UNITED STATES REPORTS

VOLUME 173

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1898

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING CO.
20 MURRAY STREET, NEW YORK
1899

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.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of the States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1898.

PIERCE *v.* TENNESSEE COAL, IRON AND RAILROAD COMPANY.

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

No. 174. Argued and submitted January 19, 20, 1899. — Decided February 20, 1899.

An agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages "from this date" should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury, and agreed that this should be a full settlement of all his claims against the company. *Held*, that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed, so long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to

elect to treat the contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting however any sum that he might have earned already or might thereafter earn, as well as the amount of any loss that the defendant sustained by the loss of his services without its fault.

This was an action brought January 22, 1892, in the circuit court of Jefferson County in the State of Alabama, by Frank H. Pierce, a citizen of the State of Alabama, against the Tennessee Coal, Iron and Railroad Company, a corporation of the State of Tennessee, doing business in the State of Alabama, upon a written contract, signed by the parties, and in the following terms:

"Pratt Mines, Ala. 4th June, 1890. Whereas I, F. H. Pierce, while in the employ of the Tennessee Iron, Coal and Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron and Railroad Company, under circumstances which I claim render the said company liable to me for damages; but whereas they disclaim any liability for said accident or the injuries to me resulting from same; and both parties being desirous of settling and compromising said matter; and whereas the said Tennessee Coal, Iron and Railroad Company did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison, as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas said proposition was accepted by me, and carried out by the said company; and whereas in May, 1889, after I had resumed work, a further proposition was made to me to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is, $60 per month, and in addition free house rent, [or in lieu of

house rent a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid by me for house rent;] and whereas said agreement has been faithfully kept by both parties; and whereas on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary; now therefore it is agreed, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be $65 a month, and in addition I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege; and I on my part agree and bind myself to release the said company from any and all liability for said accident, or from the injuries resulting to me from it or from the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company."

The complaint set out the contract, except the clause above printed in brackets; and alleged that by this contract the defendant became liable to pay the plaintiff monthly during his life the wages therein stipulated, and to furnish him with coal and wood and allow him the privilege of the garden, as therein agreed; that the plaintiff had always been ready and offered to do for the defendant such work given to him as he was able to do, and had labored at the same for such reasonable time as he was able to work and bound to work under this contract; that by the injuries received by him from the accident mentioned therein he was permanently disabled in the use of his legs and hands, and otherwise so injured as to be incapacitated to do more work than he had done and had offered to do; but that the defendant, without any reasonable ground for so doing, abandoned the contract and refused to carry it out, claiming that the defendant was under no obligation to pay to the plaintiff the wages therein stipulated longer than suited its pleasure; and had wholly and purposely disregarded and refused to abide by the obligations of the contract

for the period of six months next before the commencement of the suit, and had entirely abandoned the contract and discharged the plaintiff from its service. The plaintiff claimed damages, in the sum of $50,000, for the defendant's breach and abandonment of the contract.

The defendant demurred to the complaint, upon the ground that the contract set out therein was one of hiring, terminable at the will of either party, and not one of hiring for life, as alleged in the complaint; and that it appeared, from the obligations of the complaint, that the defendant, in terminating the contract of hiring, had only exercised its legal right under the contract. The court sustained the demurrer, and, the plaintiff declining to amend his complaint, rendered judgment for the defendant; and the plaintiff on February 21, 1894, appealed from that judgment to the Supreme Court of Alabama.

The record transmitted to this court does not show any further proceedings in the Supreme Court of Alabama. But the official reports of its decisions show that at November term, 1895, it reversed that judgment, and remanded the case to the county court. *Pierce* v. *Tennessee Coal Co.*, 110 Alabama, 533. And the record before this court necessarily implies that fact, by setting forth that in March, 1896, on motion of the defendant, suggesting that from prejudice and local influence it would not be able to obtain justice in the state courts, the case was removed from the county court into the Circuit Court of the United States for the Southern Division of the Northern District of Alabama; and a motion to remand the case to the state court was made by the plaintiff (on what ground did not appear in the record) and was overruled.

In the Circuit Court of the United States, on January 4, 1897, the following proceedings took place: The demurrer to the complaint was renewed by the defendant, and overruled by the court. The plaintiff then amended his complaint by inserting, in the copy of the contract set forth therein, the words above printed in brackets; and a demurrer to the amended complaint was filed and overruled. In answer to this complaint the defendant filed two pleas: 1st. A denial of each and every allegation of the complaint; 2d. "The de-

fendant, for further answer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by the defendant therein; and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter, and that, while engaged in the performance of such service, the plaintiff voluntarily and without excuse therefor refused to further perform such service as he was able to perform and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract." The plaintiff joined issue on the first plea; and demurred to the second plea, upon the ground that it did not go to the whole consideration of the contract, and was no answer to the entire action; and the court sustained his demurrer. The defendant, for further answer, and by way of recoupment, pleaded that on May 3, 1891, the plaintiff, voluntarily and without excuse, refused to perform such labor as he was able to perform and was in fact performing for the defendant, as required by the contract; and since that time had continued to refuse to perform and had not in fact performed such service, or any part thereof; to the damage of the defendant in the sum of $50,000.

A bill of exceptions, tendered by the plaintiff and allowed by the court, showed that at the trial before the jury the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on, and introduced evidence tending to prove the allegations of the complaint. He also offered evidence that, at the time of his discharge by the defendant from its employment in May, 1891, he was fifty-five years of age, and that he was then and had since been in good health, and addicted to no habits of drinking or otherwise, affecting his health and expectancy of life; and introduced the American tables of mortality

used by insurance companies, showing his expectancy of life at the time of his discharge, and at the time of the trial.

But the court ruled that no recovery could be allowed on the contract, beyond the instalments of wages due and in default up to the date of the trial; and, upon the defendant's motion, excluded all evidence of the plaintiff's age, health and expectancy of life, "on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

The plaintiff duly excepted to the ruling and to the exclusion of evidence; and, to present the same point, asked the court to give, and duly excepted to its refusal to give, the following instruction to the jury: "If the defendant, after making the contract sued on, and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff, and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as the defendant may have sustained from the loss of the plaintiff's service without the defendant's fault."

The defendant also tendered and was allowed a bill of exceptions, presenting substantially, though in different form, the questions involved in the plaintiff's case, and the contents of which therefore need not be particularly stated.

The jury returned a verdict for the plaintiff in the sum of $5893, upon which judgment was rendered. Each party sued out a writ of error from the Circuit Court of Appeals for the Fifth Circuit.

That court was of opinion that the contract sued on was for "an employment by the month, and therefore, like every other such employment, subject to be discontinued, at the will of either party, at the expiration of any month, or at any time for adequate cause;" and consequently that there was error

in overruling the demurrer to the complaint; and upon that ground, without passing upon any other question in the case, reversed the judgment of the Circuit Court of the United States, and remanded the case to that court for further proceedings, Judge Pardee dissenting. 52 U. S. App. 355, 365. The plaintiff thereupon applied for and obtained a writ of certiorari from this court. 168 U. S. 709.

Mr. Walker Percy for the Tennessee Coal, Iron and Railroad Company. *Mr. William I. Grubb* was on his brief.

Mr. W. A. Gunter, for Pierce, submitted on his brief.

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

In the Circuit Court of the United States, a verdict and judgment were rendered for the plaintiff for a less amount of damages than he claimed; and each party alleged exceptions to rulings and instructions of the judge, and sued out a writ of error from the Circuit Court of Appeals. That court held that the defendant's demurrer to the complaint should have been sustained, and therefore reversed the judgment of the Circuit Court, and remanded the case for further proceedings. A writ of certiorari to review the judgment of the Circuit Court of Appeals was thereupon applied for by the plaintiff, and was granted by this court.

The fundamental question in this case is whether the contract in suit, made by the parties on June 4, 1890, is a contract intended to last during the plaintiff's life, or is a mere contract of hiring from month to month, terminable at the pleasure of either party at the end of any month.

The facts bearing upon this question, as appearing upon the face of this contract, are as follows: In May, 1888, the plaintiff, while employed as a machinist in the defendant's coal mine in Alabama, was seriously hurt by a trip of tram cars on the main slope of the mine, under circumstances which the plaintiff claimed, and the defendant denied, rendered it liable to him in damages. The parties were desirous of settling and

compromising the plaintiff's claim for damages for the injuries, and had repeated negotiations with that object. In November, 1888, they made an agreement (which does not appear to have been reduced to writing) by which the defendant was to pay the plaintiff regular wages while he was disabled, and also to furnish him with such supplies as he might choose to get from a commissary, and to give him coal and wood for fuel at his dwelling house, and the benefit of a garden belonging to the defendant. The agreement was carried out by the defendant until May, 1889, and was then, after the plaintiff had resumed work, modified by stipulating that the defendant should give the plaintiff such work as he could do, should pay him therefor wages of $60 a month, as before the accident, and should give him the rent of his house, or, in lieu of house rent, an equivalent amount of supplies from the commissary; and the agreement, as so modified, was faithfully kept by both parties until June 4, 1890. Finally, on that day, the parties entered into the written contract sued on, by which, after reciting the plaintiff's claim for damages and the earlier agreements, it was agreed "in view [evidently a misprint for "in lieu"] of the above propositions, which have been faithfully carried out," that the plaintiff's "wages from this date are to be $65 a month," (the increase of wages being apparently intended as an equivalent for the provision, now omitted, for house rent or supplies from the commissary,) and that he was to have, free of charge, his fuel and the benefit of the garden; and the plaintiff, on his part, agreed to release the defendant from any and all liability for the accident, or for the injuries resulting to him from it or from the effects of it, and that this should be a full and satisfactory settlement of all claims which he might have against the defendant.

The effect of the provisions and recitals of the contract sued on may be summed up thus: The successive agreements between the parties were all made with a view to settle and compromise the plaintiff's claim against the defendant for personal injuries, caused to him by the defendant's cars while he was in its service as a machinist, and seriously impairing his ability to work. By each agreement, the defendant was

to pay him certain wages, and to furnish him with certain supplies. The supplies to be furnished were evidently a minor consideration, and require no particular discussion. The more important matter is the wages. The defendant, at first, agreed to pay the plaintiff "regular wages while he was disabled." The agreement, in that form, would clearly last so long as he continued to be disabled, and could not have been put an end to by the defendant without the plaintiff's consent. By the next succeeding agreement, made after the plaintiff had resumed work, the defendant was "to give him work, such as he could do, paying him therefor the wages paid before said accident, that is, $60 a month." That agreement must be considered as a mere modification of the first, requiring the plaintiff to do such work as he could do, but showing that he was still much disabled by his injuries. By the final agreement in writing of June 4, 1890, after reciting the plaintiff's claim for damages for these injuries, as well as the earlier agreements, his wages were increased by a stipulation that his "wages from this date are to be $65 a month," and he expressly released the defendant from all liability for the injuries resulting to him from the accident or from the effects thereof, and agreed that this should be a full and satisfactory settlement of all his claims against the defendant.

The only reasonable interpretation of this contract is that the defendant promised to pay the plaintiff wages at the rate of $65 a month, and to allow him his fuel and the benefit of the garden so long as his disability to do full work continued; and that, in consideration of these promises of the defendant, the plaintiff agreed to do such work as he could, and to release the defendant from all liability upon his claim for damages for his personal injuries. An intention of the parties that, while the plaintiff absolutely released the defendant from that claim, the defendant might at its own will and pleasure cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed. *Carnig* v. *Carr*, 167 Mass. 544, 547.

Opinion of the Court.

The Supreme Court of Alabama, when the case at bar was before it on appeal from the county court, and before the removal of the case into the Circuit Court of the United States, expressed the opinion that "the contract is sufficiently definite as to time, and bound the defendant to its performance, so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life;" and upon that ground reversed the judgment of the county court sustaining the demurrer to the complaint, and remanded the case to that court. 110 Alabama, 533, 536. As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case. See *Williams* v. *Conger*, 125 U. S. 397, 418; *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349; *Great Western Tel. Co.* v. *Burnham*, 162 U. S. 339, 344, and cases cited; *Moulton* v. *Reid*, 54 Alabama, 320.

It follows that the judgment of the United States Circuit Court of Appeals in this case was erroneous, and must be reversed.

It appears to us to be equally clear that the Circuit Court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

Upon this point, the authorities are somewhat conflicting; and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that "in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant," and, "in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the

probable duration of life, and the present value of a life annuity, are competent evidence;" *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 554; and that in an action for breach of contract "the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." *Benjamin* v. *Hilliard*, 23 How. 149, 167.

But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to.

In *Parker* v. *Russell*, 133 Mass. 74, the declaration alleged that, in consideration of a conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support him during his natural life; and that the defendant accepted the conveyance, and occupied the real estate, but neglected and refused to perform the agreement. The plaintiff proved the contract; and introduced evidence that the defendant did support him in the defendant's house for five years, and until the house was destroyed by fire, and had since furnished him no aid or support. The jury were instructed that "if the defendant, for a period of about two years, neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support." Exceptions taken by the defendant to this instruction were overruled by the Supreme Judicial Court of Massachusetts. Mr. Justice Field, in delivering judgment, said: "In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the

date of the writ, and not up to the time when the verdict is rendered. But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of an entire contract. Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract, they include damages for not performing the contract in the future, as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite, because the duration of the life of the plaintiff is uncertain; but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life. When the defendant, for example, absolutely refuses to perform such a contract, after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready, at all times during his life, to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death. *Daniels* v. *Newton*, 114 Mass. 530, decides that an absolute refusal to perform a contract, before the performance is due by the terms of the contract, is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract, after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." 133 Mass. 75, 76. It is proper to remark that the point decided in *Daniels* v. *Newton* was left open in *Dingley* v. *Oler*, 117 U. S. 490, 503, and has never been brought into judgment in this court.

So in *Schell* v. *Plumb*, 55 N. Y. 592, the action was by a woman, for a breach of an oral contract, by which the defendant's testator agreed to support the plaintiff during her life, and she agreed to render what services she could towards paying for her support. The contract was carried out for some years; and the defendant then turned her away, and refused to support her. At the trial the judge, against the defendant's objection, admitted in evidence the Northampton tables of life annuities, to show the probabilities of life at the plaintiff's age; and instructed the jury that, if the plaintiff was turned out in violation of the contract, without any misconduct on her part, she was entitled to recover damages from the breach of the contract to the time of trial, deducting what wages she might have earned during that time; and also to recover for her future support and maintenance, as to which the jury were instructed as follows: "Your verdict is all she can ever recover, no matter how long she may live. That ends the contract between these parties; and you will decide, considering her age, her health, her condition in life, and the circumstances under which she is placed, how long she will probably live, and how much services she can probably perform in the future, and say how much more it will cost her to support herself than she will be able to earn, and allow her to recover for such sum." The verdict was for the plaintiff, and judgment was rendered thereon. The defendant appealed, contending that, if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or, at most, to the time of trial; and that, as to the future, it was impossible to ascertain the damages, as the duration of life was uncertain, and a further uncertainty arose from the future physical condition of the person. But the Court of Appeals, in an opinion delivered by Judge Grover, affirmed the judgment, saying: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract." "It may be

further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount." 55 N. Y. 597, 598. See also *Remelee* v. *Hall*, 31 Vermont, 582; *Sutherland* v. *Wyer*, 67 Maine, 64.

In *Eastern Tennessee &c. Railroad* v. *Staub*, 7 Lea, 397, the facts were singularly like those in the case at bar. The plaintiff, having, while in the employ of the defendant railroad company as an engineer, and in the discharge of his duties as such, received serious injuries by a collision between his locomotive engine and another train, and having brought an action to recover damages for those injuries, an agreement, by way of compromise, was entered into, by which, in consideration of the plaintiff's agreeing to dismiss his suit, the defendant agreed to pay the costs thereof and the plaintiff's attorney's fee and physician's bills; and further agreed to retain him in its employ, the plaintiff working when, in his own opinion, he was able to do so, and performing only such services as in his disabled condition he might be able to perform; the defendant agreed to pay him a certain specified sum per day, regular wages paid to machinists, whether he labored or not; and the contract was to continue as long as the injuries should last. For some time after this agreement, the plaintiff continued, at intervals, to perform light work for the defendant, receiving pay, however, only for the time he actually worked; and the defendant then denied any liability under the agreement, and refused to allow the plaintiff to continue the service under it. The Supreme Court of Tennessee held that the plaintiff was entitled to recover in one action the entire damages, not only for wages already due and unpaid, but also damages to the extent of the benefit that he would probably have realized under the contract; and, speaking by Judge McFarland, said: "It is a mistake to suppose, as has been done in argument, that because, in estimating the damages, we look to the probable course of events after the suit is brought, we are therefore allowing damages that accrue after the action is

brought. The right to recover damages accrues upon the breach of the contract. But the rule of damages in such cases is what would have come to the plaintiff under the contract had it continued, less whatever the plaintiff might earn by the exercise of reasonable and proper diligence on his part; and, of course, in ascertaining this, we must look to a time subsequent to the breach, and in some cases to a time subsequent to the bringing of the suit. Nor is it any objection to the recovery, that in this case the damages are difficult to ascertain, depending upon contingent and uncertain events. There are many cases in which the damages are uncertain and difficult to ascertain, and, in fact, cannot be ascertained with certainty, but this has never been regarded as a sufficient reason for denying all relief." 7 Lea, 406.

These cases appear to this court to rest upon sound principles, and to afford correct rules for the assessment of the plaintiff's damages in the case at bar.

The legal effect of the contract sued on, as has been seen, was that the defendant promised to pay the plaintiff certain wages, and to furnish him with certain supplies, so long, at least, as his disability to work should continue; and the consideration of these promises of the defendant was the plaintiff's agreement to do for the defendant such work as he was able to do, and his release of the defendant from all liability in damages for the personal injuries which had caused his disability.

The complaint alleged, and the plaintiff at the trial introduced evidence tending to prove, that by those injuries he was permanently disabled; that he was always ready and offered to do for the defendant such work as he was able to do, and labored at that work for such reasonable time as he was able to work and bound to work under the contract; and that the defendant, without any reasonable ground therefor, denied its obligation to pay the plaintiff the stipulated wages longer than suited its pleasure, and, for six months before the commencement of the action, disregarded the contract, and refused to abide by it, and entirely abandoned the contract, and dismissed the plaintiff from its services.

If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on.

In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault. And such deduction was provided for in the instruction asked by the plaintiff and refused by the judge.

The questions of law presented by the defendant's bill of exceptions, allowed by the Circuit Court of the United States, are substantially like those above considered, and require no further notice.

The result is, that the judgment of the Circuit Court of Appeals, sustaining the demurrer to the complaint, and reversing the judgment of the Circuit Court of the United States, must be reversed; that the judgment of the Circuit Court of the

United States must also be reversed, because of the ruling excepted to by the plaintiff; and that the case must be remanded to that court, with directions to set aside the verdict and to order a new trial.

Judgments of the Circuit Court of Appeals and of the Circuit Court of the United States reversed, and case remanded to said Circuit Court for further proceedings in conformity with the opinion of this court.

TOWSON *v.* MOORE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 198. Argued January 25, 26, 1899. — Decided February 20, 1899.

In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void: the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor.

The same rule as to the burden of proof applies with equal, if not greater, force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child, with whom the parent makes his home and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren.

The rule, that successive and concurrent decisions of two courts in the same case upon a mere question of fact are not to be reversed unless clearly shown to be erroneous, is equally applicable in equity and in admiralty.

THE case is stated in the opinion.

Mr. Franklin H. Mackey and *Mr. A. H. Garland* for appellants.[1] *Mr. R. C. Garland* was on their brief.

Mr. Charles H. Cragin for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

[1] See Vol. 172, p. 651.

This was a bill in equity, filed April 16, 1896, in the Supreme Court of the District of Columbia, by children of Leonidas C. Campbell, the son of William H. Campbell, against the two daughters of William H. Campbell, and against their husbands, who were also executors of the wills of William H. Campbell and of Mary I. Campbell, his widow and residuary devisee and legatee, to set aside a gift made by her to their two daughters, of thirteen United States bonds for $1000 each, (five bearing interest at four and a half per cent, and eight at four per cent,) as having been obtained from her by undue influence of themselves and their husbands; and for an account, and for further relief.

After the filing of answers fully and absolutely denying the undue influence charged in the bill, and of a general replication, the case was heard upon pleadings and proofs; and a decree was entered dismissing the bill. The plaintiffs appealed to the Court of Appeals of the District of Columbia, which affirmed the decree. 11 App. D. C. 377. The plaintiffs then appealed to this court. The leading and undisputed facts of the case were as follows:

William H. Campbell, an old resident of the city of Washington, died May 21, 1881, leaving a will, dated March 16, 1878, and duly admitted to probate, by which, after reciting that he had provided for his son, Leonidas C. Campbell, by establishing him in business, he gave a legacy of $5000 to each of his two daughters, Julia, wife of Alexander W. Russell, and Christiana, wife of Frederick L. Moore, and an annuity of $500 for life to his sister, Eloise A. Campbell; and devised and bequeathed all the rest and residue of his estate in fee to his wife, Mary I. Campbell, or, if she should not survive him, to his three children as tenants in common, the children of any child dying before him to take their parent's share; and appointed his son and his son in law Moore executors of his will. His son died August 15, 1878; and the testator, by a codicil dated September 7, 1878, and likewise admitted to probate, ratified and confirmed his will in all respects, except in appointing both his sons in law and one Maury executors thereof.

His wife and daughters survived him. His son had died intestate, and leaving a widow, Mary K. Campbell, and seven children, six of whom were the plaintiffs in this bill. The seventh child had died, leaving two children, who were made defendants, but were never served with process or otherwise brought into the case.

Upon the death of William H. Campbell, his executors, for the purpose of paying the annuity bequeathed by him to his sister, set apart the aforesaid United States bonds, of the par value of $13,000, and kept them intact during the life of the annuitant. She died October 1, 1885, and the bonds then became part of the residue of the estate bequeathed to his widow, Mary I. Campbell. On October 5, 1885, the bonds were transferred to her on the books of the Treasury Department; and on the next day, October 6, 1885, their market value then being about $15,000, she made a gift of them in equal shares to her two daughters, Mrs. Russell and Mrs. Moore.

After the death of her husband in 1881, Moore was her business agent; and she resided alternately with one or the other of her two daughters, living on affectionate and confidential terms with them and their husbands; and at the times of the gift in question, and of her death, was at the house of Mr. and Mrs. Moore in Georgetown. She died August 6, 1893, aged ninety-one years, and leaving a will, dated May 26, 1882, and duly admitted to probate, by which, after some small legacies, she devised and bequeathed all the residue of her estate, in equal thirds, to her two daughters and the seven children of her deceased son; and appointed her sons in law Russell and Moore executors of her will.

It was contended by the plaintiffs that the Court of Appeals erred in holding that the burden of proving undue influence was upon them; and it was argued that, by reason of the confidential relations between the donor and the donees, the burden of proof was shifted upon the latter to prove the validity of the gift of the bonds. But the ruling of the Court of Appeals in this respect is supported by the decisions of this court, as will appear by an examination of those decisions.

In the leading case of *Jenkins* v. *Pye*, 12 Pet. 241, in which this court, at January term 1838, declined to set aside, for undue influence, a deed of real estate made by a daughter, shortly after coming of age, to her father, the court, speaking by Mr. Justice Thompson, said: "The grounds mainly relied upon to invalidate the deed were, that being from a daughter to a father rendered it, at least *prima facie*, void; and if not void on this ground, it was so because it was obtained by the undue influence of paternal authority. The first ground of objection seeks to establish the broad principle that a deed from a child to a parent, conveying the real estate of the child, ought, upon considerations of public policy growing out of the relations of the parties, to be deemed void; and numerous cases in the English chancery have been referred to, which are supposed to establish this principle." "It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for, should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed *prima facie* void. It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child without consideration, on account of their relationship, is assuming a principle at war with all filial, as well as parental, duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare [of], would be seeking to overreach and defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result." 12 Pet. 253, 254.

Mr. Justice Story (who had concurred in that judgment) in the last edition of his Commentaries on Equity Jurisprudence which underwent his revision, and which was published

in 1846, after his death, stated the doctrine on the subject as follows: "The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them; especially where the original purposes for which they have been obtained are perverted, or used as a mere cover. But we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort." And he supported this statement by large quotations from the opinion of Mr. Justice Thompson in *Jenkins* v. *Pye*. 1 Story Eq. Jur. (4th ed.) § 309.

In *Taylor* v. *Taylor*, 8 How. 183, decided at January term 1850, after the deaths of Justices Thompson and Story, the opinion of Mr. Justice Thompson in *Jenkins* v. *Pye* and the passage in Mr. Justice Story's Commentaries (omitting the last clause, which was not in the earlier editions,) were quoted by Mr. Justice Daniel as laying down the true rule upon the subject. While some expressions of that learned judge might seem to construe those authorities too strongly in favor of presuming undue influence, the decision in that case, setting aside a deed made by a daughter to her father soon after her coming of age, ultimately proceeded upon overwhelming proof of undue influence, derived in part from the testimony of witnesses to significant facts; in part from evidence conclusively showing that nearly all the statements in the deed itself were utterly false; and in part from a letter, written to the father by the daughter, a few days before executing the deed, and while they were living under the same roof, which, as the court declared, clearly appeared upon its face to be "a fabrication, designed to conceal the very facts and circumstances which it palpably betrays," and "not the production of an inexperienced girl, but of a far more practised and deliberate author."

It has since, more than once, been recognized by this court

that "the influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands *in vinculis*." *Conley* v. *Nailor*, (1886) 118 U. S. 127, 134; *Ralston* v. *Turpin*, (1889) 129 U. S. 663, 670. See also *Mackall* v. *Mackall*, (1890) 135 U. S. 167, 172, 173.

In *Ralston* v. *Turpin*, just cited, in which the object of the bill was to set aside deeds made to an agent by his principal, this court, speaking by Mr. Justice Harlan, recognized the rule of law that "gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion;" and conceded that in the case then before the court the agent held such relations, personal and otherwise, to the principal, as would enable him to exercise great influence over the latter in respect to the mode in which his property should be managed; that the principal trusted the agent's judgment as to matters of business more than the judgment of any other man; and that he had an abiding confidence in the agent's integrity, as well as in his desire to protect his interests. Notwithstanding all this, the bill was dismissed, because the plaintiff had failed to show that the deeds were obtained by undue influence, but, on the contrary, it appeared by the great preponderance of the evidence that "although their execution may have been induced, not unnaturally, by feelings of friendship for, and gratitude to, the defendant Turpin, the grantor acted upon his own independent, deliberate judgment, with full knowledge of the nature and effect of the deeds. It was for the donor, who had sufficient capacity to take a survey of his estate, and to dispose of it according to an intelligent, fixed purpose of his own, regardless of the wishes of others, to determine how far such feelings should control him when selecting the objects of his bounty." 129 U. S. 675–677.

In *Mackall* v. *Mackall*, above cited, in which it was attempted to set aside a deed from a father to his son, it appeared that for twenty years the father and mother had been separated, and this son had remained with the father, taking his part, and assisting him in his affairs, and the other children had gone with the mother and taken her part in the

family differences. This court, in the opinion delivered by Mr. Justice Brewer, speaking of the contention that the execution of the deed was induced by undue influence, said: "In this respect, reference was made to the long intimacy between father and son, the alleged usurpation by the latter of absolute control over the life, habits and property of the former, efforts to prevent others during the last sickness of the father from seeing him, and the subjection of the will of the father to that of the son, manifest in times of health, naturally stronger in hours of sickness. A confidential relation between father and son is thus deduced, which, resembling that between client and attorney, principal and agent, parishioner and priest, compels proof of valuable consideration and *bona fides* in order to sustain a deed from one to the other. But while the relationships between the two suggest influence, do they prove undue influence?" In giving a negative answer to that question, the court affirmed the following propositions: "Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practised, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence." "That the relations between this father and his several children, during the score of years preceding his death, naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something

of that nature, must appear; otherwise, that disposition of property which accords with the natural inclinations of the human heart must be sustained." 135 U. S. 171–173.

The principles established by these authorities may be summed up as follows: In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor. The same rule as to the burden of proof applies with equal, if not greater force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child, with whom the parent makes his home and is in peculiarly close relations, a larger share of the parent's estate than will be received by other children or grandchildren.

Applying these principles to the case at bar, it is beyond doubt that the relations in which Mary I. Campbell stood to her daughters and their husbands afford no ground for putting upon them the burden of disproving undue influence.

Upon the question whether undue influence was in fact exercised, the record contains a mass of conflicting testimony, which is satisfactorily considered in the opinion of the Court of Appeals, and which it would serve no useful purpose to discuss anew.

A series of decisions of this court has established the rule, that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous. This rule, more often invoked in admiralty cases, is yet equally applicable to appeals in equity. *Dravo* v. *Fabel*, 132 U. S. 487, 490; *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Baker* v. *Cummings*, 169 U. S. 189, 198.

There is one document, however, in the record, which was the subject of so much argument at the bar, that a brief notice

of it, and of the circumstances under which it was drawn up, will not be out of place.

The defendants, at the hearing, introduced in evidence a writing signed by Mary I. Campbell, and in the following terms: "Georgetown, D. C., October 6, 1885. I have to-day voluntarily, without suggestion from any one, given to my two daughters the 4½ and 4 per cent United States bonds coming to me from the estate of my husband, amounting to thirteen thousand dollars at par, thus equalling their share with the amount received by their brother and his family." There was evidence tending to show that this writing was drawn up and signed at the request of Mrs. Moore, and delivered to her, on the day of its date, and had since been kept by her.

It was argued, in behalf of the plaintiffs, that the procuring of this paper, containing the unusual and suspicious declaration that the gift of the bonds was made "voluntarily, without suggestion from any one," together with the long concealment of the paper from the plaintiffs, was strong evidence of an intent to back up a fraudulent transaction.

But this argument is fully met by evidence that the reason for the execution of this paper was that, three or four years before, Mary K. Campbell, the mother of the plaintiffs, had made an unfounded charge that Mrs. Moore had by undue influence procured the insertion of the legacies to herself and her sister in their father's will; and had only desisted from that charge upon receiving from Mary I. Campbell a written statement that it was "false in every particular." Under such circumstances, no suspicion of undue influence can arise out of the execution of the writing of October 6, 1885; or out of its not having been disclosed to the plaintiffs, which may well have been in order to prevent stirring up anew a family quarrel. In this respect, as in most others, the case wholly differs from that of *Taylor* v. *Taylor*, 8 How. 183, on which the plaintiffs rely.

Upon a careful examination of the whole evidence, aided by the able and thorough arguments of counsel, no sufficient ground appears for reversing the decree dismissing the bill.

Decree affirmed.

Counsel for Parties.

LOMAX *v.* PICKERING.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 123. Submitted January 12, 1899. — Decided February 20, 1899.

A record in the Department at Washington of the approval by the President of a deed made by an Indian to convey lands held by him subject to the provision in the treaty of Prairie du Chien that it was never to be leased or conveyed without the permission of the President, is notice to all concerned from the time it was made, and is similar, in effect, to a patent issued by the President for lands that belong to the Government, which is not required to be recorded in the county where the land is located.

The recording of a deed of such land, made without previous approval of the President, is notice of the grantee's title to subsequent purchasers; and, when approved, operates to divest the title of the grantor as against a subsequent grantee.

THIS was an action of ejectment brought by Aquila H. Pickering against John A. Lomax and William Kolze to recover possession of two parcels of land in Cook County, Illinois, which had originally been granted by the United States to certain Indians under the treaty of Prairie du Chien, of July 29, 1829.

This case was before this court upon a former hearing, *Pickering* v. *Lomax*, 145 U. S. 310, the report of which contains a full statement of the facts, which need not be here repeated. Upon that hearing the judgment of the Supreme Court of Illinois was reversed, and the case remanded for a new trial, which resulted in a judgment for Pickering, the plaintiff, and in an affirmance of that judgment by the Supreme Court of Illinois. *Lomax* v. *Pickering*, 165 Illinois, 431. To review this judgment a second writ of error was sued out from this court.

Mr. John M. H. Burgett for plaintiff in error. *Mr. James Maher* and *Mr. A. W. Browne* were on his brief.

Mr. John P. Ahrens for defendant in error.

Opinion of the Court.

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the court.

The common source of title in this case was Alexander Robinson, an Indian, to whom the lands were patented by President Tyler, December 28, 1843, under the provisions of Art. IV of the treaty of Prairie du Chien, 7 Stat. 320, subject to the following proviso: "But never to be leased or conveyed by him," (the grantee,) "them, his or their heirs, to any person whatever, without the permission of the President of the United States." The lands were subsequently allotted and set off to Joseph Robinson, one of the patentee's children, by a decree in partition of the Cook County Court of Common Pleas.

Pickering claimed title through a deed from Joseph Robinson and wife to John F. Horton, dated August 3, 1858, recorded July 16, 1861, but without the approval of the President endorsed thereon. The deed was, however, submitted to and approved by the President, January 21, 1871, and a certified copy of the deed with such approval recorded March 12, 1873.

Lomax's title was by deed from Joseph Robinson to Alexander McClure, dated November 22, 1870, submitted to and approved by the President, February 24, 1871, and recorded March 11, 1871, in Cook County.

Upon the first trial, plaintiff's chain of title being proved the defendant Lomax introduced no evidence, but at the close of plaintiff's testimony moved that the case be dismissed upon the ground that the deed of August 3, 1858, from Joseph Robinson and wife to Horton was made in direct violation of the terms of the patent, which required the approval of the President to the conveyance. This motion was granted, the court being of opinion that Robinson had no authority to convey without obtaining prior permission of the President, and that the subsequent approval of the deed was invalid. Thereupon judgment was rendered for the defendant, which was affirmed by the Supreme Court of Illinois. 120 Illinois, 289, 293.

The case was reversed by this court upon the ground that

the approval subsequently given by the President to the conveyance was retroactive, and was equivalent to permission before execution and delivery. The case went back for a new trial, when Lomax put in evidence the title above stated, relying upon a sentence in the opinion of this court to the effect that "if, after executing this deed, Robinson had given another to another person with the permission of the President, a wholly different question would have arisen." Judgment having been rendered for the plaintiff, the case was again taken to the Supreme Court of the State, which was of opinion that the defendant did not stand in the relation of a *bona fide* purchaser to the property.

It will be observed that the deed to Horton of August 3, 1858, antedated the deed to McClure of February 22, 1870, by more than twelve years, and was recorded July 16, 1861, while the deed to McClure was recorded March 11, 1871, nearly ten years thereafter. The deed to Horton also antedated the deed to McClure in the approval of the President by about a month, viz.: Horton, January 21, 1871; McClure, February 24, 1871.

Defendant, however, relies upon the fact that the McClure deed was recorded with the approval of the President endorsed thereon March 11, 1871, while plaintiff's deed with such approval was not recorded until March 12, 1873. The real question then is whether the recording of the Horton deed of July 16, 1861, without the approval of the President endorsed thereon, was notice of plaintiff's title to subsequent purchasers.

By section 30 of the conveyancing act of Illinois, it is provided that "all deeds, mortgages and other instruments in writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record."

The Supreme Court of Illinois was of opinion that the deed to Horton was entitled to record, although it had not received

the approval of the President. In delivering the opinion of the court Mr. Justice Craig observed: "As respects the approval of the President, required by the treaty and the provision in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the President in the Department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the State require a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the President for lands that belong to the Government, which is not required to be recorded in the county where the land is located."

Even if this be not a construction of the state statute binding upon us, and decisive of the case, we regard it as a correct exposition of the law.

The deed is an ordinary warranty deed upon its face, signed by the parties, and regularly acknowledged before a justice of the peace. There was nothing to apprise the recorder of any want of authority to convey, or to justify him in refusing to put the deed on record. Whether the grantors had authority to make the deed as between themselves and the grantees, or subsequent purchasers, is a matter which did not concern him. Though the deed might be impeached by showing that the grantor had no such authority, the record was notice to subsequent purchasers that they had at least attempted to convey their interests.

A deed may be void by reason of the infancy or coverture of the grantors, and yet may be, under the laws of the State, entitled to record and notice to subsequent purchasers. While the record of a void deed is of no greater effect than the deed itself, and is not such notice as will give protection to a *bona fide* purchaser, yet it may, under certain circumstances, be a notice to intending purchasers, or third persons, that the grantor has intended and undertaken to convey his title. Thus, in *Morrison* v. *Brown*, 83 Illinois, 562, a deed of trust executed by a married woman, her husband not uniting therein,

to secure the purchase money of the property, though void as a conveyance, was nevertheless held to be an instrument in writing relating to real estate within the statute of Illinois, and, when recorded, constructive notice to all subsequent purchasers of the lien of the original vendor upon the same for the unpaid price. The court took the ground that while married women had no force or power to *create* a lien, subsequent purchasers occupied the same position as they would have done had the instrument been read to them before they became interested in the question.

So, in *Tefft* v. *Munson*, 57 N. Y. 97, the record of a mortgage prior to the acquisition of title by the grantor was held to be constructive notice to a subsequent purchaser in good faith, and under the recording act, giving it priority to the title. See also *United States Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; *Alderson* v. *Ames*, 6 Maryland, 52; *Stevens* v. *Hampton*, 46 Missouri, 404.

In this case however, it appears from McClure's own statement that when Robinson came to him in 1870 to sell him his right to the land, he told him that he had already sold the premises, but without the approval of the President, and that McClure sent his own attorneys to examine the record. He thus had not only constructive but actual notice of the Horton deed.

The approval of the President was no proper part of the deed. The language of the restriction in the original patent was "but never to be leased or conveyed by him, [the grantee,] them, his or their heirs, to any person whatever, without the permission of the President of the United States." How that permission should be obtained or expressed is left undetermined by the proviso. We see no reason why it might not have been by a memorandum at the foot of the petition for approval, or even by a letter to that effect. The essential fact was that permission should be obtained and expressed in some form, of which, in all probability, a record was kept in the Department.

Indeed, we think it sufficiently appears that at the time the deed to McClure was approved by the President, February 24,

1871, there was on file in Washington the approval of the President of the prior deed to Horton. There was put in evidence a certificate of the Commissioner of Indian Affairs, signed March 7, 1896, to a certified copy of the Horton deed, with an affidavit as to the loss of the original, a further affidavit that the sale was an advantageous one for Robinson, and the approval of the President, dated January 21, 1871. It does not directly appear when the approval of the President was put on file in the office of the Commissioner, but we think the presumption is that it was filed as of its date. There was nothing requiring that this approval should be filed in the recorder's office in Cook County, and when McClure took his deed of November 22, 1870, and obtained the approval of the President of February 24, 1871, he took it with the chance that the Horton deed had already been approved, and that the power of the President had been exhausted. The approval by the President of his deed was doubtless an inadvertence, and, in view of the fact that he had already approved the Horton deed, a nullity. By his approval of the first deed the title of Robinson was wholly divested, and there was nothing left upon which a subsequent approval could operate, unless we are to assume that such subsequent approval in some way revested the title in Robinson and passed it to McClure. No new delivery was necessary to pass the title to Horton. *United States* v. *Schurz*, 102 U. S. 378; *Bicknell* v. *Comstock*, 113 U. S. 149; *Gilmore* v. *Sapp*, 100 Illinois, 297; *Bruner* v. *Manlove*, 1 Scam. 156. No injustice was done to McClure, since he already had notice, both by the record and by Robinson's statement, that he had conveyed the land, and an examination of the record in Washington would doubtless have shown that the prior deed had received the approval of the President. The two deeds stand in the relation of two patents for the same land, the second of which is uniformly held to be void.

There is nothing in the fact that the partition proceedings, under which Robinson obtained title to the land in dispute, were not approved by the President. Not only were these partition proceedings set forth as a part of the record of the case at the time he approved the Horton deed, but as already

held in the prior case, (p. 316,) such approval was retroactive, and operated as if it had been endorsed upon the deed when originally given, and enured to the benefit of Horton and his grantee, "not as a new title acquired by a warrantor subsequent to his deed enures to the benefit of the grantee, but as a deed imperfect when executed, may be made perfect as of the date when it was delivered."

The judgment of the Supreme Court of Illinois is therefore

Affirmed.

WILSON *v.* EUREKA CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 142. Submitted January 17, 1899. — Decided February 20, 1899.

Section 12 of ordinance No. 10, of Eureka City, providing that "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars," is not in conflict with the provisions of the Constitution of the United States.

Section 12 of ordinance number 10 of Eureka City, Utah, provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

The plaintiff in error was tried for a violation of the ordinance in the justice's court of the city. He was convicted and

sentenced to pay a fine of twenty-five dollars. He appealed to the district court of the first judicial district of the Territory of Utah.

On the admission of Utah into the Union the case was transferred to the fifth district court of Juab County, and there tried on the 24th of October, 1896, by the court without a jury, by consent of the parties.

Section 12, *supra*, was offered and admitted in evidence. Plaintiff in error objected to it on the ground that it was repugnant to section 1 of article 14 of the Constitution of the United States, in that it delegated an authority to the mayor of the city, or in his absence to a councillor.

There was also introduced in evidence an ordinance establishing fire limits within the city, providing that no wooden buildings should be erected within such limits except by the permission of the committee on building, and providing further for the alteration and repair of wooden buildings already erected. The ordinance is inserted in the margin.[1]

[1] SECTION 1. That the following boundaries are hereby established as the fire limits of Eureka City, to wit: Commencing at a point on Main street of said city, where said street crosses the Union Pacific Railway track, and opposite or nearly opposite, the Keystone hoisting works, thence running in an easterly direction along said Main street to a point where said street intersects the road or street easterly of the site now occupied by the M. E. Church building; the northerly and southerly boundaries of said fire limits to be two hundred feet on each side of said Main street for said distance.

SEC. 2. Every building hereafter within the fire limits of said city shall be of brick, stone, iron or other substantial and incombustible material, and only the following wooden buildings shall be allowed to be erected, except as hereinafter provided, viz.: Sheds to facilitate the erection of authorized buildings, coal sheds not exceeding ten feet in height, and not to exceed one hundred feet in area, and privies not to exceed thirty feet in area and ten feet in height, and all such sheds and privies shall be separate structures: *Provided*, That any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on building within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.

SEC. 3. Any wooden building already within said fire limits shall only be altered or repaired in such a manner that neither area nor height be in-

The evidence showed that the plaintiff in error was the owner of a wooden building of the dimensions of twenty by sixteen feet, which was used as a dwelling house. It was constructed prior to the enactment of the ordinances above mentioned. The evidence further showed that plaintiff in error applied to the mayor for permission to move the building along and across Main street in the city, to another place within the fire limits. The mayor refused the permission, stating that if the desire was to move it outside of the fire limits permission would be granted. Notwithstanding the refusal, the plaintiff in error moved the building, using blocks and tackle and rollers, and in doing so occupied the time between eleven A.M. and three P.M. At the place where the building stood originally the street was fifty feet from the houses on one side to those on the other — part of the space being occupied by sidewalks, and the balance by the travelled highway. The distance of removal was two hundred and six feet long and across Main street. Eureka City was and is a mining town, and had and has a population of about two thousand. It was admitted that the building was moved with reasonable diligence.

The plaintiff in error was again convicted. From the judg-

---

creased without the consent of the said committee on building within said fire limits.

SEC. 4. The said committee on building within said fire limits shall have the power to stop the construction of any building, or the making of alterations or repairs on any building where the same is being done in violation of the provisions of this ordinance, and any owner, architect or builder, or others who may be employed, who shall assist in violation of non-compliance with the provisions of this ordinance shall be subject to a fine for every such violation or non-compliance, of not less than ten nor more than one hundred dollars.

SEC. 5. That there shall be a committee consisting of three members of the council appointed by the mayor and confirmed by the council, to be known as the "committee on building within the fire limits of Eureka City," and that said committee be appointed immediately upon the taking effect of this ordinance.

SEC. 6. This ordinance shall take effect and be in force from and after its first publication in the Tintic Miner.

Passed and approved June 4, 1894.

ment of conviction he appealed to the Supreme Court of the State, which court affirmed the judgment, and to the judgment of affirmance this writ of error is directed.

Eureka City has no special charter, but was incorporated under the general incorporation act of March 8, 1888, and among the powers conferred by it on city councils are the following:

"10. To regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same."

The error assigned is that the ordinance is repugnant to the Fourteenth Amendment of the Constitution of the United States, because "thereby the citizen is deprived of his property without due process of law," and "the citizen is thereby denied the equal protection of the law."

Mr. J. W. N. Whitecotton for plaintiff in error.

Mr. P. L. Williams for defendant in error.

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

Whether the provisions of the charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question, and we are confined to a consideration of whether the power conferred does or does not violate the Constitution of the United States.

It is contended that it does, because the ordinance commits the rights of the plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law. To support the contention the following cases are cited: *Matter of Frazee*, 63 Michigan, 396; *State ex rel. Garrabad* v. *Dering*, 84 Wisconsin, 585; *Anderson* v. *Wellington*, 40 Kansas, 173; *Baltimore* v. *Radecke*, 49 Maryland, 217; *Chicago* v. *Trotter*, 136 Illinois, 430.

With the exception of *Baltimore* v. *Radecke*, these cases passed on the validity of city ordinances prohibiting persons parading streets with banners, musical instruments, etc., without first obtaining permission of the mayor or common council or police department. Funeral and military processions were excepted, although in some respects they were subjected to regulation. This discrimination was made the basis of the decision in *State ex rel. Garrabad* v. *Dering*, but the other cases seem to have proceeded upon the principle that the right of persons to assemble and parade was a well-established and inherent right, which could be regulated but not prohibited or made dependent upon any officer or officers, and that its regulation must be by well-defined conditions.

This view has not been entertained by other courts or has not been extended to other instances of administration. The cases were reviewed by Mr. Justice McFarland of the Supreme Court of California in *In re Flaherty*, 105 California, 558, in which an ordinance which prohibited the beating of drums on the streets of one of the towns of that State "without special permit in writing so to do first had and obtained from the president of the board of trustees," was passed on and sustained. Summarizing the cases the learned justice said:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick* v. *Bailey*, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (*Commonwealth* v. *Abrahams*, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (*Commonwealth* v. *Davis*, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (*Vance* v. *Hadfield*, 22 N. Y. 858, 1003; 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer* v. *Davis*, 136 Mass.

239; 49 Amer. Rep. 27); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (*Hine* v. *The City of New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (*Vanderbilt* v. *Adams*, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (*Nightingale, petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy* v. *Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Commissioners &c.* v. *Covey*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (*Commonwealth* v. *Brooks*, 109 Mass. 355)."

In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws — a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error. Besides, it is opposed by *Davis* v. *Massachusetts*, 167 U. S. 43.

Davis was convicted of violating an ordinance of the city of Boston by making a public address on the "Common," without obtaining a permit from the mayor. The conviction was sustained by the Supreme Judicial Court of the Commonwealth, 162 Mass. 510, and then brought here for review.

The ordinance was objected to, as that in the case at bar is objected to, because it was "in conflict with the Constitution of the United States, and the first section of the Fourteenth Amendment thereof." The ordinance was sustained.

It follows from these views that the judgment of the Supreme Court of Utah should be and it is

Affirmed.

McINTIRE *v.* PRYOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 109. Argued January 4, 5, 1899. — Decided February 20, 1899.

The facts in this case, as detailed in the statement of the case and the opinion of the court, show that a gross fraud was committed by the plaintiffs in error against the defendants, to dispossess them of the property in question; and in view of the peculiar circumstances of the case, the fraud, so glaring, the original and persistent intention of McIntire through so many years to make himself the owner of the property, the utter disregard shown of the rights of the plaintiff as well as of the mortgagee, the false personation of Emma Taylor, and the fact that the decree can do no harm to any innocent person, this court holds that these facts do away with the defence of laches, and demand of the court an affirmance of the action of the Court of Appeals of the District of Columbia, granting the relief prayed for by the plaintiffs below.

THIS was a bill in equity filed in the Supreme Court of the District of Columbia by Mary C. Pryor against Edwin A. McIntire, Martha McIntire and Hartwell Jenison to obtain the nullification and avoidance, upon the ground of fraud, of a certain foreclosure of real estate in the city of Washington.

The facts were in substance that, in May, 1880, the plaintiff Mary C. Pryor, being the owner of parts of lots twenty-one and twenty-two in square numbered 569, conveyed the same by trust deed to Edwin A. McIntire to secure the defendant Hartwell Jenison in the sum of $450 for money advanced by Jenison, which was represented by a note made by the complainant and her husband Thomas Pryor, since deceased, payable one year after date, with interest at the rate of eight per cent, payable quarterly.

Default having been made in payment of the note, the property was regularly advertised for sale under the deed of trust, and, after a week's postponement on account of the weather, was sold on June 17, 1881, and bought in nominally by Jenison for $806, the difference between $450, the amount of the Jenison loan, and $806, the amount for which the prop-

erty was sold, being the taxes which had accrued on the property, together with the expenses and commissions attending the sale, which amounted all told to $839.19. In this connection the plaintiff averred that the defendant McIntire had represented to her husband, Thomas Pryor, that the sale would be only a matter of form, and that he, Pryor, could buy in the property, and that time would be given him to pay the indebtedness; that the sale was made without the knowledge of Jenison, the holder of the note secured by the deed of trust; that, as had been previously agreed, Pryor, the husband of the plaintiff, did in fact become the purchaser at the trustees' sale for the sum of $700, and the property was struck off to him; that they were not disturbed in the possession of the property for some time, when McIntire called on them and told them that they might pay rent to him, and that it would be applied to the payment of the principal of the debt, and that accordingly they paid rent until September, 1884, at the rate of six dollars per month, with the understanding that this would be applied to the liquidation of the note, and that when the same was paid the property would be reconveyed to the plaintiff. On June 29, 1881, a few days after the sale, a deed was executed to Jenison, for the nominal consideration of $806, and on the same day Jenison gave a new note to one Emma Taylor for the sum of $425, and secured the same by a deed of trust on the same property, the note being payable one year after date with eight per cent interest. Subsequently, and on April 21, 1882, Jenison conveyed the property outright to Emma Taylor on receiving the $425 note.

