 20 How. 59. But we need not dispute them, for the proof in this case satisfies their requirement. It is ample to show that the national laws were not pursued, and besides it is conceded that at the time of the grant the state of Sonora was in rebellion against the nation. It and its officers therefore were opponents of the national authority, not its instruments; while declaring independence of it, they could not claim to act for it and convey its title.

The appellee further contends that the national government approved the title of Rodriguez. The laws which have been quoted provide that when the property had been knocked down to the highest bidder a minute or report of the proceedings was required to be made and transmitted to the supreme government, either directly under the regulations of 1831, or first to the supreme chief of the treasury under the act of April 17, 1837, and the sale could not be executed until

the approval of the supreme government. By supreme government was meant the national government, and hence the approval of the governor of Sonora, which the record shows, was not sufficient. The certificate of the governor is limited and significant —

"*Supreme Government of the free State, D. E. S. O. N. R. A.*

"This supreme authority approves the title which your honor has issued on yesterday in favor of the Señor Don Fernando Rodriguez, a resident of Hermosillo, for five square leagues of land in front of the confluence of the rivers Gila and Colorado, and the Paso de los Algodones, on the northern frontier of the state. I say this to you in reply to your note of yesterday reiterating the consideration of my regard.

"God and liberty.

"Arispe, April 13, 1838. LEONARDO ESCALANTE."

It is contended, however, that a communication of an officer of the state of Sonora to an officer of the general government made in 1847, and a certificate of the governor of Sonora given two days later, justify the presumption that the sale had been approved by the general government. We give them in full:

"To the treasurer general of the state:

"Jose Maria Mendoza, provisional commissary general of the state of Sonora, certifies that on this day he has directed, under a separate cover, and as a special matter, to his excellency the minister of state, by del despacho de hacienda of the republic, an official communication, of which the following is a copy:

> 'General Commissary Department of the State of Sonora:
>
> 'SIR: The Señor Don Fernando Rodriguez, a resident of the city of Hermosillo, has presented to me the title which was issued in his favor by the general treasury of the ancient state, on the twelfth of April, 1838, for five square leagues of vacant lands for cultivation, reg-

istered by the said Rodriguez, contiguous to the rivers Gila and Colorado, in front of the confluence of the same, and the point named Paso de los Algodones, of the said river Colorado, in the northern part of this state, and which were for him surveyed, valued and were sold by the Junta de Almonedas, and were adjudicated in the manner as shown by the (testimonio autorizado) certified copy, which I have the honor to transmit to your excellency to the end that the same may be presented to his excellency the President of the republic, for which purpose the said Señor Rodriguez has presented the said title to me of the lands situated in front of the confluence of the Gila and Colorado rivers and the Paso de los Algodones of the Colorado.

'I have the honor to repeat to your excellency the consideration of my regard.

'God and liberty. JOSE MARIA MENDOZA.

'URES, June 6, 1847.

'To his excellency the minister of state del despacho de hacienda de la Republica Mexico.

'In witness whereof I give this at the request of the interested party Don Fernando Rodriguez, at Ures, the capital of the state of Sonora, on the sixth of June, 1847.

'JOSE MARIA MENDOZA.'

"The licendiado, Jose de Aguilar, governor of the state of Sonora, certifies in due form of law that the present title, which includes five square leagues of land contiguous to the rivers Gila and Colorado, in front of the confluence of the same, and also to the point named El Paso de los Algodones, of the said river Colorado, on the northern frontier of the state, measured and adjudicated in the year 1838 to Don Fernando Rodriguez, a resident and native of Hermosillo, was legally issued by the late Jose Justo Milla, contador of the general treasury of the state, and legally encharged with the said treasurer's office at the date referred to; and that in

virtue of which he was competently authorized to for expedientes of lands, to measure and adjudicate the same and to issue titles therefor; and also that his signature, those of his assistants and the seal stamped on said title are the same that they are accustomed to use in their official acts, and with which they have legalized all their official acts of like nature. Finally he certifies that the approval of the government, which is attached to the title and the certificate of Don Jose Maria Mendoza, are legal, and that their signatures are such as they have used in their official acts, and as such are entitled to all faith and credit, judicially or extrajudicially.

"And at the request of the interested party I give this in Guaymas, on the eighth of June, 1847.