Subsequently, and in May, 1884, Emma Taylor conveyed the property to Martha McIntire, the sister of the defendant Edwin A. McIntire. By reason of some supposed defect in the deed from Jenison to Taylor, Jenison subsequently, and on September 27, 1887, made a quitclaim deed of his interest in the property to Martha McIntire, who, in October, 1886, built four houses upon the property, two fronting on F street and two in the rear facing an alley, of which she has had the use and enjoyment ever since.

Plaintiff's averments in this connection were that the sale by McIntire under the Jenison deed of trust was made in his own interest, with the fraudulent intent of getting possession of the property; that the $425 note given by Jenison to Emma Taylor, secured by a deed of trust, was fictitious and a part of the same scheme; that Emma Taylor was a fictitious person; that the deeds to her were void; that the deed from her to Martha McIntire was also fictitious, and that the subsequent deed from Jenison to Martha McIntire of September 27, 1887, was procured by the fraudulent representations of Edwin A. McIntire.

The prayer was that the sale under the deed of trust be set aside; that an account be taken of what was due by the plaintiff upon the note for $450, and upon the payment of the same that the plaintiff be declared the owner of the property, and that the trustees be required to account to her for rents, issues and profits received by them on account of such property since the foreclosure sale.

The answer of Edwin A. McIntire denied all allegations of fraud and deceit; averred that the sale was *bona fide* in all respects; that he had no interest whatever in the property, and that it belonged to his sister Martha McIntire, who bought it in the regular course of business, and who, in her answer, denied that she participated in or had anything to do with any fraudulent scheme to get possession of the property, or that she had knowledge of any fraud on the part of her brother, and alleged that she was a true and *bona fide* purchaser of the property in dispute.

Jenison also answered the bill, stating that he had directed the sale to be made and the property bought in for him, if necessary for his protection; that he made the deed to Emma Taylor, as well as the quitclaim deed to Martha McIntire, and that he knew nothing whatever of any fraud on the part of Edwin A. McIntire.

Upon a hearing upon pleadings and proofs, the Supreme Court rendered a decree dismissing the bill upon the ground of laches. Plaintiff appealed to the Court of Appeals, which reversed the decree of the court below; remanded the case to

the Supreme Court of the District of Columbia, with instructions to take an account of the indebtedness due by the plaintiff to Jenison, together with an account of the rents and profits collected by the defendants, and directed that upon the coming in of such report a final decree be passed annulling each and all of the several trust deeds that clouded the title to said premises, and awarding possession thereof to plaintiff upon her paying the amount due Jenison, and to the defendant Martha McIntire, upon the statement of the account. 7 D. C. App. 417.

In compliance with these instructions the Supreme Court subsequently entered a final decree in favor of the plaintiff for $1664.93, and set aside the deed of trust from plaintiff and her husband to Edwin A. McIntire, and all the subsequent deeds, six in number, which operated as a cloud upon plaintiff's title.

Another appeal was taken from this decree to the Court of Appeals, which affirmed the decree of the Supreme Court, 10 D. C. App. 432, whereupon Edwin A. McIntire and Martha McIntire took an appeal to this court.

Shortly after the commencement of this suit, four other suits were begun by Elizabeth Brown, Annie Ackerman, John Southey et al. and Joseph Hayne and wife, for similar purposes as the above, to procure the annulment of certain deeds of real estate to and from Emma Taylor, based upon her supposed fictitious character. The details of the fraud set forth in these bills were different, but in all of them the fictitious character of Emma Taylor was charged, and in all of them, but one, Martha McIntire purported to have become the owner of the property. For the purpose of saving the expense of repeating testimony, it was stipulated that the testimony in each of the cases, so far as relevant, might be read and considered by the court as having been taken in each of the other cases. The Court of Appeals entered a decree in each of these cases, except one which was dismissed on the ground of laches, granting the relief prayed. The amount involved in the other cases, except the *Pryor case*, was insufficient to give this court jurisdiction; but upon the appeal to this court the

testimony in each of the other cases was brought up under the stipulation in the *Pryor case.*

Mr. Frank T. Browning for appellants. *Mr. Enoch Totten* and *Mr. William H. Dennis* were on his brief.

Mr. Franklin H. Mackey 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, that of fraud in the sale and subsequent manipulation of the property in suit; and, second, that of laches in instituting these proceedings.

1. The question of fraud necessarily involves the examination of a large amount of testimony, and a scrutiny of the successive steps taken, which finally resulted in the transfer of the property from its original owner, Mary Pryor, to its present owner of record, Martha McIntire.

The bill avers and the answer admits the execution of a deed of trust May 2, 1880, by the plaintiff and her husband to Edwin A. McIntire as trustee, to secure a note for $450, payable to Hartwell Jenison one year after date, with interest at eight per cent. The transaction originated four years previously, (May 2, 1876,) when the plaintiff and her husband placed upon the same property a deed of trust, in which Brainard H. Warner and Henry McIntire were named as trustees, to secure a note of $500, payable to George E. Emmons two years after date, with interest at ten per cent. This loan had been made through the agency of B. H. Warner & Co., real estate agents, and the note appears to have been purchased as an investment by Jenison, who was then a clerk in the Treasury Department. Upon the maturity of this note, May 2, 1878, twenty-five dollars were paid by way of interest, and fifty dollars on account of the principal, but nothing was done until 1880, when the deed of trust for $450 was given. Jenison appears to have purchased the first note

at the suggestion of Henry McIntire, a brother of Edwin A., who was also a clerk in the Treasury Department. Jenison states that Edwin A. collected what was paid upon the note and attended to the second deed of trust himself, in which his name was substituted as trustee in the place of the trustees named in the first deed. Jenison appears never to have seen the Pryors, nor their property, having entire confidence in McIntire's integrity. The property seems to have been worth at that time from $1800 to $2400, and was occupied by the plaintiff's husband as a wood and coal yard. Both the Pryors were uneducated colored people, Pryor making his living by whitewashing, sawing wood, and selling coal, and his wife by taking in washing. The husband died about three months before this suit was begun.

The note fell due May 2, 1881. Neither principal nor interest was paid, and upon the following day, May 3, a warranty deed appears to have been executed by plaintiff and her husband to Martha McIntire, a sister of the principal defendant, for the nominal consideration of five dollars. It does not clearly appear why this deed was executed, as it was never recorded. Upon its face it is an ordinary warranty deed, and although the Christian name of the grantee, Martha, is obviously written over an erasure, attention is called to this fact in the testamentary clause. The grantors' signatures are probably genuine, although the deed appears to have been procured of the plaintiff in total ignorance of its contents or purport. Indeed, she had never seen Martha McIntire and knew absolutely nothing about her. Edwin A. McIntire's explanation is that Pryor came to him; said that he could not pay the note, and asked him whether he could get a purchaser of the property who would take it off his hands and assume the incumbrance and taxes, which he represented to be twenty or thirty dollars; that he offered it to his sister as an investment; had the deed made to her for a nominal consideration, with the understanding that she would assume the incumbrance and give Pryor a lease on the property for a year. He afterwards ascertained that the taxes were ten times the amount he had supposed, and reported the

fact to his sister, who thereupon declined to take the property, which accordingly went to a foreclosure. In explanation of the erasure he said the deed was first made to his uncle David McIntire, who was looking out for bargains in real estate, and then altered to Martha McIntire and noted on the deed itself.

It seems somewhat singular that neither of these parties should have been willing to give five dollars for a piece of property worth at least $1800, and subject only to the lien of a mortgage of about $475, and $250 of special taxes; and equally singular that the Pryors should have been willing to dispose of their equity in the property for so small a sum. Indeed, it is difficult to believe that they knew what they were doing when they signed the deed.

But as nothing has ever been claimed by virtue of this deed, it is practically out of the case, except so far as it tends strongly to show an original design on the part of Edwin A. McIntire, who had entire charge of the transaction and witnessed the deed, to vest the title to the property in some member of his family, whom the other evidence in the case shows him to have used as a mere catspaw for himself.

Failing to induce his sister to take the property, McIntire, as trustee, obtained written authority from Jenison to sell upon foreclosure of the deed of trust, advertised the property for sale upon June 10, and after a postponement sold the same on June 17, but to whom the property was struck off, and who was the real purchaser, is somewhat uncertain. There is a wide divergence in the testimony on this point. Plaintiff swears that the first intimation she had of the sale was the display of the auctioneer's flag in front of the property, which was then occupied as a coal yard. Not understanding what it meant, her husband went to see McIntire, who came down that day, and "said that the trustee was pushing him, and he was compelled to put the flag up and have a sale, but that he would allow my husband to bid it in and would knock it down to him." Three or four witnesses, who were present at the sale, swore that the property was struck off to Pryor. Plaintiff swore to the same effect, but she was so far from where the auctioneer stood that it was very doubtful whether she

could have heard it. She also swore to an agreement that she was to pay a rent of six dollars a month for the property, which was to be applied on the purchase money. Certain it is that rent was paid for the property after the sale and until some time in 1883, sixteen receipts for which, signed by McIntire, are produced. This testimony with regard to the sale and the arrangement for payment is wholly denied by McIntire, who produces a bill for auctioneer's services, showing the sale of the property to Jenison, to whom on June 29, 1881, McIntire executed a deed of the property in alleged pursuance of the foreclosure sale, upon an expressed consideration of $806, but kept the same from record unknown to Jenison for a period of nearly ten months, and until April 21, 1882, when he caused the same to be recorded. Did the case stand upon this testimony alone we should entertain grave doubts whether the oral evidence was sufficiently definite and credible to overcome the testimony of McIntire, the documentary evidence of the receipts for rent and the deed to Jenison in pursuance of the sale; but all doubts in this particular are fully resolved by the subsequent conduct of McIntire with reference to the property.

It seems that Jenison, being unable or unwilling to pay the expenses of foreclosure, which amounted to $87.88 and accumulated taxes to the amount of $278.81, for the purpose of raising money to pay these, executed a note to one Emma Taylor for $425, payable in one year, and secured the same by a deed of trust upon the property to the defendant McIntire as sole trustee. This deed was also executed on June 29, 1881, and was of even date with the deed executed by McIntire to Jenison in pursuance of the foreclosure.

The testimony in this case turns largely upon the existence and identity of Emma Taylor. It is charged in the bill that she is a fictitious person, and that a sister of McIntire's, whose name was Emma T. McIntire, was represented and held out by him as Emma Taylor. Certainly, so far as witnesses have sworn to having seen Emma Taylor, they might easily have been led into supposing that his sister was this person. All that we know definitely of Emma Taylor is that from April 1,

1881, to September 6, 1884, her name appears as grantor or grantee in seventeen different deeds, having an aggregate consideration of some $13,000. Copies of nine of these deeds appear in the record, in all but one of which she is described as of the city of Philadelphia, although all of these deeds, both to and from herself, were executed in Washington and acknowledged before the same magistrate. No letters written by her are produced, and but one addressed to her. This bears date September 19, 1887, and was written by McIntire, asking for her address. The letter seems to have been addressed simply to "Pittsburg, Penn.," on some information of her being there, and to have been returned to the writer. This letter was probably a subterfuge. The transactions in which she appears as a party all seem to have been carried on through McIntire as agent, who collected rents and other moneys, paid taxes and made repairs on her account. She seems then to have disappeared as suddenly as she originally appeared, and McIntire professes himself entirely unable to find her, or learn of her present whereabouts. This is certainly a feeble and suspicious explanation. In view of the number and magnitude of the transfers to which she was a party, we should have reason to expect that her existence could be established beyond the shadow of a doubt. If she were a resident of Philadelphia, as now claimed, McIntire could hardly have failed to have had correspondence with her; to have known her address and to have been able to find dozens of her friends, relatives or neighbors, who could have proved that she was a living person. If she were a resident of Washington during these years, where did she live? In what bank did she keep the money she invested in real estate? Who were her acquaintances and why did she vanish so suddenly after these large transactions? She could scarcely have failed to leave a correspondent here, and that correspondent could scarcely have failed to be McIntire himself. It is incredible that a woman so well off and so alert in matters of business should have disappeared at the moment when her presence was indispensable and left no trace behind her.

What have we in lieu of what we might naturally have ex-

pected? A few witnesses who swear they saw her once and saw her under circumstances which indicated that they had seen a woman who passed under that name, and who might have been a wholly different person — one, who took a deed from her, and after testifying that he had never seen her, on being recalled said that he "somehow had the impression" that upon one occasion she had been pointed out by McIntire's clerk in his office as Emma Taylor. The clerk himself, who was in McIntire's employ five years, has no recollection of ever meeting her, but had heard her name mentioned, and thinks he must have seen her from the fact that he witnessed a deed purporting to have been signed by her. Another, who kept an ice cream parlor on G street from 1876 to 1879, saw her once or twice in McIntire's office, and heard her called Emma Taylor by a lady who used to come to his parlor with her. Another, who used to visit McIntire's office every day in 1879, saw a lady frequently come there, whom he was informed was Emma Taylor, and that she talked about buying real estate. It appears, however, that there was no deed to her prior to April 1, 1881. Another, who had her studio on F street, used to take her meals at the same dining room, heard her spoken of as Miss Taylor, but never spoke to her herself, and did not know whether her name was Emma Taylor or not. Another, named Atkinson, who was with McIntire until the latter part of 1880, testified that he saw a woman a number of times in the office whose name he understood was Emma Taylor, and that she was a different person from Emma T. McIntire. Another testified that he had met her at the office of the magistrate before whom she made her acknowledgments.

In addition to this most indefinite testimony, we have only the testimony of Edwin A. McIntire, Martha McIntire and Emma T. McIntire, two of whom are parties to this suit and strongly interested in the result. Emma T. McIntire testifies that she was never called Emma Taylor, and that her middle name was not Taylor, and that she never executed any of the deeds purporting to have been signed by Emma Taylor. Neither she nor her sister seems to have met her more than

three or four times. It further appears that all the deeds to Emma Taylor, even from McIntire himself, carried to the recorder's office for record, were returned to McIntire, though this was denied by him, and that rents due to Emma Taylor were all paid to him. It seems, too, that he paid all the taxes upon her property, though he swears he has no recollection of doing so.

We give but little weight to the certificate of the magistrate who was not sworn as a witness, that Emma Taylor appeared before him and acknowledged the deeds to which her name was appended as grantor, since it would have been practically easy for McIntire to represent another person as Emma Taylor.

The testimony of McIntire himself with regard to Emma Taylor is extremely unsatisfactory. Notwithstanding the number and magnitude of the transactions in which he took part and acted as her agent, he has no explanation of the manner in which the consideration for these deeds was paid or received by her, the bank in which it was deposited, or from which it was drawn, and is unable to produce a single check or letter signed with her name. His memory is excellent where he cannot be contradicted and as to unimportant details, but fails him utterly as to the leading facts of the transactions. While for three years his relations with her must have been constant and confidential, collecting and disbursing moneys for her and looking out for real estate investments, yet he produces no account with her, and professes to have completely forgotten that he ever collected rent for her at all. One Alfred Brown who bought property from her in May, 1883, gave $200 in cash and twelve notes of $75 each, payable at intervals of three months, the last maturing in May, 1886, swears that he paid every one of them as they fell due to McIntire personally; yet McIntire swears he has no recollection of collecting these notes, and that Emma disappeared from Washington about 1884. He tells us that she was a woman who was constantly looking out for bargains in real estate, yet the records show that all her transactions were with him or through his agency, and in every case in

which she became the purchaser of lands the title ultimately became vested in his sister Martha. In this connection it is a suspicious circumstance that whenever she made a conveyance, the deed was not usually recorded for years afterwards, when the necessity for making a complete chain of title required it to be put on file. Upon the other hand, the deeds made to her as grantee were immediately placed on record. None of the parties to whom she gave or from whom she received deeds of property ever met her, nor did the clerk in McIntire's office during these years recollect that he had ever seen her.

He accounts for his inability to produce letters, receipts, accounts or written evidences of any sort, showing his transactions with her, by an utterly improbable story of a fire in his office, which seems to have conveniently consumed all these documents, including a large ledger, in which her accounts were contained, and to have spared everything else, leaving no mark of fire or even the stain of smoke upon documents showing his relation to others. He professes to have thought that Emma Taylor was engaged in one of the departments, because she came down F street after the hour the departments would close, but never asked her in what department she was employed, and the compiler of the "Blue Book" swears that no such person was in the employ of the Government in Washington at that time. All the witnesses who testified to having seen a person of that name fixed the time as prior to the date of her first deed, April 1, 1881; and not one of them, except the McIntires, is able to identify her as *the* Emma Taylor who signed the deeds in question.

There is strong evidence tending to establish the identity of Emma Taylor and Emma T. McIntire. A niece of McIntire's swears that she always understood that the initial in the name of Emma T. McIntire stood for Taylor, and that she was always called Emma Taylor to distinguish her from witness' sister Emma V. McIntire. This witness is corroborated by the production of the family Bible, from which it appears that Emma T. McIntire's father was named Edwin Taylor McIntire. Her own explanation, that her middle initial stood

for Tinsey Ush or Tots — a pet name given her in infancy by her father — does not seem plausible in the face of this testimony. In addition to this, a large number of documents, signed both by Emma Taylor and Emma T. McIntire, were introduced in evidence for other purposes, and a comparison of the signatures shows a resemblance between some of them which is difficult to account for, except upon the theory that they were written by the same person, although the later ones signed by Emma Taylor show an evident attempt to disguise her hand.

But it is useless to pursue this subject further. The testimony of the three McIntires is too full of contradictions and absurdities to be given any weight. While under certain circumstances the other testimony for the defendant might be sufficient to prove that there was such a person as Emma Taylor, when considered with reference to what we have a right to expect in a case of this kind, it falls far short of it, and when read in connection with plaintiff's testimony upon the same point, we are left in no doubt that Emma Taylor was a clumsy fabrication. If the person put forward by McIntire to personate her were not his own sister, it was some one whom he used for that purpose. Under whatever view we take we are satisfied that Emma Taylor was a creation of McIntire's brain, born of the supposed necessities of his case, and bolstered up by the false testimony of himself and his sisters. *Stat nominis umbra.*

The subsequent proceedings in the case show a consummation of the fraud by which the property was ultimately vested in Martha McIntire. The deed of trust given by Jenison to Emma Taylor was never formally foreclosed. It seems that McIntire had promised Jenison that he would try and find a purchaser of the property before the note fell due on June 29, 1882, so that he might get back a part of the $450 loaned to Pryor, none of which he had received; but professed himself unable to do so, and so informed Jenison, a man of perfect integrity but of little experience and much unwisdom in business methods, who seems to have had entire confidence in him, and on April 13, 1882, addressed him a note, in which he

stated that he was not in a condition to carry the property; that he should doubtless have to submit to a sacrifice by a forced sale, and requested him to advertise and do the best he could in its disposition. Considering that the property was worth from $1800 to $2400, when the mortgage to Emma Taylor was only $425, the interest on which was less than $40 per year, while the Pryors were paying six dollars a month rent, it would appear that Jenison was completely hoodwinked as to its actual value.

After some futile efforts to induce McIntire to put the property up at auction, he was finally persuaded, on April 19, 1882, more than two months before the Emma Taylor note was due, to deed the property to Emma Taylor. This deed was recorded immediately and at the same time with his deed upon foreclosure to Jenison, which had been executed ten months before. Both of these deeds, after being recorded, were returned to McIntire. This was the last step necessary to consummate the fraud by which the plaintiff lost her property, and Jenison lost the money he had loaned her upon the deed of trust. Had McIntire been content to defraud the Pryors of their property, he might, after his duties as trustee had been fully discharged, have purchased of Jenison, who doubtless would have been glad to sell for the amount of his mortgage and interest; but his desire also to defraud Jenison of this amount made it necessary for him to introduce another party to purchase Jenison's interest, from whom his sister Martha (that is, himself) might pose as a *bona fide* purchaser. In this he overreached himself.

The title remained of record in Emma Taylor until May 31, 1884, when she made a warranty deed to the defendant Martha McIntire for the expressed consideration of $2500. Subsequently, and on September 27, 1887, Jenison and wife made a quitclaim deed, apparently of further assurance, to Martha McIntire, for a consideration of $100, paid by the check of Edwin A. McIntire. The answer avers this deed to have been made to cover and cure a defect in the deed from Jenison to Taylor, but on its face it purported to pass to the grantee, Martha McIntire, all claims for drawback or rebate on account

of special taxes upon the property, and it is probable that this was its main object.

We do not care to discuss the question whether Martha McIntire was a *bona fide* purchaser of this property. So far as it turns upon her ability to pay the $2500 named as a consideration, it is at least doubtful. So far as it turns upon her actual payment of this consideration, it is more than doubtful. If Emma Taylor were a fictitious person, and the deed from her a forgery, the title of Martha McIntire falls to the ground, except so far as it depends upon the quitclaim deed of Jenison to her of September 27, 1887, which it is not improbable was procured by Edwin A. McIntire for the very purpose of giving a semblance of title in case Emma Taylor were eliminated from the case. But whatever was done by Martha McIntire to this property; whatever title she acquired was through the agency of her brother, and she is as chargeable with his frauds as if she had committed them personally. *United States* v. *State Bank*, 96 U. S. 30; *Griswold* v. *Haven*, 25 N. Y. 595; *Reynolds* v. *Witte*, 13 S. C. 5. It was held by this court in the case of *The Distilled Spirits*, 11 Wall. 356, that the rule that notice of fraud to an agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him as agent in a prior transaction for the same principal, and present to his mind at the time he is acting as such agent. Much more is this the case where the fraud is committed by the agent himself in obtaining the title to the property for the benefit of his principal. But further than this, we have little doubt that the property was really purchased for the benefit of McIntire himself. While Martha McIntire signed the contract for the construction of the house upon these lands, the testimony of the contractors shows that they supposed they were doing the work for McIntire himself; that they had no dealings with Martha; that they were paid by checks signed by McIntire himself; although she came down and looked at the houses, and seemed to be pleased with them.

We agree with the Court of Appeals that in view of their strong pecuniary interest in the case, the improbability of

many of their statements, the obvious fabrication of the Emma Taylor story, and the manifest subservience of the sisters to their brother's schemes, no confidence whatever can be placed in the testimony of either member of the family. This conviction is strengthened by a circumstance appearing in the testimony, although not directly relevant to the issue, that there was another sister, Sarah I. McIntire, who died in Philadelphia, *January 10*, 1881, leaving a deposit of $1196.60 in the Philadelphia Savings Fund Society. To obtain this money a power of attorney, bearing date *April 19*, 1881, was prepared by McIntire, purporting to be signed by Sarah I. McIntire, though she had been dead three months, and acknowledged before a notary public in Washington. It was also signed by McIntire as a subscribing witness, and by virtue of its authority Martha McIntire drew the money from the bank.

2. The question of laches only remains to be considered. The sale was made under the foreclosure of the Jenison mortgage, June 17, 1881. The bill was filed October 21, 1890, a delay of nine years and four months. Upon the theory of the plaintiff, however, — and it is upon her allegations and proofs that the question of laches must be determined, — the sale was made in her interest. The rent paid by her was to be applied by McIntire toward the extinguishment of the Jenison mortgage, and there was nothing definite to apprise her to the contrary until the fall of 1886, when she saw the contractors beginning to build, and notified them that the property belonged to her and not to McIntire. But four years elapsed from this time and the property has not been shown to have greatly increased in value except by the improvements, which were allowed to the defendants upon final decree.

We have a right to consider in this connection that the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an audacious fraud, committed by one in whom she placed entire confidence and who assumed to act as her agent; that this agent procured the title to the property to be taken in his own interest for little more than a nominal sum by the false personation of Emma Taylor; that the property is still controlled and probably

owned by himself; that the position of the property and of the parties to the suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have rapidly risen in value, and that the rights of no *bona fide* purchaser have intervened.

We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, in which we have held that where the fraud is constructive, or is proved by inconclusive testimony, or by evidence falling short of conviction, and the property has greatly increased in value, great diligence will be required in the assertion of the plaintiff's rights. But these were all cases either of bills to establish a trust, to open settled accounts, bills not involving fraud, or where the fraud was not clearly proven, or where, with knowledge of the facts, the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where the property had passed into the hands of persons innocent of the fraud, or with no actual notice that a fraud had been committed.

Granting all that may be fairly claimed of these cases, there is another class having a different bearing, in which it has been held that in case of actual fraud a delay, even greater than that permitted by the statute of limitations, is not fatal to the plaintiff's claim. The leading case is that of *Michoud* v. *Girod*, 4 How. 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que trust.* A bill filed thirty-six years after the commission of the fraud was held not to have been too late. In that case a purchase by an executor through a third person, of property of the testator, was held to be fraudulent and void, though the sale was at public auction, judicially ordered, and the result of the evidence was that a fair price was paid. Said Mr. Justice Wayne, in delivering the opinion of the court, (page 560): "In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to

exclude relief. . . . There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

So, in *Prevost* v. *Gratz*, 6 Wheat. 481, 497, it was said by Mr. Justice Story: "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence and calls more loudly upon a court of equity to grant ample and decisive relief."

In *Baker* v. *Whiting*, 3 Sumn. 475, one Tidd, being the owner of certain land, employed the defendant Whiting as his agent to care for the same, pay all taxes, etc. Whiting allowed the land to be sold for taxes in 1821 and bought it in himself, keeping the plaintiff uninformed of the facts. The bill was filed in 1837 by the heirs of Tidd, who died shortly after his employment of Whiting. In delivering the opinion, Mr. Justice Story remarked: "Then it is said the plaintiffs are barred from any right in equity by the mere lapse of time. . . . But what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill; and I apprehend that, in case of a trust of lands nothing short of the statute period, which would bar a legal estate or a right of entry, would be permitted to operate in equity as a bar of the equitable estate."

In *Allore* v. *Jewell*, 94 U. S. 506, which was a bill to cancel a conveyance of land alleged to have been obtained by the grantor a few weeks before her death, when from her condition she was incapable of understanding the nature or effect of the transaction, it was held that a lapse of six years before bringing suit to cancel the conveyance could not avail the

defendant, where he had possession of the land and a reasonable rent therefor was equal to the value of his improvements, and there had been no loss of evidence preventing a full presentation of the case.

In *Meader* v. *Norton*, 11 Wall. 442, three sisters obtained in 1839, from the governor of California, a tract of land which was approved by the departmental assembly and possession delivered. Some years after, the husband of one of the sisters, named Bolcoff, suppressed or destroyed this grant and fabricated a pretended grant to himself, and also certain other papers intended to prove the genuineness of such fabricated grant. Upon these papers the sons of Bolcoff, he having died, obtained a confirmation of their claim to the land, the land commissioners supposing that the fabricated papers were genuine; and upon such decree a patent issued to the claimants. The fabricated character of these papers being discovered, the grantee of the rights of the three sisters brought a suit in equity to have the defendants holding under the patent declared trustees of the legal title and compel a transfer of that title to him. Held: that the suit, which was begun in 1865, would lie, and that laches could not prevail as a defence where the relief sought was granted on the ground of secret fraud, and it appeared that the suit was commenced a reasonable time after the fraud was discovered.

In *Insurance Co.* v. *Eldredge*, 102 U. S. 545, 548, a deed of trust of lands to secure a promissory note was released without the surrender or payment of the note, and without express authority of the holder. It was held that a subsequent purchaser with notice took the land subject to the equitable rights of such holder. The extent of the delay does not clearly appear in the report, but in the opinion of the court it is said by Mr. Justice Field: "The company, as already stated, must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien thus gained; nor can it aver that his claim to have the instrument cancelled, by which this priority was secured, is a stale one,

when asserted within the period allowed by law, and no rights of third parties as *bona fide* purchasers have intervened to render inequitable the assertion of his original lien."

In *Bowen* v. *Evans*, 2 H. L. 257, a bill filed to set aside a sale of lands made nearly fifty years before under a decree, on the ground of irregularities in the proceedings and fraud in the sale, it was held that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable; but in delivering the opinion Lord Chancellor Cottenham observed: "So, when much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the fruits of their plunder."

The case of *Hopkins* v. *Hammond*, 143 U. S. 224, a leading case in this court, is not to the contrary. In this case two partners owned real estate in common, some of which was used in the partnership business. One died making the other by his will a trustee for the testator's children, with power of sale of all the real estate, and directing that the business be continued. After carrying on the business for some time the trustee sold the real estate by auction, and bought portions of it in through a third person, and accounted for half of the net proceeds. The transaction was open and known to all the *cestuis que trustent*, and was objected to by none of them. It was held that there was nothing in this to indicate fraud; that the purchase was not absolutely void but voidable, and might be confirmed by the parties interested, either directly or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts came to their knowledge. There was a delay of nearly twenty years in this case. In delivering the opinion the Chief Justice said: "Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be

sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like." A bare statement of these facts will show that it has no application to the case now under consideration.

So in *Felix* v. *Patrick*, 145 U. S. 317, where a bill was filed after a lapse of twenty-eight years to impeach a title fraudulently acquired through the location of certain land script, and the land was shown to have increased enormously in value by being taken within the limits of a city, and to have been largely occupied by persons who had bought on the strength of the apparent title, and erected buildings of a permanent character, it was held that the complainant was barred by laches, but in the opinion of the court it is said: "The law pronounces the transaction a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs' relief at any time during the life of either of the parties; but as the case stands at present justice requires only what the law, in the absence of the statutory limitation, would demand — the repayment of the value of the script with legal interest thereon."

In *Norris* v. *Haggin*, 136 U. S. 386, plaintiff filed his bill in 1884, alleging an actual fraud committed against him by his two attorneys in 1859, twenty-five years previously, and that he had only discovered the fraud a short time before commencing his suit. The case was heard on demurrer to the bill, and the court found that "there are many things about the bill which are peculiar and calculated to throw suspicion on the claims." It also found that the statement that the complainant had only come to a knowledge of the alleged fraud within a short time of the filing of the bill was shown by the

statements in the bill itself to be false, and that he had known of the alleged fraud for over fifteen years, and that a number of other matters alleged in the bill and amended bill were shown by other contradictory statements to be false, and thereby the whole claim was rendered suspicious; that there were ambiguities in the bill, etc. Taking the whole case as stated by the complainant himself, the court thought that the bill had properly been dismissed by the court below. It is evident that the bill was dismissed upon the ground that the fraud was doubtfully or ambiguously alleged, the claim suspicious and that knowledge of the fraud had existed for a long time.

We do not wish to be understood as holding that the plaintiff, even in the case of actual fraud, may wait an indefinite time, or always so long as the statute of limitations would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proven, the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay. As was said in *Townsend* v. *Vanderwerker*, 160 U. S. 171, 186 : "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

The circumstances of this case are so peculiar; the fraud so glaring; the original and persistent intention of McIntire through so many years to make himself the owner of the property, so manifest; the utter disregard shown of the rights of the plaintiff, as well as of Jenison, the mortgagee, upon whose ignorance in the one case and whose confidence in the other he imposed so successfully; the false personation of Emma Taylor, and the fact that the decree in favor of the plaintiff can do no possible harm to any innocent person, demand of us an affirmance of the action of the Court of Appeals. Its decree is accordingly

Affirmed.

CALHOUN *v.* VIOLET.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 180. Submitted January 20, 1899. — Decided February 20, 1899.

The provisions in the act of March 2, 1889, c. 412, 25 Stat. 980, 1005, with regard to honorably discharged Union soldiers and sailors were intended only to give them an equal right with others to acquire a homestead within the territory described by the act, but did not operate to relieve them from the general restriction as to going into the territory imposed upon all persons by the provisions of the act.

THE case is stated in the opinion.

Mr. Calvin A. Calhoun in person for appellant.

No appearance for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff sued to recover a described piece of land upon the assumption that the defendant held it in trust for him. The prayer of the petition was that the trust be recognized and the defendant be decreed to make conveyance of the land. A demurrer was interposed, which was sustained by the trial court, and the suit was thereupon dismissed. On appeal to the Supreme Court of the Territory, the action of the trial court was affirmed. The present appeal was then taken, and the issue which arises is this: Did the court below err in deciding that the petition of the plaintiff did not state a cause of action?

The facts alleged in the petition and shown by the exhibits which were annexed to it are as follows: The plaintiff Calhoun, an honorably discharged soldier, who was in all general respects qualified to claim a homestead under the law, Rev. Stat. §§ 2304 *et seq.*, seeking to avail himself of his right, entered, on April 23, 1889, at the United States land office at

Guthrie, Oklahoma, "lots 6, 7, 8, 9 and 10 of section 3, township 11 north, range 3 west, in the aforesaid land district." The petition alleged that Calhoun had performed all the subsequent acts required by law to make the entry valid. On May 21, 1889, Theodore W. Echelberger contested the entry on the ground that Calhoun had come into the Territory of Oklahoma before the time when by law he had a right to do so, in violation of the statute of the United States and of the proclamation of the President issued in pursuance thereof. 25 Stat. 980, 1004; *Payne* v. *Robertson*, 169 U. S. 323; *Smith* v. *Townsend*, 148 U. S. 490. On the 27th of May, 1890, James McCornack also filed a contest against both Calhoun and Echelberger, alleging that they were both disqualified because they had during the prohibited period entered the Territory. On June 29, 1890, contest was also filed by Thomas J. Bailey, charging the illegality of the claims of Calhoun, Echelberger and McCornack, averring that he, Bailey, was the first legal settler on the land and entitled to it. On January 25, 1890, one Linthicum filed a contest against lot No. 10, embraced in the entry made by Calhoun, on the ground that that lot was on a different side of the Canadian River from the balance of the land embraced in the entry, and as the Canadian River was a meandering stream, the entry could not lawfully cover land situated on both sides thereof, hence lot 10 had been illegally included in the Calhoun entry.

In February, 1890, the Commissioner of the General Land Office instructed the local land office to suspend, among others, the entry made by Calhoun, because the land covered by it was on both sides of a meandering stream, and hence entry thereof had been improperly allowed. The instruction transmitted to the local officer concluded as follows: "You will notify the claimant of this fact" (that is, of the suspension of his entry) "and allow him thirty days from receipt of notice in which to elect which portion of his claim he will relinquish, so that the land remaining will be confined to one side of such stream. Should any of the parties desire to do so, he may relinquish his entire entry; in which event an applica-

tion to make a second entry of a specific tract will receive due consideration. If any of the entrymen fail or refuse to take action within the time specified, his entry will be held for cancellation. Notify the parties in accordance with circular of October 28, 1886, (5 L. D. 204,) and in due time transmit the evidence of such notice with the report of your action to this office." Conforming to this notice, Calhoun, on the 17th of March, 1890, filed in the local office a formal relinquishment of "all that portion of land on the right bank of the North Canadian River known and designated as lot No. 10 (ten) in the N. W. quarter of section 3, township 11 N., range 3 west, Guthrie land district, the same having been embraced within my original entry No. 19, dated April 23, A.D. 1889."

On the 30th of October, 1890, all the contests above referred to were duly heard before the register and receiver of the local office, and it was decided that both the plaintiff and Echelberger were disqualified from taking the land because they had gone into the Territory before the time fixed by law, and that McCornack was entitled to enter the land. The claims of Bailey and Linthicum were rejected. From this decision the contests were carried to the Commissioner of the General Land Office, by whom the action of the local officers was affirmed, and thereupon an appeal was prosecuted to the Secretary of the Interior, with a like result. Subsequently, in 1894, on a petition for review by Calhoun and another of the parties, the Secretary of the Interior reiterated the previous ruling, affirming the action of the Commissioner of the General Land Office in rejecting the claims of Calhoun and others on the ground that they had been made in violation of law. Pending the appeals and decisions thereon as above stated, Calhoun filed with the Commissioner of the General Land Office an application complaining of the order which had compelled him to elect to which side of the river he would confine his entry, asserting that the action of the Department was illegal, as the stream was not a meandering one, and asking a revocation of the order.

The petition filed in the court below moreover contained an

averment that the rulings of the local land officers, of the Commissioner of the General Land Office and of the Secretary of the Interior, above stated, were null and void, because all these officers had misconceived the evidence and disregarded its weight, and was in violation of law, because the section of the act of 1889, forbidding going into the Territory before a named date of persons desirous of taking land therein, had no application to honorably discharged soldiers entitled as such to make a homestead entry. The land as to which it was averred the trust existed and a conveyance of which was sought was lot 10, as to which the relinquishment had been filed, under the circumstances above mentioned. It was charged that, despite the protest of Calhoun, a final certificate for this lot had been issued to the defendant, with full knowledge on his part of the claim of Calhoun, hence it was asserted the trust arose and the obligation to convey resulted.

The court below held that it was bound by the action of the Land Department in so far as that department had decided as a matter of fact that Calhoun had made entry of his land by going into the Territory contrary to the restrictions imposed by the act of Congress, and that in so far as the ruling of the Land Department rested upon a matter of law, it had been correctly decided that Calhoun, as a discharged soldier, was not entitled to go into the Territory contrary to law, and thereby acquire a priority over other citizens.

The first of these rulings was manifestly correct. It is elementary that, although this court will determine for itself the correctness of legal propositions upon which the Land Department of the government may have rested its decisions, it will not, in the absence of fraud, reëxamine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings, had in the lawful administration of the public lands. *United States* v. *Minor*, 114 U. S. 233; *Lee* v. *Johnson*, 116 U. S. 48; *Sanford* v. *Sanford*, 139 U. S. 647.

The fact that the plaintiff had entered the Territory prior to the time fixed by the statute and the proclamation of the President, having been conclusively determined, it follows in-

evitably, as a legal result, that an entry of land made under such circumstances was void and that the ruling by the Land Department so holding was correct. This leaves only open for our consideration the legal question whether Calhoun, because he was an honorably discharged soldier, was entitled to go into the Territory before the designated time and make a valid entry of a homestead therein. The claim that he was authorized to do so is based on a proviso contained in section 12 of the act of March 2, 1889, c. 412, § 13, 25 Stat. 980, 1005, which is as follows:

"And provided further, that the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections 2304 and 2305 of the Revised Statutes shall not be abridged."

The sections of the Revised Statutes to which this proviso relates simply invest honorably discharged soldiers with the right to enter a homestead.

The proviso in question is immediately succeeded by the following:

"And provided further, that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof, but until said lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

It is manifest from the context of the act that the proviso relied upon was intended only to give to honorably discharged soldiers and sailors an equal right with others to acquire a homestead within the territory described by the act, and the proviso was thus intended simply to exclude any implication that they were, in consequence of the prior provisions of the act, not entitled to avail themselves of its benefits. The proviso therefore in no way operated in favor of honorably discharged soldiers and sailors to relieve them from the general restriction as to going into the territory imposed upon all persons by the subsequent provisions of the law. To hold the

contrary would compel to the conclusion that the law, whilst allowing honorably discharged soldiers and sailors to take advantage of its provisions, had at the same time conferred upon them the power to violate its inhibitions. The purpose of Congress in allowing those named in the proviso to reap the benefits of the law was not to confer the power to do the very thing which the act in the most express terms sedulously sought to prevent.

Affirmed.

DUNLAP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 218. Argued November 29, 30, 1898. — Decided February 20, 1899.

The act of August 28, 1894, c. 349, does not grant a right *in præsenti* to all persons who may, after the passage of the law, use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but the grant was conditioned on use, in compliance with regulations to be prescribed, in the absence of which regulations the right did not so vest as to create a cause of action by reason of the unregulated use.

Dunlap was, and had been for many years, "engaged in the manufacture of a product of the arts known and described as 'stiff hats,'" in Brooklyn, New York. Between August 28, 1894, and April 24, 1895, he used 7060.95 proof gallons of domestic alcohol to dissolve the shellac required to stiffen hats made at his factory. An internal revenue tax of ninety cents per proof gallon had been paid upon 2604.17 gallons before August 28, 1894, making $2344.40, and a tax of one dollar and ten cents per proof gallon had been paid upon the remaining 4456.78 gallons after August 28, 1894, making $4900.81, or $7245.21 in all. In October, 1894, Dunlap notified the Collector of Internal Revenue of the First District of New York that he was using domestic alcohol at his factory, and that under section 61 of the act of August 28, 1894, c. 349, 28 Stat. 509, 567, he claimed a rebate of the internal revenue

tax paid on said alcohol, and he requested the collector to take such official action relative to inspection and surveillance as the law and regulations might require. Subsequently he tendered to the collector affidavits and other evidence tending to show that he had used the aforesaid quantity of alcohol in his business, together with stamps showing payment of tax thereon, and he requested the collector to visit the factory and satisfy himself by an examination of the books or in any other manner, that the alcohol had been used as alleged. He also requested payment of the amount of tax appearing from the stamps to have been paid. The collector declined to entertain the application, and Dunlap filed a petition in the Court of Claims to recover the full amount of the tax which had been paid, as shown by the stamps, which, on December 6, 1897, was dismissed, whereupon he took this appeal.

The findings of fact set forth, among other things, that "in the early part of September, 1894, the Secretary of the Treasury requested the Commissioner of Internal Revenue to have regulations drafted for the use of alcohol in the arts, etc., and for the presentation of claims for rebate of the tax;" and that "subsequently there was correspondence between these officers as follows:"

From the Commissioner to the Secretary, October 3, 1894:

"I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that without such supervision the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

"As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any

appropriation or any general provision of law authorizing the expenditure of money by this Department needed to procure such supervision."

From the Secretary to the Commissioner, October 5, 1894:

"Yours of the 3d instant, inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to."

From the Commissioner to the Secretary, October 5, 1894:

"I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

"In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, the preparation of these regulations be delayed until Congress has opportunity to supply this omission."

From the Secretary to the Commissioner, October 6, 1894:

"Your communication of yesterday, in reference to the execution of section 61 of the act of August 28, 1894, and

advising me that, for the reasons therein stated, you are unable 'to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress,' is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statute referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

"You are, therefore, instructed to take no further action in the matter for the present."

In consequence of this last letter a circular was issued by the Commissioner, November 24, 1894, stating:

"In view of the fact that this Department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained."

Finding VIII was:

"On December 3, 1894, the Secretary of the Treasury transmitted to the Congress the annual report on the finances, containing the following statement:

"'Owing to defects in the legislation the Treasury Department has been unable to execute the provisions of section sixty-one of the act of August 28, 1894, permitting the use of alcohol in the arts, or in any medicinal or other like compound, without the payment of the internal tax. The act made no appropriation to defray the expenses of its administration, or for the payment of taxes provided for; and, after

full consideration of the subject and an unsuccessful attempt to frame regulations which would, without official supervision, protect the Government and the manufacturers, the Department was constrained to abandon the effort and await the further action of Congress.

"'It is estimated in the office of the Commissioner of Internal Revenue that the drawbacks or repayments provided for in the act will amount to not less than $10,000,000 per annum, and that the expense of the necessary official supervision will not be less than $500,000 per annum. For the information of Congress, the correspondence between the Secretary and the Commissioner of Internal Revenue upon this subject will accompany this report. Finance report, 1894, LXVI.'

"Appended to this report was a draft of regulations proposed for carrying out section 61, copies of communications from the Commissioner of Internal Revenue explaining the estimates of the appropriations required, and copies of the official correspondence between the Secretary and the Commissioner, given in the preceding finding, showing the action of the Department. The proposed regulations were as follows:"

[These regulations, consisting of thirty-three articles and including many subdivisions, were set forth at length.]

The ninth finding was to the effect that the amounts appropriated in the urgent deficiency act of January 25, 1895, 28 Stat. 636, c. 43, aggregating $245,095, were the amounts of the Secretary's estimate transmitted to Congress December 4, 1894, as necessitated by the income tax provisions of the act of August 28, 1894.

The case is reported 33 C. Cl. 135.

Mr. George A. King and *Mr. Joseph H. Choate* for appellant. *Mr. B. F. Tracy* and *Mr. William B. King* were on their brief.

Mr. Charles C. Binney and *Mr. Attorney General* for appellees.

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

Section 61 of the act of August 28, 1894, reads as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

The Court of Claims held that as the rebate provided for was to be paid only on alcohol used "under regulations to be prescribed by the Secretary of the Treasury;" and as this alcohol had not been so used, there could be no recovery; and, speaking through Weldon, J., among other things, said:

"The right of the manufacturer to a rebate being dependent on the regulations of the Secretary, such regulations are conditions precedent to his right of repayment, and therefore no right of repayment can vest until in pursuance of regulations the manufacturer uses alcohol as contemplated by the statute. The statute having prescribed certain conditions upon which the right of the claimant is predicated, and from which it originates, there can be no cause of action unless it affirmatively appears that such conditions have been complied with on the part of the claimant. This is a proceeding based upon an alleged condition of liability upon the part of the defendants, and it must be shown that all the essential elements of that condition exist before any liability can accrue. Conceding that it was the duty of the Secretary to prescribe regulations consistent with the purpose and requirements of the law, his failure to do so will not supply a necessary element in the cause of the claimant."

Alcohol had for years been used in the arts and in medicinal and other like compounds, and had been taxed and

no rebate allowed, but by this section, manufacturers who used alcohol in the arts, etc., under regulations prescribed by the Secretary, were granted a rebate on proof of such regulated use and of the payment of the tax on the alcohol so used.

There were no regulations in respect to the use of alcohol in the arts at the time this alcohol was used, but it is contended that the right to repayment was absolutely vested by the statute, dependent on the mere fact of actual use in the arts, and not on use in compliance with regulations. So that during such period of time as might be required for the framing of regulations, or as might elapse, if additional legislation were found necessary, all alcohol used in the arts would be free from taxation, although the exemption applied only to regulated use. But if the right of the manufacturer could not enure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary; or, if he had found that it was not practicable to enforce such as he believed necessary, without further legislation, then it is obvious the right to the rebate would not attach; in any view the right was not absolute but was conditioned on the performance of an executive act, and the absence of performance left the condition of the existence of the right unfulfilled.

The distinction between the one class of cases and the other is clear, and has been observed in many decisions of this court.

By the eighth section of the act of June 12, 1866, c. 114, 14 Stat. 60, it was provided, "that when the quarterly returns of any postmaster of the third, fourth or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section," (namely, § 2, act of July 1, 1864, c. 197, 13 Stat. 335, 336;) and in *United States* v. *McLean*, 95 U. S. 750, it was held that the law imposed no obligation on the Government to pay an increased salary, though warranted by the quarterly

returns of an office, until readjustment by the Postmaster General. Mr. Justice Strong, delivering the opinion, after remarking that the "readjustment was an executive act, made necessary by the law in order to perfect any liability of the Government," said:

"But courts cannot perform executive duties, nor treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled." And see *United States* v. *Verdier*, 164 U. S. 213.

On the other hand, in *Campbell* v. *United States*, 107 U. S. 407, it was ruled that where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations prescribed by the Secretary of the Treasury, the inaction of the Secretary is immaterial, and the drawback must be paid whether ascertained under the Secretary's regulations or not, because the right to the drawback depends on the statute, and not on the Secretary's regulations, which relate merely to the ascertainment of the amount. The difference between the statutes in regard to drawbacks, and the wording of section 61, is very marked. Drawback laws relate to an article after it is manufactured. The mere use of imported materials in manufacturing does not entitle the manufacturer to a drawback, and it is only when the manufactured goods are exported that the reason for the repayment of duty arises. In such instances the exportation and the ascertainment of the character and quality of the imported materials existing in the manufactured article are subjected to regulation, but not the process of manufacture. The case of *Campbell* only concerned the ascertainment of the amount of drawback, and it was held that inasmuch as the amount had been proved to the satisfaction of the court as completely as if every reasonable regulation had been complied with, a recovery could be sustained.

If we compare section 61 with the statute involved in *Campbell* v. *United States*, (act of August 5, 1861, 12 Stat.

292, c. 45, § 4,) the distinction between this case and that will be clearly discernible.

§ 61, act of August 28, 1894.

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasurer of the United States a rebate or repayment of the tax so paid."

§ 4, act of August 5, 1861.

"From and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

By the act of 1894 Congress required that the thing itself should be done under official regulations; by the act of 1861, simply that proof of the doing of the act should be made in the manner prescribed.

In the case before us the first condition was that the alcohol should have been used by the manufacturer in accordance with regulations; and as that condition was not fulfilled, it is difficult to hold that any justiciable right by action in assumpsit arose.

This is the result of the section taken in its literal meaning, and as the rebate constituted in effect an exemption from taxation, we perceive no ground which would justify a departure from the plain words employed.

Nor are we able to see that the letter of the statute did not fully disclose the intent.

This section was one of many relating to the taxation of distilled spirits, which imposed a higher tax and introduced certain new requirements in regard to regauging, general bonded warehouses, etc., the object to derive more revenue from spirits used as beverages being perfectly clear; and the general intention to forego the revenue that had been previously derived from spirits used in the arts could only be carried out in consistency with the general tenor of the whole body of laws regulating the tax on distilled spirits, which undertook to guard the revenue at all points, and which required from the officers of the Government evidence that everything had been correctly done. The regulations contemplated by section 61 were regulations to insure the *bona fide* use in the arts, etc., of all alcohol on which a rebate was to be paid and to prevent such payment on alcohol not so used; and these were to be specific regulations under that section, and could not otherwise be framed than in the exercise of a large discretion based on years of experience in the Treasury Department.