"JOSE DE AGUILAR."

These do not establish the presumption claimed for them. The letter to the Mexican minister of state is dated nine years subsequent to the sale and grant to Rodriguez. It should have preceded the grant. Had it done so some presumption of approval might then have been deduced from the grant of the performance of precedent conditions. The approval of the government stated in the certificate of Governor Jose de Aguilar manifestly refers to the approval of his predecessor, Leonardo Escalante, and not an approval by the general government. There is no other approval "which is attached to the title and the certificate of Don Maria Mendoza."

There was introduced in evidence an *ex parte* affidavit alleged to have been made in 1881 before the treasurer general of the state of Sonora by one Matias Moran and one Antonio Corrillo. Who these persons were is not stated. Matias has no identification but his name. Antonio Corrillo is designated "citizen." Of this paper the following testimony was given by Bartolome Rochin, keeper of the archives of the treasury at Hermosillo:

"Q. 41. In whose handwriting is this paper?

"A. It is in the writing of the same Mr. Telles, who was the same treasurer general.

"Q. 42. When was Mr. Telles treasurer general?

"A. It is not mentioned the date here, but I have a great many documents that tell (after looking), '77 or '78.

"Q. 43. Has this paper been with the records of the treasurer general's office since you have had charge of the office?

"A. Yes, sir; I took this document from the archives of the treasurer general's office."

The following is as much of the affidavit as we think necessary to quote:

"I, Manuel Diaz, as treasurer general of the state of Sonora, Mexican republic, acting by notary public, appeared Matias Moran and citizen Antonio Corrillo, of this precinct, who do say that, being personally present in the treasury office for the purpose of giving (11) compliance to the foregoing disposition or order of the governor of the state, proceeded to examine, one by one, the signatures of which are contained in the expediente that forms the title to the lands situated between the Colorado and Gila rivers, that in the year 1838 was adjudicated to Don Fernando Rodriguez, in that of 1847 was approved by the supreme government of the nation, as a result of the examination we have made of the original expediente above referred to, the lines with which it is written and the signatures that accompany (?) it, we are able to certify."

This affidavit is very questionable. It was testified to be in the handwriting of a Mr. Telles, who, it was also testified, was treasurer general in 1877 and 1878, and was taken from the archives by the witness who produced it. At whose instance it was taken, or for what purpose, does not appear, except that it is recited in it that the persons who made it were personally present "for the purpose of giving compliance to the foregoing disposition or order of the governor of the state." What disposition or order is not explained. The language of the paper is very ambiguous. It is not clear whether it is the notary who, acting for Manuel Diaz, treasurer general, or the deposing witnesses, who recite that the title was in the year 1838 adjudicated to Don Fernando Rodriguez, and in that of 1847 was approved by the supreme

government of the nation. But even if by the latter, it is distinctly not their testimony, but only an assumption preceding it. This testimony comes afterwards, and is confined to the verification of certain signatures.

It follows from these views that the decree of the Court of Private Land Claims should be and it is reversed and the cause remanded for further proceedings.

Mr. Justice Gray concurred in the result.

Mr. Justice Brewer, Mr. Justice Brown, Mr. Justice Shiras and Mr. Justice Peckham dissented.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 225. TOMPKINS *v.* COOPER, ADMINISTRATRIX. Error to the Supreme Court of the State of Georgia. Argued and submitted April 21, 1898. Decided April 25, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, and cases there cited. *Mr. Alexander C. King* and *Mr. J. Hubley Ashton* for the plaintiff in error. *Mr. W. C. Glenn* for the defendant in error.

No. 229. LYMAN, ADMINISTRATOR, *v.* BOSTON AND ALBANY RAILROAD COMPANY. Error to the Circuit Court of the United States for the District of Massachusetts. Submitted April 21, 1898. Decided April 25, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Davis* v. *Geissler*, 162 U. S. 290, and cases cited. *Mr. M. F. Dickinson, Jr.*, and *Mr. Samuel Williston* for the plaintiff in error. *Mr. Samuel Hoar* for the defendant in error.