Since, as counsel for Government argue, the peculiar nature of alcohol itself, the materials capable of being distilled being plentiful, the process of distillation easy, and the profit, if the tax were evaded, necessarily great, had led in the course of thirty years to a minute and stringent system of laws, aimed at protecting the Government in every particular, it seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite; and may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so.

Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318, it is nevertheless interesting to note that efforts were made in the Senate to amend the bill by the addition of sections which, while making alcohol used in the arts free from the tax, sought to secure the Government from fraud by provisions for the methylating of such spirits so as to render them unfit for use as a beverage; that these proposed amendments were rejected, 26 Cong. Rec. 6935, 6936; and that subsequently section 61 was adopted as an amendment, it being urged in its support that "if the Secretary of the Treasury and the Commissioner of Internal Revenue think they cannot adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures and the arts, then there will be relief under it." 26 Cong. Rec. p. 6985.

As soon as the act of August 28, 1894, became a law, without the approval of the President, Congress adjourned, and at its first meeting thereafter the Secretary reported a draft of the regulations he desired to prescribe, stating that their enforcement would cost at least half a million of dollars annually, for which no appropriation was available, and that therefore he could not execute the section until Congress took further action, and he transmitted the correspondence between himself and the Commissioner, including his letter of October 6, 1894, instructing the Commissioner to take no action regarding the matter.

Congress was thus distinctly informed that no claims for rebate would be entertained in the absence of further legislation, but none such was had, and finally, on June 3, 1896, section 61 was repealed, and the appointment of a joint select committee was authorized to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax, and to report their conclusions to Congress on the first Monday in December, eighteen hundred and ninety-six," with

power to "summon witnesses, administer oaths, print testimony or other information." 29 Stat. 195, c. 310.

Numerous other provisions of the act called for regulations by the Secretary of the Treasury, such as those relating to the collection of customs duties and the free list; to the importation or manufacture in bond or withdrawal from bond free of tax; to drawbacks on imported merchandise; to the collection of internal revenue, and some others; but these related to matters for whose efficient regulation the Secretary of the Treasury was invested with adequate power, and their subject-matter was different from that of section 61.

If the duty of the Secretary to prescribe regulations was merely ministerial, and a mandamus could, under circumstances, have issued to compel him to discharge it, would not the judgment at which he arrived, the action which he took, and his reference of the matter to Congress, have furnished a complete defence? But it is insisted that by reason of the exercise of discretionary power necessarily involved in prescribing regulations as contemplated, the Secretary could not have been thus compelled to act. We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect. Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the Department, as the matter stood, such use could not be regulated.

All this, however, only tends to sustain the conclusion of the Court of Claims that this was not the case of a right granted *in præsenti* to all persons who might, after the passage of the law, actually use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but that the grant of the right was conditioned on use in compliance with regulations to be prescribed, in the absence of which the right could not vest so as to create a cause of action by reason of the unregulated use. The decisions bearing on the subject are examined and

discussed in the opinion of the Court of Claims, and we do not feel called on to recapitulate them here.

Judgment affirmed.

MR. JUSTICE BROWN, MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA dissented.

UNITED STATES *v.* NAVARRE.

APPEAL FROM THE COURT OF CLAIMS.

No. 393. Submitted January 9, 1899. — Decided February 20, 1899.

Claims for depredations on the Pottawatomie Indians committed by Indians were properly allowed by the Secretary of the Interior under the treaty of August 7, 1868, and are valid claims.

THE case is stated in the opinion.

Mr. Charles C. Binney and *Mr. Assistant Attorney General Pradt* for the United States.

Mr. J. H. McGowan and *Mr. John Wharton Clark* for Navarre.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Claims for depredations committed on members of the Pottawatomie tribe of Indians were referred to the Court of Claims for adjudication by the acts of Congress hereafter quoted.

The appellees in pursuance of said acts of Congress filed a petition setting forth claims for depredations committed on them by white men, and prayed judgment therefor.

The proof showed depredations committed by Indians as well as by white men, and the Court of Claims gave judgment accordingly, and the United States appealed.

Only the claims allowed for property taken by Indians are contested. They amount to the sum of $5890.

The right to recover was based on the tenth article of the treaty with the Pottawatomie Indians, proclaimed August 7, 1868. 15 Stat. 531, 533. It provided as follows: "It is further agreed that upon the presentation to the Department of the Interior of the claims of said tribe for depredations committed by others upon their stock, timber or other property, accompanied by evidence thereof, examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises."

The court below found that "under said treaty these claims were by the Secretary of the Interior transmitted, with the evidence in support thereof, to Congress for its action thereon; and by Congress, under the acts of March 3, 1885, c. 341, and March 3, 1891, c. 543, said claims, with all evidence, documents, reports and other papers pertaining to same, were referred to this court to be adjudicated and determined." 23 Stat. 362, 372; 26 Stat. 989, 1011.

Nothing was done under the act of March 3, 1885. It seems to be conceded that the reason was because the act required strictly legal evidence of the claims.

The act of March 3, 1891, is as follows:

"That the claims of certain individual members of the Pottawatomie Nation of Indians, their heirs or legal representatives, for the depredations committed by others upon their stock, timber or other property, reported to Congress under the tenth article of the treaty of August 7, 1868, be, and the same are hereby, referred to the Court of Claims for adjudication. And said court shall, in determining said cause, ascertain the amounts due and to whom due by reason of actual damage sustained.

"And all papers, reports, evidence, records and proceedings relating in any way to said claims now on file or of record in the Department of the Interior or any other Department, or on file or of record in the office of the secretary of the Senate or the office of the clerk of the House of Representatives, shall be delivered to said court, and in considering the merits of the claims presented to the court all testimony and reports

of special agents or other officers and other papers now on file or of record in the departments of Congress shall be considered by the court, and such value awarded thereto as in its judgment is right and proper."

The contention of the United States depends on the meaning of the words in the act, "for the depredations committed by others." Exactly the same words are used in article 10 of the treaty, and the Secretary of the Interior, exercising his duty, reported claims for depredations, by both Indians and white men, to Congress for its action. They were, therefore, claims for depredations "reported to Congress under the tenth article of the treaty of August 7, 1868." But it is argued, and ably so, that claims for depredations by other Indians were improperly reported.

We do not think it necessary to review the argument in detail. It is sufficient to say that Congress had before it when it legislated all the claims, and did not discriminate between them. If the meaning of the treaty was doubtful, it was competent for Congress to resolve the doubt and accept responsibility for all claims. It was natural enough for it to adopt the interpretation of the Interior Department. At any rate, it did not distinguish between the claims. Its language covers those which came from the acts of Indians as well as those which came from the acts of white men.

Judgment affirmed.

COLLIER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 252. Submitted January 9, 1899. — Decided February 20, 1899.

There is nothing in this case to take it out of the settled rule that the findings of the Court of Claims in an action at law determine all matters of fact.

Marks v. *United States*, 164 U. S. 297, followed to the point that when a petition, filed in the Court of Claims, alleges that a depredation was committed by an Indian or Indians belonging to a tribe in amity with the

United States it becomes the duty of that court to inquire as to the truth of that allegation; and if it appears that the tribe, as a tribe, was engaged in actual hostilities with the United States, the judgment of the Court of Claims must be that the allegation of the petition is not sustained, and that the claim is not one within its province to adjudicate.

It was the manifest purpose of Congress, in the act of March 3, 1891, c. 538, to empower the Court of Claims to receive and consider any document on file in the Departments of the Government or in the courts having a bearing upon any material question arising in the consideration of any particular claim for compensation for Indian depredation, the court to allow the documents such weight as they were entitled to have.

THE case is stated in the opinion.

Mr. A. H. Garland and *Mr. Heber J. May* for appellant.

Mr. Assistant Attorney General Thompson for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

This appeal brings up for review a judgment of the Court of Claims, dismissing, for want of jurisdiction, a claim originally filed in that court by one Ranck, since deceased, to recover for damages alleged to have been sustained on March 2, 1869, by the destruction of property of the claimant by Indians near the line of Texas and Mexico.

The finding of the court is that "The alleged depredation was committed on or about the 2d day of March, 1869, in the southeastern part of the Territory of New Mexico, by Mescalero Apache Indians, who at the time and place were not in amity with the United States." Upon its finding of the ultimate facts thus stated, the court below rested the legal conclusion that it was without jurisdiction of the cause. This court accepts the findings of ultimate fact made by the court below and cannot review them. *Mahan* v. *United States*, 14 Wall. 109; *Stone* v. *United States*, 164 U. S. 380. Applying the law to the facts, it is clear that as the Indians by whom the depredation was committed were not in amity, the court correctly decided that it was without jurisdiction. *Marks* v. *United States*, 161 U. S. 297, followed in *Leighton* v. *United States*, 161 U. S. 291; *Valk* v. *United States*, 168 U. S. 703. This legal conclusion was not disputed in the argument at bar;

but it was contended that this court will, as a matter of law, where the record enables it to do so, determine for itself whether the ultimate facts found below are supported by any evidence whatever, and that it also will determine whether the ultimate facts were solely deduced by the court below from evidence which was wholly illegal. And upon the foregoing legal proposition it is asserted, first, that it is disclosed by the record that there was no evidence whatever tending to show that the depredation was committed by the Mescalero Apache Indians; and, second, that the record also discloses that the conclusion of fact that the Indians committing the depredation were not in amity was solely rested by the court upon certain official reports and documents which were inadmissible. The rule by which these contentions are to be measured is thus stated in *United States* v. *Clark*, 96 U. S. 37, 40, as follows:

"But we are of opinion that when that court [the Court of Claims] has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is not evidence to support its verdict; that is, its finding of the ultimate fact in question." See also *Stone* v. *United States*, *supra*, 383.

Whether the record before us is in such a state as to support either of the contentions above stated, is the question for decision. In so far as the question of the tribe of Indians by whom the depredation was committed, it obviously is not, since there is not therein contained any reference whatever to the evidence upon which the court based its conclusion on this subject. The portion of the record which is relied upon to establish the contrary is the following statement:

"The court determines that the Mescalero Indians were not in amity at the time of the depredation from the following official reports, documents and facts deduced from the testimony of witnesses which are set forth in the findings."

But the matter thus certified clearly purports only to relate to the evidence from which the court drew its conclusions as to amity, and not to that upon which it based its finding as to the tribe by whom the depredation was committed. It follows, then, that the argument is simply this: That we are to determine that there was no evidence supporting the finding as to the particular tribe committing the depredation, when the record does not disclose and the court has not certified the proof from which its conclusion was drawn. The claim that the record discloses that the finding as to amity rested solely upon certain official reports and documents, finds also its only support in the excerpt from the record just above stated. Whilst it is true the statement certifies that certain reports and official documents were considered by the court in reaching its finding as to the want of amity, it does not state that it was alone based upon these reports, for it says that the determination that the Indians were not in amity at the time of the depredation was likewise drawn from "facts deduced from the testimony of witnesses which are set forth in the findings." Now, whilst the findings contain certain reports and official documents, presumably those referred to in the statement, they do not contain the testimony of any of the witnesses. After reproducing the reports and documents, the record concludes with a mere recapitulation of the result of the testimony of certain witnesses as to the number of Indians by whom the depredation was committed and the circumstances surrounding, that is, the nature of the attack made by the Indians and the conflict which ensued when it was made. It follows that even if the reports and official documents to which the findings refer were legally inadmissible to show want of amity, we could not hold that there was no legal evidence supporting the conclusion that amity did not exist, since all the evidence which the court states is considered on this subject is not in the record. But the

official reports in question were legally competent on the issue of amity. It is conceded that if competent they were relevant, since it is admitted they tended to establish that the tribe was not in amity when the depredation was committed.

The act of March 3, 1891, c. 538, for the adjudication and payment of claims arising from Indian depredations, 26 Stat. 851, provides in the fourth and eleventh sections as follows:

"In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and proper." . . .

"SEC. 11. That all papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the Attorney General."

These provisions express the manifest purpose of Congress to empower the Court of Claims to receive and consider any document on file in the Departments of the Government or in the courts, having a bearing upon any material question arising in the consideration of any particular claim for compensation for Indian depredation, the court to allow the documents such weight as they were entitled to have.

There is no merit in the contention that, although documents, within the description of the statute, were relevant to the question of amity, they were nevertheless incompetent, as they did not refer to the particular depredation in question, because the statute only authorizes the consideration of reports, documents, etc., "relating to any such claim." As amity was made by law an essential prerequisite to recover, it follows that evidence bearing on such subject was necessarily evidence relating to the claim under consideration.

Affirmed.

Syllabus.

CENTRAL LOAN & TRUST COMPANY *v.* CAMPBELL COMMISSION COMPANY.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 145. Argued and submitted January 17, 1899. — Decided February 20, 1899.

The plaintiff in error, a Texas corporation, commenced an action, in a court of Oklahoma, against the defendant in error, a Missouri corporation, and caused a writ of attachment to be issued and levied upon five thousand head of cattle, claimed to be the property of the Missouri corporation. After such levy, service was made upon one Pierce as garnishee of the Missouri corporation. Pierce answered, denying that he was indebted to or held property of that company, and further set up an agreement under the provisions of which he had shipped to the pastures of that company a large number of cattle, the ownership to remain in him until full payment for the cattle. The cattle levied upon were of this number. He also set up a notice from one Stoddard of an assignment to him of the contract by the Missouri company. He further set up that he was entitled to the possession of the cattle, and asked that they should be returned to him with damages. With the consent of both sides Pierce was appointed receiver of the cattle, and then service was made upon the Missouri corporation by publication, had in compliance with requirements of law. Stoddard then filed an interplea, setting up rights of other parties. This was demurred to, but no action was had on the demurrer. The receiver sold the cattle, paid himself in full and reported to the court that he had a balance in his hands, subject to its order. Then the Missouri company filed pleas to the jurisdiction of the court, and other pleas were filed, setting up claims to the balance in the receiver's hands. The Missouri company also set up that Pierce, by becoming receiver, had abandoned his claim to the ownership of the cattle. The trial court held that the territorial act, authorizing the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge, was unconstitutional and void, and ordered the action dismissed. The Supreme Court of the Territory held that the court below was wrong in this respect, but affirmed its judgment on the ground that an actual levy was necessary in order to give the court jurisdiction, and there had been none. The case being brought here, the Missouri corporation set up that this court was without jurisdiction, because the intervenors in the trial court had not been made parties to the appeal. *Held:*

(1) That it was not necessary to make the intervenors parties;

(2) That property of the Missouri company had been levied on under

Statement of the Case.

the writ of attachment, and that the decision of the Supreme Court of the Territory to the contrary was wrong;

(3) That the Oklahoma statute, requiring an affidavit in its support, as a prerequisite to the issuance of a writ of attachment, does not involve the discharge of a judicial function, but is the performance of a ministerial duty;

(4) That the court acquired jurisdiction of the defendant corporation by constructive service, by foreign attachment, without its consent;

(5) That the territorial statute, authorizing the issue of a writ of attachment against the property of a non-resident defendant, is not repugnant to the Fourteenth Amendment to the Constitution.

This action was commenced on July 2, 1895, in the district court of Noble County, Oklahoma, by the Central Loan and Trust Company, a Texas corporation, against the Campbell Commission Company, a Missouri corporation, to recover upon certain promissory notes not then due. Upon affidavit a writ of attachment issued, and was levied upon five thousand head of cattle, as the property of the Campbell Company. After such levy, a summons in garnishment was served upon one A. H. Pierce, who answered that he was not indebted to and held no property owned by or in which the Campbell Company had an interest. As "a further and special answer" Pierce set out a written agreement entered into between himself and the Campbell Company for the sale and shipment by him, to that company, of a specified number of cattle. This agreement provided that Pierce was to deliver at Pierce Station, Texas, a designated number of cattle, which the company agreed to ship to its pastures in the Indian Territory "at its own risk and pay all freight and other expenses," the expenses to embrace the wages of a man to be put by Pierce with the cattle, "to represent his interest in said cattle." It was recited in the contract that five thousand dollars had been paid at the signing of the agreement "as part of the purchase price;" and the company further agreed to pay to Pierce interest at the rate of ten per cent per annum on all unpaid amounts from the date of shipment of the cattle until full and final payment in accordance with the contract. The company also agreed to ship the cattle to market during the summer or fall of 1895,

for account of Pierce, and to apply the proceeds of sale to payment for the cattle until fully paid for at the rate of fifteen dollars per head; and it was also stipulated that title and ownership of the cattle should be and remain in Pierce until such payment.

In said "further and special answer" it was also alleged that the cattle, upon which the writ of attachment had been levied, formed part of the number covered by the contract above referred to, and had been shipped by Pierce to the pastures of the Campbell Company, but that they had never ceased to continue in the possession of Pierce; it being further claimed that the cattle were subject to a charge for unpaid purchase money, expenses for their care and keeping, etc. The answer further stated that notice had been received by Pierce from one T. A. Stoddard, trustee, that an assignment had been made of said contract to him by the Campbell Company, and a copy of the alleged assignment was annexed. It purported to "sell and assign all the title and interest in and to" the contract between Pierce and the Campbell Company, any profit which might be derived by Stoddard from carrying the contract into final execution, to be applied by him as trustee to the payment, *pro rata*, of certain described notes. The garnishee also declared that on July 12, 1895, receivers had been appointed of the assets of the Campbell Company, and the answer concluded with asking that Pierce might be discharged as garnishee.

With the answer to the garnishment there was also filed by Pierce what was termed an interplea. It was therein, in substance, averred that the cattle which had been levied upon were wrongfully detained from Pierce; that he was entitled to their immediate possession; and he prayed that on the hearing of the interplea judgment might be awarded for the return of the cattle, with damages for their alleged wrongful seizure and detention. A motion was also filed, on behalf of Pierce, "as garnishee and interpleader," to discharge the attachment, substantially on the ground that the cattle belonged to Pierce, and that the latter was not indebted to the Campbell Company, and held none of its property.

Statement of the Case.

On the date when this motion came on for hearing the plaintiff filed an application for the appointment of Pierce as receiver, "to take charge of the property attached in this action and sell the same in accordance with a certain written contract" attached as an exhibit, being the contract referred to in the answer of Pierce to the garnishment. The service of the writ of attachment was averred, and it was stated that the cattle which had been levied upon had been "under the care, custody and control of the sheriff of Noble County since the third day of July, 1895, when said attachment was levied;" and it was further averred: "That said A. H. Pierce claims no interest in said property or this suit except as set forth in said contract hereto attached, and is entirely friendly to all parties concerned in said action, and, as plaintiff and its attorneys are informed and believe, the appointment of said A. H. Pierce as receiver herein would be entirely satisfactory to the defendant and all other parties in said action."

The pecuniary responsibility of Pierce and his large experience as a dealer and raiser and shipper of cattle, and other circumstances, were set forth as warranting his appointment without bond to sell the cattle in the usual commercial way, instead of at public sale, and the application concluded as follows:

"That it would be to the interest of all parties concerned to have A. H. Pierce appointed receiver to take charge of said steers and sell the same to the best advantage, accounting to the court for all sales, and, after satisfying his claim under said contract, hold the money remaining in his hands subject to the final order of this court.

"That said A. H. Pierce has already shipped from five thousand head of steers so seized in attachment about three hundred and sixty head and sold the same in market, and now holds the proceeds thereof, which should be accounted for by said A. H. Pierce along with other accounts of shipments."

An order appointing the receiver was thereupon made, the consent of the attorneys both of Pierce and the plaintiff being noted thereon, and Pierce qualified as receiver.

A summons which had been issued having been returned

"defendant not found," publication was had in compliance with the legal requirements.

Subsequently Stoddard, trustee, filed an interplea. Therein it was averred that the contract between Pierce and the Campbell Company had been made by that company for account of a firm styled George W. Miller & Son, and had been entered into in the name of the Campbell Company in order to secure that company for advances which had been made by it to Miller & Son; that under an assignment by the Campbell Company to Stoddard he was entitled to the proceeds of the sale of the cattle in the hands of the receiver after the claim of Pierce had been paid. Plaintiff demurred to this interplea on November 5, 1895, but no action was ever had thereon.

A report was filed by the receiver, showing that he had sold the cattle, and from the proceeds had satisfied in full his claim under the contract of September, 1894, and that a balance was in his hands subject to the order of the court. Thereafter the Campbell Company filed a "plea to the jurisdiction," and subsequently filed an amended plea, which stated seven grounds why the court was without jurisdiction, all of which will be hereafter referred to.

After this George W. Miller and J. C. Miller filed an interplea in the action, claiming that they were the real contractors with Pierce in the agreement of September 8, 1894, and averred their ownership of the cattle, and that if the contract had been assigned to Stoddard, it was done without their authority, and was void. It was prayed that the proceeds of the cattle be paid to them after the payment to Pierce of the amount of his claim. No issue was taken on this interplea.

On the same date that the Miller interplea was filed the plaintiff filed an answer to the interplea of A. H. Pierce, averring among other things that Pierce, as a result of the receivership proceedings, had waived and abandoned all his claim in and to the ownership of the cattle levied on under the attachment. On December 16, 1895, the plea of the Campbell Company to the jurisdiction was heard, upon the

record, over objection and exception by plaintiff. The court overruled all the grounds assigned in the plea except the second, which asserted that there was a want of power in the probate judge to issue an order for attachment. As to such ground it held that the act of the territorial assembly of Oklahoma, conferring power upon the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge from the county, was unconstitutional and void. It thereupon concluded that all the proceedings were void, the attachment was quashed, and the suit dismissed for want of jurisdiction, without prejudice to the Campbell Company. The Campbell Company excepted to the action of the court in overruling all the grounds of its plea to the jurisdiction but that referring to the power of the probate judge, and the plaintiff excepted to the action of the court holding that there was a want of power in the probate judge.

Error was prosecuted to the Supreme Court of the Territory. That court, whilst concluding that the lower court was wrong in deciding that the probate judge was without authority to allow the attachment, yet affirmed the judgment below on the ground that as an actual levy on the property of the defendant Campbell Company was necessary to give the lower court jurisdiction to determine the cause, and as there had been in law no such levy, therefore the court below was without jurisdiction, and had correctly dismissed the suit. The reasoning of the court, in effect, sustained the third ground of the motion to quash the attachment made by the Campbell Company. A petition for rehearing having been overruled, the cause was brought to this court.

Mr. William D. Williams, for plaintiff in error and appellant, submitted on his brief.

Mr. John W. Shartel for defendant in error and appellee.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that as the intervenors in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. But the intervenors did not except to the action of the trial court in vacating the attachment and dismissing the action. They were not made parties to the proceedings in error prosecuted from the judgment of the trial court to the Supreme Court of the Territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising on the record could not be decided in the absence of the intervenors, and the Supreme Court of the Territory manifestly assumed that the intervenors were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. If their absence was treated by the parties to the proceedings in the Supreme Court of the Territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such intervenors is necessary on this appeal, which has solely for its object a review of the judgment rendered by the Supreme Court of the Territory. Considering the facts just stated, and the further fact that it is obvious that the rights of the intervenors cannot be prejudiced by a review of the action of the Supreme Court of the Territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled.

The third ground stated in the plea of the defendant, the Campbell Company, to the jurisdiction of the court, was the one which the Supreme Court of the Territory found to be well taken, and upon which it based its affirmance of the judgment quashing the attachment and dismissing the action for want of jurisdiction. The reasoning by which the court reached its conclusion was in substance as follows:

The garnishee Pierce answered that he had nothing subject to garnishment. After doing this, he further answered, setting out an alleged contract between himself and the de-

fendant, by which he had agreed to sell and ship to the pastures of the defendant a certain number of cattle, which agreement had been carried into execution, the cattle seized under the attachment being a portion of those shipped in carrying out the contract. The answer then stated that although the cattle had been thus shipped, by the terms of the contract, the right to their possession remained in the garnishee Pierce, to whom there was a large amount due under the contract for purchase money and expenses. The answer further stated that the garnishee had been notified of an assignment by the defendant of its rights under the contract, the date of this assignment as given being prior in time to the levy of the attachment. Considering that there had been no traverse by the plaintiff to the answer of the garnishee, within twenty days, as required by the Oklahoma statute, the court concluded that all the facts and averments and the inferences deducible therefrom, stated in the answer, were to be taken as true, not only as between the garnishee and the plaintiff, but also between the plaintiff and the defendant, in determining whether property of the defendant had been levied upon, under the attachment. Upon this assumption, finding that the answer of the garnishee established that no property of the defendant had been levied upon under the attachment, it thereupon dissolved the attachment and dismissed the suit. But this reasoning was fallacious, since it assumed that because the failure to traverse the answer of the garnishee was conclusive of his non-liability, in the garnishment proceedings, it was therefore equally so, as between the plaintiff and defendant, in determining whether the property which had been levied upon under the attachment belonged to the defendant. But the two considerations, the liability of the garnishee under the proceedings in garnishment and the validity of the levy previously made under the attachment, were distinct and different issues. The section of the Oklahoma statute to which the court referred (Oklahoma Stat. 1893, sec. 4085) provides that the answer of the garnishee "shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice

in writing that he elects to take issue on his answer." It, however, can in reason be construed only as importing that the facts stated in the answer, unless traversed, should be conclusive, for the purpose of determining whether the garnishee was liable under the process issued against him and to which process his answer was directed.

Indeed, all the facts stated in the "further" answer of the garnishee were, in legal effect, substantially irrelevant to the issue between the plaintiff and the garnishee, since they referred not to the garnishee's liability to the defendant, but propounded a distinct and independent claim which the garnishee asserted existed in his favor as against the defendant, as a basis on his part for claiming property which was already in the possession of the court under the attachment, and held as the property of the defendant in attachment. This was the view taken by the garnishee of his rights on the subject, for the answer in the garnishment concluded simply by asking that the garnishee be discharged from the proceedings. And on the same day he intervened in the main action and filed his interplea asserting in his behalf a right of possession to the cattle seized and demanding damages for their detention. The judgment below, then, not alone caused the failure to traverse the answer to conclude the plaintiff as to the issues which could legally arise on the garnishment, that is, the liability of the garnishee thereunder, but it also made the failure to traverse operate as a summary and conclusive finding in favor of the garnishee on his interplea in the action, which was a wholly independent and distinct proceeding from the garnishment itself. The reasoning necessarily went further than this, since by relation it caused the answer of the garnishee to become conclusive between the plaintiff and the defendant, thereby setting aside the seizure made before the garnishment issued, falsifying and destroying the return of the sheriff that he had levied upon the property of the defendant, and in effect decided the case in favor of the defendant without proof and without a hearing.

Nor can a different conclusion be reached by considering that in the further answer of the garnishee it was stated that

he had been notified of an assignment of the rights of the defendant Campbell Company under the contract, purporting to have been made prior to the levy of the attachment. This was not pertinent to the question of the liability of the garnishee under the garnishment proceedings, and could not operate to conclusively establish as between the plaintiff and the defendant, or as between the plaintiff and the alleged assignee, either the verity or the legal sufficiency of the alleged assignment.

Aside, however, from the foregoing consideration, the record established a condition of facts which relieved the plaintiff from the necessity of traversing the answer of the garnishee, in so far as that answer referred to the independent facts substantiating the intended claim of the garnishee to the right of possession of the property already under seizure, and which, moreover, estopped the garnishee, and, therefore, the defendant, from asserting any right of possession by reason of the facts alleged in the further answer. Before the time for traverse had expired, and at the date when a motion filed by Pierce, as garnishee and interpleader, to discharge the attachment on the ground of his assumed right of possession under the contract, had been noticed for hearing, the court, by the consent of plaintiff and the garnishee, (the only parties who had up to that time appeared in the cause,) appointed the garnishee Pierce receiver, to dispose at private sale of the cattle, which had been levied upon, to pay from the proceeds the claim of Pierce, by virtue of his contract, and to hold the balance subject to the final order of the court. Obviously, this order, and the rights which Pierce took under it were wholly incompatible with the assumption that he was entitled to the possession of the property levied upon as the owner thereof. By the effect of the order, he was to be paid the full purchase price of the cattle. He could not take the price and keep the cattle. The situation was this: At the time the Campbell Company made its motion to dismiss for want of jurisdiction, the garnishee had taken substantial rights which had for their inevitable legal effect to render unnecessary any traverse of so much of his answer as referred to his rights

under the supposed contract, and which also disposed of his interplea and claim of individual right to the possession of the property levied on under the attachment; yet the result of the judgment rendered below was to dismiss the action at the instance of the defendant on the ground of supposed rights vested in the garnishee, when the garnishee himself had disclaimed or had abandoned the assertion of such presumed rights.

As the foregoing reasons dispose of the view of the case taken by the lower court, we confine ourselves to them. Because, however, we do so, we must not be understood as intimating that the defendant had the right to assail the jurisdiction of the court, or question the right of the court to order the giving of notice by publication, on the ground that it was not the owner of the property actually levied upon, and that the affidavit for publication was untrue in stating that the defendant had property within the jurisdiction, when if it were not such owner no prejudice could come to it, as the judgment of the court, from the nature of the proceeding before it, could necessarily only operate upon the property levied on. Nor, moreover, must we be considered as assenting to the construction given by the court to the contract between the Campbell Company and Pierce, the court, in its recital of the facts, stating that under the contract Pierce had a vendor's lien for the amount of the purchase price upon the cattle which had been levied upon, but in the opinion construing the contract as not divesting Pierce of the title to the cattle.

Although the court below based its conclusion only upon one of the grounds taken in the plea of the defendant to the jurisdiction, it nevertheless in the course of its opinion stated that the whole plea was before it, and that all the grounds therein stated were open for its consideration. We, therefore, shall briefly consider such of the remaining grounds stated in the plea to jurisdiction as have been urged in argument upon our attention.

I. It is contended that the attachment proceedings were void and that the court consequently was without jurisdiction,

because the order for attachment was signed by the probate judge, acting in the absence of the district judge, conformably to a power to that effect given by the territorial statute. The claim is that the statute conferring such power upon the probate judge was repugnant to the organic act and void, for the following reason: The organic act authorized the establishment of a Supreme Court and district courts to be vested with "chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property." The grant of common law jurisdiction, it is argued, embraced authority to issue attachments. Being then within the jurisdiction expressly vested in the courts named, it was incompetent for the territorial legislature to delegate to the probate courts, which the organic act authorized to be established, or to a judge of such a court, any jurisdiction in the premises, even although the organic act empowered the legislature to define and limit the jurisdiction to be exercised by probate courts.

A review of this contention is rendered unnecessary, because of the mistaken premise upon which it rests. On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute. The text of the statute is stated in the margin.[1] This statute is a reproduc-

[1] SEC. 4120. Where a debtor has sold, conveyed or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering them or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due and have an attachment against the property of the same debtor.

tion of a statute of Kansas; and, in 1884, before the organization of the Territory of Oklahoma, the Supreme Court of Kansas, in *Buck* v. *Panabaker*, 32 Kansas, 466, had recognized the power of a probate judge to grant a writ of attachment in cases provided by law, while it had early held, in *Reyburn* v. *Brackett*, 2 Kansas, 227, under a statute containing requirements as to the statements to be made in the affidavit for an attachment like unto those embodied in the statute of Oklahoma now under consideration, that the authority vested in an official to grant the writ imposed a duty simply ministerial in its nature. It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court. *Reyburn* v. *Brackett*, 2 Kansas, 227; *Wheeler* v. *Farmer*, 38 California, 203; *Harrison* v. *King*, 9 Ohio St. 388; Drake on Attachments, 7th ed. p. 92. The cases cited and relied upon by counsel as holding to the contrary do not sustain what is claimed for them. In some of them, *Reyburn* v. *Brackett*, 2 Kansas, 227; *Simon* v. *Stetter*, 25 Ohio St. 388; and *Harrison* v. *King*, 9 Ohio St. 388, the rule we have stated is upheld; in others, *Morrison* v. *Lovejoy*, 6 Minnesota, 183, and *Guerin* v. *Hunt*, 8 Minnesota, 477, 487, the particular statute under consideration was construed as requiring, on the part of the officer allowing the writ, a weighing and determination of the sufficiency of the proof; whilst, again, in others, *Seidentopf* v. *Annabil*, 6 Nebraska, 524, and *Howell* v. *Circuit Judge*, 88 Michigan, 369, the statute expressly required that the writ should be allowed by a judge, and hence the clerk of the court was held incompe-

---

Sec. 4121. The attachment authorized by the last section may be granted by the court in which the action is brought, or by the judge thereof, or in his absence from the county by the probate judge of the county in which the action is brought; but, before such action shall be brought or such attachment shall be granted the plaintiff, or his agent or attorney, shall make an oath in writing showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds for an attachment enumerated in the preceding section.

tent to issue the writ without the previous authorization of the order by the court.

Nor does section 3 of the act of Congress of December 21, 1893, c. 5, 28 Stat. 20, empowering the Supreme Court of the Territory or its Chief Justice to designate any judge to "try" a particular case in any district where the regular judge is for any reason unable to hold court, constitute an implied prohibition against the conferring by the legislature of authority upon one not a judge of the court in which the main action is pending to perform a ministerial act like that here considered.

II. It is insisted that "under the organic act of the Territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent."

The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant resides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem*, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached. It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such non-resident is found.

III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the Territory, it is said, in case of an attachment, for the cause stated, against a resident of the Territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a non-resident. This, it is argued,

is a discrimination against a non-resident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a State or Territory may classify residents in one class and non-residents in another, but it is insisted that where non-residents "are not capable of separate identification from residents by any facts or circumstances other than that they are non-residents — that is, when the fact of non-residence is their only distinguishing feature — the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification."

When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the residents of a State or Territory and non-residents, as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attempts to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument in substance is that where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a non-resident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing processes of attachment against a non-resident and not permitting such process against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification in accordance with the suggestion just made is conceded, and, if it were not, is obvious. The reasoning then is, that, although the difference between the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is

exacted in the other. The power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and non-residents, for the purpose of the writ of attachment, and then from this concession, to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction is without merit.

The foregoing considerations dispose not only of the grounds passed upon by the court below, but those pressed upon our attention and which were subject to review in that court; and as from them we conclude there was error in the judgment of the lower court, its judgment must be

Reversed, and the case remanded for further proceedings in conformity to this opinion.

SIOUX CITY TERMINAL RAILROAD AND WAREHOUSE COMPANY *v.* TRUST COMPANY OF NORTH AMERICA.

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

No. 192. Argued January 23, 24, 1899. — Decided February 20, 1899.

The Supreme Court of Iowa having repeatedly decided that in that State the fact that a corporation of Iowa contracts a debt in excess of its charter or statutory limitation does not render the debt void, but, on the contrary, such debt is merely voidable, and is enforceable against the corporation and those holding under it, and gives rise only to a right of action on the part of the State because of the violation of the statute, or entails a liability on the officers of the corporation for the excessive

debts so contracted, this court holds itself bound by those decisions, without determining whether as an independent question, it would decide that the issue of stock by a corporation, in excess of a statutory inhibition, is not void, but merely voidable.

THE facts which are revelant to the controversy arising on this record are as follows: The Sioux City Terminal Railroad and Warehouse Company (hereafter designated as the Terminal Company) was, in 1889, incorporated under the general laws of the State of Iowa with an authorized capital of one million of dollars. In January, 1890, the corporation, by authority of its board of directors, authorized by its stockholders, mortgaged in favor of the Trust Company of North America its "grounds, franchises, liens, rights, privileges, lines of railway, side tracks, warehouses, storage houses, elevators and other terminal facilities . . . within the corporate limits of the city of Sioux City," all of which property was more fully described in the deed of mortgage. The purpose of the mortgage was to secure an issue of negotiable bonds with the interest to accrue thereon, the bonds being for the face value of one million two hundred and fifty thousand ($1,250,000) dollars. The form of the bonds was described in the deed, and they were numbered from 1 to 1250 inclusive. The deed contained a statement that the corporation "has full power and authority under the laws of the State of Iowa to create this present issue of bonds and to secure the same by mortgage of all its property, leases and franchises." The bonds thus secured were negotiated to innocent purchasers for value and the proceeds were applied to the credit of the company.

In 1893 the Terminal Company also mortgaged in favor of the Union Loan and Trust Company, an Iowa corporation, the property previously mortgaged, as above stated, this second mortgage being to secure one hundred and ninety promissory notes, fifty whereof were for one thousand dollars each and one hundred and forty whereof were for five thousand dollars each, the total aggregating seven hundred and fifty thousand ($750,000) dollars. All the notes referred to in this mortgage bore the date of the deed, which contained

the following covenant: "The said party of the first part (that is, the mortgagor) hereby covenants that the said premises are free from all incumbrances, excepting a deed of trust made on the first day of January, A.D. 1890, by said party of the first part to the Trust Company of North America of Philadelphia, to secure the sum of one million two hundred and fifty thousand ($1,250,000) dollars of bonds, and the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assignees, against all persons whomsoever claiming the same, subject to the lien of the said prior deed of trust."

On the tenth day of October, 1893, in the United States Circuit Court for the Northern District of Iowa, a bill was filed by certain national banks, citizens of other States than the State of Iowa, against the Terminal Company, E. H. Hubbard, as assignee of the Union Loan and Trust Company, and others, having for its object the foreclosure of the second mortgage above referred to. Without fully recapitulating the averments of the bill, it suffices to say that it alleged that the notes which were secured by the second mortgage had been placed in the hands of the Union Loan and Trust Company in part for the benefit of certain claims against the Terminal Company held by the complainants; that the Union Loan and Trust Company had, in April, 1893, made an assignment to E. H. Hubbard for the benefit of all its creditors, and that Hubbard had succeeded to the rights and obligations of the company of which he was assignee, and in which capacity he held the notes secured by the second mortgage, and the benefit of which the complainants were entitled to invoke for the purpose of procuring the payment of their claims. A receiver was prayed for and was appointed.

On the 23d of December, 1893, the Terminal Company, reciting the fact that the notes which were secured by the second mortgage for $750,000 had been drawn, and the mortgage given for the benefit of certain outstanding creditors whose claims amounted to $728,000, and that the notes covered by the second mortgage had been placed in the hands of the Union Loan and Trust Company for the benefit of such

creditors; that the company had made an assignment to Hubbard, assignee, and in that capacity he had received the notes in question; that in a suit pending in the Northern District of Iowa, to foreclose said second mortgage, a question had arisen whether such creditors were entitled to avail themselves of the benefit of the second mortgage. Therefore, in order to allay any such question and to give the creditors intended to be covered by the second mortgage an undoubted right to claim under it, the deed conveyed absolutely to Hubbard, trustee, the property covered by the mortgage, giving to the trustee full power to realize and apply the property and rights to the discharge of the debts secured or intended to be secured as above stated. It suffices, for the purpose of this case, to give this outline of the deed in question, without stating all the various clauses found in it intended to accomplish the purpose which it had in view. The deed, however, contained this declaration: "This conveyance is made, however, with full notice of the assertion of the following claims against the said property, to wit, a certain mortgage or trust deed to the Trust Company of North America, of Philadelphia, Pennsylvania, as trustee, to secure certain bonds for the sum of one million two hundred and fifty thousand ($1,250,000) dollars, and also certain mechanics' liens to the amount of about $55,000, and also certain judgments to the amount of about $20,000. Nor shall said first party (that is, the transferrer) be understood to covenant that there are not other claims than those hereinbefore expressly mentioned, none of which, however, are to be considered and assumed by said second party, (Hubbard, trustee,) nor by the acceptance of this deed is he in anywise held to admit the validity of said trust deed liens, judgments or of any claims made or that may arise thereunder, nor shall this deed be held in any manner to operate as the merger of said mortgage to said Union Loan and Trust Company, but said mortgage shall at all times be kept in full force until all persons and corporations entitled and claiming benefits thereunder shall consent to its discharge, or so long as it may be necessary to keep said mortgage in force for the protection

of the title herein conveyed, or any interest claimed by virtue hereof."

Default having taken place in the payment of the interest on the bonds secured by the first mortgage, the Trust Company of North America, as the trustee, filed its bill in the Circuit Court of the United States for the Northern District of Iowa for foreclosure. On the 20th of June, 1894, the court ordered the two foreclosure suits, that is, the one previously brought by certain national banks in October, 1893, and the one brought by the Trust Company of North America, to be consolidated, and appointed the same person who had been made receiver under the first bill also the receiver under the second. On July 23, 1895, the Credits Commutation Company, a corporation organized under the laws of the State of Iowa, filed its suit against the Terminal Company in the state court of Iowa in and for Woodbury County. It was alleged that the Credits Commutation Company had become the holder and owner of a large number of the claims against the Terminal Company which were intended to be secured by the second mortgage and for whose benefit the deed to Hubbard, trustee, had been made. The relief sought was a judgment against the Terminal Company "without prejudice to any rights or interests which the plaintiff (the Credits Commutation Company) may have as a holder of said notes in the said trust deed;" that is, the deed of trust to Hubbard, trustee, for the benefit of the noteholders as already mentioned. On the day the suit was filed the Terminal Company answered, admitting the correctness of the claim, and judgment was then entered for $692,096.95 with interest, the whole without prejudice to the rights of the parties under the deed of trust as prayed for.

The Terminal Company in its answer to the suit for foreclosure brought by the Trust Company of North America relied upon many defences, only one of which need be referred to, that is, that the bonds and the mortgage in favor of the said Trust Company of North America were *ultra vires*. However, it may be observed that the Terminal Company by its answer asserted that the rights of those entitled to claim

under the second mortgage or the conveyance, made for their benefit to Hubbard, trustee, were paramount to the claims of the Trust Company of North America, or the bondholders under the first mortgage in favor of that company. The Credits Commutation Company intervened in the foreclosure proceedings, averring that the bonds secured by the deed in favor of the Trust Company of North America were void, because the Terminal Company at the time the bonds were executed was without lawful power to issue them or to secure them by mortgage. It was also claimed that in virtue of the judgment rendered in the state court the Credits Commutation Company was a creditor of the Terminal Company to the amount of the judgment, and was entitled to avail itself of the rights accruing to it from the deed of conveyance made by the Terminal Company to Hubbard, trustee, and therefore that the Credits Commutation Company was entitled to be paid from the proceeds of the property sought to be foreclosed before the holders of the bonds secured by the deed which had been made in favor of the Trust Company of North America.

The trial court decided in favor of the validity of the bonds issued to the Trust Company of North America and of the mortgage securing the same. 69 Fed. Rep. 441. On appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment of the trial court was affirmed. 49 U. S. App. 523. The case then, by the allowance of a writ of certiorari, was brought to this court.

Mr. Henry J. Taylor and *Mr. John C. Coombs* for the Railroad and Warehouse Company.

Mr. Asa F. Call for the Trust Company. *Mr. Joseph H. Call* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The errors assigned and the discussion at the bar confine

the question to be decided solely to the validity of the negotiable bonds of the Terminal Company which were issued to the Trust Company of North America, and which were sold in open market to innocent purchasers for value and the proceeds of which inured to the benefit of the Terminal Company. The issue for decision is restricted to this question, since all the errors assigned and the contentions based upon them depend on the assertion that the bonds issued to the Trust Company of North America, and the mortgage by which their payment was secured, were wholly void. This complete want of power in the Terminal Company is predicated upon certain requirements of the law of the State of Iowa, existing at the time of the incorporation of the Terminal Company, and of a provision in the charter of that company, inserted therein in compliance with the Iowa statute. The law of Iowa relied on is section 1611 of the Iowa Code of 1897, contained in the portion thereof relating to the organization of corporations, and is as follows:

"Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street railway securities, issued or guaranteed by railway or street railway companies of the State, in aid of the location, construction and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard gauge, or eight thousand dollars per mile of single track, narrow gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first

liens upon unencumbered real estate worth at least twice the amount loaned thereon."

The part of the foregoing section commanding the insertion in the charter of incorporated companies of the amount of liability for which the corporation could at one time be subject, and limiting such amount to two thirds of the capital stock, originated in the State of Iowa in the year 1851, and was continuously in force from the time of its adoption in the year in question up to the period when it was embodied in the Code of 1897. Iowa Code, 1851, Title 10, c. 43, § 676; Iowa Code, 1873, Title 9, § 1061. The subsequent portions of the section creating exceptions as to certain classes of railway bonds, and as to bonds secured by an actual transfer of real estate securities, originated, the one March 30, 1884, and the other March 30, in the year 1886, and continued in force until they were also incorporated in the Iowa Code of 1897. 20 Iowa Laws, c. 22; 21 Ib. c. 54. And section 1622 of the Iowa Code also contains the following cognate provision: ". . . If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

The portion of the charter of the Terminal Company fixing, in obedience to the statutory requirement, the amount of the debt which could at any one time exist was as follows:

"The highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

As the sum of the bonds which were issued and secured by the mortgage in favor of the Trust Company of North America exceeded the statutory limit and the amount stated in the charter, the question which arises first for consideration is this: Did this fact render them void; and, secondarily, was the issue of bonds taken from out the operation of the general rule laid down in the statute by the exceptions mentioned in the

latter portions thereof? As the claim that the bonds were void is based on the statutory provisions above referred to, it follows that we are compelled to primarily ascertain the meaning and operation of the state law. In making this inquiry we are constrained in the first place to inquire what construction has been placed upon the Iowa statute by the Supreme Court of that State, for it is an elementary principle that this court in interpreting a state statute will construe and apply it as settled by the court of last resort of the State, and will hence only form an independent judgment, as to the meaning of the state law, when there was no binding construction of such state statute by the court of last resort of the State. *Nobles* v. *Georgia*, 168 U. S. 398; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440; *Morley* v. *Lake Shore and Mich. South. Railway Co.*, 146 U. S. 162, 166, and authorities there cited.

The subject-matter of the creation by an Iowa corporation of a debt in excess of the maximum amount fixed in its charter in accordance with the requirement of the statute, and also in excess of the sum limited by the state law, was considered by the Supreme Court of the State of Iowa in *Garrett* v. *Burlington Plough Co.*, (1886) 70 Iowa, 697. The case was this: An action was brought in chancery to foreclose a mortgage executed by the Burlington Plough Company, an Iowa corporation, to the plaintiff as a trustee for certain of its creditors upon real estate and personal property. The authorized capital stock of the corporation was fifty thousand dollars. The maximum limit imposed by the articles of incorporation was the maximum imposed by the statute, that is, two thirds of the amount of the capital stock. The corporation had contracted an indebtedness in excess of the limitation fixed by the statute and fixed by the charter; that is, with an authorized capital stock of fifty thousand dollars it had contracted an indebtedness exceeding fifty thousand dollars, of which total indebtedness the sums pressed in the foreclosure suit were a part. The defence to the suit was twofold: First, that the total debt of the corporation, including that sued on, was in excess of the two thirds limitation; and, second, that the mortgage was void because it had been granted to protect certain directors

of the corporation to the prejudice of its general creditors. The fact that the debt exceeded the two thirds allowed by the charter and the statute was admitted on the face of the record and stated by the court in its opinion to be unquestioned. The court said (p. 701):

"Do the facts alleged in the answer, that the holders of the notes, as directors of the company, in the management of its affairs, contracted indebtedness beyond the limit prescribed by the articles of incorporation, and caused the mortgage to be executed to secure the amount due them, defeat their security, and give other creditors a right to share in the proceeds of the property mortgaged? We do not understand counsel for defendants to claim that a debt of the corporation beyond the prescribed limits of its indebtedness is invalid, and, if held by a director of the corporation, cannot be enforced for that reason alone. It may be that a director would be answerable to stockholders or others for negligence or mismanagement of the affairs of a corporation whereby debts were contracted in excess of the limitation prescribed in the articles of incorporation; but it cannot be claimed that such a debt, for a consideration received by the corporation, cannot be enforced against it."

Again referring to the same subject, the court said (p. 702):

"It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claims in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby."

In *Warfield* v. *Marshall County Canning Co.*, (1887) 72 Iowa, 666, where a debt had been confessedly contracted by a corporation in excess of its charter limitation, confining the power of the corporation to create a debt to a sum not exceeding one half of the capital stock actually paid in, the court, in considering the legal consequences of such excessive debt, said (p. 672):

"The proposition is stated by counsel, but it is not, we

think, insisted upon, that the mortgage is *ultra vires*, because the articles of incorporation provide 'that it shall be competent to mortgage the property of the company to the amount of not exceeding one half of the capital stock actually paid in.' The question was determined adversely to appellant in *Garrett* v. *Plough Co.*, before cited."

It follows, then, that at the time of the issue of the bonds in favor of the Trust Company of North America, and of the execution of the deed of mortgage by which such bonds were secured, the Supreme Court of the State of Iowa had, in two cases, declared the law of that State to be that a debt contracted in excess of the maximum limitation stated in the charter, in virtue of the provisions of the statute requiring that such maximum limit should be fixed, was not void, although the consequence of contracting a debt beyond the limitation might be to entail upon the officers of the corporation a personal liability for the amount thereof.

Light is thrown upon the condition of the law of the State of Iowa, on the question now before us, by a decision of the Supreme Court of that State, wherein it was called upon to consider issues arising from the identical contracts which are involved in this case. The cause was adjudged in the Supreme Court of Iowa after the decision of the trial court in this cause, and after that of the Circuit Court of Appeals. Without deciding that the construction given the statute by the Supreme Court of the State of Iowa at the time and under the circumstances stated is necessarily controlling on this court, such interpretation, conceding that it is not controlling, is manifestly relevant for the purpose of elucidating the previous decisions of the Supreme Court of Iowa, and as indicating what was the settled law of that State at the time the contract in question was entered into and prior to the time when the controversy which this case presents originated in the courts of the United States. The decision in question is *Beach* v. *Wakefield*, (1898) 76 N. W. Rep. 688, (not yet reported in the official reports of the State of Iowa). The case as stated in the report thereof was this: Beach, a sub-contractor, commenced proceedings to establish and foreclose a mechanic's

lien on a depot built by the Terminal Company. Wakefield was the principal contractor for building the depot. He denied in part the claim of Beach, and sought also on his own behalf to be recognized as having a mechanic's lien upon the depot. The Terminal Company, the Trust Company of North America and the Credits Commutation Company were parties to the cause. The decree of the Supreme Court of Iowa recognized in part a mechanic's lien on the depot building paramount to the mortgage in favor of the Trust Company of North America, but adjudged that the bonds issued to the Trust Company of North America and the mortgage by which they were secured were paramount to the claim of the Credits Commutation Company and others holding junior mortgage rights. In considering the legal result of the creation of a debt in excess of the statutory limitation the court said (p. 694):

"A distinction is to be taken between contracts like this and those which, independent of statute, are in violation of public policy. The creation of this indebtedness involved no moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt, and to execute a mortgage to secure it. The only ground of complaint is that it went further than the law permitted. Of this the State may complain, but the Terminal Company cannot; nor can any person whose rights are derived through the Terminal Company, and who acquired such rights with knowledge of the mortgage lien."

Again, in commenting on the same subject, the court said (p. 695):

"We are aware that the security has been held invalid, and a right of recovery thereon denied, in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases. In *Garrett* v. *Plough Co.*, *supra*, the indebtedness exceeded the charter limit of the corporation, and the creditors had notice

thereof when the transaction took place; and yet a right of recovery was allowed and the lien of the mortgage upheld."

Recurring to the legal consequence, under the Iowa statute, of contracting a debt in excess of the statutory limit, the court said (p. 695):

"It is said further that the plea of estoppel can be urged only in favor of the innocent, and that the bondholders here are not of that class, for they are held to notice of the corporate power of the Terminal Company. This rule has been applied in cases where the act done was wholly void because of an absolute want of power to sustain it and in cases where considerations of public policy intervened. Here, as repeatedly said, the act is voidable only. The statute does not even impose a penalty therefor."

The argument, then, reduces itself to this: Although it was conclusively settled by the decisions of the State of Iowa at the time the contract in question was entered into, that a debt contracted by a corporation in excess of the statutory limitation was in no sense of the word void, but on the contrary was merely voidable, that we nevertheless should, in enforcing the state statute, disregard the construction affixed to it by the Supreme Court of the State of Iowa, and hold that the act of the corporation in exceeding the limit of debt imposed by the statute or fixed in the charter in compliance with the statute was absolutely void. But to so decide would violate the elementary rule previously referred to, under which this court adopts and applies the meaning of a state statute as settled by the court of last resort of the State. As then under the Iowa law, the fact that the corporation contracted a debt in excess of the charter or statutory limitation did not render the debt void, but, on the contrary, such debt, by the settled rule in Iowa, was merely voidable, and was enforceable against the corporation and those holding under it, and gave rise only to a right of action on the part of the State because of the violation of the statute, or entailed, it would seem, a liability on the officers of the corporation for the excessive debt so contracted, it follows that the whole foundation upon which the errors assigned in this court must rest is without support in

respect of Federal law, and therefore the decrees below were correctly rendered.

It is claimed, however, that this court is not obliged to follow the Iowa decisions interpreting the statute of that State, because it is assumed that those decisions proceed alone upon the principle of estoppel. Estoppel, it is argued, is a matter of general and not of local law upon which this court must form an independent conclusion, even although in doing so it may disregard the rule established in the State of Iowa by the Supreme Court of that State. Whatever, it is argued, may be the rule in state courts, in this court it is settled that a corporation cannot be estopped from asserting that it is not bound by a corporate act which is absolutely void, citing, among other cases, *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138; *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market National Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24.

But we are not called upon, in the case before us, to decide the question thus raised, since it rests upon an assumption that the court of Iowa has decided that the corporation was by estoppel prevented from complaining of a void act. But the Supreme Court of Iowa has not so decided. On the contrary, whilst in the course of its opinions it has referred to the doctrine of estoppel, it expressly, in the cases cited, made the application of the doctrine depend upon the legal conclusion found by it, that the act of a corporation in contracting a debt in excess of the statutory limit was not void but merely voidable, and for this reason the corporation, or those holding under it, could not be heard to assail the act in question. The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its relation to contracts which were merely voidable. Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow

the settled construction given to it by the Supreme Court of that State.

It necessarily follows that the decrees of the Circuit Court and of the Circuit Court of Appeals were correct, and both are therefore

Affirmed.

BAUSMAN *v.* DIXON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 197. Argued and submitted January 25, 1899. — Decided February 20, 1899.

A receiver of a railroad in a State, appointed by a Circuit Court of the United States, is not authorized by the fact of such appointment to bring here for review a judgment in a court of the State against him, when no other cause exists to give this court jurisdiction.

The case is stated in the opinion.

Mr. Frederick Bausman for plaintiff in error.

Mr. John E. Humphries and *Mr. Edward P. Edsen* for defendant in error submitted on their brief, on which were also *Mr. William E. Humphrey*, *Mr. Harrison Bostwick* and *Mr. C. E. Remsberg.*

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

Dixon brought an action in the Superior Court of King County, Washington, against Bausman, receiver of the Ranier Power and Railway Company, to recover damages for injuries sustained by reason of defendant's negligence. The complaint alleged that the Ranier Power and Railway Company was a corporation organized under the laws of Washington, and engaged in operating a certain street railway in the city of Seattle; that June 13, 1893, one Backus was duly appointed by the Circuit Court of the United States for the District of Washington, receiver of the company, and qualified and served

as such until February 11, 1895, when he was succeeded by Bausman; and that the injury of which plaintiff complained was inflicted in the course of the operation of the railway, on June 15, 1893. The answer denied that Bausman's predecessor in office had employed Dixon; and that Dixon's injuries were caused by negligence; and set up contributory negligence as an affirmative defence. The action was tried by a jury and a verdict rendered in favor of Dixon, the jury also returning answers to certain questions of fact specially propounded. A motion for new trial was overruled and judgment entered on the verdict, and the cause was carried to the Supreme Court of Washington, which affirmed the judgment, (17 Washington, 304,) whereupon this writ of error was allowed.

We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

We have just held in *Capital National Bank of Lincoln* v. *The First National Bank of Cadiz*, 172 U. S. 425, that where

the receiver of a national bank was a party defendant in the state courts, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the application of general law, this court had no jurisdiction to revise the judgment of the highest court of the State resting thereon; and, certainly, an officer of the Circuit Court stands on no higher ground than an officer of the United States.

Defendant did not deny that he was amenable to suit in the state courts; he did not claim immunity as receiver from suit without previous leave of the Circuit Court, and could not have done so in view of the act of March 3, 1887, c. 373, 24 Stat. 552; all the questions involved were questions of general law, including the inquiry whether one person holding the office of receiver could be held responsible for the acts of his predecessor in the same office; and the judgment specifically prescribed that the "said amount and judgment is payable out of the funds held by said Bausman, as receiver of said company, which come into the hands of said receiver and are held by him as receiver, and funds belonging to the receivership which are applicable for that purpose which may hereafter come into the receiver's hands, or under direction of the court appointing such receiver."

Section three of the act of March 3, 1887, provides that: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." It is not denied that this action was prosecuted and this judgment rendered in accordance therewith.

The writ of error is

Dismissed.

MULLEN *v.* WESTERN UNION BEEF COMPANY.

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

No. 153. Argued and submitted January 18, 1899. — Decided February 20, 1899.

On the facts stated by the court in its opinion, it declines to hold that it affirmatively appears from the record that a decision could not have been had in the Supreme Court of the State, which is the highest court in the State; and this being so, it holds that the writ of error must be dismissed.

THIS was an action brought by Mullen and McPhee against the Western Union Beef Company, in the district court of Arapahoe County, Colorado, to recover damages for loss of stock occasioned by the communication from cattle of defendant to cattle of plaintiffs of the disease known as splenetic or Texas fever, by the importation into Colorado of a herd of Texas cattle, in June, 1891, and suffering them to go at large, in violation of the quarantine rules, regulations and orders of the United States Department of Agriculture, in accordance with the act of Congress approved May 29, 1884, c. 60, entitled "An act for the establishment of a Bureau of Animal Industry, etc.," 23 Stat. 31; and the act approved July 14, 1890, c. 707, 26 Stat. 287; and in violation of the quarantine rules and regulations of the State of Colorado. The trial resulted in a verdict for defendant, on which judgment was entered. Plaintiffs sued out a writ of error from the Court of Appeals of the State of Colorado and the judgment was affirmed, whereupon the present writ of error was allowed.

The Court of Appeals held that the question of violation by defendant of the quarantine rules and regulations of the State need not be considered because "upon sufficient evidence, it was settled by the jury in defendant's favor;" that "no question of negligence generally in the shipment and management of the cattle is presented by the record;" and that the theory on which the case had been tried below and was argued in that court was that "if the loss of the plaintiffs'

cattle was in consequence of disease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe."

The regulations of the Secretary of Agriculture were as follows:

"*Regulations Concerning Cattle Transportation.*

"UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 5, 1891.

"To the managers and agents of railroad and transportation companies of the United States, stockmen and others:

"In accordance with section 7 of the act of Congress approved May 29, 1884, entitled 'An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals,' and of the act of Congress approved July 14, 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1891, you are notified that a contagious and infectious disease known as splenetic or southern fever exists among cattle in the following-described area of the United States: . . . From the 15th day of February to the 1st day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations."

[Here followed a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts.]

"UNITED STATES DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April* 23, 1891.

"Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described

may be moved from said area by rail into the States of Colorado, Wyoming and Montana for grazing purposes, in accordance with the regulations made by said States for the admission of southern cattle thereto.

"Provided:

"1. That cattle from said area shall go into said States only for slaughter or grazing, and shall on no account be shipped from said States into any other State or Territory of the United States before the 1st day of December, 1891.

"2. That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

"3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5, 1891.

"4. That the state authorities of the States of Colorado, Wyoming and Montana agree to enforce these provisions."

The court, after stating that the territory described in both orders included that from which the defendant's cattle were shipped, said: "It is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which were claimed to have been violated by the defendant."

And it was then ruled that the regulations were not binding, as it was not shown that the State had agreed to them; that they were not authorized by the statute; that "the second provision undertakes to regulate the duties in relation to them [the cattle], of the persons by whom they might be removed after their arrival in the State, and it is upon this provision that plaintiffs' reliance is chiefly placed. After becoming domiciled within the State their management would be regulated by its laws and not by the act of Congress. Any violation of the Federal law in connection with the cattle would consist in their removal. The disposition of them after-

wards was not within the scope of the statute." 9 Colorado, 497. 49 Pac. Rep. 425.

Mr. T. B. Stuart for plaintiffs in error. *Mr. W. C. Kingsley* filed briefs for the same.

Mr. C. S. Thomas and *Mr. W. H. Bryant* for defendant in error submitted on their brief, on which was also *Mr. H. H. Lee.*

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

We are met on the threshold by the objection that the writ of error runs to the judgment of the Court of Appeals, and cannot be maintained, because that is not the judgment of the highest court of the State in which a decision could be had.

The Supreme Court of Colorado is the highest court of the State, and the Court of Appeals is an intermediate court, created by an act approved April 6, 1891, (Sess. Laws, Col. 1891, 118,) of which the following are sections:

"Section 1. No writ of error from, or appeal to, the Supreme Court shall lie to review the final judgment of any inferior court, unless the judgment, or in replevin, the value found exceeds two thousand five hundred dollars, exclusive of costs. *Provided*, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the State or of the United States is necessary to the determination of a case. *Provided, further*, that the foregoing limitation shall not apply to writs of error to county courts."

"Section 4. That the said court shall have jurisdiction:

"*First*— To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"*Second*— It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or in replevin the value found is two thousand five hundred dollars, or less, exclusive of costs.

"*Third* — It shall have jurisdiction, not final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the State, or of the United States, is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the Court of Appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the Supreme Court."

The Supreme Court of Colorado has held in respect of its jurisdiction under these sections, that whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error from that court will lie; that "it matters but little how such question is raised whether by the pleadings, by objections to evidence or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it;" but "it must fairly appear from an examination of the record that a decision of such question is necessary, and also that the question raised is fairly debatable," *Trimble* v. *People*, 19 Colorado, 187; and also that "when it appears by the record that a case might well have been disposed of without construing a constitutional provision, a construction of such provision is not so necessary to a determination of the case as to give this court jurisdiction to review upon that ground," *Arapahoe County* v. *Board of Equalization*, 23 Colorado, 137; and, again, that "unless a constitutional question is fairly debatable, and has been properly raised, and is necessary to the determination of the particular controversy, appellate jurisdiction upon that ground does not exist." *Madden* v. *Day*, 24 Colorado, 418.

This record discloses that defendant insisted throughout the trial that the acts of Congress relied on by plaintiffs were unconstitutional if construed as authorizing the particular regulations issued by the Secretary.

When plaintiffs offered the rules and regulations in evidence, which they contended defendant had violated, defend-

ant objected to their admission on the two grounds that they were not authorized by the acts of Congress, and that, if they were, such acts were unconstitutional. The objection was overruled and defendant excepted.

The regulations having been introduced in evidence, plaintiffs called as a witness, among others, a special agent of the Department of Agriculture, who was questioned in respect of their violation, to which defendant objected and excepted on the same grounds.

At the conclusion of plaintiffs' case, a motion for non-suit was made by defendant, the unconstitutionality of the acts under which the regulations were made being again urged, and an exception taken to the denial of the motion.

The trial then proceeded, and, at its close, defendant requested the court to give this instruction: "The court instructs the jury that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated, are not authorized by the Constitution of the United States, and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not, of itself, be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

This instruction was objected to and was not given, though no exception appears to have been thereupon preserved.

On behalf of plaintiffs the court was asked to instruct the jury as follows:

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph two of the rules and regulations of the United States Department of Agriculture of April 23, 1891, and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, then that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defendant did

not use reasonable care in this case, and that the defendant was guilty of negligence."

This was refused by the court and plaintiffs excepted. But the court charged the jury that the rule promulgated by the Secretary of Agriculture "would have the effect to give to this defendant notice that the United States authorities having in charge the animal industries, so far as the Government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble County at that period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to co-mingle with them." To this modification of the instruction requested plaintiffs saved no specific exception.

After the affirmance of the judgment by the Court of Appeals, plaintiffs filed a petition for a rehearing, the eighth specification of which was that —

"This court erred in holding and deciding that the rules and regulations promulgated by the Secretary of Agriculture on April 23, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the state laws, and not by the act of Congress, and that the disposition of said cattle afterwards was not within the scope of Federal authority."

It thus appears that if the trial court and the Court of Appeals had been of the opinion that the Secretary's rules and regulations were within the terms of the authority conferred by the statutes, and that non-compliance therewith would have constituted negligence *per se*, those courts would have been necessarily compelled to pass upon the constitutionality of the acts, which question was sharply presented by defendant. And it is also obvious that if the Supreme Court had been applied to and granted a writ of error, and that court had differed with the conclusions of the Court of Appeals, arrived at apart from constitutional objections, the validity of the acts and regulations would have been considered.

Syllabus.

The Court of Appeals seems to have been of opinion that after the cattle arrived in Colorado, Congress had no power to regulate their disposition, and hence that the regulations were not binding. And the question of power involved the construction of a provision of the Constitution of the United States. At the same time its judgment may fairly be said to have rested on the view that the statutes did not assert the authority of the United States, but conceded that of the State, in this regard; and that the regulations were not within the terms of the statutes. But, if the case had reached the Supreme Court, that tribunal might have ruled that the judgment could not be sustained on these grounds, and then have considered the grave constitutional question thereupon arising.

And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.

We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the State, and, this being so, the writ of error cannot be sustained. *Fisher* v. *Perkins*, 122 U. S. 522.

Writ of error dismissed.

HENRIETTA MINING AND MILLING COMPANY *v.* GARDNER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 140. Argued January 16, 1899. — Decided February 20, 1899.

The provisions in the Revised Statutes of Arizona of 1887, c. 42, § 3, concerning the commencement of process for attachment, are inconsistent with those concerning the same subject contained in the act of March 6, 1891; and although chapter 42 is not expressly repealed by the act of 1891, it must be held to be repealed by the later act on the principle laid

down in *United States* v. *Tynen*, 11 Wall. 88, 92, that "when there are two acts on the same subject the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the latter act without any repealing clause operates, to the extent of the repugnancy, as a repeal of the first."

THE case is stated in the opinion.

Mr. Frank A. Johnson for appellant. *Mr. William H. Barnes* filed a brief for same.

Mr. S. M. Stockslager for appellee. *Mr. George C. Heard* was on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona, affirming a judgment of the district court of the fourth judicial district, in and for Yavapai County, for $12,332.08 in favor of appellee and against appellant, who was plaintiff in error below. The action was upon an open account and a large number of assigned accounts. An attachment was sued out and the mines and mining property of appellant company were seized. Judgment was rendered by default, and the property attached ordered sold.

The judgment is attacked on two grounds: (1) That there was no personal service on appellant; (2) that the attachment was void because the writ was issued before the issuance of summons.

It is conceded that the appellant is an Illinois corporation, and that there was no personal service upon it. Was the attachment issued in accordance with the statutes of Arizona? If it was not, the judgment must be reversed. *Pennoyer* v. *Neff*, 95 U. S. 714.

The record shows that the complaint was filed December 4, 1894; that on the 24th of that month affidavit and bond for attachment were filed and the writ was issued. The return shows the seizure of the property on the 26th of December, the day summons was issued.

Opinion of the Court.

The Revised Statutes of Arizona of 1887, chapter 1 of title IV, provided for attachments and garnishments as follows:

"40 (Sec. 1). The judges and clerks of the district courts and justices of the peace may issue writs of original attachment returnable to their respective courts, upon the plaintiff, his agent or attorney, making an affidavit in writing, stating one or more of the following grounds:

"1. That the defendant is justly indebted to the plaintiff, and the amount of the demand; and,

"2. That the defendant is not a resident of the Territory, or is a foreign corporation, or is acting as such; or,

"3. That he is about to remove permanently out of the Territory, and has refused to pay or secure the debt due the plaintiff; or,

"4. That he secretes himself, so that the ordinary process of law cannot be served on him; or,

"5. That he has secreted his property, for the purpose of defrauding his creditors; or,

"6. That he is about to secrete his property for the purpose of defrauding his creditors; or,

"7. That he is about to remove his property out of the Territory, without leaving sufficient remaining for the payment of his debts; or,

"8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or,

"9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

"10. That he is about to dispose of his property with intent to defraud his creditors; or,

"11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

"12. That the debt is due for property obtained under false pretences.

"41 (Sec. 2). The affidavit shall further state:

"1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and,

"2. That the plaintiff will probably lose his debt unless such attachment is issued.

"42 (Sec. 3). No such attachment shall issue until the suit has been duly instituted, but it may be issued in a proper case either at the commencement of the suit or at any time during its progress.

"43 (Sec. 4). The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due, and the same proceeding shall be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due."

Paragraph 649 provides that "all civil suits in courts of record shall be commenced by complaint filed in the office of the clerk of such court." Therefore, if paragraph 42 (section 3) was in force at the time the writ of attachment was issued, to wit, on the 24th of December, 1894, there is no doubt of the validity of the writ. But it is contended that the paragraph was not in force, because, it is claimed, it had been repealed by an act passed by the legislative assembly of the Territory, approved March 6, 1891.

This act is entitled "An act to amend chapter 1, title 4, entitled 'Attachments and garnishments,' Revised Statutes of Arizona, 1887." Section 1 is as follows:

"Section 1. Paragraph 40, being section 1, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"The plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this act provided in the following cases:

"First. In an action upon a contract, express or implied, for the direct payment of money where the contract is made or is payable in this Territory, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

"Second. When any suit be pending for damages, and the

defendant is about to dispose of or remove his property beyond the jurisdiction of the court in which the action is pending, for the purpose of defeating the collection of the judgment.

"Third. In any action upon a contract, express or implied, against the defendant not residing in this Territory or a foreign corporation doing business in this Territory.

"SEC. 2. Paragraph 41, being section 2, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"Section 2. The clerk of the court or justice of the peace must issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, showing —

"First. That the defendant is indebted to the plaintiff upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this Territory, and that the payment of the same has not been secured as provided in section 1 of this act, and shall specify the character of the indebtedness, that the same is due to plaintiff over and above all legal set-offs or counter claims, and that demand has been made for the payment of the amount due; or,

"Second. That the defendant is indebted to the plaintiff, stating the amount and character of the debt; that the same is due over and above all legal set-offs and counter claims; and that the defendant is a non-resident of this Territory or is a foreign corporation doing business in this Territory; or,

"Third. That an action is pending between the parties, and that defendant is about to remove his property beyond the jurisdiction of the court to avoid payment of the judgment; and,

"Fourth. That the attachment is not sought for wrongful or malicious purpose, and the action is not prosecuted to hinder or delay any creditor of the defendant.

"SEC. 3. Paragraph 43, being section 4, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby repealed.

"SEC. 4. Paragraph 47, being section 8, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by

striking out the word 'original' where it occurs in the first line of said section.

"SEC. 5. Paragraph 50, being section 11, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by striking out the word 'repleviable' where it occurs in line five of said section.

"SEC. 6. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

"Approved March 6, 1891."

The amending act is more than a revision of the provisions of the statute of 1887: it is a substitute for them. It, however, does not expressly repeal paragraph 42. Does it do so by implication? Expressing the rule of repeal by implication, Mr. Justice Strong, in *Henderson's Tobacco Company*, 11 Wall. 657, said:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In *United States* v. *Tynen* it was said by Mr. Justice Field, that 'when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new

provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

May paragraph 40, as amended, subsist with paragraph 42? Certainly not, if the former prescribes the time when the writ of attachment may be issued, and not the time when it may be levied. Its identical language was section 120 of the Practice Act of California, and was continued as 537 of the Code of Civil Procedure of said State, and was such at the time the act of 1891 of Arizona was passed. When part of the Practice Act, it was construed by the Supreme Court of California in the case of *Low* v. *Henry*, 9 California, 538. Mr. Justice Burnett, speaking for the court, said:

"The twenty-second section of the Practice Act provides that a suit shall be commenced by the filing of a complaint and the issuance of a summons; and the one hundred and twentieth section allows the plaintiff, 'at the time of issuing the summons, or at any time afterwards,' to have the property of the defendants attached. These provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. *Ex parte Cohen*, 6 California, 318. The issuance of the summons afterwards cannot cure that which was void from the beginning."

Counsel for appellee, however, urges that this decision is explained by the fact that by the California laws a suit was commenced by *filing a complaint* and the *issuance* of a *summons*, and that the decision of the court was that the attachment having been issued before summons was issued, it was issued before the commencement of suit, and hence was void on that ground. We think not. "To have the property of the defendant attached" was construed to mean the issuance of the attachment, and it was held to be a nullity if done before the summons was issued. If, however, ambiguity could arise under the Practice Act and the Code of Civil Procedure as originally passed, it could not arise after the code was amended in 1874, and as it existed at the time of the Arizona enactment of 1891. At that time the issuance of summons

was not the commencement of the action. The amendment of 1874 (Amendment of the Codes 1873–4, 296) provided that "civil actions in the courts of the State are commenced by filing a complaint," (section 405,) and summons may be issued at any time within one year thereafter (section 406). Section 537, which provided for the issuance of an attachment and which was adopted by the Arizona statute, was not changed. Notwithstanding the amendment of 1874, we have been cited to no case reversing or modifying *Low* v. *Henry*, nor is it claimed that the practice did not continue in accordance with the ruling in that case. Indeed, how could there be change? The provisions of the code did not need further interpretation. The procedure was clearly defined. An action was commenced by filing a complaint. Within a year summons might be issued, and when issued the plaintiff might have the property of the defendant attached, that is, have an attachment issued.

The language of paragraph 40, as amended in 1891, having been taken from the California code, it is presumed that it was taken with the meaning it had there, and hence we hold it worked a repeal of paragraph 42 of the Revised Statutes of Arizona of 1887; and the judgment of the Supreme Court of the Territory is

Reversed and the cause remanded for further proceedings in accordance with this opinion.

MERRILL v. NATIONAL BANK OF JACKSONVILLE.

SAME v. SAME.

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

Nos. 54, 55. Argued October 20, 21, 1898. — Decided February 20, 1899.

As the controversy in this case involved the question on what basis dividends in insolvency should have been declared, and therein the enforcement of the trust in accordance with law, this court has jurisdiction of it in equity.

Less than two years having elapsed from the payment of the first dividend to the filing of this bill, and the other creditors of the bank not having been harmed by the delay, no presumption of laches is raised, nor can an estoppel properly be held to have arisen.

A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.

On the seventeenth day of July, A.D. 1891, the First National Bank of Palatka, Florida, a banking association incorporated under the laws of the United States, having its place of business at Palatka, Florida, failed and closed its doors. Subsequently T. B. Merrill was duly appointed receiver of the bank by the Comptroller of the Currency, and entered upon the discharge of his duties. At the time of the failure of the bank, it was indebted to the National Bank of Jacksonville in the sum of $6010.47, on sundry drafts, which indebtedness was unsecured; and also in the sum of $10,093.34, being $10,000, and interest, for money borrowed June 5, 1891, evidenced by a certificate of deposit, which was secured by sundry notes belonging to the First National Bank of Palatka, attached to the certificate as collateral. These notes aggregated $10,896.22, the largest being a note of A. L. Hart for $5350.22. The

National Bank of Jacksonville proved its claim upon the unsecured drafts for $6010.47, and as to this there was no controversy. It also offered to prove its claim for $10,093.34, but the receiver would not permit it to do this, and, under the ruling of the Comptroller of the Currency, it was ordered first to exhaust the collaterals given to secure the certificate of deposit, and then to prove for the balance due, after applying the proceeds of the collaterals in part payment.

The Jacksonville Bank collected all the notes excepting that of A. L. Hart, obtained a judgment on the latter, which it assigned and transferred to the receiver, applied the proceeds of the collaterals which it had collected to its claim on the certificate, and proved for the balance due thereon, being the sum of $4496.44. On December 1, 1892, a dividend of $1573.75 was paid on the claim as thus proven, and on May 17, 1893, a second dividend of $449.64 was paid.

On the eleventh of September, 1894, the Jacksonville Bank filed its bill of complaint in the Circuit Court of the United States for the Southern District of Florida against Merrill as receiver, which set forth the foregoing facts, complained of the action of the receiver in not permitting proof for the full amount of the certificate of deposit, and alleged that it "gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit, that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A.D. 1891."

The prayer of the bill was, among other things, for a *pro rata* distribution on the entire amount of the indebtedness.

The defendant demurred to the bill, and, the demurrer having been overruled, answered, denying "that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security;" and averring to the contrary that "the complainant accepted the said ruling of the said Comptroller without demur and accepted from the said Comptroller, through this defendant, without protesting notice of any kind, the checks of the said Comptroller

in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the Comptroller and would demand payment upon a different basis."

Sundry exceptions were taken to the answer, which were overruled, and the cause was set down for final hearing on bill and answer.

The Circuit Court entered its decree, January 29, 1896, that complainant was entitled to receive dividends on the whole face of the indebtedness due July 17, 1891, less the dividends actually paid to it; that the receiver declare the dividend on the basis of the whole claim, and pay it out of any assets which were in his hands March 15, 1894; and that he render an account.

From this decree the receiver prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit. That court, differing from the Circuit Court as to the form of its decree, reversed it and remanded the cause, with directions to enter a decree that the Jacksonville Bank was entitled to prove its claims to the entire amount of the indebtedness, and to the payment thereon of the same dividends as had been paid on other indebtedness of the Palatka Bank, with interest on such dividends from the date of the declaration thereof, less a credit of the sums which had been paid as dividends on the part of the claim theretofore allowed provided the dividends theretofore paid and thereafter to be paid on the sum of $10,093.34, together with the amounts theretofore and thereafter received on the collaterals securing that indebtedness, should not exceed one hundred cents on the dollar of the principal and interest of said debt; that the receiver recognize the Jacksonville Bank as creditor of the Palatka Bank in said sum of $10,093.34 as of July 17, 1891, and pay dividends as aforesaid thereon, or certify the same to the Comptroller of the Currency, to be paid in due course of administration; and that the Jacksonville Bank receive, before further payment to other creditors, its due proportion of the dividends as thus declared, with interest. 41 U. S. App. 529. From that decree,

after the mandate of the Circuit Court of Appeals had been sent down to the Circuit Court, and proceedings had thereunder, an appeal was taken and perfected to this court and is numbered 54 of this term.

The decree was entered by the Circuit Court in pursuance of the mandate of the Circuit Court of Appeals, July 27, 1896, and the receiver prayed an appeal therefrom to the Circuit Court of Appeals, which was by that court dismissed on motion of the Jacksonville Bank. 41 U. S. App. 645. From this decree of dismissal, an appeal was allowed and perfected to this court, and is numbered 55 of this term.

These appeals were argued together.

Mr. Edward Winslow Paige and *Mr. Francis F. Oldham* for appellant.

Mr. William Worthington for appellee. *Mr. George H. Yeaman* was on his brief. *Mr. J. C. Cooper* filed a brief for appellee.

Mr. Chief Justice Fuller, after making the above statement, delivered the opinion of the court.

The Circuit Court of Appeals reversed the decree of the Circuit Court with specific directions. Nothing remained for the Circuit Court to do except to enter a decree in accordance with the mandate, and, for the purposes of an appeal to this court, the decree of the Circuit Court of Appeals was final. The mandate went down and the Circuit Court entered its decree in strict conformity therewith before the appeal in No. 54 was prosecuted to this court. This promptness of action did not, however, cut off that appeal, and any difficulty in our dealing with the cause in the Circuit Court was obviated by the second appeal, which brings before us in No. 55 the record subsequent to the first decree of the Circuit Court of Appeals.

It is contended that the bill should have been dismissed because of adequate remedy at law, and on the ground of

laches and estoppel. As the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, we have no doubt of the jurisdiction in equity.

Nor was the lapse of time such as to raise any presumption of laches, nor could an estoppel properly be held to have arisen. Less than two years had elapsed from the payment of the first dividend to the filing of the bill, and the other creditors of the insolvent bank had not been harmed by the temporary submission of complainant to the ruling of the Comptroller. The decree affected only assets on hand or such as might be subsequently discovered; and if the other creditors had no rights superior to that of complainant, they lost nothing by the reduction of their dividends, if any, afterwards declared to be paid out of such assets.

The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full.

Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:

"Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the proceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

"Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

"Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

"Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

The Circuit Court and the Circuit Court of Appeals held the fourth rule applicable, and decreed accordingly.

This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs.

In *Kellock's case*, L. R. 3 Ch. App. 769, it was held that

the creditor's interest in the general fund to be distributed vested at the date of presenting or proving his claim; and this rule has been followed in many jurisdictions where statutory provisions have been construed to require an affirmative election to become a beneficiary thereunder. For instance, the cases in Illinois construing the assignment act of that State, which are well considered and full to the point, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim with the assignee." *Levy* v. *Chicago National Bank*, 158 Illinois, 88; *Furness* v. *Union National Bank*, 147 Illinois, 570.

On the other hand, the Supreme Court of Pennsylvania in *Miller's Appeal*, 35 Penn. St. 481, and many subsequent cases, has held, necessarily in view of the statutes of Pennsylvania regulating the matter, that the interest vests at the time of the transfer of the assets in trust. In that case the debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became entitled to a legacy which was attached by a creditor, who realized therefrom $2402.87. It was held that such creditor was notwithstanding entitled to a dividend out of the assigned estate on the full amount of his claim at the time of the execution of the assignment. Mr. Justice Strong, then a member of the state tribunal, said: "By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the $2402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a distributive share of

the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by the statute, or deed of trust, or rule of law, under which they are to be administered.

The first rule is commonly known as the bankruptcy rule, because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise, is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other, but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story Eq. Jur. (13th ed.) § 633; *In re Bates*, 118 Illinois, 524. And it is well established that in marshalling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. Leading Cases in Equity, White & Tudor, Vol. II, Part 1, 4th Amer. ed., pp. 258, 322.

Opinion of the Court.

In *Greenwood* v. *Taylor*, 1 Russ. & Myl. 185, Sir John Leach applied the bankruptcy rule in the administration of a decedent's estate, and remarked that the rule was "not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets;" and referred to the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. But *Greenwood* v. *Taylor* was in effect overruled by Lord Cottenham in *Mason* v. *Bogg*, 2 Myl. & Cr. 443, 488, and expressly so by the Court of Appeal in Chancery in *Kellock's case;* and the application of the bankruptcy rule rejected.

In *Kellock's case*, Lord Justice W. Page Wood, soon afterwards Lord Chancellor Hatherly, said:

"Now in the case of proceedings with reference to the administration of the estates of deceased persons, Lord Cottenham put the point very clearly, and said: 'A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see.'

"Mr. De Gex, who argued this case very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that where a mortgagor is insolvent the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand.

"It was strongly pressed upon us, and the argument succeeded before Sir J. Leach in *Greenwood* v. *Taylor*, that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is, that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property

of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the Court of Chancery. . . . We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

And it was the established rule in England prior to the Judicature Act, 38 and 39 Victoria, c. 77, that in an administration suit a mortgagee might prove his whole debt and afterwards realize his security for the difference, and so as to creditors with security, where a company was being wound up under the Companies Act of 1862. 1 Daniel's Ch. Pr. 384; *In re Withernsea Brick Works*, L. R. 16 Ch. Div. 337.

Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis* v. *United States*, 92 U. S. 618, 623, it was ruled that: "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment, but as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

As Judge Taft points out, it is because of the distinction

between the right *in personam* and the right *in rem* that interest is only added up to the date of insolvency, although after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York Court of Appeals in *People* v. *Remington*, 121 N. Y. 328, 336, "unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement." The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part, and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken.

We cannot concur in the view expressed by Chief Justice Parker in *Amory* v. *Francis*, 16 Mass. 308, 311, (1820) that "the property pledged is in fact security for no more of the debt, than its value will amount to; and for all the rest, the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken."

We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

The ruling in *Amory* v. *Francis* was disapproved, shortly

after it was made, by the Supreme Court of New Hampshire in *Moses* v. *Ranlet*, 2 N. H. 488, (1822) Woodbury, J., afterwards Mr. Justice Woodbury of this court, delivering the opinion, and is rejected by the preponderance of decisions in this country, which sustain the conclusion that a creditor, with collateral, is not on that account to be deprived of the right to prove for his full claim against an insolvent estate. Many of the cases are referred to in *Bank* v. *Armstrong*, and these and others given in the Encyclo. of Law and Eq. 2d ed. vol. 3, p. 141.

Does the legislation in respect to the administration of national banks require the application of the bankruptcy rule? If not, we are of opinion that the equity rule was properly applied in this case.

By section 5234 of the Revised Statutes, and section 1 of the act of June 30, 1876, c. 156, 19 Stat. 63, the Comptroller of the Currency is authorized to appoint a receiver to close up the affairs of a national banking association when it has failed to redeem its circulation notes, when presented for payment; or has been dissolved and its charter forfeited; or has allowed a judgment to remain against it unpaid for thirty days; or whenever the Comptroller shall have become satisfied of its insolvency after examining its affairs. Such receiver is to take possession of its effects, liquidate its assets and pay the money derived therefrom to the Treasurer of the United States.

Section 5235 of the Revised Statutes requires the Comptroller, after appointing such receiver, to give notice by newspaper advertisement for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

By section 5242, transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by the chapter of which that section forms a part, or with a view to preferring any creditor except in payment of its circulating notes, are declared to be null and void.

Section 5236 is as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

In *Cook County National Bank* v. *United States*, 107 U. S. 445, it was ruled that the statute furnishes a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved and was not decided, but the case is in harmony with *Bank* v. *Colby*, 21 Wall. 609, and *Scott* v. *Armstrong*, 146 U. S. 499, which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by section 5242, are preserved; and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be "ratable" on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be "ratable" the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White* v. *Knox*, 111 U. S. 784. In that case it appeared that the Miners' National Bank had been put in the hands of a receiver by the Comptroller of the Currency, December 20, 1875. White presented a claim for $60,000, which the Comptroller refused to allow. White then brought suit to have his claim adjudicated, and on June 23, 1883, recovered judgment for $104,523.72, be-

ing the amount of his claim with interest to the date of the judgment. Meanwhile the Comptroller had paid the other creditors ratable dividends, aggregating sixty-five per cent of the amounts due them, respectively, as of the date when the bank failed. When White's claim was adjudicated, the Comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent on that amount. White admitted that he had received all that was due him on the basis of distribution assumed by the Comptroller, but claimed that he was entitled to have his dividends calculated on the face of the judgment, which would give him several thousand dollars more than he had received, and he applied for a mandamus to compel the payment to him of the additional sum. The writ was refused by the court below and its judgment was affirmed. Mr. Chief Justice Waite, speaking for the court, said: "Dividends are to be paid to all creditors, ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment. . . . The business of the bank must stop when insolvency is declared. Rev. Stat. § 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

In *Scott* v. *Armstrong*, 146 U. S. 499, 510, it was argued that the ordinary equity rule of set-off in case of insolvency did not apply to insolvent national banks in view of sections 5234, 5236 and 5242 of the Revised Statutes. It was urged "that these sections by implication forbid this set-off because they require that after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered,

in contemplation of or after committing the act of insolvency, shall stand;" and "that the assets of the bank existing at the time of the act of insolvency include all its property without regard to any existing liens thereon or set-offs thereto." But this court said: "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

The set-off took effect as of the date of the declaration of insolvency, but outstanding collaterals are not payment, and the statute does not make their surrender a condition to the receipt by the creditor of his share in the assets.

The rule in bankruptcy went upon the principle of election; that is to say, the secured creditor "was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the Court of Bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy his demand; but if he neglected to do this and proved for his whole debt, he

was bound to give up his security." Robson, Law Bank. 336. But it was only under bankrupt laws that such election could be compelled. *Tayloe* v. *Thompson*, 5 Pet. 358, 369.

And we are unable to accept the suggestion that compulsion under those laws was the result merely of the provision for ratable distribution, which only operated to prevent preferences, and to make all kinds of estates, both real and personal, assets for the payment of debts, and to put specialty and simple contract creditors on the same footing; and so gave to all creditors the right to come upon the common fund. Equality between them was equity, but that was not inconsistent with the common law rule awarding to diligence, prior to insolvency, its appropriate reward; or with conceding the validity of prior contract rights.

We repeat that it appears to us that the secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.

Whatever Congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks. Yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do, unless required by statute, at the time the indebtedness was created.

Dissenting Opinion: White, Harlan, McKenna, JJ.

The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any such creditors, and ought not to be construed as having, or being intended to have, such a result.

Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited.

The case was rightly decided by the Circuit Court of Appeals; its decree in No. 54 is

Affirmed, and the decree of the Circuit Court entered July 27, 1896, in pursuance of the mandate of that court, also affirmed, and the case remanded accordingly.

Mr. Justice White, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, dissenting.

The court now decides: 1st. That on the failure of a national bank a creditor thereof whose debt is secured by pledge is entitled to be recognized and classed by the Comptroller of the Currency to the full amount of his debt, without in any way taking into account the collaterals by which the debt is secured, and on the amount so recognized he is entitled to be paid out of the general assets the sum of any dividends which may be declared. 2d. That this right to be classed for the full amount of the debt, without regard to the value of the collaterals, is fixed by the date of the insolvency and continues to the final distribution, whatever may be the change in the debt thereafter brought about by the realization of the securities, provided only that the sums received by the creditor by way of dividends and from the amount collected

from the collaterals do not exceed the entire debt and therefore extinguish it.

I am constrained to dissent from these propositions, because, in my opinion, their enforcement will produce inequality among creditors and operate injustice, and, as a necessary consequence, are inconsistent with the National Banking Act.

It cannot be doubted that the acts of Congress, which regulate the collection and distribution of the assets of an insolvent national bank, are controlling. It is clear that every creditor who contracts with such bank does so subject to the provisions directing the manner of distributing the assets of such bank in case of its insolvency, and therefore that the terms of the act enter into and form part of every contract which such bank may make. Now, the act of Congress makes it the duty of the receiver appointed by the Comptroller to liquidate the affairs of a failed national bank, to take possession of and realize its assets, Rev. Stat. § 5234; to call, by advertisement for ninety days, upon creditors, to present and make legal proof of their claims, Rev. Stat. § 5235; and, from the proceeds of the assets, the Comptroller is directed to make a "ratable dividend" on the recognized claims, Rev. Stat. § 5236. To prevent preferences, the law, moreover, directs that all contracts from which preferences may arise, made after the commission of an act of insolvency or in contemplation thereof, "shall be utterly null and void." Rev. Stat. § 5242.

It seems to me superfluous to demonstrate that the rules now upheld by which a creditor holding security is decided to be entitled to disregard the value of his security and take a dividend upon the whole amount of the debt from the general assets, violates the principle of equality and ratable distribution which the act of Congress establishes. Is it not evident that if one creditor is allowed to reap the whole benefit of his security, and at the same time take from the general assets a dividend, on his whole claim, as if he had no security, he thereby obtains an advantage over the other general creditors, and that he gets more than his ratable share of the general assets? Let me illustrate the unavoida-

ble consequence of the doctrine now recognized. A loans a national bank $5000, and takes as the evidence of such loan a note of the bank for the sum named, without security. The lender is thus a general or unsecured creditor for the sum of $5000. B loans to the same bank $5000, without security. He is applied to for a further loan, and agrees to loan another $5000 on receiving collateral worth $5000, and requires that a new note be executed for the amount of both loans, which recites that it is secured by the collateral in question. While theoretically, therefore, B is a secured creditor for $10,000, he practically has no security for $5000 thereof. Insolvency supervenes. The general assets received by the Comptroller equal only fifty per cent of the claims. Now, under the rule which the court establishes, A on his unsecured claim of $5000 collects a dividend of but $2500, thereby losing $2500; B, on the other hand, who proves $10,000, taking no account whatever of his collateral, realizes by way of dividends $5000, and by collections on collaterals a similar amount, with the result that though as to $5000 he was, in effect, an unsecured creditor, he loses nothing. B is thus in precisely as good a situation as though he had originally demanded and received from the borrowing bank collateral securities equal in value to the full amount loaned. It is thus apparent that the application of the rule would operate to enable B — who, I repeat, virtually held no collateral security for $5000 of the sums loaned — to be paid his entire debt, though the assets of the insolvent estate of the borrower paid but fifty cents on the dollar, while another creditor holding an unsecured claim for $5000 fails to realize thereon more than $2500. Is it not plain that this result is produced by practically a double payment to B, that is, by recognizing B as a preferred creditor in the specific property, of the value of five thousand dollars, pledged to him, withdrawing that property from the general assets, and allowing B to solely appropriate it, yet permitting him, when the secured part of his debt is thus virtually satisfied, to *again assert* the same secured portion of the debt against other assets, by a claim upon the general fund in the hands of the receiver for the full amount

loaned. The consequence of the receipt of this extra sum upon account of the already fully secured portion of the original loan is that B is enabled to offset it against the deficient dividend on the unsecured portion of the debt, one equalling the other, thus closing the transaction without loss to him.

Let us suppose also the case of a creditor of a national bank who recovers a judgment for $100,000 and levies the same upon real estate of the bank worth only $50,000. While the legal title and possession is still in the bank a receiver is appointed and takes possession of the real estate. Certainly it cannot be contended that this judgment lien holder is not in equally as good a position as the holder of a mortgage lien or other collateral security. The doctrine of the court, however, if applied to the judgment lien holder, would authorize him to demand that the receiver treat the real estate as not embraced in the general assets, and that the creditor be allowed to enforce his whole claim against the other assets irrespective of the value of the specific security acquired by his lien.

That the doctrine maintained by the court also tends to operate a discrimination as between secured creditors, in favor of the one holding collateral securities not susceptible of prompt realization, is, I think, demonstrable. Thus a secured creditor who takes collaterals maturing on the same day with the debt owing to himself, which collaterals consist of negotiable notes, the makers of which and endorsers upon which are pecuniarily responsible, finds the collaterals promptly paid when deposited for collection, and if his debtor should become insolvent the day after payment the creditor could only claim for the residue of the debt still unpaid. On the other hand, a creditor of the same debtor, the debt to whom matures at the same time as that owing the other creditor, and is secured by collaterals also due contemporaneously, has the collaterals protested for non-payment, and when the debtor fails the collaterals have not been realized. While the first debtor, who had received first class collateral, can collect dividends against the estate of his insolvent debtor only for the unpaid portion of the claim, losing a part of such residue by the inability of the

estate to pay in full, the debtor who received poor collateral collects dividends out of the general assets on his whole claim, and if he eventually realizes on his securities may come out of the transaction without the loss of one cent. These illustrations, to my mind, adequately portray the inequality and injustice which must arise from the application of the rules of distribution now sanctioned by the court.

The fallacies which it strikes me are involved in the two propositions sanctioned by the court are these: First: The erroneous assumption that although the act of Congress contemplates that the dividend should be declared out of the general assets after the secured creditors have withdrawn the amount of their security, it yet provides that the secured creditor who has withdrawn his security and thus been *pro tanto* satisfied, can still assert his whole claim against the general assets, just as if he had no security and had not been allowed to withdraw the same. Second: The mistaken assumption that the act confers upon the secured creditor a new and substantial right, enabling him to obtain, as a consequence of the failure of the bank, an advantage and preference which would not have existed in his favor had the failure not supervened. This arises from holding that the insolvency fixed the amount of the claim which the secured creditor may assert, as of the time of the insolvency; thereby enabling him to ignore any collections which he may have realized from his securities after the failure, and permitting him to assert as a claim, not the amount due at the time of the proof, but, by relation, the amount due at the date of the failure, the result being to cause the insolvency of the bank to relieve the creditor holding security from the obligation to impute any collections from his collateral to his debt, so as to reduce it by the extent of the collections, a duty which would have rested on him if insolvency had not taken place. Third: By presupposing that, because before failure a secured creditor had a legal right to ignore the collaterals held by him and resort for the whole debt, in the first instance, against the general estate of his debtor, it would impair the obligation of the contract to require the secured creditor in case of insolvency

to take into account his collaterals and prevent him from asserting his whole claim, for the purpose of a dividend, against the general assets. But the preferential right arising from the contract of pledge is in nowise impaired by compelling the creditor to first exercise his preference against the security received from the debtor, and thus confine him to the specific advantage derived from his contract. Further, however, as the contract, construed in connection with the law governing it, restricts the secured as well as the unsecured creditor to a ratable dividend from the general assets, the secured creditor is prevented from enhancing the advantage obtained as a result of the contract for security, by proving his claim as if no security existed, since to allow him to so do would destroy the rule of ratable division, subject and subordinate to which the contract was made. A forcible statement of the true doctrine on the foregoing subject was expressed in the case of *Société Générale de Paris* v. *Geen*, 8 App. Cas. 606. The question before the court arose upon the construction to be given to a clause of the English bankrupt act of 1869, incidental to the requirement of a section, expressly embodied for the first time in a bankrupt act, that the secured creditor should in some form account for the collateral held by him in proving his claim against the general estate. In considering the restriction upon the remedy of a secured creditor produced by the insolvency, and the consequent right of such creditor to receive only a ratable dividend on the balance of the debt after the deduction of the value of the collaterals, Lord Fitzgerald said (p. 620):

"Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him; but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered — the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy the bankrupt law endeavors to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right."

To resort, however, to reasoning for the purpose of en-

deavoring to demonstrate that where a statute does not allow preferences in case of insolvency, and commands a ratable distribution of the assets, a secured creditor cannot be allowed to disregard the value of his security and prove for the whole debt, seems to me to be unnecessary, since that he cannot be permitted to so do, under the circumstances stated, has been the universal rule applied in bankruptcy in England and in this country from the beginning.

In the earliest English bankrupt act, 34 & 35 Hen. VIII, c. 4, the distribution of the general assets of the bankrupt was directed to be made, "for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion rate and rate alike, according to the quantity of their debts." In the statute of 13 Eliz., c. 7, (and which was in force in this particular when the consolidated bankrupt statute of 6 Geo. IV, c. 16, was adopted,) the distribution of assets was directed in language similar to that just quoted from the statute of Henry VIII. Under these statutes, from the earliest times, it was held by the Lord Chancellors of England, having the supervision of the execution of the bankrupt statutes, that a secured creditor could not retain his collateral security and prove for his whole debt, but must have his security sold, and prove for the rest of the debt only. Lord Somers, in *Wiseman* v. *Carbonell*, (1695) 1 Eq. Cas. Ab. 312, pl. 9; Lord Hardwicke, in *Howel, petitioner*, (1737) 7 Vin. Ab. 101, pl. 13, and in *Ex parte Grove*, (1747) 1 Atk. 104; Lord Thurlow, in *Ex parte Dickson*, (1789) 2 Cox Ch. 194, and in *Ex parte Coming*, (1790) 2 Cox Ch. 225; Cooke's Bankrupt Laws, (1st ed. 1786) 114, and (4th ed. 1799) 119.