No. 233. UNITED STATES *v.* MCGLASHAN. Error to the United States Circuit Court of Appeals for the Seventh Circuit. Submitted April 26, 1898. Decided May 2, 1898. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Hunt* v. *United States*, 166 U. S. 424. *Mr. Attorney General, Mr. Solicitor General* and *Mr. Assistant Attorney General Boyd* for the plaintiff in error. *Mr. George E. Sutherland* and *Mr. H. L. Eaton* for the defendant in error.

No. 359. NORDSTROM *v.* MOYER, SHERIFF, ETC. Appeal from the Circuit Court of the United States for the District of

Washington. Motions to dismiss or affirm submitted May 6, 1898. Decided May 9, 1898. *Per Curiam.* Order affirmed, with costs, on the authority of *Craemer* v. *Washington*, 168 U. S. 124; *Nordstrom* v. *Washington*, 164 U. S. 705, and cases cited. Also see *State* v. *Nordstrom*, 7 Wash. St. 506. *Mr. James Hamilton Lewis* for the appellant. *Mr. W. C. Jones* and *Mr. Patrick Henry Winston* for the appellees.

Decisions on Petitions for Writs of Certiorari.

No. 616. HENRY *v.* PITTSBURGH CLAY MANUFACTURING COMPANY. Third Circuit. Denied April 11, 1898. *Mr. Albert H. Clarke* and *Mr. Frederic D. McKenney* for petitioner.

No. 614. CITY OF RICHMOND *v.* SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY. Fourth Circuit. Granted April 18, 1898. *Mr. C. V. Meredith* for petitioner.

No. 618. WADE *v.* TRAVIS COUNTY, TEXAS. Fifth Circuit. Granted April 18, 1898. *Mr. Joseph Paxton Blair* and *Mr. Frank W. Hackett* for petitioner.

No. 613. LOUISVILLE TRUST COMPANY *v.* LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY. Seventh Circuit. Granted April 25, 1898. *Mr. St. John Boyle* for petitioner. *Mr. A. H. Joline*, *Mr. H. B. Turner*, *Mr. G. W. Kretzinger* and *Mr. E. C. Field* opposing.

No. 630. JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY *v.* HOOPER. Fifth Circuit. Denied April 25, 1898. *Mr. A. W. Cockrell* and *Mr. James Lowndes* for petitioner. *Mr. James R. Challen* opposing.

Decisions announced without Opinions.

No. 634. Erie and Western Transportation Company *v.* Union Steamboat Company. Sixth Circuit. Granted April 25, 1898. *Mr. Harvey D. Goulder* and *Mr. F. H. Canfield* for petitioner.

No. 637. Stearns *v.* Lawrence, Receiver, etc. Sixth Circuit. Denied April 25, 1898. *Mr. Mark Norris* and *Mr. Duane E. Fox* for petitioner.

No. 556. Dawson *v.* Rushin, Agent. Eighth Circuit. Denied May 2, 1898. *Mr. William M. Cravens* for petitioner.

No. 639. Charles Pope Glucose Company *v.* Chicago Sugar Refining Company. Seventh Circuit. Denied May 2, 1898. *Mr. L. L. Coburn* for petitioner. *Mr. Charles K. Offield* opposing.

No. 622. McMullen *v.* Hoffman, Executrix. Ninth Circuit. Granted May 9, 1898. *Mr. L. B. Cox*, *Mr. Wm. A. Maury* and *Mr. R. Percy Wright* for petitioner. *Mr. Rufus Mallory* opposing.

No. 626. Board of County Commissioners of Kiowa County, Kansas, *v.* Rathbone. Eighth Circuit. Denied May 9, 1898. *Mr. Daniel Smyth* for petitioner. *Mr. John F. Dillon*, *Mr. Harry Hubbard* and *Mr. John M. Dillon* opposing.

No. 628. City of Denver *v.* Barber Asphalt Paving Company. Eighth Circuit. Denied May 9, 1898. *Mr. John F. Shafroth* for petitioner. *Mr. James H. Brown* opposing.

No. 641. Venner *v.* Farmers' Loan and Trust Company. Eighth Circuit. Denied May 9, 1898. *Mr. W. E. Blake* for

petitioner. *Mr. Wm. A. Underwood*, *H. B. Turner*, *David McClure* and *Mr. Frederick B. Van Vorst* opposing.

No. 643. Chicago, Milwaukee & St. Paul Railway Company *v.* Bosworth, Receiver. Seventh Circuit. Granted May 9, 1898. *Mr. George R. Peck* and *Mr. Burton Hanson* for petitioner. *Mr. Bluford Wilson* and *Mr. Philip B. Warren* opposing.

No. 644. Huntting Elevator Company *v.* Bosworth, Receiver. Seventh Circuit. Granted May 9, 1898. *Mr. George R. Peck* and *Mr. Burton Hanson* for petitioner. *Mr. Bluford Wilson* and *Mr. Philip B. Warren* opposing.

No. 645. Rau *v.* Bosworth, Receiver. Seventh Circuit. Granted May 9, 1898. *Mr. George R. Peck* and *Mr. Burton Hanson* for petitioner. *Mr. Bluford Wilson* and *Mr. Philip B. Warren* opposing.

No. 647. Bosworth, Receiver, *v.* Carr, Ryder & Engler Company. Seventh Circuit. Granted May 9, 1898. *Mr. Bluford Wilson* and *Mr. Philip B. Warren* for petitioner. *Mr. George R. Peck* and *Mr. Burton Hanson* opposing.

No. 649. Fitzhugh *v.* Hazzard. Fifth Circuit. Denied May 9, 1898. *Mr. A. S. Lathrop* for petitioner.

No. 651. Canada Sugar Refining Company, Limited, *v.* Insurance Company of North America. Second Circuit. Granted May 9, 1898. *Mr. Wilhelmus Mynderse* for petitioner. *Mr. Clifford A. Hand* opposing.

No. 654. William Johnston & Co. (Limited) *v.* Johanson.

Fifth Circuit. Denied May 9, 1898. *Mr. J. Parker Kirlin* for petitioner.

No. 656. UNITED STATES *v.* MORRISON & SON. Second Circuit. Granted May 23, 1898. *Mr. Attorney General* and *Mr. Solicitor General Richards* for petitioner. *Mr. Albert Comstock* opposing.

No. 657. UNITED STATES *v.* WOLFF & Co. Second Circuit. Granted May 23, 1898. *Mr. Attorney General* and *Mr. Solicitor General Richards* for petitioner. *Mr. Albert Comstock* opposing.

INDEX.

CASES AFFIRMED OR FOLLOWED.

Tennessee v. *Union & Planters' Bank*, 152 U. S. 454, followed. *Sawyer* v. *Kochersperger*, 303.

See CRIMINAL LAW, 2; MUNICIPAL CORPORATION, 7; DISTRICT ATTORNEY, 2; RAILROAD, 5; TAX AND TAXATION, 1, 2.

CASES DISTINGUISHED.

See CONSTITUTIONAL LAW, 6.

COMMON CARRIER.

The appellant shipped, by a vessel belonging to the appellee, goods under a bill of lading which contained the following stipulation: "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 as printed on the back hereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder." Of these stipulations and conditions, this court regards only the following as material: "1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewellery, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." "9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise." "14. This agreement is made with reference to, and subject to the provisions of the U. S. carriers' act, approved February 13, 1893." The goods were not delivered at the port to which they were consigned, and were subsequently lost at sea on another vessel belonging to the appellee, on which they had been placed without the appellant's knowledge. In a suit in admiralty to recover their value, *Held*, (1) That as the negligence of the company was clearly proven, there can be no doubt of its liability under the act of February 13, 1893, c. 105, known as the "Harter Act;" (2) That the clause limiting the amount of the carriers' liability is to be construed as a statement that the carrier shall not be liable to any amount for goods exceeding $100 per package; and being so interpreted, that it is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of $100 per package, and as such is not only prohibited by the Harter Act, but held to be invalid in a series of cases in this court. *Calderon* v. *Atlas Steamship Co.*, 272.

See RAILROAD.

CONSTITUTIONAL LAW.

CONTRACT.

CONTRIBUTORY NEGLIGENCE.

COURT AND JURY.

CRIMINAL LAW.

CUSTOMS DUTIES.

DISTRICT ATTORNEY.

DISTRICT OF COLUMBIA.

delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation or person so offending, and each of them, and any agent of said company, corporation or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offence and pay costs of prosecution, and the costs shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid," cannot be held to apply to a box of spirituous liquors, shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that State while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa Law to be repugnant to the Constitution of the United States. *Rhodes* v. *Iowa*, 412.