In 1794, 4 Brown's Ch. Rep. star paging 550, the prevailing practice with respect to a sale of a mortgage security was regulated by a general order formulated by Lord Chancellor Loughborough, wherein, among other things, it was provided that in case the proceeds of sale should be insufficient to pay and satisfy what should be found due upon the mortgage, "that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or

effects, ratably and in proportion with the rest of the creditors seeking relief under the said commission," etc.

Concerning the practice in bankruptcy, Lord Chancellor Eldon, in 1813, in *Ex parte Smith*, 2 Rose, 63, said: "The practice has been long established in bankruptcy, not to suffer a creditor holding a security to prove unless he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious: Till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is. . . . It is, however, clearly within the discretion of the court to relax this rule, and cases may occur in which it would be for the benefit of the general creditors to relax it."

The first two bankrupt statutes enacted in this country (April 4, 1800, c. 19, 2 Stat. 19; August 4, 1841, c. 9, 5 Stat. 440) required a ratable distribution of the assets, and it was conceded in argument that the universal practice enforced under these acts was to require a creditor holding collateral security to deduct the amount of his security and prove only for the residue of the debt. This court, speaking through Mr. Justice Story, in 1845, in *In re Christy*, 3 How. 292, declared that under the act of 1841, "if creditors have a pledge or mortgage for their debt they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto* and to prove for the residue."

As the universal rule and practice in bankruptcy in England and in this country, up to and including the bankrupt act of 1841, was solely the result of the statutory requirement that the assets should be ratably distributed among the general creditors, my mind fails to discern why the requirement for ratable distribution of the assets in the act for the liquidation of failed national banks, should not have the same meaning and produce the same result as the substantially similar provisions had always meant and had always operated in England for hundreds of years and in this country for many years before the adoption by Congress of the act for the liquidation of national banks. Indeed, the fact that the requirement of ratable distribution had by a long course of practice

and judicial construction in England and in this country required the secured creditor to account for his security, before proving against the general assets, gives rise to the application of the elementary canon of construction that where words are used in a statute, which words at the time had a settled and well-understood meaning, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning.

The reasoning by which it is maintained that the requirement for ratable distribution should not be applied in the act providing for the liquidation of an insolvent national bank may be thus summed up: True it is, that universally in bankruptcy in England and in this country the rule was as above stated, but outside of bankruptcy a different practice prevailed in England, known as the chancery rule; and as the winding up of an insolvent national bank does not present a case of bankruptcy, its liquidation is governed by such chancery rule and not by the bankruptcy rule. The bankruptcy rule, it is said, is commonly so called because enforced by bankruptcy courts in the exercise of their "peculiar" jurisdiction, and the courts which refuse to apply the rule generally declare that it arose from express provisions in bankrupt statutes requiring a creditor to surrender his collaterals or deduct for their value before proving against the estate.

Pretermitting for a moment an examination of this reasoning, it is to be remarked in passing that the argument, if sound, rests upon the hypothesis that all the bankruptcy laws from the beginning in England and in our own country, and the universal course of decision thereon and the practice thereunder, have worked out inequality and injustice by depriving a secured creditor of rights which it is now asserted belonged to him and which could have been exercised by him without producing inequality. This deduction follows, for it cannot be that, if not to compel the creditor to deduct produces no inequality or injustice, then to compel him to do so would have precisely the same result. The two opposing and conflicting rules cannot both be enforced and yet in each instance equality result. At best, then, the contention admits that by

the consensus of mankind not to compel the secured creditor to deduct the value of his collaterals before proving produces inequality, for of all statutes those relating to bankruptcy have most for their object an equal distribution of the assets of the insolvent among his creditors.

It is worthy also of notice, in passing, that the reasoning to which we have referred rests upon the assumption that the act of Congress providing for the liquidation of the affairs of a national bank and a distribution of the assets thereof among the creditors is not substantially a bankrupt statute. It certainly is a compulsory method provided by law for winding up the concerns of an insolvent bank, for preventing preferences, and for securing an equal and ratable division of the assets of the association among its creditors. And it assuredly can be safely assumed that Congress in adopting the rule of ratable distribution in the National Banking Act did not intend that the words embodying the rule should be so construed as to produce a result contrary to that which for hundreds of years had been recognized as necessarily implied by the employment of similar language. It may also, I submit, be likewise considered as certain that it was not intended, in using the words "ratable distribution" in the statute, to bring about an unequal instead of a ratable distribution of the general assets.

But, coming to the proposition itself, is there any foundation for the assertion that the rule or practice in bankruptcy requiring the secured creditor to account for his security was the result of something peculiar in the jurisdiction of bankruptcy courts, other than the requirement contained in bankruptcy statutes that the assets should be distributed ratably among creditors, and is there any merit in the contention that the rule was the consequence of an express provision in such laws imposing the obligation referred to on the secured creditor?

A careful examination of every bankrupt statute in England, from the first statute of 34 & 35 Hen. VIII, c. 4, down to and including the Consolidated Bankrupt Act of 6 Geo. IV, c. 16, fails to disclose any provision sustaining the statement that

the rule in bankruptcy depended upon express statutory requirement, and on the contrary shows that it was simply a necessary outgrowth of the command of the statute that there should be an equal distribution of the bankrupt's assets.

I submit that not only an examination of the English statutes makes clear the truth of the foregoing, but that its correctness is placed beyond question by the statement of Lord Chancellor Eldon respecting proof in bankruptcy by a secured creditor, already adverted to, that "till his debt has been reduced by the proceeds of that sale," (that is, of the security,) "it is impossible correctly to say what the actual amount of it is." And, as an authoritative declaration of the origin of the rule, the opinion of Vice Chancellor Malins, in *Ex parte Alliance Bank*, (1868) L. R. 3 Ch., note at page 773, is in point. The Vice Chancellor said:

"This rule" (requiring a creditor to realize his security and prove for the balance of the debt only) "does not depend on any statutory enactment, but on a rule in bankruptcy, established irrespective of express statutory enactment, and under the statute of *Elizabeth*, which provides: 'Or otherwise to order the same (*i.e.* the assets) to be administered for the due satisfaction and payment of the said creditors, that is to say, for every of the said creditors a portion, rate and rate alike, according to the quantity of his and their debts.'"

Indeed, not only was the obligation of the secured creditor to account for his security derived from the provision as to ratable distribution, but from that provision also originated the equally well-settled rule causing interest to cease upon the issuance of the commission of bankruptcy. As early as 1743, Lord Hardwicke, in *Bromley* v. *Goodere*, 1 Atkyns, 75, 79, in speaking of the suspension of interest by the effect of bankruptcy, said: "There is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors, that they may have a rate-like satisfaction, and is founded upon the equitable power given them by the act."

Whilst, generally, the claim that the bankruptcy rule was the creature of an express provision of the bankruptcy acts,

other than the requirement as to a ratable distribution of assets, rests upon a mere statement to that effect without any reference to the specific text of the bankrupt act which it was assumed made such requirement, in one instance, in the brief of counsel in an early case in this country, *Findlay* v. *Hosmer*, (1817) 2 Conn. 320, the statement is made in a more specific form. A particular section of an English bankrupt statute is there referred to, as, in effect, expressly requiring a secured creditor to account for his collaterals in order to prove against the general assets. The statute thus referred to was section 9 of 21 Jac. I, c. 19. But an examination of the section relied on shows that it in nowise supports the assertion. The pertinent portion of the section reads as follows:

". . . all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupts, before such time as he or she shall, or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments or other security for any more than a ratable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security."

The securities other than attachment referred to in this section were manifestly embraced in the class known at common law as "personal" security, as distinguished from "real" security or security upon property. (Sweet's Dict'y English Law, *verbo* Security.) In other words, the effect of the section was but to forbid preferences in favor of creditors which at law would have resulted from the particular form in which the debt was evidenced, and from which form a claim would

be raised to a higher rank than a simple contract debt. That this is the significance of the word "security" as used in this section is shown by the following excerpt from Cooke's treatise on bankrupt laws, published in 1786. At page 114 he says:

"The aim of the legislature in all the statutes concerning bankrupts, being, that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally; nor will the nature of their demands make any difference, unless they have obtained actual execution, or taken some pledge or security before an act of bankruptcy committed. For when a creditor comes to prove his debt he is obliged to swear whether he has a security or not; and if he has, and insists upon proving, he must deliver it up for the benefit of his creditors, unless it be a joint security from the bankrupt and another person," etc.

The fact that the expression "security" contained in the section referred to had no reference to security on property, is further demonstrated by the subsequent statute of 6 Geo. IV, c. 9, § 103, which reënacted in an altered form the ninth section of the statute of James; for the reënacted section, although it referred in broad terms to securities generally, yet especially excepted the case of a mortgage or pledge. The section is as follows:

"Sec. 103. And be it enacted, That no creditor having security for his debt, or having made any attachment in London, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy."

Is it pretended anywhere that after the reënactment of section 9 of the statute of James I, found in section 103, c. 9, 6 Geo. IV, that the obligation of a secured creditor to account for his collateral before he took a dividend out of the general assets ceased to exist? Certainly, there is no such

contention. If, however, that duty of the general creditor arose, not from the provision as to ratable distribution, but from the provisions of section 9 of the act of James as claimed, then necessarily such obligation on the part of the general creditor would have ceased immediately on the enactment of the statute of 6 Geo. IV, which expressly excepted the mortgage creditor from the operation of the particular section which it is contended imposed the duty on the mortgage creditor to account. The continued enforcement of the rule which required the mortgage creditor to deduct the value of his security before proving against general assets after the reënactment of section 9 of the statute of George referred to, can lead to but one conclusion; that is, that the duty of the mortgage creditor before existing arose from the provision for ratable distribution and not from the terms of section 9 of the statute of James, since that duty continued to be compelled after the reënactment of that section in terms which renders it impossible to contend that that section created the duty.

A similar course of reasoning applies to bankrupt statutes of this country.

Section 31 of our first bankrupt statute, act April 4, 1800, c. 19, 2 Stat. 19, 30, was, in substance and effect, similar to the provision in the act of James. The statute of 1800 is said to have been a consolidation of the provisions of previous English bankrupt statutes, *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Roosevelt* v. *Mark*, 6 Johns. Ch. 266, 285; and in *Tucker* v. *Oxley*, Chief Justice Marshall declared that, for that reason, the decisions of the English judges as to the effect of those acts might be considered as adopted with the text that they expounded. Section 31 reads as follows:

"Sec. 31. And be it further enacted, That in the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bank-

rupt, (provided, there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt."

This provision of the act of 1800 was, however, omitted from the bankrupt act of 1841, manifestly because it had become unnecessary. The later statute contained in the fifth section a general provision forbidding all preferences except in favor of two classes of debts, thus rendering it superfluous to enumerate cases in which there should be no preference. It was, however, under the act of 1841, which was drafted by Mr. Justice Story, (2 Story's Life of Story, 407,) that this court, speaking through that learned justice, in *In re Christy*, already cited, declared that a secured creditor must account for his security when proving against the bankrupt estate. How it can be now argued that the requirement that such creditor should only so prove his claim was the result of a provision not found in the act of 1841, and clearly shown by all the antecedent legislation not to refer to a creditor holding property security, my mind fails to comprehend.

True it is, that both in our own act of 1867 and in the English bankrupt act of 1869, there were inserted express provisions requiring a secured creditor to account for his collaterals before proving against the general assets. But this was but the incorporation into the statutes of the rule which had arisen as a consequence of the requirement for a ratable distribution and which had existed for hundreds of years before the statutes of 1867 and 1869 were adopted. In other words, the express statutory requirement only embodied in the form of a legislative enactment what theretofore from the earliest time had been universally enforced, because of the provision for a ratable distribution.

The rule in bankruptcy imposing the duty upon the creditor to account for his security before proving being then the result of the provision of the bankrupt laws requiring ratable distribution, I submit that the same requirements upon such

creditor should be held to arise from a like provision contained in the act of Congress under consideration.

But, coming to consider the chancery rule which it is contended lends support to the doctrines applied in the cases at bar.

The foundation upon which the so called chancery rule rests is the case of *Mason* v. *Bogg*, 2 Myl. & Cr. 443, decided in 1837, where Lord Chancellor Cottenham expressed his approval of the contention that a mortgage creditor, despite the death and insolvency of his debtor, possessed the contract right to assert his whole claim against general assets in the course of administration in chancery, without regard to his mortgage security. The question was not directly decided, however, as to whether the creditor might prove in the administration for the whole amount of the debt, but was reserved. As stated, however, the reasoning of the court favored the existence of such right, upon the theory that a court of chancery, when administering assets, *in the absence of a statute regulating the subject*, could not deprive a secured creditor of legal rights previously existing which he might have asserted at law, although by permitting the exercise of such rights preferences in the general assets would arise.

The next case in point of time in England, and indeed the one upon which most reliance is placed by those favoring the chancery rule, is *Kellock's case*, reported in L. R. 3 Ch. 769, involving two appeals, and argued before Sir W. Page Wood, L. J., and Sir C. J. Selwyn, L. J. The cases arose in the winding up of companies by virtue of the statute of 25 & 26 Victoria, c. 89. The issue presented in each case was whether a creditor having collateral security was entitled to dividends upon the full amount of the debt without reference to the value of collaterals; and in one of the cases the lower court applied the doctrine supported by the reasoning in *Mason* v. *Bogg*, while in the other the lower court decided the bankruptcy rule governed. The appellate court held that the chancery practice should be followed. The claim was made that the secured creditor ought not to be allowed to take a dividend on the full amount of his claim, because, among

other reasons, of section 133 of the act, which provided as follows:

"133. The following Consequences shall ensue upon the voluntary Winding-up of a Company:

"(1.) The Property of the Company shall be applied in satisfaction of its Liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the Regulations of the Company, be distributed amongst the Members according to their Rights and Interests in the Company."

This contention, however, was answered by Lord Justice Wood, who said (p. 778):

"There is a clause in the Companies Act of 1862 which says that in a voluntary winding up equal distribution is to be made among creditors; an expression similar to which, in 13 Eliz. c. 7, appears to have led to the establishment of the rule in bankruptcy."

He then called attention to the fact that a voluntary winding up was not limited to cases of insolvent companies, but might be resorted to on behalf of a solvent one; and he proceeded to comment upon the fact that in previous winding-up acts, "when the legislature intended proceedings to be conducted according to the course in bankruptcy, it said so," concluding with the declaration that the omission to do so in the case before the court indicated the purpose of Parliament that the court should be governed by the chancery rule. Lord Justice Selwyn, in a measure, also adopted this view, saying (p. 782):

"I think, therefore, that the onus is clearly thrown on those persons who come here and say that when the legislature, with a knowledge of the existence of the difference between the practice in bankruptcy and the practice in chancery, entrusted the winding up of the companies to the Court of Chancery, and said in express terms that the practice of the Court of Chancery was to prevail, they intended by some implication or inference to diminish, prejudice or affect the rights of creditors. I can find no trace of any such intention. I think, therefore, we are bound to follow the established practice of the Court of Chancery, especially when we find that

that practice has been followed ever since the passing of the Winding-up Act, and so long as winding-up orders have been made in the Court of Chancery."

The whole subject has been set at rest, however, in Great Britain, by section 25 of the Judicature Act of August 5, 1873, c. 66, and by an amendment thereto adopted August 11, 1875, c. 77, which expressly required that in the administration in chancery of an insolvent estate of one deceased and in proceedings in the winding up of an insolvent company under the Companies Acts, "the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, . . . as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt."

So that now, in Great Britain, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security.

In view, therefore, of the English legislation in 1873 and 1875, which has rendered it impossible in cases of insolvency to apply the doctrine of the *Kellock case*, we need not particularly notice decisions rendered in England subsequent to 1868, when the *Kellock case* was decided, particularly as the tribunals which rendered such decisions were subordinate to the Court of Appeal and necessarily bound by its rulings.

Now, I submit, as the English Chancellors, from the date of the enactment of the earliest English bankrupt law, felt constrained to compel a secured creditor to account for his security before proving against the general assets of the bankrupt estate, because Parliament had directed a ratable distribution of all such assets, it cannot in consonance with sound reasoning be said that this court is to apply the chancery rule to the distribution of the assets of an insolvent national bank as to which Congress has directed a ratable distribution, because in England a different rule was for a time applied to an act of Parliament providing not solely for the liquidation of an insolvent estate, but equally to a solvent and

insolvent one, and which rule was so applied in England because a particular statute was construed as requiring that the practice pursued in chancery in administering upon estates should govern.

It is worthy of note that Lord Justice Wood, after stating in his opinion in the *Kellock case* that the bankruptcy rule was "adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements," conceded that the provision in the statute of 13 Eliz. c. 7, requiring equal distribution, "led to the establishment of the rule in bankruptcy." But the Lord Justice took the cases then under consideration out of the operation of the provision of the statute of Elizabeth because of provisions found in the Company Act which, in his opinion, gave rise to a contrary view in cases governed by that act. The distribution of the assets of a failed national bank under the act of Congress, it is obvious, presents the "peculiar" features which Lord Justice Wood had in mind, since the requirement of ratable distribution is the exact equivalent of the provision contained in the statute of Elizabeth. But the reasoning now employed to cause the rule announced in the *Kellock case* to apply so as to defeat the ratable distribution provided by the act of Congress, is made to rest upon the assumption that the act of Congress does not contain the peculiar requirement which was found in the bankruptcy acts, from which the duty of the secured creditor to account for his security before taking a dividend from the general assets arose. It comes, then, to this: That the theory by which the obsolete doctrine of the *Kellock case* is made to apply rests upon an assumption which repudiates the reasoning of that case; in other words, that the result of the *Kellock case* is taken and applied to this case, whilst the reasoning upon which the decision of the *Kellock case* was based is in effect denied.

That to permit a secured creditor to retain his specific contract security and also to prove against the general assets of his insolvent debtor for the whole amount of the debt was deemed to work out inequality is shown not only by the fact

that it was not applied in bankruptcy, but that in the administration of equitable, as contradistinguished from legal, assets, courts of equity, following the maxim *Equitas est quasi equalitas*, would not permit claimants against equitable assets to share in the distribution of such assets, until they had accounted for any advantage gained by the assertion against the general estate of the debtor of a preference permitted at law. *Morrice* v. *Bank of England*, Cases Temp. Talb. 218; *Sheppard* v. *Kent*, 2 Vern. 435; *Deg* v. *Deg*, 2 P. W. 412, 416; *Chapman* v. *Esgar*, 1 Sm. & G. 575; *Bain* v. *Sadler*, L. R. 12 Eq. 570; *Purdy* v. *Doyle*, 1 Paige, 558; *Bank of Louisville* v. *Lockridge*, 92 Kentucky, 472; 1 Story Eq. Jur. 12th ed. p. 543; Watson, 1 Comp. Ex. 2d rev. ed. ch. 11, p. 35.

It was undoubtedly from a consideration of this fundamental rule of equity, in construing the statutory requirement for ratable division of general assets, that the bankruptcy rule was formulated. That rule, however, in effect, declared that secured creditors might retain their preferential contract rights in particular portions of the estate of the insolvent debtor, but that it was the purpose of Parliament, in commanding ratable distribution, that general assets, that is, assets disencumbered of liens, should be distributed only among the general or unsecured creditors; the necessary effect being that a secured creditor could not prove against general assets without surrendering his security, thus becoming a general or unsecured creditor *for the whole amount of the debt*, or realizing upon the security or in some form accounting for its value, in which latter contingency he would be general or unsecured creditor only *for the deficiency*. That the bankruptcy rule was deemed to be founded upon equitable principles, I think, is demonstrated by the statement of Lord Hardwicke in a case already mentioned, *Bromley* v. *Goodere*, 1 Atk. 77, where, after referring to the act of 13 Eliz. c. 7, he said:

"It is manifest that this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall think fit; and that this has

been the construction ever since; and therefore when petitions have come before the Chancellor, he has always proceeded upon the same rules, as he would upon causes coming before him upon the bill, *The rules of equity.*"

The foregoing reasoning renders it unnecessary to review at length the opinion delivered by the Circuit Court of Appeals for the Sixth Circuit in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465, to which the court has referred, as the conclusions announced by the Circuit Court of Appeals were rested on the assumption that the bankruptcy rule was the creature of an express statutory requirement, and that to prevent a secured creditor from proving for his whole debt, as of the time of the insolvency, without regard to his collaterals, would deprive him of a contract right, both of which contentions have been fully considered in what I have already said. Nor is the case of *Lewis* v. *United States*, 92 U. S. 619, also referred to in the opinion of the court in the case at bar, controlling upon the question here presented. True, it was said in the *Lewis case*, in passing, and upon the admission of counsel, that "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor," citing the *Kellock case* and two other English and two Pennsylvania cases involving the question of the rights of a creditor having the securities of distinct estates of separate debtors. But the controversy before the court in the *Lewis case* was of this latter character, being between the United States, as creditor of a partnership and holding collaterals belonging to the partnership, and the trustee in bankruptcy of the separate estates of individual members of the partnership. The government was seeking to assert against such separate estates a right of preference given to it by statute. The court decided that as the United States had a paramount lien upon all the assets of every debtor for the full satisfaction of its claim, it was unaffected by the bankruptcy statutes, and therefore was not controlled by any provision found therein for ratable distribution or otherwise. It is apparent, therefore, that the court, by the quoted statement did not decide that a court of equity

would apply the doctrine there set forth, where the rights of the secured creditor were limited and controlled by statute. If the secured creditor, who is allowed in the case now decided to disregard his security and prove for the whole amount of his claim had a paramount lien not only upon his collaterals, but upon each and every asset of the insolvent bank, the rule in the *Lewis case* would be apposite. But that is not the character of the case now before the court, since here a secured creditor has no paramount lien upon anything but his collaterals, and is governed in his recourse against the general assets by the requirement that there should be a ratable distribution.

As the case before us is to be controlled by the act of Congress, it would appear unnecessary to advert to state decisions construing local statutes; but inasmuch as those decisions were referred to and cited as authority, I will briefly notice them. They are referred to in the margin and divide themselves into four classes: 1. Those which maintain that where ratable distribution is required, the creditor must account for his security before proving.[1] 2. Those cases which, on the contrary, decide that to allow the creditor to prove for his whole claim without deduction of security, is not incompatible with ratable distribution, and hold that the security need not be taken into account.[2] 3. Those cases which, whilst seemingly deny-

---

[1] *Amory* v. *Francis*, (1820) 16 Mass. 308; *Farnum* v. *Boutelle*, (1847) 13 Met. 159; *Vanderveer* v. *Conover*, (1838) 1 Harr. 487; *Bell* v. *Fleming's Executors*, (1858) 1 Beasley, (12 N. J. Eq.) 13, 25; *Whittaker* v. *Amwell National Bank*, (1894) 52 N. J. Eq. 400; *Fields* v. *Creditors of Wheatley*, (1853) 1 Sneed, (Tenn.) 351; *Winton* v. *Eldridge*, (1859) 3 Head, (Tenn.) 361; *Wurtz* v. *Hart*, (1862) 13 Iowa, 515; *Searle, Ex'or*, v. *Brumback, Assignee*, (1862) 4 Western Law Monthly, (Ohio) 330; *In re Frasch*, (1892) 5 Wash. 344; *National Union Bank* v. *National Mechanics Bank*, (1895) 80 Maryland, 371; *American National Bank* v. *Branch*, (1896) 57 Kansas, 327; *Investment Co.* v. *Richmond National Bank*, (1897) 58 Kansas, 414.

[2] *Findlay* v. *Hosmer*, (1817) 2 Conn. 350; *Moses* v. *Ranlet*, (1822) 2 N. H. 488; *West* v. *Bank of Rutland*, (1847) 19 Vermont, 403; *Walker* v. *Baxter*, (1854) 26 Vermont, 710, 714; *In the matter of Bates*, (1886) 118 Illinois, 524; *Furness* v. *Union National Bank*, (1893) 147 Illinois, 570; *Levy* v. *Chicago National Bank*, (1895) 158 Illinois, 88; *Allen* v. *Danielson*, (1887) 15 R. I. 480; *Greene* v. *Jackson Bank*, (1895) 18 R. I. 779; *People* v. *Remington*,

ing the obligation of the secured creditor to account for his security, yet, practically, work out a contrary result by requiring deduction upon collaterals as collected, and affording remedies to compel prompt realization of collaterals.[1] 4. Those which originated in purely local statutes and which hold that the secured creditor can prove for the whole amount without reference to either the bankruptcy or the chancery rule.[2] And in the margin I supplement the compilation heretofore made by a reference to some state statutes and decisions referring to statutes which expressly provide that the claimants upon an insolvent estate can only prove for the balance due, after deduction of any security held.[3]

Of course, for the purposes of this case, only the first two classes of cases need be considered. The first class is well represented by two Massachusetts cases: *Amory* v. *Francis*, 16 Mass. 308, and *Farnum* v. *Boutelle*, 13 Met. 159. In the first-named case Chief Justice Parker said (p. 311): "If it were not so, the equality, intended to be produced by the

(1890) 121 N. Y. 328; *Third National Bank of Detroit* v. *Haug*, (1890) 82 Michigan, 607; *Kellogg* v. *Miller*, (1892) 22 Oregon, 406; *Winston* v. *Biggs*, (1895) 117 N. C. 206.

[1] *In re Estate of McCune*, (1882) 76 Missouri, 200; *State* v. *Nebraska Savings Bank*, (1894) 40 Nebraska, 342; *Jamison* v. *Alder-Goldman Commission Co.*, (1894) 59 Arkansas, 548, 552; *Philadelphia Warehouse Co.* v. *Anniston Pipe Works*, (1895) 106 Alabama, 357; *Erle* v. *Lane*, (1896) 22 Colorado, 273.

[2] *Shunk's and Freedley's Appeals*, (1845) 2 Penn. St. 304; *Morris* v. *Olwine*, (1854) 22 Penn. St. 441, 442; *Keim's Appeal*, (1856) 27 Penn. St. 42; *Miller's Appeal*, (1860) 35 Penn. St. 481; *Patten's Appeal*, (1863) 45 Penn. St. 151. And see a reference to the cases in Pennsylvania, in *Boyer's Appeal*, (1894) 163 Penn. St. 143.

[3] Indiana: — *Combs* v. *Union Trust Co.*, 146 Ind. 688, 691; Kentucky: — Statutes, 1894, (Barbour & Carroll's ed.) c. 7, sec. 74, p. 193; *Bank of Louisville* v. *Lockridge*, 92 Kentucky, 472; Massachusetts: — Act of April 23, 1838, c. 163, sec. 3; General Statutes, 1860, ch. 118, sec. 27; Michigan: — 2 How. St. sec. 8824, p. 2156; Minnesota: — By statute March 8, 1860, the security is made the primary fund, to which resort must be had before a personal judgment can be obtained against the debtor for a deficit, *Swift* v. *Fletcher*, 6 Minn. 550; New Hampshire: — Laws 1862, ch. 2594; South Carolina: — *Piester* v. *Piester*, 22 S. C. 139; *Wheat* v. *Dingle*, 32 S. C. 473; Texas: — Civil Stats. 1897, art. 83; Acts 1879, ch. 53, sec. 13; *Willis* v. *Holland*, (1896) 36 S. W. Rep. 329.

bankrupt laws, would be grossly violated, and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security only for a portion of the debt equal to its value; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value, as is the dividend, which may be received upon the whole debt."

In the later case, Chief Justice Shaw announced the rule as follows: 13 Met. 164:

"If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors cannot prove their debt, without first waiving their mortgage, or, in some mode, applying the amount thereof to the reduction of the debt, and then proving only for the balance. *Amory* v. *Francis*, 16 Mass. 308."

The second class of cases may be typified by the case of *People* v. *Remington*, 121 N. Y. 328, where the conclusion of the court was placed upon the ground that the rule in bankruptcy originated in an express requirement in the bankrupt acts other than that for a ratable distribution. The court, speaking through Gray, J., said (p. 332):

"Some confusion of thought seems to be worked by the reference of the decision of the question to the rules of law governing the administration of estates in bankruptcy; but there is no warrant for any such reference. The rules in bankruptcy cases proceeded from the express provisions of the statute, and they are not at all controlling upon a court administering, in equity, upon the estates of insolvent debtors. The bankruptcy act requires the creditor to give up his security, in order to be entitled to prove his whole debt; or, if he retains it, he can only prove for the balance of the debt, after deducting the value of the security held. The jurisdiction in bankruptcy is peculiar and special, and a particular mode of administration is prescribed by the act."

Having thus eliminated the bankruptcy rule, the court reviewed the decisions in *Mason* v. *Bogg* and *Kellock's case*, and held those cases to be controlling. The *Remington case*,

therefore, as well as those of which it is a type, need not be further reviewed, as the fundamental error upon which they rest has been fully stated in what I have previously said.

It is necessary, however, to call attention to the fact that in the cases which decline to apply the rule in bankruptcy and refuse to enforce the provision for ratable distribution, there is an entire want of harmony as to the time when the rights of creditors are fixed with respect to the amount of the claim which may be proved against general assets, some holding that dividends are to be paid on the amount due at the date of insolvency, others on the amount due at the time of proof; and others upon the sum due when dividends are declared. This confusion is the necessary outcome of the erroneous premise upon which the cases rest. A similar confusion, moreover, I submit, is manifested by the rule now announced by the court; since whilst it is avowedly rested upon the defunct chancery rule exemplified in *Mason* v. *Bogg* and the *Kellock case*, yet in effect it fails to follow the very rule upon which the decision is based. This is clear when it is borne in mind that the chancery rule was decided in both *Mason* v. *Bogg* and the *Kellock case* to be that the amount of the claim of the creditor was fixed by the date when proof was actually made, and yet under the authority of the chancery rule and the cases in question the court now decides that the rights of the secured creditor are fixed by insolvency. Thus the chancery rule is applied and at the same time repudiated in an important particular, for the grave difference between allowing a secured creditor to prove only for the amount due when proof was made and therefore compelling him to account for all collections realized on collaterals up to that time, and allowing him long after insolvency to prove, by relation, as of the date of the insolvency, and disregard the collections actually made, is manifest. In this connection it may not be amiss to call attention to the fact that if the bankruptcy rule was applied in the proof of claims, the amount of the claim would not vary, whether the date of insolvency or the time when proof was made was held to be the date when the rights of the creditor in the fund were fixed.

Moreover, I submit that the propositions now adopted, which reject the bankruptcy rule, rest on reasoning which, if it be logically applied, requires the enforcement of the bankruptcy rule in its integrity. It seems to me it has been shown by the doctrine announced by Lord Hardwicke, in 1743, *Bromley* v. *Goodere*, *supra*, that the stoppage of interest on the claims of all creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court. This, then, takes the provision of the bankruptcy rule which favors the secured creditor and which arises alone from ratable division, and gives him the benefit of it whilst at the same time rejecting the obligation to account which arises from and depends on the very principle of ratable distribution which is in part enforced. To repeat, it strikes my mind that the conclusion now announced is this, that the obsolete chancery rule both applies and does not apply, that the bankruptcy rule at the same time does not apply and does apply, the result of this conflict being to so interpret the act of Congress as to strike from it the beneficent provision for equality of distribution among general creditors.

Mr. Justice Gray dissenting.

While also unable to concur in the opinion of the majority of the court, I prefer to rest my dissent upon the effect of the legislation of Congress, read in the light of the English statutes and decisions before the American Revolution, and of the judgments of the courts of the United States — without particularly considering the cases in England in recent times, or the conflicting decisions made in the courts of the several States under local statute or usage or upon general theory. As the course of reasoning in support of this view traverses part of the ground covered by the other dissenting justices, I shall endeavor to state it as shortly as possible.

The English bankrupt acts in force at the time of the Declaration of Independence, so far as they touched the distribution of a bankrupt's estate among his creditors, were the

statute of 13 Eliz. (1571) c. 7, § 2, which directed the estate to be applied to the "true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate like, according to the quantity of his or their debts;" and the statute of 21 James I, (1623) c. 19, § 8 (or § 9), which made more specific provisions against allowing any creditors, whether "having security" or not, to prove "for any more than a ratable part of their just and due debts with the other creditors of the said bankrupt." As appears on the face of this provision, the word "security" was evidently there used, not as including a mortgage or other instrument executed by the debtor by way of pledging part of his property as collateral security for the payment of a debt, but merely as designating a bond or writing which was evidence of the debt itself as a direct personal obligation; and the objects of the provision would appear to have been to put all debts, whether by specialty or by simple contract, upon an equal footing in the ratable distribution of a bankrupt's estate, and to permit the real amount only of any debt, and not any larger sum named in a bond or other specialty, to be proved in bankruptcy. 4 Statutes of the Realm, 539, 1228; 2 Cooke's Bankrupt Laws, (4th ed.) [18] [33]; 1 Ib. 119; Bac. Ab. Obligations, A; 3 Bl. Com. 439.

Neither of those statutes contained any provision whatever for deducting the value of collateral security and proving the rest of the debt. Yet, from the earliest period of which there are any reported cases, it was uniformly held — without vouching in any provision of the bankrupt acts, other than those directing a ratable distribution among all the creditors — and had long before the American Revolution become the settled practice in the Court of Chancery, that a creditor could not retain collateral security received by him from the bankrupt and prove for his whole debt, but must have his collateral security sold and prove for the rest of the debt only. The authorities upon this point are collected in the opinion of Mr. Justice White, *ante*, 153.

After the American Revolution, the provision of the statute of James I was thrice reënacted, with little modification.

Stats. 5 Geo. IV, (1824) c. 98, § 103; 6 Geo. IV, (1825) c. 16, § 108; 12 & 13 Vict. (1849) c. 106, § 184. But the rule established by the decisions and practice of the Court of Chancery, as to the proof of secured debts, was never expressly recognized in any of the English bankrupt acts until 1869, when provisions to that effect were inserted in the statute of 32 & 33 Vict. c. 71, § 40. And there is no trace of a different rule in England, in proceedings in equity for the distribution of the estate of any insolvent debtor or corporation, until more than sixty years after the Declaration of Independence. *Amory* v. *Francis*, (1820) 16 Mass. 308, 311; *Greenwood* v. *Taylor*, (1830) 1 Russ. & Myl. 185; *Mason* v. *Bogg*, (1837) 2 Myl. & Cr. 443. In 1868, indeed, the Court of Chancery declined to apply the bankruptcy rule to proceedings under the winding-up acts. *Kellock's case*, L. R. 3 Ch. 769. But Parliament, by the Judicature Acts of 1873 and 1875, applied that rule to such proceedings. Stats. 36 & 37 Vict. c. 66, § 25 (1); 38 & 39 Vict. c. 77, § 10. And Sir George Jessel, M. R., has pointed out the absurdity of having different rules in the cases of living and of dead bankrupts. *In re Hopkins*, (1881) 18 Ch. D. 370, 377.

The first bankrupt act of the United States, enacted in 1800, was in great part copied from the earlier bankrupt acts of England, and condensed the provisions, above mentioned, of the statutes of Elizabeth and of James I, in this form: "In the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts,) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt with the other creditors of the bankrupt." Act of April 4, 1800, c. 19, § 31; 2 Stat. 30. That provision must have received the

same construction that had been given by the English judges to the statutes therein reënacted. *Tucker* v. *Oxley*, (1809) 5 Cranch, 34, 42; *Scott* v. *Armstrong*, (1892) 146 U. S. 493, 511.

The bankrupt act of 1841, which is well known to have been drafted by Mr. Justice Story, omitted that section, and made no specific provision whatever as to the proof of secured debts; but simply provided that "all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets." Act of August 19, 1841, c. 9, § 5; 5 Stat. 444.

Yet Mr. Justice Story, both in the Circuit Court and in this court, laid it down, as an undoubted rule, that a secured creditor could prove only for the rest of the debt, after deducting the value of the security given him by the bankrupt himself of his own property. *In re Babcock*, 3 Story, (1844) 393, 399, 400; *In re Christy*, (1845) 3 How. 292, 315.

The omission by that eminent jurist, when framing the act of 1841, of all specific provisions on the subject as unnecessary, and his repeated judicial declarations, after he had been habitually administering that act for three or four years, recognizing that rule as still in force, compel the inference that a general enactment for the ratable distribution of the estate of an insolvent among all the creditors had the effect of preventing any individual creditor, while retaining collateral security on part of the estate, from proving for his whole debt.

In 1864, Congress, in the first national bank act, after providing for the appointment of a receiver with power to convert the assets of any insolvent national bank into money and pay it to the treasurer of the United States, subject to the order of the comptroller of the currency, further provided that "from time to time the comptroller, after full provision shall

have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money, so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." Act of June 3, 1864, c. 106, § 50; 13 Stat. 115.

The words of this act, requiring "a ratable dividend" to be paid "on all claims" proved or adjudicated, are equivalent to the words of the last preceding bankrupt act, directing that "all creditors coming in and proving their debts" "shall be entitled to share" in the estate "*pro rata*, without any priority or preference whatsoever;" and, in view of the judicial construction which had been given to that act, may reasonably be considered as having been intended by Congress to have the same effect of preventing a creditor, secured on part of the estate, from proving his whole debt without relinquishing or applying the security, although neither act specifically so provided.

If such was the rule under the national bank act of 1864, it could not be affected, as to national banks, by the express affirmance of the rule in the bankrupt act of 1867, or by the reënactment of the provisions of each of these two acts in the Revised Statutes. And the extension of the bankrupt act of 1867 to "moneyed business or commercial corporations and joint stock companies" increases the improbability that Congress intended banking associations to be governed by a different rule from that governing other private corporations, as well as natural persons, in regard to the effect which a creditor's holding collateral security should have upon the sum to be proved by him against an insolvent estate. Act of March 2, 1867, c. 176, §§ 20, 37; 14 Stat. 526, 535; Rev. Stat. §§ 5075, 5236.

Reliance has been placed upon the remark of Mr. Justice Swayne in *Lewis* v. *United States*, 92 U. S. 618, 623, that "it is a settled principle in equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." But he added, "This

is admitted," so that it is evident that the point was not controverted by counsel, or much considered by the court. Nor was it necessary to the decision, which had nothing to do with the right of an individual creditor, holding security upon the separate property of the debtor, to prove against his estate in bankruptcy; but simply affirmed the right of the United States, holding a debt against an English partnership, to prove the whole amount of the debt against one of the partners, an American, in proceedings in bankruptcy here under the act of 1867, without surrendering or accounting for collateral security given to the United States by the partnership. The United States were not bound by the bankrupt acts, nor subject to the rule of a ratable distribution, but were entitled to preference over all other creditors. *United States* v. *Fisher*, 2 Cranch, 358; *Harrison* v. *Sterry*, 5 Cranch, 289; *United States* v. *State Bank*, 6 Pet. 29; *United States* v. *Herron*, 20 Wall. 251. And, even as to a private creditor, it has always been held that he is obliged to account for such securities only as he holds from the debtor against whose estate he seeks to prove; and that a creditor proving against the estate of a partnership is not bound to account for security given to him by one partner, nor a creditor proving against the estate of one partner to account for security given him by the partnership. *Ex parte Peacock*, (1825) 2 Glyn & Jameson, 27; *In re Plummer*, (1841) 1 Phil. Ch. 56; *Rolfe* v. *Flower*, (1866) L. R. 1 P. C. 27, 46; *In re Babcock*, 3 Story, 393, 400. To require a creditor, before proving against the estate of one partner, to surrender to the assignee of that estate security held from the partnership, would be to add to the separate estate property which should go to the estate of the partnership.

The ground and the limits of the rule in bankruptcy were clearly stated by Lord Chancellor Lyndhurst in *Plummer's case*, above cited, in which a partnership creditor was allowed to prove a partnership debt against the separate estate of each partner, without surrendering or realizing security held by him from the partnership. The Lord Chancellor said: "Now what are the principles applicable to cases of this kind? If

a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound. That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, 76; and *Ex parte Goodman*, 3 Maddock, 373; in which it has been laid down. The next point is this. In administration under bankruptcy, the joint estate and the separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir John Leach and afterwards by Lord Eldon, and has since been followed in *Ex parte Bowden*, 1 Deacon & Chitty, 135. Now this case is merely the converse of that, and the same principle applies to it." 1 Phil. Ch. 59, 60.

This court, under the existing national bank act, approving and following the example of the English courts under the statute of 13 Elizabeth, above cited, has allowed creditors to set off, against their claims on the estate, debts due from them to the debtor whose estate is in course of distribution, although the statute in question in either case contained no provision directing or permitting a set-off. *Scott* v. *Armstrong*, 146 U. S. 493, 511. In giving effect to a statute which simply directs an equal and ratable distribution of a debtor's estate among all creditors, without saying anything about either col-

lateral security or set-off, there would seem to be quite as much ground for requiring each creditor to account for his collateral security, for the benefit of all the creditors, as for allowing him the benefit of a set-off, to their detriment.

For the reasons thus indicated, I cannot avoid the conclusion that, under every act of Congress directing the ratable distribution among all creditors of the estate of an insolvent person or corporation, and making no special provision as to secured creditors, an individual creditor, holding collateral security from the debtor on part of the estate in course of administration, is not entitled to a dividend upon the whole of his debt, without releasing the security or deducting its value; and that therefore the judgment of the Circuit Court of Appeals should be reversed.

GREEN BAY AND MISSISSIPPI CANAL COMPANY *v.* PATTEN PAPER COMPANY.

PETITIONS FOR REHEARING.

No. 14. Distributed January 16, 1899. — Decided February 20, 1899.

The petitions for rehearing rest upon a misapprehension of the decision in this case, the purport of which was to preserve to the Canal Company the use of the surplus waters created by the dam and the canal; but, after they had flowed over the dam and through the sluices, and had found their way into the unimproved bed of the stream, the rights and disputes of the riparian owners must be determined by state courts.

While the state courts may legitimately take cognizance of controversies between riparian owners concerning the use and apportionment of waters flowing in the non-navigable parts of the stream, they cannot interfere, by mandatory injunction or otherwise, with the control of the surplus water power incidentally created by the dam and canal now owned and operated by the United States.

Two petitions were filled on the same day for a rehearing in this case, decided November 28, 1898, and reported 172 U. S. 58.

The first was signed by *Moses Hooper*, Attorney, and *George*

Statement of the Case.

G. Greene of counsel for the Patten Paper Company, and, omitting notes and citations of authorities, was in substance as follows.

The opinion herein shows that the plaintiffs below, defendants in error, did not make the leading facts respecting their water power plain. Hence they respectfully petition this honorable court for a rehearing upon the following grounds, being matters of fact only.

I. The claim of the original plaintiffs seems to have been lost sight of. This court says: "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition, nor was it created by the erection of a dam by private persons for that sole purpose."

Plaintiffs below, defendants in error, should have made it appear, as the fact is, that the water power about which they are contending is created by a dam built by private persons, Mathew J. Mead and N. M. Edwards, riparian owners, in 1880, for the sole purpose of water power.

This dam furnishes a head of 12 to 18 feet. The mills on this power cost about seventy thousand dollars ($70,000). Under very like conditions mills have been built by riparian owners at the Grand Chute, costing over half a million dollars, and at Grand Chute Island, costing at least a million dollars, and at Kaukauna, below the improvements of the tenants of the Canal Company, costing over one hundred thousand dollars. All these investments are seriously threatened by the decision herein unless modified.

This private dam was across an unnavigable channel between islands three and four. Its legality cannot be questioned herein.

If its legality could be questioned by other parties, it cannot by the Canal Company, because, as complaint recites:

On August 1, 1881, it, as a riparian owner, leased to the Union Pulp Company, one of the plaintiffs below, a constant flow of about 20,000 cubic feet of water per minute, parcel of and to be drawn from said Mead & Edwards water power, for

hydraulic power, for a term of ten years, renewable for one hundred years, which leasehold interest said Union Pulp Company still holds. Said Union Pulp Company has erected on said lot a pulp mill worth about forty thousand dollars ($40,000) and now operates same, running same by said water power.

Original defendant Kelso, for whom Reese Pulp Company was afterwards substituted, stands in the same relation to the Canal Company.

An examination of the printed record will show that in many other respects the original plaintiffs, defendants in error, have failed to make the facts in this case apparent to this court.

II. This court seems to us to have held in 142 U. S. 254, at 269, 270, that it was necessary that there should be notice of taking while compensation could be had. No other view seems admissible.

The notice of taking held sufficient in 142 U. S. was given to the Kaukauna Water Power Company only. There is no pretence of notice of taking as against the original plaintiffs herein, or any of the owners on the Mead & Edwards power or middle channel. None of them were parties to that suit.

Speaking of this notice, Justice Brown said (p. 270): "Until this time there had been no active interference with any claim or riparian rights belonging to the Water Power Company."

Herein the original plaintiffs were, when action was commenced, ever since have been, and still are using their water power between islands three and four to run their mills. One of them, Union Pulp Company, is lessee of the Canal Company as riparian owner of part of this mill power.

The Canal Company united as riparian owner with the Patten Paper Company in leasing land and 1000 cubic feet of water per minute parcel of this Mead & Edwards, or middle power to Kelso (now Reese Pulp Company). Not only had Canal Company not given notice of taking, but it had recognized the title of the riparian owners on this middle power by leasing to Union Pulp Company, original plaintiff, parcel of such power, as riparian owner, and uniting with original

plaintiff Patten Paper Company as riparian owner in lease of parcel of this power to Kelso.

Compensation act of 1875 (18 Stat. 508) was repealed in 1888 (25 Stat. 4, 21). Hence, any notice of taking after 1888 is fruitless. There was no claim made by Canal Company to this middle power otherwise than as riparian owner, until filing of cross bill in 1890.

III. This mill power can be preserved without interfering with the use of all the water of the river, by the Canal Company, on its appurtenant lots from one to two thousand feet below the dam represented on sheet marked "Kaukauna" on Canal Company's maps. Such middle power may be supplied by the spent water of the upper mills mentioned on page 3, of printed copy of opinion. But if the Canal Company changes its plans and draws the water from the canal at lower points than now and heretofore, the water will be diverted from this middle power and the mills on it become valueless.

The judgment should provide that $\frac{62}{200}$ of the flow of the river, its proportion as partitioned, should, after being used by the Canal Company, be permitted to flow into the middle channel to feed the mills of riparian owners on that power, including lessees of the Canal Company.

If the judgment should follow the opinion unmodified, it might be construed to permit the Canal Company to violate its own leases to Union Pulp Company, original plaintiff, and George F. Kelso (now Reese Pulp Company), original defendant.

We cannot think the court would so determine in view of the facts evidently not sufficiently presented.

IV. We failed to make clear to the court another matter of fact. The court says: "It was found by the trial court that the Green Bay and Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal."

We have not seen such finding of the trial court. The trial court did find that the Canal Company had leased all of the water power which it could find customers for, not that it had leased all the water power created by the dam and canal. The

Canal Company filed a schedule of its leases existing at the time of trial. This schedule, the company's own statement, shows leases of water to be used over the water lots abutting on the canal of only 860 horse power out of the 2500 horse power reserved. It also shows leases from the pond at the middle power below the dam, whereon are the mills of the original plaintiffs and whereon the canal company is a riparian owner of 900 horse power.

V. This power is one of those referred to by Colonel Houston in his report to the Secretary of War, accompanying arbitrators' report, wherein he says: "There is an immense water power in the lower Fox entirely independent of the works of improvement, part of which has been made available by works of private parties." This was not charged to the Canal Company by the United States.

We respectfully certify to this honorable court our full belief that the grounds assigned for the foregoing petition for rehearing are meritorious and well founded in law."

The second petition was signed by *John T. Fish* and *Alfred L. Cary*, as counsel for the Kaukauna Water Power Company and others; and by *Moses Hooper* and *George G. Greene* as counsel for original plaintiffs, defendants in error, and, with like omissions, was in substance as follows:

The defendants in error respectfully petition this honorable court for a rehearing herein, upon the following grounds:

I. There is no controversy respecting the ownership or control of the navigation of the Fox River by the United States. All the parties throughout the whole litigation have at all times and in all places conceded such ownership and control to be absolute and paramount. The judgment under review expressly recognized such ownership and control. In its first subdivision it only partitioned such of the waters of the river as were not required for the purposes of navigation. In its third subdivision it expressly limited the right of the defendants in error, as to the use of water below the dam, to such as was not or might not be necessary for navigation.

Neither the parties nor the state Supreme Court have sought to invade the empire of the United States over the navigation or commerce of this river.

II. The opinion states that "the decisive question in this case" is whether the water power . . . is subject to control and appropriation by the United States owning and operating those public works, or by the State of Wisconsin, within whose limits Fox River lies.

We do not understand that any question arises respecting the control of the water power by the State of Wisconsin. The State does not claim any control over or interest in it. The question in controversy seems to us to be, — Was the property of the riparian owners under United States patent to 12,600 horse power of water created by the fall of Fox River below the dam, taken away from such riparian owners without compensation by section 16, act of Wisconsin of August 8, 1848, saying, "Whenever a water power shall be created by reason of any dam erected, or other improvements made, on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature"?

This is state legislation; it is the only foundation of the claim of the Canal Company.

The Canal Company makes no claim by virtue of any grant from the United States. It alleges that the dam and canal were constructed . . . under the act . . . approved August 8, 1848, and acts of the legislature subsequent thereto, other than which there was no authority for building and maintaining the same.

The controversy over the construction of this act arises between citizens of Wisconsin. Is not the construction of a local statute, in a controversy between its own citizens, a state question and not a Federal question? The State's construction of its own legislation between its own citizens is binding on this court.

We are not now questioning the jurisdiction of the court over this case, but only the power of the court to determine certain questions which are state and not Federal.

III. (*a*) On error to the state court in chancery cases

this court is concluded by the findings of fact by the court below.

(*b*) The opinions of the Wisconsin Supreme Court are a part of the record, made such by section 2410, Wisconsin Statutes of 1898, in force since 1870.

Such opinions must therefore be examined by this court as a part of the record to ascertain what the court below found as facts.

(*c*) On appeals in equitable actions the Supreme Court of Wisconsin retries the case upon the merits, so that its findings of fact are the ultimate findings in the case.

(*d*) When the Supreme Court of Wisconsin retried this case on appeal it had before it a full record of all the proceedings in the lower court, including all the evidence, findings, requests for findings, refusals and exceptions.

Some of the facts found by the Wisconsin Supreme Court are as follows:

First. Such court found that the State never took any of the water powers below the dam, and never granted any such water powers to the Improvement Company, or to the Canal Company.

This finding that the State did not take or own real estate below its dams, except what was taken for and occupied by the canal, really covers the whole question of fact as to its taking water powers below the dam. If it did not take any real estate below the dam, it took no water powers, for such water powers are part and parcel of the land itself.

The state Supreme Court found as a fact that the water power created by the dam at Kaukauna was about 2700 horse power, and that on the rapids below the dam there was 12,600 horse power. These findings, together with the report of Major Houston, show it to be a conclusive fact that the State never took any of the water powers below the dam, and that the Canal Company, at the time of the arbitration for the sale of the improvement to the United States, only claimed to own at Kaukauna 2500 horse power, which is a little less than that found by the state Supreme Court to be created by the dam.

From that finding and the evidence supporting it, it is clear

that the water powers below the dam were never taken by the State, and were never treated by the State, the Canal Company or the United States, as the source of a fund expended, or to be expended, in the completion and maintenance of the public improvement.

IV. The water powers reserved to the Canal Company in its deed to the United States were only those which the arbitrators had valued at $140,000 and the title to which was already in said company.

All water powers reserved in the deed were granted to the Canal Company by the State, through state legislation, presenting only state questions, which we respectfully submit are not reviewable by this court upon this writ of error.

V. If we may be permitted to do so, we desire to suggest that the conclusion expressed in the following language of the opinion, viz., "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition," is not strictly accurate. While it is true that in the natural condition of the stream the water power in question (being that below the dam) did not exist in its most available form, yet that it did exist in its most essential and valuable feature as a property right, viz., in the natural fall of 42 feet from the head to the foot of the rapids, is too clear for controversy. Were it not for this natural fall there would be no water power; with it a power exists, which can be fully developed for use at small cost. It also exists in that part of the stream which the state Supreme Court found, as a fact, had never been navigable, and recognized the right of the riparian owner to place structures to make available the natural power, so long as such structures do not materially or unreasonably interfere with the public right.

VI. We failed to make clear to the court another matter of fact. The court says: "It was found by the trial court that the Green Bay and Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal." This is only true in the sense that the Canal Company had leased all of the water power which it could find

customers for, not that it had leased all the water power "created by the dam and canal." The Canal Company filed a schedule of its leases existing at the time of the trial of this cause. This schedule, the company's own statement, shows leases of water "to be used over the water lots abutting on the canal" of only 860 horse power out of the 2500 horse power reserved. It also shows leases from the pond at the middle power below the dam, whereon are the mills of the original plaintiffs and whereon the Canal Company is a riparian owner, of 900 horse power.

On and prior to October 1, 1880, the Canal Company had leased only 230 horse power to be used over the water lots abutting on the canal.

VII. This court says: "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition, nor was it created by the erection of a dam by private persons for that sole purpose." It should have been made to appear that a part of the water power involved in this contention is created by a dam built by private persons, Mathew J. Mead and N. M. Edwards, riparian owners, in 1880, for the sole purpose of a water power. The Kaukauna Water Power Company, principal defendant herein, is a riparian owner of part of this power, being the owner of three fourths of the residue after the separation therefrom of certain parcels leased to one of the original plaintiffs, the Union Pulp Company, and to one of the defendants.

VIII. This court held, in 142 U. S. 254, at 269–70, that it was necessary that there should be notice of taking while compensation could be had.

The notice of taking held sufficient in that case only related to the withdrawing of water from the pond held by the government dam and not to the use of water on the various channels of the river below the dam.

Speaking of this notice, Mr. Justice Brown said: "Until this time there had been no active interference with any claim or riparian rights belonging to the Water Power Company."

This notice did not in any way relate to the water power

here in contention, which is that created by the fall of the river below the government dam. As to that water power, there has been no notice of taking; on the contrary, the Canal Company has recognized the riparian ownership by acting as a riparian owner itself and by uniting as a riparian owner with other riparian owners in leases of power created by the Mead and Edwards' dam above referred to.

IX. The case of *Kaukauna Co.* v. *Green Bay &c. Canal Co.*, 142 U. S. 254, between some of the parties to this suit, and relating to water power and other rights on this river at Kaukauna, settles so many questions applicable to the case at bar that we take the liberty of calling attention to it. Many of the rights of the defendants in error are there clearly defined and settled. Among these are the following:

(1) The state Supreme Court found as a fact that the river between the dam and slack water below is rapids and had never been navigable. As to this part of the river the rights of the riparian owners to the use of the water for hydraulic purposes, and to erect structures in the bed of the stream to develop such uses, is fully recognized by the above decision.

(2) The state Supreme Court found as facts that the ordinary flow of the river is 300,000 cubic feet a minute, and that a flow of only 1000 cubic feet of water a minute is required for the use of the canal for the purposes of navigation during the season of navigation. The diversion of the remaining 299,000 cubic feet of flow of water per minute from the riparian owners below the dam for hydraulic power would seem to be for the express or apparent purpose of obtaining water power to lease to private individuals, and not as an incident to the public improvement below the dam, viz., the canal.

(3) The taking by the State of the 12,600 horse power, found by the state Supreme Court to exist upon the rapids below the dam, would seem to be for private purposes only, and not as an incident to the public improvement, and to be thoroughly condemned by the decision which we have just quoted.

Opinion of the Court.

X. This decision goes very far towards overruling all former decisions respecting riparian rights upon public rivers. It practically denies the existence of such right, as against the claim of the State, to take the waters of the public rivers for private purposes, hydraulic power.

The decision may also work a public calamity to the cities of the Fox River valley. Its effect may embrace the water powers upon the whole line of the improvement, extending from Lake Winnebago to Green Bay, many of which have heretofore been possessed and enjoyed by parties other than the Canal Company under a supposed ownership. The decision may be so construed as to give all of the water powers throughout the whole line of the improvement to the Canal Company and place all of the industries of the Fox River valley depending upon water powers (and there are many) under contribution to that company.

We most respectfully submit this petition to this honorable court and ask it to grant a rehearing herein, and certify that in our judgment the grounds assigned therefor are meritorious and well founded in law and in fact.

Mr. Justice Shiras delivered the opinion of the court.

This is a petition, by the defendants in error, for a rehearing of the case of *Green Bay and Mississippi Canal Co.* v. *Patten Paper Co. and others*, decided at the present term, and reported in 172 U. S. 58.

The reasons set forth in the petition and accompanying brief seem to go upon a misapprehension of the scope and meaning of the decision of this court.

Thus it is made matter of complaint that this court did not deal with questions concerning the division of the waters of Fox River after they had spent the force or head given them by the dam and canal, and had passed into a non-navigable portion of the stream below the improvement; and it is suggested that we overlooked the fact that a private dam had been constructed between islands three and four.

But those are questions to which the jurisdiction of this

court does not extend, and hence could not be considered by us. The purport of our decision was to preserve to the Green Bay and Mississippi Canal Company the use of the surplus waters created by the dam and canal. After such waters had flowed over the dam and through the sluices, and had found their way into the unimproved bed of the stream, the rights and disputes of the riparian owners must be determined by the state courts.

Again, apprehensions are expressed lest the decision in the present case may be construed so as to injure parties using water powers at other places in the river, and who are not represented in the present controversy.

We are not ready to presume that the authorities of the United States will either permit or make changes in the places where the surplus waters are to be used by the Green Bay and Mississippi Canal Company, so as to deprive other parties of the water powers they have been using for so many years, unless such changes are found to be necessary and proper in the regulation and delivery of the surplus waters created by the public improvement. But such questions are not now before us.

While the courts of the State may legitimately take cognizance of controversies between the riparian owners, concerning the use and apportionment of the waters flowing in the non-navigable parts of the stream, they cannot interfere by mandatory injunction or otherwise with the control of the surplus water power incidentally created by the dam and canal now owned and operated by the United States.

The petition for a rehearing is

Denied.

NEW ORLEANS v. QUINLAN.

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

No. 343. Submitted December 19, 1898. — Decided February 27, 1899.

The Circuit Court of the United States for the Eastern District of Louisiana has jurisdiction of a suit brought in it by a citizen of New York to recover from the city of New Orleans on a number of certificates, payable to bearer, made by the city, although the petition contains no averment that the suit could have been maintained by the assignors of the claims or certificates sued upon.

Newgass v. *New Orleans*, 33 Fed. Rep. 196, approved in holding that "A Circuit Court shall have no jurisdiction for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over, (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made; (3) suits upon choses in action payable to bearer, and made by a corporation."

THE case is stated in the opinion.

Mr. Samuel L. Gilmore, *Mr. W. B. Sommerville* and *Mr. Branch K. Miller* for plaintiff in error.

Mr. Charles Louque for defendant in error.

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

This was an action brought in the Circuit Court of the United States for the Eastern District of Louisiana by Mary Quinlan, a citizen of the State of New York, against the city of New Orleans, to recover on a number of certificates owned by her, made by the city, and payable to bearer. Defendant excepted to the jurisdiction because the petition contained no averment that the suit could have been maintained "by the assignors of the claims or certificates sued upon." The

Circuit Court overruled the exception, and the cause subsequently went to judgment.

By the eleventh section of the Judiciary Act of 1789, it was expressly provided that the Circuit Courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. The act of March 3, 1875, 18 Stat. 470, c. 137, provided: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." The restriction was thus removed as to "promissory notes negotiable by the law merchant," and jurisdiction in such suits made to depend on the citizenship of the parties as in other cases. *Tredway* v. *Sanger*, 107 U. S. 323.

By the first section of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the provision was made to read as follows: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

These certificates were payable to bearer and made by a corporation; they were transferable by delivery; they were not negotiable under the law merchant, but that was immaterial; they were payable to any person holding them in good faith, not by virtue of any assignment of the promisee, but by an original and direct promise, moving from the maker to the bearer. *Thompson* v. *Perrine*, 106 U. S. 589. They were, therefore, not subject to the restriction, and the Circuit Court

had jurisdiction. In *New Orleans* v. *Benjamin*, 153 U. S. 411, where the question was somewhat considered, the instruments sued on were not payable to bearer.

In *Newgass* v. *New Orleans*, 33 Fed. Rep. 196, District Judge Billings construed the provision thus: "The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over — *First*, suits upon foreign bills of exchange; *Second*, suits that might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made; *Third*, suits upon choses in action payable to bearer, and made by a corporation." This decision was rendered several months prior to the passage of the act of August 13, 1888, and has been followed by the Circuit Courts in many subsequent cases. The same conclusion was reached by Mr. Justice Miller in *Wilson* v. *Knox County*, 43 Fed. Rep. 481, and *Newgass* v. *New Orleans* was cited with approval. We think the construction obviously correct, and that the case before us was properly disposed of.

It is true that the act of March 3, 1887, was evidently intended to restrict the jurisdiction of the Circuit Courts, but the plain meaning of the provision cannot be disregarded because in this instance that intention may not have been carried out.

Judgment affirmed.

DEWEY *v.* DES MOINES.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 122. Argued January 11, 12, 1899. — Decided February 27, 1899.

A resident in and citizen of Chicago in Illinois, was the owner of certain lots in Des Moines in Iowa, which were assessed by the municipal authorities in that place to an amount beyond their value, for the purpose of paving the street upon which they abutted. The statutes of Iowa authorized a personal judgment against the owner in such cases.

Statement of the Case.

He filed a petition to have the assessment set aside; to obtain an injunction against further proceedings for the sale of the property; and to obtain a judgment that there was no personal liability against him for the excess. This petition contained no allegation attacking the validity of the assessment by reason of any violation of the Federal Constitution, and there was nothing in the record to raise such Federal right or claim beyond the mere allegation in the petition that "the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same." The contractor for the pavement set up his right to a judgment on certificates given him for the work which had been done, which were made a lien upon the abutting lots. The trial court dismissed the petition, and gave judgment in favor of the contract. In the Supreme Court of the State it was assigned as error that "the court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the Fourteenth Amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject." *Held* that this court was confined to the consideration of the question as to the validity of the personal judgment against the plaintiff in error, and that, without deciding what the effect of the proceedings would have been, if the plaintiff had been a resident in Iowa, the State had no power to enact a statute authorizing an assessment upon real estate for a local improvement, and imposing upon its owner, a non-resident of the State, a personal liability to pay such assessment.

The petition in this case was filed by the plaintiff in error to set aside certain assessments upon his lots in Des Moines, in the State of Iowa, which had been imposed thereon for the purpose of paying for the paving of the street upon which the lots abutted, and to obtain a judgment enjoining pro-

ceedings towards their sale, and adjudging that there was no personal liability to pay the excess of the assessment above the amount realized upon the sale of the lots.

The petition alleged that the petitioner was at all times during the proceedings mentioned a resident of Chicago, in the State of Illinois, and that he had no actual notice of any of the proceedings looking towards the paving of the street upon which his lots abutted; that the street was paved under the direction of the common council, which decided upon its necessity, and the expense was, by the provisions of the Iowa statute, assessed upon the abutting property, and the lot owner made personally liable for its payment; that the expense of the improvement was greater than the value of the lots assessed, and the common council knew it would be greater when the paving was ordered.

Various other facts were set up touching the invalidity of the assessment upon the lots, but no allegation was made attacking its validity by reason of any violation of the Federal Constitution. Under stipulation of the parties various allegations of fraud upon the part of the members of the common council, which had been included in the petition, were withdrawn, and the allegations of the petition as thus amended were not denied.

The contractor who did the work of paving the street was made a party to this proceeding, and he set up a counterclaim asking that the certificates given him by the city in payment for his services, and which by statute were made a lien upon the lots abutting upon the street, might be foreclosed and the lots sold, and a personal judgment pursuant to the same statute rendered against the plaintiff in error.

By stipulation certain motions, which were made to strike out allegations in the petition were treated as demurrers to the petition, and the case was thus placed at issue.

Upon the trial the district court of Polk County gave judgment dismissing the petition with costs, and in favor of the contractor on his counterclaim, foreclosing the lien of the latter and ordering the sale of the lots, and the judgment also provided for the issue of a personal or general execution

against the plaintiff in error to collect any balance remaining unpaid after sale of the lots.

Plaintiff took the case to the state Supreme Court and there made an assignment of errors, one of which is as follows:

"The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law, and was in contravention of the provisions on that subject of the Fourteenth Amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject."

The Supreme Court affirmed the judgment of the district court, and plaintiff brought the case here by writ of error.

Mr. Andrew E. Harvey for plaintiff in error. *Mr. Amasa Cobb* was on his brief.

Mr. N. T. Guernsey for defendants in error.

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

The only one of the assignments of error made in the state Supreme Court which has reference to any Federal question is the one set forth in the statement of facts, and it will be seen that such assignment relates solely to the validity of the provision for the personal liability imposed upon plaintiff in error by the judgment of the district court.

None of the other assignments of error involves any Federal question.

In the brief for plaintiff in error in this court it is said that the "counsel for plaintiff in error in the state court seem to have relied upon one single proposition only as involving a Federal question, to wit: As plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, the imposition of the personal liability against him in excess of the value of all the lots was not due process of law, and was in contravention of the provisions upon that subject of the Fourteenth Amendment of the Constitution of the United States."

The counsel, however, does not confine himself in this court solely to a discussion of the Federal question which was contained in the assignment of error above set forth, and which was argued in the court below, regarding the validity of a personal judgment; but counsel claims the further right to attack the validity of the assessment upon the lots themselves, because as he asserts it was laid without regard to any question of benefits, and that it exceeds the actual value of the property assessed, and that even if permitted by the statute of Iowa, such an assessment constitutes a taking, under the guise of taxation, of private property for public use without just compensation, and is therefore void under the Federal Constitution as amounting to a taking of property without due process of law.

This is a very different question from that embraced in the assignment of errors and argued in the Supreme Court of the State.

It is objected on the part of the defendant in error that as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.

Reference to the opinion of the Supreme Court of the State shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with

it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed. Having, however, raised only one Federal question in the court below, can a party come into this court from a state court and argue the question thus raised, and also another not connected with it and which was not raised in any of the courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?

The two questions, the one as to the invalidity of the personal judgment and the other as to the invalidity of the assessment upon the lots, are not in anywise necessarily connected any more than that they both arise out of the proceedings in paving the street and in levying the assessment. The assessment upon the lots might be valid, while the provision for a personal judgment might be void, each depending upon different principles, and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

In *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to reëxamine the final judgment of the state court upon that matter. See also *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175; *Kipley* v. *Illinois*, 170 U. S. 182. In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. *Bridge Pro-*

prietors v. *Hoboken Company*, 1 Wall. 116, 143. In the case at bar no claim was made in the state court that the assessment upon the lots was invalid as in violation of any provision of the Federal Constitution.

Nor does the record herein show by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it. In such case it has been held that the Federal question sufficiently appears. *Green Bay &c. Company* v. *Patten Paper Company*, 172 U. S. 58, 68, and cases cited. In substance, the validity of the statute or the right under the Constitution must have been drawn in question. *Powell* v. *Brunswick County*, 150 U. S. 433; *Sayward* v. *Denny*, 158 U. S. 180. The latest decision to this effect is *Capital National Bank of Lincoln* v. *First National Bank of Cadiz*, 172 U. S. 425.

Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour*, 146 U. S. 153, 159; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 231; *Green Bay &c. Company* v. *Patten Paper Company;* and *Bank of Lincoln* v. *Bank of Cadiz*, *supra.*

In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the state court. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Company* v. *Massachusetts*, 6 Wall. 632. In order to be available in this court some claim or right must have been asserted

in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case.

A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company* v. *Massachusetts*, *supra*. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

No question of a Federal nature claimed under the Constitution of the United States can be said to have been made by the mere allegation "that the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same." There is nothing else in the record which can be said to raise this Federal right or claim.

Upon these facts we are compelled to hold that we are confined to a discussion of the only Federal question which this

record presents, viz.: The validity of the personal judgment against the plaintiff in error. The assignment of error above set out is broad enough to raise the question not only as to the sufficiency of notice, but as to the validity of such a judgment against a non-resident.

It is asserted in the petition that the defendant Dillworth, the treasurer of Holt County, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counterclaim the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lot owner. Thus a non-resident, simply because he was the owner of property on a street in a city in the State of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council, or by the board of public works and city engineer under the statute, upon his property abutting upon the street, for the purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction of the State of Iowa, and the only jurisdiction that State had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An assessment upon lots, for a local improvement, is in the nature of a judgment.

It is said that the statute (Code of Iowa, sec. 478) provides for the personal liability of the owner of lots in a city in the State of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the assessment. It is also said

that the statute has been held to be valid by the Iowa Supreme Court. This seems to be true. *Burlington* v. *Quick*, 47 Iowa, 222, 226; *Farwell* v. *Des Moines Brick Manufacturing Co.*, 97 Iowa, 286. The same thing is also held in the opinion of the state court delivered in the case now before us.

In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the State of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a non-resident of that State, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a non-resident of the State, a personal liability to pay such assessment, is a statute which the State has no power to enact, and which cannot therefore furnish any foundation for a personal claim against such non-resident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement by which it can be shown that any jurisdiction to collect the assessment personally from a non-resident can exist. The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretence proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

In this proceeding of the lot owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a non-resident, although a litigant in the courts of the State, was not only erroneous but it was so far erroneous as to constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned. By resorting to the state court

to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

The principle which renders void a statute providing for the personal liability of a non-resident to pay a tax of this nature is the same which prevents a State from taking jurisdiction through its courts, by virtue of any statute, over a non-resident not served with process within the State, to enforce a mere personal liability, and where no property of the non-resident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer* v. *Neff*, 95 U. S. 714, and many other cases therein cited. *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, 209.

The lot owner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the State, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the State extends are objects of taxation. Cooley on Taxation, 1st ed. pp. 3, 4; Burroughs on

Taxation, sec. 6. The power of the State to tax extends to all objects within the sovereignty of the State. (Per Mr. Justice Clifford, in *Hamilton Company* v. *Massachusetts*, 6 Wall. 632, at 638.) The power to tax is however limited to persons, property and business within the State, and it cannot reach the person of a non-resident. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319. In Cooley on Taxation, 1st ed. p. 121, it is said that "a State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this oversteps the sovereign power of a State.

In this case the contractor, by filing his counterclaim herein, has commenced the enforcement of an assessment and a personal liability imposed by virtue of just such a statute, and the judgment under review gives him the right to do so. The lot owner is called upon to make such defence as he can to the claim of personal liability or else be forever barred from setting it up. He does claim that as a non-resident he did not have such notice, and the State or city did not obtain such jurisdiction over him, with regard to the original assessment as would authorize the establishment of any personal liability on his part to pay such assessment.

The contractor nevertheless has obtained a judgment, not alone for a foreclosure of his lien, but also for the personal liability of the lot owner, and unless he can in this proceeding have the provision in the judgment, for a personal liability, stricken out, the lot owner cannot thereafter resist it, even when the lots fail (if they should fail) to bring enough on their sale to satisfy the judgment.

The case of *Davidson* v. *New Orleans*, 96 U. S. 97, has been cited as authority for the proposition that the rendering of a personal judgment for the amount of an assessment for a local improvement is a matter in which the state authorities cannot be controlled by the Federal Constitution. It does not

Statement of the Case.

appear in that case that the complaining party, in regard to the state statute, was a non-resident of the State, but on the contrary it would seem that she was a resident thereof. That fact is a most material one, and renders the case so unlike the one at bar as to make it unnecessary to further refer to it.

The statute, upon which the right to enter this personal judgment depends, being as to the non-resident lot owner an illegal enactment, it follows that the judgment should and must be amended by striking out the provision for such personal liability. For that purpose the judgment is

Reversed and the cause remanded to the Supreme Court of Iowa, for further proceedings therein not inconsistent with this opinion.

FIRST NATIONAL BANK OF WELLINGTON *v.* CHAPMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 137. Argued January 13, 16, 1899. — Decided February 27, 1899.

The system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against owners of shares in national banks, and, in its practical operation it does not materially do so; and there is nothing upon the face of these statutes which shows such discrimination.

The term "moneyed capital" in the act of Congress fixing limits to state taxation on investments in national banks, Rev. Stat. § 5219, does not include capital which does not come into competition with the business of national banks, and exemptions from taxation, made for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by those statutes.

This action was brought to restrain the collection of taxes, through or by means of the bank, by the defendant in error, levied under a statute of Ohio, upon certain individual shareholders in the bank, on the ground, as alleged, that the assessments upon such specified shareholders were illegal, as having been made without regard to the debts of such individual

owners, contrary to the case of other moneyed capital in the hands of individual citizens whose debts were permitted to be deducted from the value of such capital before the assessment of taxes thereon.

The petition contained allegations intended to show a case for the interposition of a court of equity, and a tender was therein made of the amount of the taxes which the plaintiff admitted to be due on such shares after deducting the debts.

The answer, while not taking any objection that a case for equitable relief by injunction was not made, provided the contention of the petition as to the assessments being illegal was well founded, claimed, substantially, that by the laws of the United States and of Ohio the assessments were legal, and the petition should therefore be dismissed. Upon trial in the court of common pleas of Lorain County the court found the following facts:

"First. Plaintiff is a national banking association, incorporated under and by virtue of an act of Congress, entitled 'An act to provide for the national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, county of Lorain, and State of Ohio.

"Second. The defendant is the duly elected and qualified treasurer of the county of Lorain and State of Ohio.

"Third. The plaintiff has a capital stock of $100,000, divided into 1000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons.

"Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that included in said return so

made by said cashier was the real estate owned by the plaintiff, valued at $3420, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded, as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and fixed the same at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said state board of equalization, acting under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and the auditor of said State did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

"Fifth. That the following named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr.	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

"That said shares were valued by said state board of equalization for the year 1893 at $36,607.90, and certified by said board to the auditor of Lorain County as the taxable value of the same; that the rate of taxation for all taxes

assessed and collected for the year 1893 within said county and village was $0.0255 on a dollar's valuation, and amounted on said value of said shares to $933.50.

"Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to wit, between the first and second Mondays of May of said year, each of said above named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate delivered to the treasurer the entire valuation of said shares so made without allowing any deductions therefrom, by reason of any *bona fide* indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

"Seventh. That the plaintiff tendered to said treasurer of Lorain County on the 28th day of December, 1893, and offered to pay to said treasurer, the sum of $485.80, if he would receive the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to accept the same, and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock."

The court also found as a conclusion of law from the above facts that the injunction should be denied and the petition dismissed. The plaintiff appealed to the circuit court

of Lorain County, where, after argument, the judgment for defendant was reversed and judgment ordered for plaintiff enjoining the collection of the tax. The defendant, the treasurer of Lorain County, brought the case to the Supreme Court of the State, where, after hearing, the court reversed the circuit court and affirmed the judgment of the common pleas dismissing the petition. *Chapman* v. *National Bank of Wellington*, 56 Ohio St. 310.

The state law on the subject of taxation, so far as it may be claimed to in any way affect the question, is contained in the various sections of the Revised Statutes of Ohio, which are set out in the margin.[1]

---

[1] Section 2730 gives definitions of the terms used in the article relating to taxation. This section is not set out in so many words, but as therein used the following terms are thus defined:

a. "Real property" and "lands" mean not only land itself, but everything connected therewith in the way of buildings, structures and improvements, and all rights and privileges appertaining thereto.

b. "Investment in bonds" includes moneys in bonds or certificates of indebtedness of whatever kind, issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other incorporations, or by the United States.

c. "Investment in stocks" includes all moneys invested in the capital or stock of any association, corporation, joint stock company or other company, where the capital or stock is divided into shares, transferable by each owner without the consent of the other shareholders, for the taxation of which no special provision is made by law.

d. "Personal property" includes (1) every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part or any parcel of real property; (2) the capital stock, undivided profits and all other means not forming part of the capital stock of a company, whether incorporated or unincorporated, and all interest in such stock, profits or means, including shares in a vessel as therein stated; (3) money loaned on pledge or mortgage of real estate, although a deed may have been given, provided the parties consider it as security merely.

e. The term "moneys" includes surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand.

f. The term "credits" means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon,

Counsel for Parties.

Mr. W. W. Boynton for plaintiff in error.

Mr. F. S. Monnett and *Mr. S. W. Bennett* for defendant in error.

---

including deposits in banks, or with persons in or out of the State, other than such as are held to be money as defined in this section, when added together, (estimating every such claim or demand at its true value in money,) over and above the sum of legal *bona fide* debts owing by such person; but in making up the sum of such debts owing, no obligation can be taken into account: (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint stock company; (3) for any subscription for any religious, scientific or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc.

Other sections read as follows:

SEC. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise; and also of all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, held on said day by another, residing in or out of this State, for and belonging to the person so listing, or any one residing in this State, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this State.

SEC. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise which such

Opinion of the Court.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

Complaint is made in behalf of the shareholders of the national bank in question that they are, by means of the sys-

---

person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker or stock jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits or other effects, within that time invested in or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

SEC. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.

UNINCORPORATED BANKS AND BANKERS.

SEC. 2758. Every company, association or person, not incorporated under any law of this State or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidence of indebtedness, with a view to profit, shall be deemed a bank, banker or bankers, within the meaning of this chapter.

SEC. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First. The average amount of notes and bills receivable, discounted or

tem of taxation adopted and enforced in the State of Ohio, subjected to taxation at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens,

---

purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, bonds, including United States government bonds or evidences of indebtedness, held as an investment or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

Eighth. The average amount of United States government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained, added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.

Sec. 2759*a*. The said bank, banker or bankers shall, at the same time, make statement under oath of the amount of capital paid in or employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership.

Incorporated Banks.

Sec. 2762. All the shares of the stockholders in any incorporated bank or banking association, located in this State, whether now or hereafter incorporated or organized under the laws of this State or of the United States, shall be listed at their true value in money, and taxed in the city, ward or village where such bank is located, and not elsewhere.

Sec. 2763. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals.

Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and the second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preced-

contrary to section 5219 of the Revised Statutes of the United States.

The complaint is founded upon the allegation that the owners of what is termed credits in the law of Ohio, (Rev. Stat. § 2730,) are permitted to deduct certain kinds of their debts from the total amount of their credits, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the same as credits, and their owners permitted to deduct their debts from the valuation. The owners of property other than credits are not permitted to deduct their debts from the valuation of that property.

It is also claimed that there is an unfavorable discrimination against the national bank shareholder and in favor of an unincorporated bank or banker.

At the outset it is plain that the system of taxation adopted in Ohio was not intended to be unfriendly to or to discriminate against the owners of shares in national banks, for, as observed by the state Supreme Court, that system was adopted long prior to the passage of the law by Congress providing for the incorporation of national banks. Under this system the owner of shares in national banks is taxed precisely like the owner of shares in incorporated state banks. Rev. Stat. Ohio, § 2762.

The main purpose of Congress in fixing limits to state taxation on investments in national banks was to render it impossible for the State in levying such a tax to create and

---

ing said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

Sec. 2766. Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor.

fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. "Moneyed capital" does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from *Mercantile Bank* v. *New York*, 121 U. S. 138, 155. That case has been cited with approval many times, especially in *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, and in *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440.

The result seems to be that the term "moneyed capital," as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute.

The case last cited contains a full and careful reference to most of the prior cases decided in this court upon the subject, and gives the meaning (as above stated) of the term "moneyed capital," when used in the Federal statute.

With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks, state and national, pre-

cisely the same, the question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank shareholder in the assessment upon his bank shares?

Under the Ohio law the shares in national and also in state banks are what is termed stocks or investments in stocks, and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers. In regard to this latter class, there is no capital stock so-called, and section 2759 of the Revised Statutes therefore makes provision, in order to determine the amount to be assessed for taxation, for deducting the debts existing in the business itself from the amount of moneyed capital belonging to the bank or banker and employed in the business, and the remainder is entered on the tax book in the name of the bank or banker, and taxes assessed thereon. This does not give the unincorporated bank or banker the right to deduct his general debts disconnected from the business of banking and not incurred therein from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined and the taxes assessed thereon.

This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks. Under the sections of the Revised Statutes which relate to the taxation of these latter classes of banks (§§ 2762, etc.) the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. In order to arrive at their true value in money the bank returns to the auditor

the amount of its liabilities as well as its resources. Thus in both incorporated and unincorporated banks the same thing is desired, and the same result of assessing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible, considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks which have a capital stock divided into shares. That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers on the one hand and holders of shares in national banks on the other.

If the value of national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where added elements of value exist in the national bank shares which are absent in the case of unincorporated banks, but in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation.

The court below did not hold, as erroneously suggested by counsel for plaintiff in error, that as the state and national banks were placed on an exact equality regarding taxation, therefore there was no discrimination made against national banks, and in favor of other moneyed capital in the hands of individual citizens. The state court said upon this subject that if the state and national banks were treated equally, the latter were not assessed at a greater rate than the former;

that national bank shareholders were not, in such event, illegally assessed, *unless* there were a clear discrimination in favor of moneyed capital other than that employed in either state or national banks. This statement, we think, is plainly correct.

The question recognized by the state court, therefore, remains whether there is any such discrimination?

The chief ground for maintaining that there is, exists in the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation.

It is claimed in substance that all credits are moneyed capital, and that they are large enough in amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

There is no finding of the trial court upon the subject of the total amount of credits in the State. Reference was made on the argument to the report of the auditor of the State for 1893, from which it is said to appear that the total credits, after deducting the debts allowed, were $106,000,000 or $111,000,000, the amounts differing to that extent as presented by the counsel for the different parties. The case does not show that the trial court received the report in evidence, and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court upon which we must decide this case.

However, if we were to look at this report we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this

court, in its decisions above cited, holds is moneyed capital within the meaning of the act of Congress.

Indeed, there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits," amounts to even under the widest definition of that term.

In looking at the statutory definition of the term "credits" we find that so far from its including all legal claims and demands of every conceivable kind, except investments in bonds of the classes described in section 2730, and investments in stocks, it does not include any claim or demand for deposits which the person owning, holding in trust or having the beneficial interest therein, is entitled to withdraw in money on demand, nor the surplus or undivided profits held by societies for savings or banks having no capital stock, nor bank notes of solvent banks in actual possession, and from the credits as defined their owner cannot deduct certain kinds of indebtedness therein mentioned. It cannot be contended that all credits, as defined in the statute, are moneyed capital within the meaning of the act of Congress. The term "credits" includes among other things, as stated in the statute, "all legal claims and demands . . . for labor or service due or to become due to the person liable to pay taxes thereon." These claims are not in any sense of the statute moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed manual labor, and their total must amount to a large sum. What proportion that total bears to the whole sum of credits we do not know, and the record contains no means of ascertaining.

It is impossible to tell from anything appearing in the record what proportion of the whole sum of credits consists of moneyed capital within the meaning of the Federal act. We know that claims for labor or services do not consist of that kind of capital. We also know that there are probably large amounts of other forms of property which might enter into the class of credits as defined in the act which would not be moneyed capital within the meaning of the act of Congress, as that meaning has been defined by this court in

the cases above cited. It is thus seen that there are large and unknown amounts of what are in the act termed "credits" which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens, included in the term "credits" (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are, therefore, unable to say whether there has or has not been any material discrimination such as the Federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and that of *Bank of Garnett* v. *Ayers*, 160 U. S. 660, and *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, and *Bank of Commerce* v. *Seattle*, 166 U. S. 463.

As a result we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court.

It is stated, however, that this specific question has been otherwise decided in *Whitbeck* v. *Mercantile National Bank of Cleveland*, 127 U. S. 193. If this were true, we should be guided by and follow that decision. Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks made by the state board of equalization, from sixty per cent of their true value in money, as fixed by the auditor of Cuyahoga County, to sixty-five per cent, as fixed by the board, (other property being valued at only sixty per cent,) amounted to such a discrimination in the taxation of the

shareholders of such banks as is forbidden by the Federal statute. It was held that it did.

Coming to the question of the deduction of the *bona fide* indebtedness of shareholders, the court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their *bona fide* indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.

For the reasons already stated, we think the judgment in this case should be

Affirmed.

HENRIETTA MINING AND MILLING COMPANY *v.* JOHNSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 139. Submitted January 16, 1899. — Decided February 27, 1899.

Personal service of a summons, made in the Territory of Arizona upon the general manager of a foreign corporation doing business in that Territory, is sufficient service under the laws of the Territory to give its courts jurisdiction of the case.

This was an action instituted by Johnson in the district court of Yavapai County, Arizona, to obtain a judgment against, and to establish a lien upon, the property of the Mining Company, an Illinois corporation, for work and labor done and material furnished, and to fix the priority of such lien over certain other lienholders who were also made defendants. The plaintiff, in an affidavit annexed to the complaint, made oath that "H. N. Palmer is the general manager of the said Henrietta Mining and Milling Company, and in charge of the property of the said company in the said county of Yavapai," and that said company "has no resident agent in the said county of Yavapai and Territory of Arizona, as is required by law, and this affiant causes a copy of this notice of lien to be served upon the said H. N. Palmer, as the general manager of said company."

A summons was issued, and a return made by the sheriff that he had "personally served the same on the 9th day of July, 1894, on the Henrietta Mining and Milling Company, by delivering to H. N. Palmer, superintendent and general manager of said company, . . . being the defendants named in said summons, by delivering to each of said defendants personally, in the city of Prescott, county of Yavapai, a copy of summons, and a true copy of the complaint in the action named in said summons, attached to said summons."

Default having been made, judgment was entered against the company personally, with a further clause that plaintiff have a lien upon its property in the sum of $5748.57. The case

was taken to the Supreme Court of the Territory by writ of error, where the judgment was modified by striking out the lien upon the property, and in all other respects was affirmed, and a new judgment entered against the sureties upon the supersedeas bond.

Whereupon the Mining and Milling Company sued out a writ of error from this court, insisting, in its assignments of error, that "the said court below did not have jurisdiction of the person of defendant for the reason that no service had been had upon said defendant, either personal or constructive."

Mr. William H. Barnes and *Mr. Frank Asbury Johnson* for appellant.

Mr. E. M. Sanford and *Mr. Robert E. Morrison* for appellee.

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

The affidavit of the plaintiff, and the return of the sheriff, each stated that Palmer was the general manager of the company. No evidence to the contrary was introduced, and the fact must therefore be assumed upon this record.

As the judgment of the district court was modified by the Supreme Court, it became simply a personal judgment against the company, and the only question presented is whether the service of a summons upon the general manager of the company was, under the laws of Arizona, a sufficient service upon the company itself.

Our attention is called to several sections of the Revised Statutes of Arizona, (1887) the first of which is part of a chapter entitled "Foreign Corporation" and provides: "Sec. 348. It shall be the duty of any association, company or corporation organized or incorporated under the laws of any other State or Territory . . . to file with the secretary of this Territory and the county recorder of the county in which such enterprise, business, pursuit or occupation is proposed to be located, or is located, the lawful appointment of an agent, upon

whom all notices and processes, including service of summons, may be served, and when so served shall be deemed taken and held to be a lawful, personal service," etc. There is no penalty provided for a failure to file such appointment, though in the next section, 349, it is declared that "every act done by it, prior to the filing thereof, shall be utterly void." Beyond this disability, it is left optional with the corporation to file such appointment, and the record of this case shows that none such was filed by the plaintiff in error.

The second section is taken from that chapter of the Code of Civil Procedure entitled "Process and Returns": "Sec. 704. In suits against any incorporated company or joint stock association the summons may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association, in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours," etc.

There is a further provision in the same chapter, Sec. 712, that when it is made to appear by affidavit that the defendant "is a corporation incorporated under the laws of any other State or Territory or foreign country, and doing business in this Territory, or having property therein, but having no legally appointed or constituted agent in this Territory, . . . the clerk shall issue a summons, . . . and said sheriff shall serve the same by making publication thereof in some newspaper," etc.; and by section 713, when the residence of defendant is known, the plaintiff, his agent or attorney, shall forthwith deposit a copy of the summons and complaint in the post office, postage prepaid, directed to the defendant at his place of residence.

It is insisted by the plaintiff in error that the service in this case upon its manager was ineffectual to bind the corporation, and that a personal judgment under it could only be obtained by complying with section 348 and serving upon an agent appointed in pursuance of that section; and that this position holds good notwithstanding such appointment had never been made. We are of opinion, however, that sections 348, 712

and 713, providing specially for service upon foreign corporations, were not intended to be exclusive, and were merely designed to secure a special mode of service in case the corporation had ceased to do business in the Territory, or had no local or official agent appointed in pursuance of section 348. Not only is the language of section 348 permissive in the use of the words "may be served" upon the agent appointed under the statute, but the general language of section 704, taken in connection with the general subject of the statute, "Process and Returns," indicates that no restriction was intended to domestic corporations; and that the words "any incorporated company or joint stock association" are as applicable to foreign as to domestic companies. No penalty is imposed upon foreign corporations for failure to file the appointment of an agent under section 348, and the only disability which such failure entails is its incompetence to enforce its rights by suit. If, as contended by the plaintiff in error, the remedy against the foreign corporation be confined to service of process upon such appointed agent, it results that, if the corporation does not choose to file such appointment, intending suitors are confined to the remedy by publication provided by section 712, which, under the decisions of this court, would be ineffectual to sustain a personal judgment. *Pennoyer* v. *Neff*, 95 U. S. 714.

It is incredible that the legislature should have intended to limit its own citizens to such an insufficient remedy, when the corporation is actually doing business in the Territory and is represented there by a manager or local agent.

The cases cited by the plaintiff in error do not sustain its contention. In the *Southern Building and Loan Association* v. *Hallum*, 28 S. W. Rep. 420, it was held by the Supreme Court of Arkansas, under a statute similar to section 348, that a service made on an agent in a county other than that in which the action was begun, and which failed to show that he had been designated as prescribed, was insufficient to authorize a judgment by default. Obviously, by section 348, it is intended that service may be begun in any county and served upon the appointed agent, and all for which this case

is authority is that, if it be served upon any other agent, the action must be brought in the county where such agent is served. The opinion of the court was put upon this ground. In the case under consideration, Palmer, the superintendent, was served in the county of Yavapai, where the suit was begun.

The case of the *State* v. *United States Mutual Accident Association*, 67 Wisconsin, 624, is against the proposition for which it is cited. In that case service of a summons upon an unlicensed foreign insurance company, by delivering a copy to an agent of the company, was held to be sufficient, the defendant never having made an appointment of an agent under the statute. Said the court: "If the argument of counsel, to the effect that section 1977 only relates to agents of such foreign insurance companies as are duly licensed to do business within this State, is sound, then there would be no possible way of commencing an action against an unlicensed foreign insurance company doing business in this State in violation of the law. In other words, such construction would reward such foreign insurance companies as refused to pay the requisite license, by enabling them to retain the license money and then shielding them from the enforcement of all liability, whether on their contracts or otherwise, in the courts of Wisconsin. Such construction would defeat the whole purpose and scope of the statute."

The cases from Michigan are too imperfectly reported to be of any practical value. In *Desper* v. *The Continental Water Meter Company*, 137 Mass. 252, the service of a bill in equity by subpœna upon the treasurer of a foreign corporation, was held to be unauthorized by any statute, and also that there was no method of bringing it in except by means of an attachment of its property. Neither this nor that of *Lewis* v. *Northern Railroad*, 139 Mass. 294, is in point.

We are of opinion that the service upon Palmer was sufficient, and the judgment of the Supreme Court of Arizona is therefore

Affirmed.

No. 138. HENRIETTA MINING AND MILLING COMPANY *v.* HILL. Appeal from the Supreme Court of the Territory of Arizona. The

facts in this case, so far as they bear upon the question in controversy, are precisely similar to the one just decided, and the judgment of the Supreme Court of Arizona is therefore

Affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* JOY.

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

No. 129. Submitted January 12, 1899. — Decided February 20, 1899.

An action, pending in the Circuit Court of the United States sitting in Ohio, brought by an injured person as plaintiff, to recover damages for injuries sustained by the negligence of the Baltimore and Ohio Railroad Company in operating its road in Indiana, does not finally abate upon the death of the plaintiff before trial and judgment, but may be revived and prosecuted to judgment by his executor or administrator, duly appointed by the proper court in Ohio.

A right given by a statute of a State to revive a pending action for personal injuries in the name of the personal representative of a deceased plaintiff is not lost upon the removal of the case into a Federal court.

Whether a pending action may be revived in a Federal court upon the death of either party, and proceed to judgment, depends primarily upon the laws of the jurisdiction in which the action was commenced, and in the present case is not affected in any degree by the fact that the deceased received his injuries in Indiana.

THE case is stated in the opinion.

Mr. Hugh L. Bond, Jr., and *Mr. J. H. Collins* for the Baltimore and Ohio Railroad Company.

No appearance for Joy.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case is before us upon a question of law certified by the Judges of the United States Circuit Court of Appeals for the Sixth Circuit under the sixth section of the act of March 3, 1891, c. 517, 26 Stat. 826.

Opinion of the Court.

It appears from the statement accompanying the certificate that on the 18th day of October, 1891, John A. Hervey, a citizen of Ohio residing in Hancock County in that State, was a passenger on a train of the Baltimore and Ohio Railroad Company between Chicago, Illinois, and Fostoria, Ohio. While upon the train as passenger he was injured at Albion, Indiana, in a collision caused by the negligence of the railroad company. He brought suit in the Common Pleas Court of Hancock County, Ohio, to recover damages for the personal injuries he had thus received.

Upon the petition of the railroad company the suit was removed into the Circuit Court of the United States for the Northern District of Ohio upon the ground of diverse citizenship. After such removal Hervey died, and, against the objection of the railroad company, the action was revived in the name of the administrator of the deceased plaintiff appointed by the proper court in Ohio.

At the time of Hervey's death the common law rule as to the abatement of causes of action for personal injuries prevailed in Ohio. But by section 5144 of the Revised Statutes of that State, then in force, it was provided that "except as otherwise provided, no *action or proceeding pending* in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, assault or assault and battery, for a nuisance or against a justice of the peace for misconduct in office, which shall abate by the death of either party." Rev. Stat. Ohio, 1890, vol. 1, p. 1491. That section was construed in *Ohio & Penn. Coal Co.* v. *Smith, Admr.*, 53 Ohio St. 313, which was an action for personal injuries caused by the negligence of a corporation and its agents. The Supreme Court of Ohio said: "The action was a pending one at the time of the death of the plaintiff. It is not within any of the enumerated exceptions of section 5144, and was, therefore, properly revived and prosecuted to judgment in the name of the administrator of the deceased plaintiff."

The Revised Statutes of Indiana, in which State the injury was received, provided that "no action shall abate by the

death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue," § 272; also, that "a cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment and malicious prosecution." § 283.

By section 955 of the Revised Statutes of the United States, brought forward from the Judiciary Act of September 24, 1789, c. 20, § 31, 1 Stat. 73, 90, it is provided that "when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the *cause of action* survives by law, prosecute or defend any such suit to final judgment."

The question upon which the court below desires the instruction of this court is this:

"Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?"

If the case had not been removed to the Circuit Court of the United States, it is clear that under the statutes of Ohio, as interpreted by the highest court of that State, the action might have been revived in the state court in the name of the personal representative of Hervey and proceeded to final judgment. We think that the right to revive attached under the local law when Hervey brought his action in the state court. It was a right of substantial value, and became inseparably connected with the cause of action so far as the laws of Ohio were concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the Circuit Court of the United States? Was it not rather a right that inhered in the action, and

accompanied it when in the lifetime of Hervey the Federal court acquired jurisdiction of the parties and the subject-matter? This last question must receive an affirmative answer, unless section 955 of the Revised Statutes of the United States is to be construed as absolutely prohibiting the revival in the Federal court of an action for personal injuries instituted in due time and which was removed from one of the courts of a State whose laws modified the common law so far as to authorize the revival upon the death of either party of a pending action of that character.

We are of opinion that the above section is not to be so construed. In our judgment, a right given by the statute of a State to revive a pending action for personal injuries in the name of the personal representative of a deceased plaintiff is not lost upon the removal of the case into a Federal court. Section 955 of the Revised Statutes may reasonably be construed as not applying to an action brought in one of the courts of a State whose statutes permit a revivor in the event of the death of a party before final judgment. Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a Federal court, and is based upon some act of Congress or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject. But if at the time an action is brought in a state court the statutes of that State allow a revivor of it on the death of the plaintiff before final judgment — even where the right to sue is lost when death occurs before any suit is brought — then we have a case not distinctly or necessarily covered by section 955. Suppose Hervey had died while the action was pending in the state court and it had been revived in that court, nevertheless after such revival, if diverse citizenship existed, it could have been removed for trial into the Federal court and there proceeded to final judgment, notwithstanding section 955 of the Revised Statutes of the United States. If this be so, that section ought not to be construed

as embracing the present case. Nor ought it to be supposed that Congress intended that in case of the removal of an action from a state court on the petition of the defendant prior to the death of the plaintiff, the Federal court should ignore the law of the State in reference to the revival of pending actions, and make the question of revivor depend upon the inquiry whether the cause of action would have survived if no suit had been brought. If Congress could legislate to that extent it has not done so. It has not established any rule that will prevent a recognition of the state law under which the present action was originally instituted, and which at the time the suit was brought conferred the right, when the plaintiff in an action for personal injuries died before final judgment, to revive in the name of his personal representative. Cases like this may reasonably be expected out of the general rule prescribed by section 955.

These views are in harmony with section 721 of the Revised Statutes, which was brought forward from the Judiciary Act of 1789, 1 Stat. 92, c. 20, § 34, and provides that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply;" and also with section 914, providing that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." They are in accord also with what was said in *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 692, in which, after referring to *Schreiber* v. *Sharpless*, 110 U. S. 76, 80, this court said: "In that case, the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a

right of action depends upon the law of West Virginia, where the action was brought and the administrator appointed. Rev. Stat. § 721; *Henshaw* v. *Miller*, 17 How. 212."

It is scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that State, rather than by the law of the State in which the injuries occurred.

The question propounded to this court must be answered in the negative. It will be so certified to the Circuit Court of Appeals.

COVINGTON *v.* KENTUCKY.

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

No. 152. Submitted January 18, 1899. — Decided February 20, 1899.

This court is bound by the construction put by the highest court of the State of Kentucky upon its statutes, referred to in the opinion of the court, relating to exemptions from taxation of property used for "public purposes," however much it may doubt the soundness of the interpretation.