2. Moving such goods in the station from the platform on which they are put on arrival to the freight warehouse is a part of the interstate commerce transportation. *Ib.*

3. It is settled by previous adjudications of this court: (1) That the respective States have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the States, provided always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other States of the Union; (2) That the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States; (3) That the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State; but, since the passage of the act of August 8, 1890, c. 728, 26 Stat. 313, which provides "that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being

MINERAL LAND.

See PUBLIC LAND, 1, 2.

MUNICIPAL CORPORATION.

PUBLIC LAND.

See MEXICAN GRANT.

RAILROAD.

SURETY BOND.

1. In an action against the maker of a bond, given to indemnify or insure a bank against loss arising from acts of fraud or dishonesty on the part of its cashier, if the bond was fairly and reasonably susceptible of two constructions, one favorable to the bank and the other to the insurer, the former, if consistent with the objects for which the bond was given, must be adopted. *American Surety Co.* v. *Pauly* (No. 1), 133.
2. Under the condition of the bond in this case, requiring notice of acts of fraud or dishonesty, the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge; and it is not sufficient to defeat the plaintiff's right of action upon the policy to show that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant: though he may have had suspicions of irregularities or fraud, he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act that might involve the defendant in liability for the misconduct. *Ib.*
3. When the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier; but, within the meaning of the bond, he did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification. *Held*, that the six months from "the death or dismissal or retirement of the employé from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named. *Ib.*
4. The making of a statement as to the honesty and fidelity of an employé of a bank for the benefit of the employé, and to enable the latter to

obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president. *Ib.*

5. The presumption that an agent informs his principal of that which his duty and the interests of his principal require him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal; and in such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf. *Ib.*

6. When an agent has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed. *Ib.*

7. This was an action upon a bond guaranteeing a national bank against loss by any act of fraud or dishonesty by its president. The bond was similar in its provisions to the one referred to in the case preceding this, and contained among other provisions the following: "Now, therefore, in consideration," etc., . . . "it is hereby declared and agreed, that subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employé, or for the possession of which he is responsible, by any act of fraud or dishonesty, on the part of the employé, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employé, shall be *prima facie* evidence thereof." *Held*, (1) That this language was susceptible of two constructions, equally reasonable, and that the one most favorable to the insured should be accepted, namely, that the required

written statement of loss arising from the fraud or dishonesty of the president of the bank, based upon its accounts, was admissible in evidence, if suit was brought, and was *prima facie* sufficient to establish the loss; (2) That within the meaning of the bond in suit, the president of the bank remained in its service at least up to the day on which the receiver took possession of books, papers and assets. *American Surety Company* v. *Pauly* (No. 2), 160.

TAX AND TAXATION.

1. On the authority of *Louisville Water Company* v. *Clark*, 143 U. S. 1, which is affirmed, it is held that the exemption from taxation acquired by the Louisville Water Company under the act of Kentucky of April 22, 1882, c. 1349, was not withdrawn except from the day on which the act of May 17, 1886, known as the Hewitt Act, took effect; and the company cannot be held for taxes which were assessed and became due prior to September 14, 1886, when that act took effect. *Louisville Water Company* v. *Kentucky*, 127.
2. *Thomas* v. *Gay*, 169 U. S. 264, affirmed and followed to the point that "the act of the legislative assembly of the Territory of Oklahoma of March 5, 1895, which provided that 'when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district, or reservation is attached for judicial purposes,' was a legitimate exercise of the Territory's power of taxation, and when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States." *Wagoner* v. *Evans*, 588.
3. Prior to the passage of that act there existed no power in the authorities of Canadian County to tax property within the attached reservation; and, as such authority was first given by that act, it could only be validly exercised on property subjected to its terms after its enactment. *Ib.*
4. Taxes, otherwise lawful, are not invalidated by the fact that the resulting benefits are unequally shared. *Ib.*

See CONSTITUTIONAL LAW, 8.

TREATY.

See INDIAN, 2.

TRUST.

1. The clear intent of the act of the Province of Pennsylvania of March 11, 1752, authorizing trustees to acquire the land in question, was, that while the legal estate in fee in the land should be acquired by the