The provision in the act of the legislature of Kentucky of May 1, 1886, c. 897, that "the said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land on which they are situated," which the city of Covington was, by that act, authorized to acquire and construct, "shall be and remain forever exempt from state, county and city tax," did not, in view of the provision in the act of February 14, 1856, 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 shall be therein plainly ex-

pressed," which was in force at the time of the passage of the act of May 1, 1886, tie the hands of the Commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption, and subject the property to taxation.

Before a statute — particularly one relating to taxation — should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; and it is not so expressed when the existence of the intent arises only from inference or conjecture.

A municipal corporation is a public instrumentality, established to aid in the administration of the affairs of the State, and neither its charters, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States: and if the legislature choose to subject to taxation property held by a municipal corporation of the State for public purposes, the validity of such legislation, so far as the National Constitution is concerned, cannot be questioned.

THE case is stated in the opinion.

Mr. William Goebel and *Mr. W. S. Pryor* for plaintiff in error.

Mr. W. S. Taylor, Attorney General of Kentucky, and *Mr. Ramsey Washington* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, a municipal corporation of Kentucky, insists that by the final judgment of the Court of Appeals of that Commonwealth sustaining the validity of certain taxation of its water-works property, it has been deprived of rights secured by that clause of the Constitution of the United States which prohibits any State from passing a law impairing the obligation of contracts. That is the only question which this court has jurisdiction to determine upon this writ of error. Rev. Stat. § 709.

By an act of the general assembly of Kentucky approved May 1, 1886, the city of Covington was authorized to build a water reservoir or reservoirs within or outside its corporate limits, either in the county of Kenton or in any county adjacent thereto, and acquire by purchase or condemnation in fee

simple the lands necessary for such reservoirs, and connect the same with the water-pipe system then existing in the city; to build a pumping house near or adjacent to the Ohio River, and provide the same with all necessary machinery and appliances, together with such lands as might be needed for the pumping house, and for connecting it with said reservoir or reservoirs. § 21.

The declared object of that legislation was that the city and its citizens might be provided with an ample supply of pure water for all purposes. To that end the city was authorized and empowered, by its board of trustees, to issue and sell bonds to an amount not exceeding $600,000, payable in not more than forty years after date, with interest at a rate not exceeding five per cent per annum — such bonds not, however, to be issued until the question of issuing them and the question of the location of the reservoir or reservoirs, whether above or below the city, should first be submitted to the qualified voters of the corporation at an election held for that purpose and approved by a majority of the votes cast.

By section 31 of that act it was provided that "said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from state, county and city tax." Ky. Acts, 1885–6, c. 897, p. 317.

A subsequent act, approved February 15, 1888, authorized the city, in execution of the provisions of the act of 1886, to issue and sell bonds to the additional amount of $400,000. Ky. Acts, 1887–8, c. 137, p. 221.

The scheme outlined in these acts received the approval of the majority of the votes cast at an election held in the city, and thereafter bonds to the amount of $600,000 and $400,000 were issued in the name of the city and disposed of.

The proceeds of the bonds were duly applied by the city in building water reservoirs, in constructing the requisite approaches, pipes and mains, in acquiring the lands necessary for the reservoirs and for its approaches and connections, in erecting a pumping house and providing it with necessary machinery and appliances, and in buying land for a pumping house

and the connection thereof by pipes and mains with the reservoirs.

The entire works upon their completion passed under the control of the city which managed the same until March 19, 1894, by the Commissioners of Water Works, under the act of March 31, 1879, c. 121, Ky. Acts, 1879, p. 93; and since March 19, 1894, they have been controlled under the act of that date, c. 100, by a board, subject to such regulations as the city by ordinance might provide. Ky. Acts, 1894, p. 278. By the latter act it was also provided that the net revenue derived from its water works by any city of the second class — to which class the city of Covington belongs — should be applied exclusively to the improvement or reconstruction of its streets and other public ways.

When the above act of May 1, 1886, was passed there was in force a general statute of Kentucky, passed February 14, 1856, which provided, as to all charters and acts of incorporation granted after that date, 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;" and that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 2 Rev. Stat. Ky. 121.

This statute was not modified by the general revenue statute of May 17, 1886, which took effect September 14, 1886, and became part of Chapter 68 of the General Statutes of 1888. It constitutes § 1987 of the Revision known as the Kentucky Statutes of 1894. Nor has it been changed by any subsequent legislation in Kentucky.

The present constitution of Kentucky, adopted in 1891, contains the following provisions:

"§ 170. There shall be exempt from taxation public property used for public purposes. . . .

"§ 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"§ 172. All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

By the Kentucky Statutes of 1894 it is provided:

"§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"§ 4022. For the purposes of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property — that which is tangible as well as that which is intangible."

"§ 4026. The following property is exempt from taxation: Public property used for public purposes. . . ."

This act repealed all acts and parts of acts in conflict with its provisions except the act of June 4, 1892, providing additional funds for the ordinary expenses of the state government, and the act amendatory thereof approved July 6, 1892.

In the year 1895 certain lands acquired under the above act of May 1, 1886, and constituting a part of the Covington Water Works, were assessed for state and county taxation, pursuant to the statutes enacted after the passage of that act, and conformably as well to the constitution of Kentucky if that instrument did not exempt them from taxation. The taxes so assessed not having been paid, those lands after due notice were sold at public outcry by the sheriff, (who by law was the collector of state and county revenue,) and no other bidder appearing, the Commonwealth of Kentucky purchased them for $2187.24, the amount of the taxes, penalty, commission and cost of advertising.

The present action was brought by the Commonwealth to recover possession of the property so purchased.

The principal defence is that the provision in the act of May 1, 1886, that the reservoir or reservoirs, pumping house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, "shall be and remain forever exempt from state, county and city taxes," constituted, in respect of the lands in question, a contract between the city of Covington and the Commonwealth of Kentucky, the obligation of which was impaired by the subsequent legislation to which reference has been made.

Referring to section 170 of the present constitution of Kentucky declaring that "there shall be exempt from taxation public property used for public purposes," the Court of Appeals of Kentucky, in this case, said: "It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation as prescribed by the constitution; and accordingly, in section 4020, Kentucky Statutes, adopted for the purpose of carrying out the provisions of section 170, is the identical language we have quoted. As it was manifestly intended by both the constitution and stat-

ute to make subject to taxation all property not thereby in express terms exempted, it results that, unless the water-works property of the city of Covington be, in the language or meaning of section 170, 'public property used for public purposes,' it must be held, like similar property in other cities, subject to taxation, and the special act of May 1, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires us to do, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it, for in the cases cited and others, where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to mean in that connection the same as the words 'for governmental purposes,' and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, water-works property of a city has been invariably treated by this court as belonging to the latter class, and consequently subject to the state and county taxation. In our opinion, the property in question is under the constitution subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886."

However much we may doubt the soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation one of the instrumentalities or agencies of the State, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of that Commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase "pub-

lic purposes" in that section means "governmental purposes," and that the property here taxed is not held by the city of Covington for such purposes but only for the "profit or convenience" of its inhabitants and is liable to taxation at the will of the legislature unless at the time of the adoption of the constitution of Kentucky it was exempt from taxation in virtue of some contract the obligation of which is protected by the Constitution of the United States.

The fundamental question in the case then is whether at the time of the adoption of that constitution the city of Covington had, in respect of the lands in question, any contract with the State the obligation of which could not be impaired by any subsequent statute or by the present constitution of Kentucky adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that constitution any more than by a legislative enactment.

We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. *Griffin* v. *Kentucky Ins. Co.*, 3 Bush, 592. The city accepted the act of 1886 and acquired under it the property taxed subject to that reservation. There was in the act no "plainly expressed" intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they were situated, should be forever exempt from state, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of

amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute — particularly one relating to taxation — should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture.

The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal are supported by many adjudged cases. *Tomlinson* v. *Jessup*, 15 Wall. 454, 458; *Railroad Co.* v. *Maine*, 96 U. S. 499, 510; *Railroad Co.* v. *Georgia*, 98 U. S. 359, 365; *Hoge* v. *Railroad Co.*, 99 U. S. 348, 353; *Sinking Fund cases*, 99 U. S. 700, 720; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 21; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Water Works Co.* v. *Schottler*, 110 U. S. 347, 352; *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 696; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 408; *Sioux City Street Railway* v. *Sioux City*, 138 U. S. 98, 108; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 12. In *Tomlinson* v. *Jessup*, above cited, referring to the reserved power to amend and repeal, this court said: "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which, without that provi-

sion, would be irrepealable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. . . . Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State." So in *Railroad Co.* v. *Maine*, above cited: "By the reservation in the law of 1831, which is to be considered as if embodied in that act, [one subsequently passed,] the State retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities. The existence of the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control."

In our consideration of the question of contract we have assumed, in harmony with the judgment of the Court of Appeals of Kentucky, that the property in question was held by the city only for the profit or convenience of its people collectively, that is, in its proprietary, as distinguished from its governmental, character. There are cases adjudging that the extent of legislative power over the property of municipal corporations, such as incorporated towns and cities, may depend upon the character in which such property is held. Mr. Dillon, in his work on Municipal Corporations, says: "In its *governmental or public character*, the corporation is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty

which creates it. Over all its civil, political or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular State. But in its *proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality or corporate individual;* and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent." 1 Dillon's Munic. Corp. 4th ed. pp. 107, 108, § 66, and authorities cited.

If however the property in question be regarded as in some sense held by the city in its governmental or public character, and therefore as public property devoted to public purposes — which is the interpretation of the state constitution for which the city contends — there would still be no ground for holding that the city had in the act of 1886 a contract within the meaning of the Constitution of the United States. A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the State. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the State for public purposes, the validity of such legislation, so far as the national Constitution is concerned, could not be questioned.

In *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 91, after referring to previous adjudications, this court said that the authorities were full and conclusive to the point that a municipal corporation, being a mere agent of the State, "stands in its governmental or public character in no contract relations with its sovereign, at whose pleasure its charter may

be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." Chancellor Kent, in his Commentaries, says: "In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent's Com. 12th ed. p. *306. Dillon says: "Public including municipal corporations are called into being at the pleasure of the State and while the State may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the State and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes exclusively — that is, for purposes connected with the administration of civil or of local government — and corporations are public only when, in the language of Chief Justice Marshall, 'the whole interests and franchises are the exclusive property and domain of the government itself,' such as *quasi* corporations (so called), counties and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhibition, erect, change,

divide and even abolish them, at pleasure, as it deems the public good to require." 1 Dillon's Munic. Cor. 4th ed. p. 93, § 54.

In any view of the case there is no escape from the conclusion that the city of Covington has no contract with the State exempting the property in question from taxation which is protected by the contract clause of the National Constitution.

Perceiving no error in the record of which this court may take cognizance, the judgment is affirmed.

LAKE COUNTY COMMISSIONERS *v.* DUDLEY.

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

No. 177. Argued December 14, 15, 1898. — Decided February 20, 1899.

The instruments sued on in this case being payable to bearer, and having been made by a corporation, are expressly excepted by the Judiciary Act of August 13, 1888, c. 866, from the general rule prescribed in it that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of the United States, unless his assignor or transferrer could have sued in such court.

From the evidence of Dudley himself, the plaintiff below, it is clear that he does not own any of the coupons sued on, and that his name is being used with his own consent, to give jurisdiction to the Circuit Court to render judgment for persons who could not have invoked the jurisdiction of a Federal court, and the trial court, on its own motion, should have dismissed the case, without considering the merits.

THE case is stated in the opinion.

Mr. George R. Elder for the Lake County Commissioners. *Mr. C. S. Thomas*, *Mr. W. H. Bryant* and *Mr. H. H. Lee* were on his brief.

Mr. John F. Dillon and *Mr. Edmund F. Richardson* for Dudley. *Mr. Harry Hubbard* and *Mr. John M. Dillon*

were on their brief. *Mr. Daniel E. Parks* filed a brief for Dudley.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the District of Colorado by the defendant in error Dudley, a citizen of New Hampshire, against the plaintiff in error the Board of County Commissioners of the County of Lake, Colorado, a governmental corporation organized under the laws of that State. Its object was to recover the amount of certain coupons of bonds issued by that corporation under date of July 31, 1880, and of which coupons the plaintiff claimed to be the owner and holder.

Each bond recites that it is "one of a series of fifty thousand dollars, which the Board of County Commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A.D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the State of Colorado, entitled 'An act concerning counties, county officers and county government, and repealing laws on these subjects,' approved March 24, A.D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

The Board of County Commissioners by their answer put the plaintiff on proof of his cause of action and made separate defences upon the following grounds: 1. That the bonds to which the coupons were attached were issued in violation of section six, article eleven of the constitution of Colorado and the laws enacted in pursuance thereof. 2. That the aggregate amount of debts which the county of Lake was permitted by law to incur at the date of said bonds, as well as when they were in fact issued, had been reached and exceeded. 3. That the plaintiff's cause of action, if any he ever had, upon certain named coupons in suit, was barred by

the statute of limitations. 4. That when the question of incurring liability for the erection of necessary public buildings was submitted to popular vote, the county had already contracted debts or obligations in excess of the amount allowed by law.

One of the questions arising on the record is whether Dudley had any such interest in the coupons in suit as entitled him to maintain this suit. The evidence on this point will be found in the margin.[1]

---

[1] At the trial George W. Wright was introduced as a witness on behalf of the plaintiff. He stated at the outset that Dudley was the owner of the bonds, but his examination showed that he had really no knowledge on the subject, and that his statement was based only upon inference and hearsay. In connection with his testimony certain transfers or bills of sale to Dudley of bonds of the above issue of $50,000 were introduced in evidence as follows: One dated December 5, 1888, purporting to be "for value received" by Susan F. Jones, executrix of the estate of Walter H. Jones, deceased, of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66; one dated February 11, 1885, by David Creary, Jr., J. H. Jagger, Henry D. Hawley and L. C. Hubbard, all of Connecticut, for bonds Nos. 80, 81 and 82, and Nos. 83 to 86, both inclusive, the consideration recited being $5380.56, "paid by Harry H. Dudley of Concord" in the county of Merrimac and State of New Hampshire; one dated March 20, 1885, by the Nashua Savings Bank of Nashua, New Hampshire, for twenty bonds, Nos. 92 to 111, both inclusive, the consideration recited being $11,869.45, "paid by Harry H. Dudley of Concord," New Hampshire; one dated March 20, 1885, by the Union Five Cents Saving Bank of Exeter, New Hampshire, of bonds Nos. 112 to 129, both inclusive, the consideration recited being $10,695, "paid by Harry H. Dudley of Concord," New Hampshire; one, undated, by Susan F. Jones, "for value received," of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66, together with coupons falling due in 1884 of bonds Nos. 55 to 60, both inclusive; and one dated December 10, 1884, by Joseph Stanley of Colorado of twelve bonds, Nos. 68 to 79, both inclusive, and six bonds, numbered 67 and 87 to 91, both inclusive, the consideration recited being $15,887.50, "paid by Harry H. Dudley of Concord," New Hampshire.

Here were transactions which if genuine indicated the actual payment by Dudley in 1882 and 1884 on his purchase of bonds of many thousand dollars.

Dudley's deposition was taken twice; first on written interrogatories, January 14, 1895, and afterwards, March 2, 1895, on oral examination.

In his first deposition Dudley was asked whether he owned any bonds issued by Lake County, and he answered: "Yes, I own certain Lake County bonds which I hold under written bills of sale transferred to me from several different parties." Being asked whether he owned any bonds of Lake

At the close of the plaintiff's evidence in chief the defendant asked for a peremptory instruction in its behalf, but this request was denied at that time. When the entire evidence

---

County, Colorado, numbered 92 to 111 inclusive, 83 to 86 inclusive, 55 to 64 inclusive, 68 to 79 inclusive, 80 to 82 inclusive, 65, 66 and 67, and 87 to 91 inclusive, he answered: "I own, under the aforesaid bills of sale, bonds mentioned in Interrogatory 3." He was then asked (Interrogatory 4) if in answer to the preceding interrogatory he said that he owned any of said bonds or the coupons cut therefrom, to state when he purchased the same, from whom he purchased them, and what consideration he paid therefor. In his answer he referred to each of the above mentioned bills of sale, and said that he owned the bonds described in it *by virtue of* such instruments. He did not say that he paid the recited consideration, but contented himself with stating what was the consideration named in the bill of sale. Being asked (Interrogatory 5), "If you are not the owner of said bonds, or any coupons cut therefrom, please state what, if any, interest you have in the same," he answered: "I have stated my interest in the bonds in my answer to Interrogatory 4." He was asked (Interrogatory 9), "If you say you authorized suit to be commenced in your name, please state under what circumstances you authorized it to be brought, and whether or not the bonds or coupons upon which it was to be brought were your own individual property, or were to be transferred to you simply for the purpose of bringing said suit." His answer was: "I understand said bonds and coupons were transferred to me, as aforesaid, for the purpose of bringing suit against the county to make them pay the honest debts of the county."

It should be stated that before the witness appeared before the commissioner who took his deposition upon interrogatories, he prepared his answers to the interrogatories with the aid of counsel, and read his answers so prepared when he came before the commissioner.

When Dudley gave his second deposition his attention was called to his answer to Interrogatory 4, in his first deposition, in relation to the bill of sale running to him from Craig [Creary], Jagger, Hawley and Hubbard. We make the following extract from his last deposition, giving questions and answers as the only way in which to show what the witness intended to say and what he intended to avoid saying: "Q. You also say in the answer to which I have referred, that the consideration in the said bill of sale was $5380.56. Did you pay that consideration for the bonds mentioned in the bill of sale? A. No, I did not. Q. Did you pay any part of it? A. No, sir. Q. Why was that bill of sale made to you, Mr. Dudley? A. I think I have answered that in some interrogatory here, my answer to Interrogatory 9 in the deposition I gave before in this case. Q. Are not the bonds mentioned in the said bill of sale, together with the coupons, still owned in fact by the grantors named in said bill of sale? A. Not as I understand the bill of sale. I understand I am absolute owner. Q. Was not that bill of sale made to you for the purpose of enabling you to prose-

on both sides was concluded, the defendant renewed its request for a peremptory instruction, and the plaintiff asked a like instruction in his favor. The plaintiff's request was denied,

---

cute this claim upon them? A. My answer to Interrogatory 9 in my former deposition answers that also. Q. I repeat the question and ask for a categorical answer. A. I cannot more fully answer the question than I have in answer to Interrogatory 9, former deposition. Q. Do you decline to answer it, yes or no? A. I think this answer is sufficient. Q. If you are successful in the suit brought upon the coupons heretofore attached to the bonds mentioned in said bill of sale, do you not intend to pay the amount of those coupons so recovered to the grantors in said bill of sale, less any legitimate expenses attendant upon the prosecution of this case? A. Yes, my understanding in the matter would be something might be paid them. Q. Is there something to be paid them different from the amount involved in the suit represented by the coupons cut from said bonds? A. I should think there was. Q. In what respect is the difference? A. They would not be paid the full amount. Q. What deduction would you make? A. I do not know just what deduction would be made. Q. When you took this bill of sale, did you execute some sort of a written statement back to the grantors of said bill of sale? A. No, sir. Q. Did you make a verbal agreement at the time with them or any of them? A. No, sir. Q. Were you present when the bill of sale was drawn? A. No, sir. Q. Where was it drawn? A. My impression is that it was drawn at Hartford, Conn., this particular one that you refer to. Q. Yes. Who represented you at the drawing of the bill of sale? A. I have no knowledge of being represented there. Q. When did you first know that such bill of sale had actual existence? A. When I received it. Q. When was that? A. I cannot tell the date. It was in the year 1894. Q. Then you knew nothing of it until some nine years after it was made? A. That was the first I knew of it, the year 1894."

In reference to the bonds referred to in the bill of sale from Stanley, the witness testified: "Q. When did you first know of the existence of the bill of sale? A. I think it was in the year 1894. Q. Some ten years after it was made? A. Do you want me to answer that? Q. Yes. A. I received it as I have stated heretofore, that was the first I knew of it. Q. Are you personally acquainted with Joseph Stanley? A. I am not; no, sir. Q. Did you ever meet him? A. Don't remember that I ever met him. Q. Did you at any time ever pay him $15,887.50 for the bonds mentioned in his bill of sale to you? A. No, sir. Q. Is it not a fact that Mr. Stanley still owns these bonds? A. I have answered in a former deposition that I hold a bill of sale of certain bonds of Joseph Stanley. Q. Do you refuse to answer the last question I asked you, yes or no? A. I prefer to answer it as I have stated above. Q. If you should recover in this suit, are not the amounts represented by the coupons cut from the bonds mentioned in the Stanley bill of sale to be paid to Joseph Stanley less the expenses of this suit? A. I could not answer that definitely. Q. Why not? A. Because

an exception to the ruling of the court being reserved. Other instructions asked by the plaintiff were refused, and in obedience to a peremptory instruction by the court the jury returned

---

I haven't enough knowledge of the matter to answer it definitely. Q. You have no knowledge of it at all personally, have you? A. My understanding of the matter would be, Joseph Stanley would have a certain amount of money if the suit was won. Q. Was not the bill of sale drawn in Denver — the Stanley bill of sale? A. I have no actual knowledge where it was drawn. Q. Do you know who had the bill of sale before it was sent on to you in 1894? A. I do not think I have any actual knowledge. Q. Did you have any sort of knowledge? A. Yes. I imagined it came from Rollins & Son. Q. By letter? A. It came through the mail. Q. Have you the letter now? A. I do not think that I have; no, sir. Q. What did you do with it? A. I could not swear that it was. Q. It came in December of 1894, did it not? A. I should say it did."

As to the bonds referred to in the bill of sale by Susan F. Jones, executrix, the witness testified: "Q. What did you pay for that bill of sale, Mr. Dudley? A. For consideration not named in the bill of sale. Q. That does not answer my question. What did you pay for it? A. I do not remember as I paid anything. Q. Do you remember that you did not pay anything? A. It is my impression that I did not. Q. Were you present when it was drawn? A. No, sir. Q. In the event you recover a judgment in this case, are not the amounts of the coupons belonging to the bonds mentioned in the bill of sale from Mrs. Jones to be paid to Mrs. Jones, less her proportion of [the expenses of] the case? A. I could not state definitely about that. Q. Why? A. For the reason that I answered similar questions above. Q. Going back to the bonds of Mr. Stanley, I will ask you one or two other questions. Is Mr. Stanley a citizen of Colorado? A. I think he is. Q. Now why did you not include in this case the coupons belonging to the Stanley bonds for 84, 85 and 86, and the coupons to bonds 68 to 72, including in the Stanley bill of sale of 1888, and the coupons on 67, 87–91 for 1884–'5? A. If they were not included I do not know why they were not. Q. Is Mrs. Jones a citizen of the State of Colorado? A. I think she is. Q. Were not those bonds of Stanley and Jones assigned to you in order that you might as a citizen of another State bring suit upon them and upon the coupons belonging to them in the Federal court in Colorado? A. I should answer that by referring to my answer in former deposition to Interrogatory 9."

In reference to the other bills of sale and the bonds mentioned in them, the witness testified: "Q. In your answer to Interrogatory 4 of your former deposition you also say that you own bonds of Lake County by the written bill of sale from the Nashua Savings Bank, numbered 92–111, both inclusive, together with all coupons originally attached and unpaid. You also say that the consideration for the said bill of sale is $11,689.45. Did you pay any part of that, Mr. Dudley? A. No, sir. Q. Were you present

a verdict for the defendant, and judgment was accordingly entered upon that verdict. Upon writ of error to the Circuit Court of Appeals the judgment was reversed, Judge Thayer dissenting. 49 U. S. App. 336.

1. In the oral argument of this case some inquiry was made

---

when the bill of sale was drawn? A. No, sir. Q. When did you first know that there was such a bill of sale? A. As soon as I received it, in the year 1894. Q. In the event of a recovery in this case, are not the amounts of the coupons belonging to the said bonds to be paid over to the Nashua Savings Bank, less their proportion of the expense of this litigation? A. I do not know how much will be paid them. Q. Do you know anything about it? A. Indirectly, yes. Q. Do you mean by that you have some hearsay evidence upon it? A. Yes; I have an impression from hearsay that the bank would have some equivalent for these bonds if suit was won. Q. You say here that you own bonds of Lake County by virtue of a bill of sale from the Union Five Cent Savings Bank of Exeter, numbered 112–129, inclusive, together with all coupons, the first being No. 4, and the subsequent ones being consecutive up to and including No. 21. What is the date of that bill of sale? A. I think it was dated March 25, 1885. Q. Were you present when it was made? A. No, sir. Q. When did you first know of its existence? A. In the year 1894. Q. At the time that you were informed of the existence of the others? A. Nearly at the same time, I should say. Q. Did you pay the Bank of Exeter $10,695, or any other sum for the bonds mentioned in that bill of sale? A. No, sir. Q. You also say in the same answer to the same interrogatory in your former deposition that you hold a bill of sale and assignment from Susan F. Jones for coupons Nos. 55 to 64 and Nos. 65 to 66 for the years 1886, '7, '8, 1891, also coupons amounting to $600 from bonds 55–6–7–8–9–60 falling due in the year 1894. What is the date of that bill of sale and assignment? A. I could not tell. Q. When did you first know of its existence? A. I should say in 1894. Q. Did you pay anything for it? A. No, sir. . . . Q. Did you ever have in your possession any of the coupons or any of the bonds to which this examination has thus far been directed? A. Strictly speaking, I don't think I ever had them in my own possession. I have seen some of the bonds and handled them, had them in a safe. Q. Where? A. In Boston. Q. When? A. Well, I should say in the year 1893. Q. But that was before you knew they had been assigned to you by bill of sale, was it not? A. I was really handling them as agent for other parties. Q. Who were the other parties you were handling them as agent for? A. I don't know as I was exactly an agent. I was an officer of another company. They came into our hands. Q. What was that company? A. E. H. Rollins & Sons. Q. Were you a stockholder of that company? A. Yes. Q. Are you now? A. Yes, sir. Q. Is not that the only interest which you have in these bonds or any of them — your interest as a stockholder in the firm of E. H. Rollins & Sons? A. Yes, probably it is."

whether Dudley's right to maintain this action was affected by that clause in the first section of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433, 434, providing that no Circuit or District Court of the United States shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The provision on the same subject in the act of March 3, 1875, but which was, of course, displaced by the clause on the same subject in the act of 1888, was as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. 470, c. 137, § 1.

Without stopping to consider the full scope and effect of the above provision in the act of 1888, it is only necessary to say that the instruments sued on being payable to bearer and having been made by a corporation are expressly excepted by the statute from the general rule prescribed that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of the United States unless his assignor or transferrer could have sued in such court. It is immaterial to inquire what were the reasons that induced Congress to make such an exception. Suffice it to say that the statute is clear and explicit, and its mandate must be respected.

2. There is however a ground upon which the right of Dudley to maintain this action must be denied.

By the fifth section of the above act of March 3, 1875, it is provided "that if, in any suit, commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed

thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat. 470, 472, c. 137. This provision was not superseded by the act of 1887, amended and corrected in 1888. 25 Stat. 433. *Lehigh Mining & Manfg. Co.* v. *Kelly*, 160 U. S. 327, 339.

Prior to the passage of the act of 1875 it had been often adjudged that if title to real or personal property was put in the name of a person for the purpose only of enabling him, upon the basis of the diverse citizenship of himself and the defendant, to invoke the jurisdiction of a Circuit Court of the United States for the benefit of the real owner of the property who could not have sued in that court, the transaction would be regarded in its true light, namely, as one designed to give the Circuit Court cognizance of a case in violation of the acts of Congress defining its jurisdiction; and the case would be dismissed for want of jurisdiction. *Maxwell's Lessee* v. *Levy*, 2 Dall. 381; *Hurst's Lessee* v. *McNeil*, 1 Wash. C. C. 70, 80; *M'Donald* v. *Smalley*, 1 Pet. 620, 624; *Smith* v. *Kernochen*, 7 How. 198, 216; *Jones* v. *League*, 18 How. 76, 81; *Barney* v. *Baltimore City*, 6 Wall. 280, 288. These cases were all examined in *Lehigh Mining & Manfg. Co.* v. *Kelly*, 160 U. S. 327, 339. In the latter case it appeared that a Virginia corporation claimed title to lands in that Commonwealth which were in the possession of certain individuals, citizens of Virginia. The stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania in order that the Pennsylvania corporation, after receiving a conveyance from the Virginia corporation, could bring suit in the Circuit Court of the United States sitting in Virginia, against the citizens in that Commonwealth

who held possession of the lands. The contemplated conveyance was made, but no consideration actually passed or was intended to be passed for the transfer. This court held that within the meaning of the act of 1875 the case was a collusive one and should have been dismissed as a fraud on the jurisdiction of the United States court. It said: "The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose — and no other purpose is stated or suggested — of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States, and as being in law a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case." And this conclusion, the court observed, was "a necessary result of the cases arising before the passage of the act of March 3, 1875."

From the evidence in this cause of Dudley himself it is certain that he does not in fact own any of the coupons sued on and that his name, with his consent, is used in order that the Circuit Court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the Board of Commissioners of Lake County, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire who could themselves have sued in the Circuit Court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the Circuit Court of the United States, and if all the causes of actions were thus united for the collusive purpose of making "a case" cognizable by the Federal court as to every issue made in it, then the act

of 1875 must be held to apply, and the trial court on its own motion should have dismissed the case without considering the merits.

In *Williams* v. *Nottawa*, 104 U. S. 209, 211, this court said that Congress when it passed the act of 1875 extending the jurisdiction of the courts of the United States "was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction."

So, in *Farmington* v. *Pillsbury*, 114 U. S. 138, 146, which was a suit upon coupons, brought by a citizen of Massachusetts against a municipal corporation of Maine, and in which one of the questions was as to the real ownership of the coupons, this court said: "It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay." It was consequently held that the transfer of the coupons was "a mere contrivance, a pretence, the result of a collusive arrangement to create a fictitious ground of Federal jurisdiction."

In *Little* v. *Giles*, 118 U. S. 596, 603, reference was made to the act of 1875, and the court said that where the interest of the nominal party was "simulated and collusive, and created for the very purpose of giving jurisdiction, the courts

should not hesitate to apply the wholesome provisions of the law."

We have held that if, for the purpose of placing himself in a position to sue in a Circuit Court of the United States, a citizen of one State acquires a domicil in another State without a present intention to remain in the latter State permanently or for an indefinite time, but with the present intention to return to the former State as soon as he can do so without defeating the jurisdiction of the Federal court to determine his suit, the duty of the Circuit Court is on its own motion to dismiss such suit as a collusive one under the act of 1875. *Morris* v. *Gilmer*, 129 U. S. 315. The same principle applies where there has been a simulated transfer of a cause of action in order to make a case cognizable under the act.

The cases cited are decisive of the present one. As the coupons in suit were payable to bearer and were made by a corporation, Dudley being a citizen of New Hampshire could have sued the defendant a Colorado corporation in the Circuit Court of the United States without reference to the citizenship of his transferrers or the motive that may have induced the transfer of the coupons to him, or the motive that may have induced him to buy them, provided he had really purchased them. But he did not buy the coupons at all. He is not the owner of any of them. He is put forward as owner for the purpose of making a case cognizable by the Federal court as to all the causes of action embraced in it. The apparent title was put in him without his knowledge and without his request, and only that he might represent the interests of the real owners. He never requested the execution of the pretended bills of sale referred to, nor did he hear of their being made until more than nine years after they were signed. And, notwithstanding the evasive character of his answers to questions, it is clear that his transferrers are the only real parties in interest and his name is used for their benefit. The transfer was collusive and simulated for the purpose of committing a fraud upon the jurisdiction of the Circuit Court in respect at least of part of the causes of action that make the case before the court.

For the reasons stated the trial court, when the evidence

Counsel for Rollins.

was concluded, should on its own motion have dismissed the suit. The judgment of the Circuit Court and the judgment of the Circuit Court of Appeals must both be

Reversed and the cause remanded for a new trial and for further proceedings consistent with this opinion, and it is so ordered.

GUNNISON COUNTY COMMISSIONERS *v.* ROLLINS.

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

No. 178. Argued December 15, 16, 1898. — Decided February 20, 1899.

Although the bill of exceptions in this case does not state, in so many words, that it contains all the evidence, it sufficiently appears that it does contain all, and this court can inquire on this record whether the Circuit Court erred in giving a peremptory instruction for the defendant.

The recitals in the bonds of Gunnison County, the coupons of which are in suit in this case, that they were "issued by the Board of County Commissioners of said Gunnison County in exchange, at par, for valid floating indebtedness of the said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; 'that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;' that the total amount of the issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison, voting on the question at a general election duly held in said county on the seventh day of November, A.D. 1882," estop the county from asserting, against a *bona fide* holder for value, that the bond so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado.

This case is controlled by the judgment in *Chaffee County* v. *Potter*, 142 U. S. 355, which the court declines to overrule.

The plaintiff corporation was a *bona fide* holder, when this suit was brought, of some of the bonds sued for in it.

THE case is stated in the opinion.

Mr. John F. Dillon and *Mr. Edmund F. Richardson* for

Rollins. *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on their brief.

Mr. Charles S. Thomas for Gunnison County Commissioners. *Mr. Thomas C. Brown*, *Mr. W. H. Bryant* and *Mr. H. H. Lee* were on his brief.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought by E. H. Rollins & Sons, a corporation of New Hampshire, to obtain a judgment against the Board of Commissioners of Gunnison County, Colorado, a municipal corporation of that State, for the amount of certain coupons of bonds issued by the defendant in 1882. At the close of the evidence the defendant requested a peremptory instruction in its behalf. The Circuit Court charged the jury at some length, but concluded with a direction to find a verdict for the defendant, which was done, and a judgment in its favor was entered. That judgment was reversed in the Circuit Court of Appeals, and the case is here upon writ of certiorari. 49 U. S. App. 399.

The case made by the complaint is as follows:

By the laws of Colorado Boards of County Commissioners were authorized to examine, allow and settle all accounts against their respective counties, and to issue county warrants therefor; to build and keep in repair the county buildings, to insure the same, and to provide suitable rooms for county purposes; and to represent the county and have the care of county property and the management of the business and concerns of the county in all cases where the law did not otherwise provide.

On the 1st day of December, 1882, the defendant Board caused to be made and executed certain bonds acknowledging the county of Gunnison to be indebted and promising to pay to ——— or bearer the sum therein named, for value received, redeemable at the pleasure of the county after ten years, and absolutely due and payable twenty years after date, at the office of the county treasurer, with interest at eight per cent

per annum, payable semi-annually on the first days of March and September in each year at the county treasurer's office, or at the Chase National Bank in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally became due.

Each bond contained this recital: "This bond is issued by the Board of County Commissioners of said Gunnison County in exchange, at par, for valid floating indebtedness of the said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue *does not exceed the limit prescribed by the constitution of the State of Colorado*, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison, voting on the question at a general election duly held in said county on the seventh day of November, A. D. 1882. The bonds of this issue are comprised in three series, designated 'A,' 'B' and 'C' respectively, the bonds of series 'A' being for the sum of one thousand dollars each, those of series 'B' for the sum of five hundred dollars each and those of series 'C' for the sum of one hundred dollars each. This bond is one of series 'A.' The faith and credit of the county of Gunnison are hereby pledged for the punctual payment of the principal and interest of this bond."

To each bond were attached coupons for the semi-annual interest, signed by the county treasurer.

On the first day of December, 1882, for the bonds of the county with coupons attached as above specified, the defendant Board made an exchange with the parties then holding county warrants which before that time in accordance with the statutes in such case made and provided had been issued to them in settlement of claims presented by them against the county.

In every case when warrants were presented they were exchanged for the bonds of the county at par for their face and interest. In each case the blanks were filled out with the name of the party receiving the bonds or exchanging the warrants, and the blank for the place of payment filled in as the banking house of the Chase National Bank in the city of New York. Thereupon the bonds were signed by the chairman of the Board of County Commissioners, countersigned by the county treasurer and attested by the county clerk with the seal of the county; and the coupons attached were also filled out, stating the place of payment to be in the city of New York at the banking house of the Chase National Bank, and stating also the number of the funding bond and the series to which it was attached.

The issue of bonds as above set forth was authorized by a vote of the qualified electors to be exchanged for warrants, and the amount thereof was spread upon the records of the county as provided for by the act of February 21, 1881, entitled "An act to enable the several counties of the State to fund their floating indebtedness." In all other respects the terms and conditions of the act were fully complied with. The bonds were duly registered in the office of the auditor of the State.

In every case where bonds were issued and delivered to the payee or to any person for him, the parties received them in exchange for warrants, the amount of the bonds being the same as the amount of the warrants and interest thereon that had theretofore been issued by the county.

From the 1st day of December, 1882, and up until the 1st day of March, 1886, the county paid the interest on the bonds semi-annually in accordance with their terms and of the coupons attached to them.

The defendant Board made default in the payment of interest due on the first day of September, 1886, and made like default thereafter up to and including September 1, 1892.

The plaintiff was the holder and owner of coupons formerly attached to and belonging to certain bonds of the above issue. It asked judgment for the aggregate amount of the principal

of the coupons, with interest on the amount of each coupon as it became due.

The answer of the county contained a general denial of all the allegations of the complaint, and in addition set out eleven affirmative defences, which were chiefly based upon the alleged fact that the county, in issuing the bonds set forth in the complaint, had attempted to incur an indebtedness not authorized by the constitution of Colorado or by the statute referred to in the bonds.

The provision of the constitution of Colorado prescribing the extent to which counties may become indebted and to which the bonds referred, is as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millons of dollars, one dollar and fifty cents on each thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law, the question of incurring debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided that this section shall not apply to counties having a valuation of less than one million of dollars." Laws of Colorado, 1877, p. 62.

The act of February 21, 1881, referred to in the bonds in question, contains among other provisions the following:

"§ 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars, upon the petition of fifty of the electors of said counties [county] who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish for the period of thirty days, in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit, in writing, to the board of county commissioners, within thirty days from the date of the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par, and accrued interest, for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on property assessed to them in said county in the preceding year, the question whether the board of county commissioners shall issue bonds of such county under the provisions of this act, in exchange at par for the warrants of such county issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish for the period of at least thirty days immediately preceding such general or special election in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and cause to be delivered to the judges

of election in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness, unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants, issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county in exchange therefor, at par. No bonds shall be issued of less denomination than one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent per annum. The interest to be paid semi-annually at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond." Laws of Colorado, 1881, pp. 85, 86, 87.

1. The Circuit Court of Appeals held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason it did not consider the question whether error was committed in directing the jury to find for the defendant. We are of opinion that the bill of exceptions

should be taken as containing all the evidence. It appears that as soon as the jury was sworn to try the issues in the cause, "the complainants to sustain the issues on their part offered the following oral and documentary evidence." Then follow many pages of testimony on the part of the plaintiffs, when this entry appears: "Whereupon complainants rested." Immediately after comes this entry: "Thereupon the defendants to sustain the issues herein joined on their part, produced the following evidence." Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: "Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock A.M." Immediately following is this entry: "Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows." The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: "Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant." Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence. It is therefore proper to inquire on this record whether the Circuit Court erred in giving a peremptory instruction for the defendant.

2. We have seen that the bonds to which were attached the coupons in suit recited that they were issued by the Board of County Commissioners "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881;" that "all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;" that the total amount of the issue did "not exceed the limit prescribed by the constitution of the State of Colorado;" and that such issue had been authorized by a vote

of a majority of the duly qualified electors of the county, voting on the question at a general election duly held in the county on the 7th day of November, 1882.

Do such recitals estop the county from asserting against a *bona fide* holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado? An answer to this question can be found in former decisions of this court. It is necessary to advert to those decisions, particularly those in which the court considered the effect of recitals importing compliance with constitutional provisions.

In *Buchanan* v. *Litchfield*, 102 U. S. 278, 290, 292, which was a suit on interest coupons of municipal bonds, the defence was made that the bonds were issued in violation of that clause of the constitution of the State providing that "no county, city, township, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This court said: "As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma* v. *Eaves*, 92 U. S. 484, in which case we said, and now repeat, that 'where legislative authority has been given to a municipality, or to its officers, to subscribe for the

stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made on the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' So, in the more recent case of *Orleans* v. *Pratt*, 99 U. S. 676, it was said that 'where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.'" Again: "A recital that the bonds were issued under the authority of the statute and in pursuance of the city ordinance, did not necessarily import a compliance with the constitution. Had the bonds made the additional recital that they were issued in accordance with the constitution, or had the ordinance stated, in any form, that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness."

In *Northern Bank of Toledo* v. *Porter Township*, 110 U. S. 608, 616, 619, which was an action on municipal bonds, and involved a question respecting the conclusiveness as between the municipality and a *bona fide* holder for value of recitals in the bonds that they had been issued in conformity to law, the court referred to the above rule established in *Town of Coloma* v. *Eaves*, and said: "We are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a

bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. . . . The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance."

A leading case on this subject is *Dixon County* v. *Field*, 111 U. S. 83, 92–94, which involved the validity of bonds issued in the name of Dixon County, Nebraska, the constitution of which State prescribed conditions upon which donations could be made to a railroad or other work of internal improvement by cities, towns, precincts, municipalities or other subdivisions of the State, and imposed limitations upon the amount thereof and upon the mode of creating municipal debts of that kind. The principal question was as to the conclusiveness of certain recitals in the bonds sued on in that case. This court said: "The estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is

involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be, that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow, that all persons claiming under the exercise of such a power might be put to proof of the fact, made a condition of its lawfulness, notwithstanding any recitals in that instrument. This principle is the essence of the rule declared upon this point, by this court, in the well-considered words of Mr. Justice Strong, in *Coloma* v. *Eaves*, 92 U. S. 484, where he states (p. 491) that it is, 'where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with,' that 'their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclu-

sive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' The converse is embraced in the proposition and is equally true. If the officers authorized to issue bonds, upon a condition, are not the appointed tribunals to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

In *Lake County* v. *Graham*, 130 U. S. 674, 680, 683–684, the question was as to the validity of certain bonds issued by Lake County, Colorado, under the very statute of that State referred to in the bonds the coupons of which are here in suit, namely, the above act of February 21, 1881, authorizing the several counties of the State to fund their floating indebtedness. It was recited in each of the bonds sued on in that case that they were issued under and by virtue of and in full compliance with that act, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." No one of the bonds, let it be observed, contained any recital that it was issued in conformity to the provisions of the state constitution. This court said: "Nothing is better settled than this rule — that the purchaser of bonds, such as these, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to the protection of such recitals of facts as the bonds may contain. In this case the constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals one million of dollars, there is a

maximum limit beyond which those counties can incur no further indebtedness under any possible conditions, provided, that in calculating that limit, debts contracted before the adoption of the constitution are not to be counted. The statute, on the other hand, charges the purchaser with knowledge of the fact that the county commissioners were to issue bonds, at par, in exchange for such warrants of the county as were themselves issued prior to the date of the first publication of the notice provided for; that the only limitation on the issue of bonds in the statute was, that the bonds should not exceed in amount the sum of the county indebtedness on the day of notice aforesaid; that while the commissioners were empowered to determine the amount of such indebtedness, yet the statute does not refer that board, for the elements of its computation, to the constitution or to the standards prescribed by the constitution, but leaves it open to them, without departing from any direction of the statute, to adopt solely the basis of the county warrants. The recitals of the bonds were merely to the effect that the issue was 'under, and by virtue of, and in full compliance with,' the *statute;* 'that all the provisions and requirements *of said act* have been fully complied with by the proper officers in the issuing of this bond;' and that the issuing was 'authorized by a vote of a majority of the duly qualified electors,' etc.; no express reference being made to the constitution, nor any statement made that the constitutional requirements had been observed. There is, therefore, no estoppel as to the *constitutional* question, *because there is no recital in regard to it. Carroll County* v. *Smith*, 111 U. S. 556." In disposing of the contention that, under the doctrines of certain adjudged cases, the county was estopped to deny that the bonds were issued in conformity to the constitution, the court said: "The question here is distinguishable from that in the cases relied on by counsel for defendant in error. In this case the standard of validity is created by the constitution. In that standard two factors are to be considered; one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself,

it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts. In the case of *Sherman County* v. *Simons*, 109 U. S. 735, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was, that the legislature, being the source of exaction, had created a board authorized to determine whether its action had been complied with, and that its finding was conclusive to a *bona fide* purchaser. So also in *Oregon* v. *Jennings*, 119 U. S. 74, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people."

This brings us in our reference to the authorities to the important case of *Chaffee County* v. *Potter*, 142 U. S. 355, 363, 364, 366. That was an action upon coupons of bonds issued by Chaffee County, Colorado, under the act of February 21, 1881, under which the bonds here in suit were issued. The bonds and coupons were in the same form and contained the *same recitals* as the above bonds issued by Gunnison County, and were of like date. The defence in part in the *Chaffee County case* was that the bonds, and each of them, were issued in violation of the constitution of the State. After referring to the decision in *Lake County* v. *Graham* (the bonds in which did not contain any express recitals as to the constitutional limit of indebtedness), and stating that it was based largely on the ruling in *Dixon County* v. *Field*, this court said: "To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and in the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from *Lake County* v. *Graham* and *Dixon County* v. *Field*, and *are sufficient to operate as an estoppel against the county.* Of course, the purchaser of bonds in open market was bound to take notice of

the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds, there was any express recital that the limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County case*, and in *Dixon County* v. *Field*, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is — What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County* v. *Graham* and *Dixon County* v. *Field*. But that is not this case. Here, by virtue of the statute under which the bonds were issued, *the county commissioners were to determine the amount to be issued*, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the State and the statute under which they

were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and *that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue*, under the law, *estops the county from saying that it is untrue. Town of Coloma* v. *Eaves*, 92 U. S. 484; *Town of Venice* v. *Murdock*, 92 U. S. 494; *Marcy* v. *Township of Oswego*, 92 U. S. 637; *Wilson* v. *Salamanca*, 99 U. S. 499; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608." After referring to what was said in *Town of Coloma* v. *Eaves* and *Buchanan* v. *Litchfield*, the court thus concludes its opinion: "We think this case comes fairly within the principles of those just cited; and that it is not governed by *Dixon County* v. *Field* and *Lake County* v. *Graham*, but is distinguishable from them in the essential particulars above noted."

It is contended that the present case is controlled by *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230, 235, 237–8, rather than by *Chaffee County* v. *Potter*. The action in the *Sutliff case* was upon coupons of bonds issued by a county of Colorado, each bond reciting that it was issued under and by virtue of and in compliance with the act of assembly entitled "An act concerning counties, county officers and county government, and repealing laws on these subjects," approved March 24, 1877, and it was certified in each bond that "all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." It was a vital fact in that case that there was no recital in the bonds that the indebtedness thus created was not in excess of the constitutional limit. Still the defence was that the bonds in fact increased the indebtedness of the county to an amount in excess of the limit prescribed by the state constitution and therefore were illegal and void. The court, upon the facts certified and in the light of previous decisions, held it to be clear that "the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the duty

of examining the records of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the constitution. In those cases," it continued, "in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the State, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy* v. *Oswego*, 92 U. S. 637; *Humboldt* v. *Long*, 92 U. S. 642; *Dixon County* v. *Field*, 111 U. S. 83; *Lake County* v. *Graham*, 130 U. S. 674, 682; *Chaffee County* v. *Potter*, 142 U. S. 355, 363. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds." After referring to *Dixon County* v. *Field*, above cited, the court proceeded to show the precise grounds upon which the decisions in *Lake County* v. *Graham* and *Chaffee County* v. *Potter* were rested: "That decision [*Dixon County* v. *Field*] and the ground upon which it rests were approved and affirmed in *Lake County* v. *Graham* and *Chaffee County* v. *Potter*, above cited, each of which arose under the article of the constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County* v. *Graham*, each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to

be estopped to plead that limit. 130 U. S. 682, 683. In *Chaffee County* v. *Potter*, on the other hand, the bonds contained an express recital *that the total amount of the issue did not exceed the constitutional limit*, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: 'The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the constitution, in the premises.' 142 U. S. 363. The case at bar does not fall within *Chaffee County* v. *Potter*, and cannot be distinguished in principle from *Dixon County* v. *Field* or from *Lake County* v. *Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

It thus appears that in the *Sutliff case* the court neither modified, nor intended to modify, but distinctly recognized, the principle announced in *Chaffee County* v. *Potter*, namely, that the recital in the bonds that the debt thereby created did not exceed the limit prescribed by the constitution estopped the county from asserting, as against a *bona fide* holder for value, that the contrary was the fact.

We have made this extended reference to adjudged cases because of the wide difference among learned counsel as to the effect of our former decisions. This course has also been pursued in order to bring out clearly the fact that the present case is controlled by the judgment in *Chaffee County* v. *Potter*. The views of the Circuit Court, as expressed in its charge in

this case and as enforced by its peremptory instruction to find for the defendant, cannot be approved without overruling that case. It was expressly decided in the *Chaffee County case* that the statute under which the bonds there in suit (the bonds here in suit being of the same class) authorized the County Commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the constitution and the statute; and that the recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County* v. *Potter*, and upon the authority of that case, and without reëxamining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit and were issued by virtue of and in conformity with the statute of 1881 and in full compliance with the requirements of law.

We have assumed thus far that the plaintiff corporation was a *bona fide* purchaser or holder of the bonds to which the coupons in suit were attached. Upon this question we concur in the views expressed by the Circuit Court of Appeals. Speaking by Judge Thayer, that court said: "The testimony contained in the present record shows, we think, without contradiction that the plaintiff was a *bona fide* holder when the suit was brought of at least five of the bonds which are involved in the present controversy, because it holds the title of Joseph Stanley, who was himself an innocent purchaser of said bonds before maturity, for the price of ninety-eight cents on the dollar. The rights which Stanley acquired by virtue of such purchase inure to the plaintiff, by virtue of its purchase of the bonds from Stanley in June, 1892, and this without reference to any knowledge which the plaintiff may have had at the latter date affecting the validity of the secu-

rities. A *bona fide* holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defences existing against the paper. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 286; *Hill* v. *Scotland County*, 34 Fed. Rep. 208; Daniel on Negotiable Instruments, (4th ed.,) § 803, and cases there cited." 49 U. S. App. 399, 413.

The remaining five bonds owned by the plaintiff corporation were also purchased from Stanley, who received them directly from the county in exchange for warrants that he owned and held. There is no reason why upon the surrender of county warrants for county bonds he was not entitled to the benefit of the rule above declared as to the conclusiveness of the recital in the bonds, or why he may not be regarded as much an innocent holder of the bonds exchanged for county warrants as of the other bonds purchased by him in open market. There is no proof that at the time of such exchange he had or was chargeable with knowledge or notice that the debt created by the bonds exceeded the constitutional limit; consequently, in taking the bonds in exchange he was entitled, for the reasons heretofore given, to rely upon the truth of the recitals contained in them. When the Board of County Commissioners, proceeding under the act of 1881, offered to exchange county bonds for the warrants held by him, he was entitled under the circumstances disclosed to assume it to be true as recited in the bonds that the constitutional limit was not being exceeded.

It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a state constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market

in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defence that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities.

It follows that the Circuit Court erred in directing the jury to return a verdict for the defendant.

What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. Those rulings were inconsistent with the principles herein announced.

As neither the Circuit Court nor the Circuit Court of Appeals proceeded in accordance with the principles herein announced, the judgment of each court is

Reversed, and the cause is remanded for further proceedings consistent with this opinion.

OHIO *v.* THOMAS.

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

No. 353. Argued and submitted January 10, 1899. — Decided February 27, 1899.

In making provision for feeding the inmates of the soldiers' home in Ohio, in accordance with the legislation of Congress in that respect, and under the direction of the board of managers, the governor of the house is engaged in the internal administration of a Federal institution, and the state legislature has no constitutional power to interfere with the management which is provided for it by Congress, nor with the provisions made by Congress for furnishing food to the inmates, nor does the police power of the State enable it to prohibit or regulate the furnishing of any

Statement of the Case.

article of food approved by the officers of the home, by the board of managers and by Congress.

Federal officers who are discharging their duties in a State, and who are engaged in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.

This is one of the cases in which it is proper to issue a writ of *habeas corpus* from the Federal court under the rule as stated in *Ex parte Royall*, 117 U. S. 241, instead of awaiting the slow process of a writ of error from this court to the highest court of the State where the decision could be had.

In this case complaint was made by affidavit by the dairy commissioner of Ohio against the appellee, alleging that on March 2, 1897, he violated the act of the legislature of the State of Ohio, passed in 1895, (92 Ohio State Laws, 23,) in relation to the use of oleomargarine. Appellee was arrested and brought before a justice of the peace, and declined to plead to the charge on the ground that the act complained of in the affidavit of the complainant was performed by him as governor of the soldiers' home, located in the county of Montgomery in the State of Ohio, and what he did was done by the authority of the board of managers of the home. He therefore moved to dismiss the complaint for want of jurisdiction in the magistrate. This motion was denied. He then consented to be tried without a jury upon the following agreed statement of facts:

"1. That on the 2d day of March, 1897, Joseph E. Blackburn was and now is the food and dairy commissioner of the State of Ohio.

"2. That on the 2d day of March, 1897, J. B. Thomas was and now is the duly chosen and acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in the county of Montgomery, State of Ohio, and as said governor was in charge of the eating house at the said Central Branch of the National Home for Disabled Volunteer Soldiers.

"3. Said eating house is used by said J. B. Thomas for serving and furnishing to the inmates of said Central Branch of the National Home for Disabled Volunteer Soldiers their daily

food or rations, and is the only place so provided at said National Home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held and used by the United States therefor, and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof, under appropriations made by the Congress of the United States for the support of said inmates; and that no placard in size not less than 10 x 14 inches, having printed thereon in black letters not less in size than 1½ inches square, the words 'oleomargarine sold and used here,' was displayed in said eating house.

"4. The affidavit in the cause is made in conformity with an act of the general assembly of the State of Ohio, (Ohio Laws, vol. 92, p. 23,) passed in 1895, and entitled 'An act to amend section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the State of Ohio,"' passed May 16, 1894."

Section 3 of the act, as so amended, reads as follows:

"SEC. 3. Every proprietor, keeper, manager or person in charge of any hotel, boat, railroad car, boarding house, restaurant, eating house, lunch counter or lunch room, who therein sells, uses, serves, furnishes or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining room, eating house, restaurant, lunch room or place where such substance is furnished, served, sold or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'oleomargarine sold and used here,' and said card shall not contain any other words than the ones above described; and such proprietor, keeper, manager or person in charge shall not sell, serve or dispose of such substance as or for butter when butter is asked for or purported to be furnished or served."

In addition to the above statement, reference was made to

the following acts of Congress, providing for the creation and government of the National Homes for Disabled Volunteer Soldiers, viz.: act of March 3, 1865, c. 91, 13 Stat. 509; act of March 21, 1866, c. 21, 14 Stat. 10; act of March 3, 1875, c. 129, 18 Stat. 343, 359. By the last cited statute, on page 359, it is made the duty of the managers of the home, on or before the first day of August in each year, "to furnish to the Secretary of War estimates, in detail, for the support of said home for the fiscal year commencing on the first day of July thereafter; and the Secretary of War shall annually include such estimates in his estimates for his Department. And no moneys shall, after the first day of April, 1875, be drawn from the Treasury for the use of said home, except in pursuance of quarterly estimates, and upon quarterly requisitions by the managers thereof upon the Secretary of War, based upon such quarterly estimates, for the support of said home, for not more than three months next succeeding such requisition. . . . And the managers of said home shall, at the commencement of each quarter of the year, render the Secretary of War an account of all their receipts and expenditures for the quarter immediately preceding, with vouchers for such expenditures; and all such accounts and vouchers shall be authenticated by the officers of said home thereunto duly appointed by said managers, and audited and allowed as required by law for the general appropriations and expenditures of the War Department."

By the act approved August 4, 1886, c. 902, 24 Stat. 222, 251, it was also provided that "hereafter the estimates for the support of the Home for Disabled Volunteer Soldiers shall be submitted by items." Also by the act approved October 2, 1888, c. 1069, 25 Stat. 505, 543, it was "*Provided further*, That it shall be the duty of the managers of said home, on or before the first day of October, in each year, to furnish to the Secretary of War estimates, in detail, for the support of said home for the fiscal year commencing on the first day of July thereafter, and the Secretary of War shall annually include such estimates in his estimates for his department." Also by the act approved June 11, 1896, c. 420, 29

Stat. 413, 445, an appropriation was made for the support of the home at Dayton, Ohio, and for "the cost of all articles purchased for the regular ration, their freight, preparation and serving."

The material portions of the acts of March 3, 1865, and March 21, 1866, have been enacted in the Revised Statutes of the United States, being sections 4825 to 4837, both inclusive.

On the third of April, 1867, the legislature of the State of Ohio passed an act ceding jurisdiction to the United States over the lands and their appurtenances within the State of Ohio which might be acquired by donation or purchase by the managers of the National Asylum for Disabled Volunteer Soldiers within the State of Ohio, for the uses and purposes of the asylum.

By the act, approved January 21, 1871, c. 25, 16 Stat. 399, Congress ceded back to the State of Ohio jurisdiction over the place named, and relinquished such jurisdiction on the part of the United States, and the act contained the following: "And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: *Provided*, That nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers, incorporated under said act, in and over said territory."

Upon these facts the appellee was convicted by the magistrate before whom he was tried, and was sentenced to pay a fine of $50, and to be imprisoned until such fine was paid. He refused to pay the fine, and applied to the Circuit Court of the United States for the Southern District of Ohio, Western Division, for a writ of *habeas corpus*, on the ground that the state tribunal before which he was tried had no jurisdiction to try him. The writ was granted and the constable made return thereto, setting up that he held appellee under the mittimus from the justice of the peace before whom he was tried. Upon the hearing the court made an order discharging appellee. 58 U. S. App. 431. The State appealed from that order to the Circuit Court of Appeals for the Sixth

Circuit, where it was affirmed, (87 Fed. Rep. 453,) and the State then appealed to this court.

Mr. Charles H. Bosler and *Mr. Otto J. Renner*, for plaintiff in error, submitted on their brief.

Mr. Judson Harmon for defendant in error. *Mr. D. W. Bowman* was on his brief.

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

The act of the legislature of the State of Ohio, passed May 16, 1868, ceding jurisdiction to the United States, if it had remained in force, would have prevented the state officials from taking jurisdiction in this case. Congress, however, by the act of January 21, 1871, ceded back and relinquished the jurisdiction that had been granted, and provided that it would claim or exercise no jurisdiction thereafter, except as therein mentioned.

If we assume, what the state court decided, that the provisions of the state statute relating to the sale of oleomargarine were intended to apply to and cover the soldiers' home, the question then arises whether the State had the power to legislate so as to control the governor of the home, acting under the direction of the board of managers and by the authority of Congress, in regard to the internal administration of the affairs of the home and in respect to the conditions upon which an article of food might be provided by the governor under such directions and authority.

The home is a Federal creation, and is under the direct and sole jurisdiction of Congress. The board of managers have certain powers granted them, Rev. Stat. § 4825, and among other things to make by-laws, rules and regulations not inconsistent with law for carrying on the business and government of the home.

The persons entitled to the benefits of the home are "officers and soldiers who served in the late war for the suppression of the rebellion," and also other soldiers and sailors. The inmates

are subject to the rules and articles of war, the same as if they were in the army. Rev. Stat. §§ 4832, 4835.

Under the statutes above cited, in which it is provided that the board of managers shall furnish to the Secretary of War, in each year, estimates, in detail, for the support of the home for the succeeding fiscal year, it would naturally be the duty of the governor of each home, in order to enable the board of managers to perform their own duty, to report to the board the same kind of detailed estimates that the board is by law directed to report to the Secretary of War, and which are to be included by the Secretary in the estimates for his department. At all events, the duty is laid upon the board of managers, by the very terms of the statute, to make these estimates in detail. It is admitted in the record that the oleomargarine complained about herein was served and furnished by the appellee as food and as part of the rations furnished the inmates under the appropriations made by Congress for the support of such inmates.

From these facts the inference is plain that oleomargarine had been included in the detailed estimates for rations to be furnished the inmates, and that the appropriation for rations included oleomargarine as part thereof. Otherwise we should have to infer a dereliction of duty on the part of the board of managers in not making out estimates in detail, and we would adopt an inference contrary to the admission, which states that the oleomargarine was furnished as food under an appropriation of Congress. The appropriation does not precede the detailed estimates, but is made subsequently and is presumably enacted with reference thereto. Congress has therefore in effect provided oleomargarine as part of the rations for the inmates of the home. It is given them in the mess room of the institution and under the rules and regulations for feeding them there. In making provision for so feeding the inmates, the governor, under the direction of the board of managers and with the assent and approval of Congress, is engaged in the internal administration of a Federal institution, and we think a state legislature has no constitutional power to interfere with such management as is provided by Congress.

Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application.

We mean by this statement to say that Federal officers who are discharging their duties in a State and who are engaged as this appellee was engaged in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority.

In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the State. The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed.

The claim is made that neither the board of managers nor the governor of the home can through their officers or by himself violate the statute law of a State having jurisdiction, when the acts constituting the infringement are not necessary for the government and management of the home for the purpose for which it was incorporated, or authorized by any act of the United States.

This claim might be conceded and still the conviction of the appellee would be invalid, because we find in this record the authority of the United States for the act of the governor. The statutes above referred to, when taken in connection with the admitted facts, show an appropriation by Congress for the

purchase of oleomargarine as part of the regular rations of the inmates of the home. The act of the governor in serving it was authorized by Congress and it was therefore legal, any act of the State to the contrary notwithstanding.

Under the facts herein the state court had no jurisdiction to try the appellee for the offence charged in the written complaint made to the magistrate. See authorities cited in *In re Waite*, 81 Fed. Rep. 359.

Assuming, in accordance with the decision of the state court, that the act of the Ohio legislature applies in terms to the soldiers' home at Dayton, in that State, we are of opinion that the governor was not subject to that law and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the act complained of was performed as part of the duty of the governor as a Federal officer in and by virtue of valid Federal authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio.

The authorities cited in the case of *In re Waite*, *supra*, and those cited by the learned circuit judge in this case fully support the view we have taken herein. The cases of *Tennessee* v. *Davis*, 100 U. S. 257; *Ex parte Siebold*, 100 U. S. 371, 394, 395; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1, all concur in upholding the paramount authority of the Federal government under circumstances similar, in effect, to those set forth in this record.

Some of the same authorities also show that this is one of the cases where it is proper to issue a writ of *habeas corpus* from the Federal court instead of awaiting the slow process of a writ of error from this court to the highest court of the State where a decision could be had. One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall*, 117 U. S. 241; *Whitten* v. *Tomlinson*, 160 U. S. 231, and *Baker* v. *Grice*, 169 U. S. 284, consists in the fact that the Federal officer proceeded against in the courts of the State may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal government might in the meantime be

obstructed. This is such a case. In *Ex parte Royall*, it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down, that "When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission or order or sanction of any foreign State or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority."

For the reasons herein given we think the order of the Circuit Court of Appeals, affirming the Circuit Court, was right, and it must be

Affirmed.

Mr. Justice Harlan concurred in the judgment, but not in all the reasoning of the opinion.

The Chief Justice took no part in the consideration or decision of this case.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 95. Argued December 13, 1898. — Decided February 20, 1899.

The statute of Ohio relating to railroad companies, in that State which provides that "Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand in-

habitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employé thereof, violate, or cause or permit to be violated, this provision, such company, agent or employé shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the State, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section, the company whose agent or employé caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation," is not, in the absence of legislation by Congress on the subject, repugnant to the Constitution of the United States, when applied to interstate trains, carrying interstate commerce through the State of Ohio on the Lake Shore and Michigan Southern Railway.

The case is stated in the opinion.

Mr. George C. Greene for plaintiff in error.

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

Mr. Justice Harlan delivered the opinion of the court.

This action was commenced before a justice of the peace of the county of Cuyahoga, Ohio, to recover the penalty prescribed by section 3320 of the Revised Statutes of that State. That section is a part of a chapter relating to railroad companies, and, as amended by the act of April 13, 1889, provides:

"Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employé thereof, violate, or cause or permit to be violated, this provision, such company, agent or employé shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the State, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provisions of this section,

the company whose agent or employé caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held, *prima facie*, to have caused the violation." Laws of Ohio, 1889, vol. 86, p. 291; Rev. Stat. Ohio, 1890, § 3320.

The case was removed for trial into the court of common pleas of Cuyahoga County in which a judgment was rendered against the railroad company for the sum of one hundred dollars. Upon writ of error to the Circuit Court of that county the judgment was affirmed, and the judgment of the latter court was affirmed by the Supreme Court of Ohio.

The facts upon which the case was determined in the state court were as follows:

The plaintiff Lawrence is a resident of West Cleveland, a municipal corporation of Ohio having more than three thousand inhabitants.

The defendant railway company is a corporation organized under the respective laws of Ohio, New York, Pennsylvania, Indiana, Michigan and Illinois, and owns and operates a railroad located partly within the village of West Cleveland. Its line extends from Chicago through those States to Buffalo.

On the 9th day of October, 1890, as well as for some time prior thereto and thereafter, the company caused to run daily both ways over its road within the limits of West Cleveland three or more regular trains carrying passengers. And on that day (which was not Sunday) it did not stop or cause to be stopped within that village more than one of such trains each way long enough to receive or let off passengers.

On the day above named and after that date the company was engaged in carrying both passengers and freight over its railroad from Chicago and other stations in Indiana and Michigan through each of said several States to and into New York, Pennsylvania and Ohio and to Buffalo, and from Buffalo through said States to Chicago. It did not on that day nor shortly prior thereto nor up to the commencement of the present suit, run daily both ways or either way over said road through the village of West Cleveland, three regular trains nor more than one regular train each way carrying passengers " which were

not engaged in interstate commerce, or that did not have upon them passengers who had paid through fare, and were entitled to ride in said trains going in the one direction from the city of Chicago to the city of Buffalo, through the States of Indiana, Ohio and Pennsylvania, and those going the other direction from the city of Buffalo . . . through said States to the city of Chicago."

On or about the day named the company operated but one regular train carrying passengers each way that was not engaged in carrying such through passengers, and that train did stop at West Cleveland on that day for a time sufficient to receive and let off passengers.

The through trains that passed westwardly through West Cleveland on the 9th day of October, 1890, were a limited express train having two baggage and express cars, one passenger coach and three sleepers, from New York to Chicago; a fast mail train having five mail cars, one passenger coach and one sleeper from New York to Chicago; and a train having one mail car, two baggage and express cars, four passenger coaches and one sleeper from Cleveland to Chicago. The trains running eastwardly on the same day through West Cleveland were a limited express train having one baggage and express car and three sleepers from Chicago to New York; a train having one baggage and express car, three passenger coaches and two sleepers from Chicago to New York; a train having one mail car, two baggage and express cars and seven passenger coaches from Chicago to Buffalo; and a train having three mail cars and one sleeper from Chicago to New York.

The average time required to stop a train of cars and receive and let off passengers is three minutes.

The number of villages in Ohio containing three thousand inhabitants through which the above trains passed on the day named was thirteen.

The trial court found as a conclusion of law that within the meaning of the Constitution of the United States the statute of Ohio was not a regulation of commerce among the States and was valid until Congress acted upon the subject. This gen-

eral view was affirmed by the circuit court of Cuyahoga County and by the Supreme Court of Ohio.

The plaintiff in error contends that as the power to regulate interstate commerce is vested in Congress the statute of Ohio in its application to trains engaged in such commerce is directly repugnant to the Constitution of the United States.

In support of this contention it insists that an interstate railroad carrier has the right to start its train at any point in one State and pass into and through another State without taking up or setting down passengers within the limits of the latter State. As applied to the present case, that contention means that the defendant company, although an Ohio corporation deriving all its franchises and privileges from that State, may, if it so wills, deprive the people along its line in Ohio of the benefits of interstate communication by its railroad; in short, that the company if it saw fit to do so could, beyond the power of Ohio to prevent it, refuse to stop within that State trains that started from points beyond its limits, or even trains starting in Ohio destined to places in other States.

In the argument at the bar as well as in the printed brief of counsel, reference was made to the numerous cases in this court adjudging that what are called the police powers of the States were not surrendered to the General Government when the Constitution was ordained but remained with the several States of the Union. And it was asserted with much confidence that while regulations adopted by competent local authority in order to protect or promote the public health, the public morals or the public safety have been sustained where such regulations only incidentally affected commerce among the States, the principles announced in former adjudications condemn as repugnant to the Constitution of the United States all local regulations that affect interstate commerce in any degree if established merely to subserve the *public convenience.*

One of the cases cited in support of this position is *Hennington* v. *Georgia*, 163 U. S. 299, 303, 308, 317, which involved the validity of a statute of Georgia providing that "if any freight train shall be run on any railroad in this

State on the Sabbath Day (known as Sunday), the superintendent of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such trains shall pass, and on conviction shall be punished. . . . *Provided, always*, That whenever any train on any railroad in this State, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for the freight trains on the different railroads in this State running over said roads on Saturday night, to run through to destination: *Provided*, The time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than eight o'clock on Sunday morning." This court said: "The well-settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

The contention in that case was that the running of railroad cars laden with interstate freight was committed exclusively to the control and supervision of the National Government; and that although Congress had not taken any affirmative action upon the subject, state legislation interrupting interstate commerce even for a limited time only, whatever might be its object and however essential such legislation might be for the comfort, peace or safety of the people of the State, was a regulation of interstate commerce forbidden by the Constitution of the United States.

After observing that the argument in behalf of the defendant rested upon the erroneous assumption that the statute of Georgia was such a regulation of interstate commerce as was

forbidden by the Constitution without reference to affirmative action by Congress, and not merely a statute enacted by the State under its police power, and which, although in some degree affecting interstate commerce, did not go beyond the necessities of the case, and therefore was valid, at least until Congress intervened, this court, upon a review of the adjudged cases, said: "These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." Again: "We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the

State by which it was established, and therefore not invalid by force alone of the Constitution of the United States."

It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the States, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals or safety of the public, and do not embrace regulations designed merely to promote the *public convenience.*

This is an erroneous view of the adjudications of this court. While cases to which counsel refer involved the validity of state laws having reference directly to the public health, the public morals or the public safety, in no one of them was there any occasion to determine whether the police powers of the States extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are however numerous decisions by this court to the effect that the States may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, 729, which involved the validity of a state enactment authorizing the construction of a permanent bridge over the Schuylkill River within the limits of Philadelphia, and which bridge in fact interfered with the use of the river by vessels of a certain size which had been long accustomed to navigate it, the court said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it ob-

structs. *It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other.* The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation."

So, in *Pound* v. *Turck*, 95 U. S. 459, 464, which was a case where obstructions — piers and booms — had been placed under the authority of the State of Wisconsin in the Chippewa River, one of the navigable waters of the United States, it was said: "There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use *as will best reconcile and accommodate the interest of all concerned in the matter.* And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

The same principles were announced in *Escanaba Company* v. *Chicago*, 107 U. S. 678, 683. That case involved the validity of a certain local ordinance regulating the opening and closing of bridges over the Chicago River within the limits of the city of Chicago. That ordinance required the bridges to be closed at certain hours of the day, so as not to obstruct the passage over them of vast numbers of operatives and other

people going to and from their respective places of business. It was conceded that by the closing of the bridges at those hours vessels were obstructed in their use of the river. This court in that case said: "The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, *convenience and prosperity of their people.* This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, *for the convenience and comfort of its inhabitants, and the growth of its commerce.* And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject the power of the State over bridges across its navigable streams is plenary." It was consequently adjudged that the city ordinance was not to be deemed such a regulation of interstate commerce as, in the absence of national legislation, should be deemed invalid.

In *Cardwell* v. *American Bridge Company*, 113 U. S. 205, 208, it was held that a statute of California authorizing a bridge *without a draw or opening for the passage of vessels* to be constructed over a navigable water of the United States within that State was not — in the absence of legislation by Congress — to be deemed repugnant to the commerce clause of the Constitution. The court, referring to prior cases, said: "In these cases the control of Congress over navigable waters within the States so as to preserve their free navigation under the commercial clause of the Constitution, the power of the States within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the States to regulate within their limits matters of internal police, which embraces among other things the construction, repair and maintenance of roads and bridges, and the establishment of ferries; that the States are more likely to appreciate the importance of these means of internal communication and to provide for their proper management, than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams." The doctrines of this case were reaffirmed in *Huse* v. *Glover*, 119 U. S. 543.

In *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 662, the question was presented whether a state enactment requiring telegraph companies with lines of wires wholly or partly within the State to receive telegrams and on payment of the charges thereon to deliver them with due diligence, was not a regulation of interstate commerce when applied to interstate telegrams. We held that such enactments did not in any

just sense regulate interstate commerce. It was said in that case: "While it is vitally important that commerce between the States should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress, the statute is a valid exercise of the power of the State over the subject."

So, in *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311, 315, it was adjudged that a statute of Virginia defining the obligations of carriers who accepted for transportation anything directed to points of destination beyond the termini of their own lines or routes, was not, in its application to interstate business, a regulation of interstate commerce within the meaning of the Constitution. This court said: "Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a State of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce." And the court cited in support of its conclusion the case of *Chicago, Milwaukee &c. Railway* v. *Solan*, 169 U. S. 133, 137, which involved the validity of state regulations as to the liability of carriers of passengers, and in which it was said: "They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

Now, it is evident that these cases had no reference to the health, morals or safety of the people of the State, but only

to the public convenience. They recognized the fundamental principle that outside of the field directly occupied by the General Government under the powers granted to it by the Constitution, all questions arising within a State that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the State, and that its legislative enactments relating to those subjects, and which are not inconsistent with the state constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is — to use the words of Chief Justice Shaw — the power "to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." *Commonwealth* v. *Alger*, 7 Cushing, 53, 85. Mr. Cooley well said: "It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition." Cooley's Const. Lim. (6th ed.) p. 715. It may be that such legislation is not within the "police power" of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with ref-

erence to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the General Government. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626.

It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the State of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains or any of them carrying interstate passengers at a particular place or places in the State for a reasonable time, so directly affects commerce among the States as to bring the statute, whether Congress has acted or not on the same subject, into conflict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequence whatever; for, it is said, a state regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the state enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the States, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the States and to be respected so long as Congress did not itself cover the subject by legislation. *Cooley* v. *Philadelphia*, 12 How. 299, 320; *Sherlock* v. *Alling*, 93 U. S. 99, 104; *Morgan* v. *Louisiana*, 118 U. S. 455, 463; *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, Chattanooga &c. Railway* v. *Alabama*, 128 U. S. 96, 100; *Hennington* v. *Georgia*, above cited; *Missouri, Kansas and Texas Railway* v. *Haber*, above cited; and *N. Y.*,

N. H. & Hartford Railroad v. *New York*, 165 U. S. 628, 631, 632, were all cases involving state regulations more or less affecting interstate or foreign commerce, but which were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce and valid until superseded by legislation of Congress on the same subject.

In the case last cited — *N. Y., N. H. & Hartford Railroad* v. *New York* — the question was as to the validity, when applied to interstate railroad trains, of a statute of New York forbidding the heating of passenger cars in a particular mode. This court said: "According to numerous decisions of this court sustaining the validity of state regulations enacted under the police powers of the State, and which incidentally affected commerce among the States and with foreign nations, it was clearly competent for the State of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passengers cars in that State by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people. The statute in question had for its object to protect all persons travelling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars.

. . . The statute in question is not directed against interstate commerce. Nor is it within the necessary meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

Consistently with these doctrines it cannot be adjudged that the Ohio statute is unconstitutional. The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules.

In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not go beyond the necessities of the case, and is not directed against interstate commerce. In *Railroad Co.* v. *Husen*, 95 U. S. 465, 473, reference was made to some decisions of state courts in relation to statutes prohibiting the introduction into a State of cattle having infectious diseases, and in which it was contended that it was for the legislature and not for the courts to determine whether such legislation went beyond the danger to be apprehended and was therefore something more than the exertion of the police power. This court said that it could not concur in that view; that as the police power of a State cannot obstruct either foreign or interstate commerce "beyond the necessity for its exercise," it was the duty of the courts to guard vigilantly against "needless intrusion" upon the field

committed by the Constitution to Congress. As the cases above cited show, and as appears from other cases, the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the State to protect the public interests or promote the public convenience.

In our judgment the assumption that the statute of Ohio was not directed against interstate commerce but is a reasonable provision for the public convenience, is not unwarranted. The requirement that a railroad company whose road is operated within the State shall cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city or village of three thousand inhabitants for a time sufficient to receive and let off passengers, so far from being unreasonable, will greatly subserve the public convenience. The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is only three minutes. Certainly, the State of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers travelling through the State between points outside of its territory. "The question is no longer an open one," this court said in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 657, "as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate property

for the purpose of a right of way, upon making just compensation to the owner, in the mode prescribed by law." In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the State. *Smyth* v. *Ames*, 169 U. S. 466, 544. The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the State without stopping. Any other view of the relations between the State and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders and without taking into consideration the interests of the general public. It would mean not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that beyond the power of the State to prevent it the defendant railway company could run all its trains

through the State without stopping at any city within its limits however numerous its population, and could prevent the people along its road within the State who desired to go beyond its limits from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned.

We perceive in the legislation of Ohio no basis for the contention that the State has invaded the domain of national authority or impaired any right secured by the National Constitution. In the recent case of *Jones* v. *Brim*, 165 U. S. 180, 182, it was adjudged that, embraced within the police powers of a State was the establishment, maintenance and control of public highways, and that under such powers reasonable regulations incident to the right to establish and maintain such highways could be established by the State. And the State of Ohio by the statute in question has done nothing more than to so regulate the use of a public highway established and maintained under its authority as will reasonably promote the public convenience. It has not unreasonably obstructed the freedom of commerce among the States. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it. It has only forbidden one of its own corporations from discriminating unjustly against a large part of the public, for whose convenience that corporation was created and invested with authority to maintain a public highway within the limits of the State.

It has been suggested that the conclusion reached by us is not in accord with *Hall* v. *De Cuir*, 95 U. S. 485, 488; *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 556, and *Illinois Central Railroad Company* v. *Illinois*, 163 U. S. 142, 153, 154, in each of which cases certain state enactments were adjudged to be inconsistent with the grant of power to Congress to regulate commerce among the States.

In *Hall* v. *De Cuir* a statute of Louisiana relating to carriers of passengers within that State, and which prohibited any discrimination against passengers on account of race or color, was

held — looking at its necessary operation — to be a regulation of and a direct burden on commerce among the States, and therefore unconstitutional. The defendant, who was sued for damages on account of an alleged violation of that statute, was the master and owner of a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, Louisiana, and Vicksburg, Mississippi, touching at the intermediate landings both within and without Louisiana as occasion required. He insisted that it was void as to him because it directly regulated or burdened interstate business. The court distinctly recognized the principle upon which we proceed in the present case, that state legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may to some extent or under some circumstances affect such commerce. But, speaking by Chief Justice Waite, it said: "We think it may be safely 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 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. . . . 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. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color." The import of that decision is that, in the absence of legislation by Congress, a state enactment may so directly and materially burden interstate commerce as to be in itself a regulation of such commerce. We cannot perceive that there is any conflict between the decision in that case and that now made. The Louisiana statute, as interpreted by the court, embraced every passenger carrier coming into the State. The Ohio statute does not interfere at all with the management of the defendant's trains outside of the State, nor does it apply to all its trains coming into the State. It relates only to the stopping of a given number of its trains within the State at certain points, and then only long enough to receive and let off passengers. It so manifestly subserves the public convenience, and is in itself so just and reasonable, as wholly to preclude the idea that it was, as the Louisiana statute was declared to be, a direct burden upon interstate commerce, or a direct interference with its freedom.

The judgment in *Wabash, St. Louis & Pacific Railway* v. *Illinois* is entirely consistent with the views herein expressed.

A statute of Illinois was construed by the Supreme Court of that State as prescribing rates not simply for railroad transportation beginning and ending within Illinois, but for transportation between points in Illinois and points in other States under contracts for continuous service covering the entire route through several States. Referring to the principle contained in the statute, this court held that if restricted to transportation beginning and ending within the limits of the State it might be very just and equitable, but that it could not be applied to transportation through an entire series of States without imposing a direct burden upon interstate commerce forbidden by the Constitution. In the case before us there is no attempt upon the part of Ohio to regulate the movement of the defendant company's interstate trains throughout the whole route traversed by them. It applies only to the movement of trains while within the State, and to the extent simply of requiring a given number, if so many are daily run, to stop at certain places long enough to receive and let off passengers.

Nor is *Illinois Central Railroad* v. *Illinois* inconsistent with the views we have expressed. In that case a statute of Illinois was held, in certain particulars, to be unconstitutional, (although the legislation of Congress did not cover the subject,) as directly and unnecessarily burdening interstate commerce. The court said: "The effect of the statute of Illinois, as construed and applied by the Supreme Court of the State, is to require a fast mail train, carrying interstate passengers and the United States mail, from Chicago in the State of Illinois to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus travelling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, it is admitted in this case, the railway company fur-

nishes other and ample accommodation. This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States." Again: "It may well be, as held by the courts of Illinois, that the arrangement made by the company with the Post Office Department of the United States cannot have the effect of abrogating a reasonable police regulation of the State. But a statute of the State, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation." The statute before us does not require the defendant company to turn any of its train from their direct interstate route. Besides, it is clear that the particular question now presented was not involved in *Illinois Central Railroad* v. *Illinois;* for it is stated in the court's opinion that "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the State, is not presented, and cannot be decided, upon this record." The above extracts show the full scope of that decision. Any doubt upon the point is removed by the reference made to that case in *Gladson* v. *Minnesota*, 166 U. S. 427, 431.

It has been suggested also that the statute of Ohio is inconsistent with section 5258 of the Revised Statutes of the United States authorizing every railroad company in the United States operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." In *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 638, above cited, it was held that the authority given by that statute to railroad companies to carry "freight and property" over their respective roads from one State to another State, did not authorize a railroad company to carry into a State

cattle known, or which by due diligence might be known, to be in such condition as to impart or communicate disease to the domestic cattle of such State; and that a statute of Kansas prescribing as a rule of civil conduct that a person or corporation should not bring into that State cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, could not be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes. And we adjudge that the above statutory provision was not intended to interfere with the authority of a State to enact such regulations, with respect at least to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public.

Imaginary cases are put for the purpose of showing what might be done by the State that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the State, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds.

For the reasons stated the judgment of the Supreme Court of Ohio is

Affirmed.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE BREWER and MR. JUSTICE PECKHAM, dissenting.

The Constitution of the United States, in its eighth section, confers upon Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and to establish post offices and post roads.

In pursuance of this power, Congress, on June 15, 1866, enacted that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." Rev. Stat. § 5258.

By the act of February 4, 1887, c. 104, entitled "An act to regulate commerce," 24 Stat. 379, Congress created the Interstate Commerce Commission, and enacted that the provisions of that act should "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States . . . ;" and that it should be unlawful for any common carrier, subject to the provisions of the act, to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination.

It was said by this court, in *California* v. *Central Pacific Railroad*, 127 U. S. 1, 39, that "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for

postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent — the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations."

In the case of *Cincinnati, New Orleans and Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, the validity of the act of February 4, 1887, was sustained, and its provisions were held applicable even to a railroad company whose entire road was within the limits of the State of its creation, when, by agreeing to receive goods by virtue of foreign through bills of lading and to participate in through rates and charges, it became part of a continuous line of transportation.

By an act approved February 23, 1869, the State of Louisiana forbade common carriers of passengers to make dis-

crimination on account of race or color. A person of color took passage upon a steamboat plying between New Orleans and Vicksburg, in the State of Mississippi, and was carried from New Orleans to her place of destination within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought an action in the district court for the parish of New Orleans, under the provisions of the act above referred to. By way of defence it was insisted that the statute was void, in respect to the matter complained of, because, as to the business of the steamboat, it was an attempt to regulate commerce between the States, and therefore in conflict with the Constitution of the United States. The state court held that the statute was valid, and the case was brought to this court, where the judgment of the state court was reversed. *Hall* v. *De Cuir*, 95 U. S. 485, 488. The reasoning of the court is so closely applicable to the case before us that we quote a considerable part of the opinion:

"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 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 hardships. 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. If this statute can be enforced against those engaged in interstate commerce, it may as well be against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, exemplary as well as actual, by any one who felt himself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law, or the civil law where that prevails, has provided

for the government of each business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton* v. *Missouri*, 91 U. S. 275, 282: 'Inaction [by Congress] is equivalent to a declaration that interstate commerce shall remain free and untrammelled.' Applying that principle to the circumstances of this case, congressional inaction left Benson [the captain of the steamboat] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the States."

I am not able to think that this decision is satisfactorily disposed of, in the principal opinion, by citing it, and then dismissing it with the observation that it is not perceived that there is any conflict between it and that now made.

The State of Illinois enacted that if any railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad, *for any distance within the State*, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight, of the same class over a greater distance of the same road, all

such discriminating rates, charges, collections or receipts, whether made directly or by the means of rebate, drawback or other shift or evasion, shall be deemed and taken against any such railroad company as *prima facie* evidence of unjust discrimination prohibited by the provisions of the act. The act further provided a penalty of not over $5000, and also that the party aggrieved should have a right to recover three times the amount of damages sustained, with costs and attorneys' fees. Rev. Stat. Ill. c. 114, § 126.

An action to recover penalties under this statute was brought by Illinois against the Wabash, St. Louis and Pacific Railway Company, an Illinois corporation, in which the allegations were that the railroad company had charged Elder & McKinney for transporting goods from Peoria, in the State of Illinois, to New York City, at the rate of fifteen cents per hundred pounds for a carload; that on the same day the railroad company had charged one Bailey, for transporting similar goods from Gilman to New York City, at the rate of twenty-five cents per hundred pounds per carload; that the carload for Elder & McKinney was carried eighty-six miles farther in the State of Illinois than the other carload of the same weight; that this freight being of the same class in both instances, and over the same road, except as to the difference in the distance, made a discrimination forbidden by the statute, whether the charge was regarded for the whole distance from the terminal point in Illinois to New York City, or the proportionate charge for the haul within the State of Illinois. Judgment went against the company in the courts of the State of Illinois, and the case was brought to this court.

It was here strenuously contended that, in the absence of congressional legislation, a state legislature has the power to regulate the charges made by the railroads of the State for transporting goods and passengers to and from places within the State, when such goods and passengers are brought from, or carried to, points without the State, and are, therefore, in the course of transportation from any State, or to another State. And of that view were several Justices of this court, who, in the opinion filed on their behalf, cited the very cases

that are cited and relied on in the majority opinion in the present case.

But the court did not so hold, *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557, 572; and its reasoning is so plainly applicable to the question now before us, it may well be quoted at some length.

After having reviewed some of the previous cases, and having quoted those passages in the opinion of the court in *Hall* v. *De Cuir*, 95 U. S. 485, which have hereinbefore been quoted, Mr. Justice Miller, giving the opinion of the court, proceeded as follows:

"The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to Central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation, and, in the language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for terms and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.'

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the

subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

"The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195–6. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses state lines, and extends into the States, and the power of Congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is, only, as a means of transportation, now largely superseded by railroads, he says: 'The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, "connected with commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York and act upon the very waters, [the Hudson River,] to which the prohibition now under consideration applies.' So the same power may pass the line of the State of Illinois and act upon its restriction upon the right of transportation extending over several States including that one.

"In the case of *Telegraph Co.* v. *Texas*, 105 U. S. 460, 465, the court held that 'a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods,' and that both companies are instruments of commerce, and their business is commerce itself. . . . In the case of *Welton* v. *Missouri*, 91 U. S.

275, 280, it was said: 'It will not be denied that that portion of commerce with foreign nations and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating state legislation.' And in *County of Mobile* v. *Kimball*, 102 U. S. 671, 702, the same idea is very clearly stated in the following language: 'Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.' . . . We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court, that the statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

"Let us see precisely what is the degree of interference with the transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair

and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but he is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.

"The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of carriage

through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rates.

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute, it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

This case, so recent and so elaborately considered, has not received adequate attention in the opinion of the court in the present case.

The legislature of Illinois, by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it to construct and maintain a railroad, with one or more tracks, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with the same to the city of Chicago on Lake Michigan, and also a branch

via the city of Galena to a point on the Mississippi River opposite the town of Dubuque, in the State of Iowa. The Chicago, St. Louis and New Orleans Railroad Company, a consolidated company formed under the legislatures of the States of Louisiana, Mississippi, Tennessee and Kentucky, whose line extended from New Orleans to the Ohio River, built a railroad bridge across the Ohio River to low-water mark on the Illinois side, to which the jurisdiction of the State of Kentucky extended. The north end of this bridge was at a part of Cairo about two miles north of the station of the Illinois Central Railroad Company in that city; and the peculiar conformation of the land and water made it impracticable to put the bridge nearer the junction of the Ohio and Mississippi rivers. By this bridge the road of the Illinois Central Railroad Company was thereby connected with that of the Chicago, St. Louis and New Orleans Railroad Company. Thereafter the Illinois Central Railroad Company put on a daily fast mail train, to run from Chicago to New Orleans, carrying passengers as well as the United States mail, not going to or stopping at its station in Cairo, but local trains adequate to afford accommodations for passengers to or from Cairo were run daily on that part of the railroad between the Bridge Junction and Cairo. By a subsequent act of 1889 it was enacted by the legislature of Illinois that "every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, All regular passenger trains shall stop a sufficient length of time, at the railroad station of county seats, to receive and let off passengers with safety."

In April, 1891, a petition was filed in the Circuit Court for Alexander County, in the State of Illinois, by the county attorney in behalf of the State, alleging that the Illinois Central Railroad Company ran its southbound fast mail train through the city of Cairo, two miles north of its station in that city, and over a bridge across the Ohio River, connecting its road with other roads south of that river, without stopping

at its station in Cairo, and praying for a writ of mandamus to compel it to cause all its passenger trains, coming into Cairo, to be brought down to that station, and there stopped a sufficient length of time to receive and let off passengers with safety.

The railroad company contended that the statute did not require its fast mail train to be run to and stopped at its station in Cairo, and that the statute was contrary to the Constitution of the United States, as interfering with interstate commerce, and with the carrying of the United States mail. The court granted the writ of mandamus, and the railroad company appealed to the Supreme Court of the State, which affirmed the judgment, and held that the statute of Illinois concerning the stoppage of trains obliged the defendant to cause its fast mail train to be taken into its station at Cairo, and be stopped there long enough to receive and let off passengers with safety, and that the statute, so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the United States mails. The case was brought to this court, where the judgment of the Supreme Court of Illinois was reversed in a unanimous opinion delivered by Mr. Justice Gray. *Illinois Central Railroad* v. *Illinois*, 163 U. S. 142, 153. After reciting several statutes of Illinois and of Congress, particularly the act of June 15, 1866, wherein Congress, for the declared purpose of facilitating commerce among the several States, and the postal and military communications of the United States, authorized every railroad company in the United States, whose road was operated by steam, to carry over its road, bridges and ferries, as well passengers and freight, as government mails, troops and supplies, from one State to another, and to connect, in any State authorizing it to do so, with roads of other States, so as to form a continuous line of transportation, the court proceeded to say:

"The effect of the statute of Illinois, as construed and applied by the Supreme Court of the State, is to require a fast mail train, carrying interstate passengers and the United States mails, from Chicago, in the State of Illinois, to places south of the Ohio River, over an interstate highway established

by authority of Congress, to delay the transportation of such passengers and mail, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus travelling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation. This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States. Upon the state of facts presented by this record, the duties of the Illinois Central Railroad Company were not confined to those which it owed to the State of Illinois under the charter of the company and other laws of the State; but included distinct duties imposed upon the corporation by the Constitution and laws of the United States.

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

"The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the State can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic."

Beyond the bare allegation that the case of *Illinois Central Railroad* v. *Illinois* is not inconsistent with the views expressed in the present case, no attempt is made to compare or reconcile the principles involved in the two cases. It is, indeed, said that the Ohio statute "does not require the defendant company to turn any of its trains from their direct interstate route;" and the remark of the court in the *Illinois case* is

cited, in which it was said "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the State, is not presented, and cannot be decided, upon this record." Reference is also made to the case of *Gladson* v. *Minnesota*, 166 U. S. 427, as removing any doubt as to the scope of the decision in the *Illinois case.*

But an examination of that case will show that no question was presented or decided as to the power of a State to compel interstate railroad trains to stop at all county seats through which they might pass. On the contrary, the court was careful to say, distinguishing it from the *Illinois case:* "But, in the case at bar, the train in question ran wholly within the State of Minnesota, and could have stopped at the county seat of Pine County without deviating from its course;" and to point out that the statute of Minnesota expressly provided that "*this act shall not apply to through railroad trains entering this State from any other State, or to transcontinental trains of any railroad.*"

On what then does the court's opinion rely to distinguish the *Illinois case* from the present case? Merely that the through train in the one case was obliged to go out of its direct route some three or four miles, while in the other the obligation is to stop at towns through which the trains pass. But what was the *reason* why this court held that the Illinois statute was void as an interference with interstate commerce? Was not the *delay* thus caused the sole reason? And is there any difference between a delay caused by having to go a few miles out of a direct course in a single instance, and one caused by having to stop at a number of unimportant towns? Probably the excursion to the Cairo station did not detain the Illinois train more than half an hour; and it is admitted in the present case that the number of villages in Ohio through which the trains passed were thirteen, and that the average time required to stop a train of cars and receive and leave off passengers would be three minutes at each station, to say nothing of the time expended in losing and in regaining headway. Besides the delays thus caused, there would be many

inconveniences to the railroad companies and to the travelling public occasioned by interfering with regulations made for the comfort and safety of through passengers.

Western Union Telegraph Co. v. *James*, 162 U. S. 650, is cited by the court as sustaining its present position. But that was a case in which the legislation of the State was of a nature that was in aid of the performance of the duty of the company that would exist in the absence of any such statute, and was in nowise obstructive of its duty as a telegraph company, and the decision of this court was expressly put upon that ground. It was pointed out, in the opinion, that the legislation in question could in no way affect the conduct of the company with regard to the performance of its duties in other States, and that such important particular distinguished the case from *Hall* v. *De Cuir*, 95 U. S. 485, and from *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347.

Richmond & Alleghany Railroad v. *Patterson Tobacco Co.*, 169 U. S. 311, is cited as adjudging that a statute of Virginia, defining the obligations of carriers who accept for transportation anything directed to points of destination beyond the termini of their own lines or routes, was not, in its application to interstate business, a regulation of interstate commerce within the meaning of the Constitution. But the holding in that case simply was that the statute in question did not attempt to substantially regulate or control interstate shipments, but merely established a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless by agreement its liability was limited to its own line — that the lawful exercise by a State of its power to determine the form in which contracts may be proven does not amount to a regulation of interstate commerce. The reasoning of the court went upon the assumption that if the statute was not merely a rule of evidence, but an attempt to regulate interstate commerce, it would have been void.

Reference is also made, in the principal opinion, to *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613. There an attack was made on the validity of legislation of the State

of Kansas, subjecting any person or persons who should bring into that State any cattle liable or capable of communicating "Texas or splenetic fever" to any domestic cattle of Kansas to a civil action for damages. In such an action it was contended, on behalf of the defendant, that the Kansas statutes were an interference with the freedom of interstate commerce, and also covered a field of action actually occupied by Congressional legislation, known as the Animal Industry Act. But it appeared that the Kansas act, under which the action was brought, was passed in 1885 and amended in 1891, and that Congress had previously invited the authorities of the States and Territories concerned to coöperate for the extinction of contagious or communicable cattle diseases. Act of May 29, 1884, c. 60, 23 Stat. 31. And accordingly a majority of this court held that the statutory provisions of Kansas were not inconsistent with the execution of the act of Congress, but constituted an exercise of the coöperation desired. Otherwise the case would have fallen within the ruling in *Railroad Co.* v. *Husen*, 95 U. S. 465, where a similar statute of the State of Missouri, passed before the legislation by Congress, and prohibiting the bringing of Texas cattle into the State of Missouri between certain times fixed by the statute, was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police power of the State.

The case of *Hennington* v. *Georgia*, 163 U. S. 299, demands notice. In it was involved the validity of what is known as the Sunday law of Georgia. That statute forbade the running in Georgia of railroad freight trains on the Sabbath day. The Supreme Court of Georgia held the statute to be a regulation of internal police and not of commerce, and that it was not in conflict with the Constitution of the United States even as to freight trains passing through the State from and to adjacent States, and laden exclusively with freight received on board before the trains entered Georgia and consigned to points beyond its limits.

It was shown, in that case, that it had been the policy of Georgia, from the earliest period of its history, to forbid all persons, under penalties, from using the Sabbath as a day of

labor and for pursuing their ordinary callings, and that the legislation in question was enacted in the exercise of that policy. It was said in the opinion of the Supreme Court of Georgia, which was brought to this court for review, that "with respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is notable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest." And it was said in the opinion of this court that "in our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State."

If, as has often been said, Christianity is part of the common law of the several States, and if the United States, in their legislative and executive departments throughout the country, since the foundation of the government, have recognized Sunday as a day of rest and freedom from compulsory labor, then such a law as that of Georgia, being based upon a public policy common to all the States, might be sustained.

But, if put upon the ground now declared in the opinion of the court in the present case, namely, as an exercise of the police power of the State, and, as such, paramount to the control of Congress in administering the commerce clause of the Constitution, then it is apparent, as I think, that the decision in *Hennington* v. *Georgia* was wrong, and the judges dissenting in that case were right.

For if, as a mere matter of local policy, one State may forbid interstate trains from running on the Christian Sabbath, an adjoining State may select the Jewish or Seventh Day Sabbath as the day exempt from business. Another State may choose to consecrate another day of the week in commemoration of the Latter Day Saint and Prophet who founded such State, as the proper day for cessation from daily labor.

Or, what is more probable, one or more of the States may think fit to declare that one day in seven is not a sufficient portion of the time that should be exempted from labor, and establish two or more days of rest. The destructive effect of such inconsistent and diverse legislation upon interstate commerce, carried on in trains running throughout the entire country, is too obvious to require statement or illustration.

But whatever may be said of the decision in *Hennington* v. *Georgia*, it is, as I think, quite apparent that the Ohio legislation, now under consideration, cannot be reconciled with the principles and conclusions of the other cases cited.

The principal facts of this case, as found by the trial court, were: "That the defendant company is a corporation organized under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, and that its railroad is operated from Chicago to Buffalo; that said defendant was on and prior to October 9, 1890, and has been ever since, engaged in carrying passengers and freight over said railroad, through and into each of said several States, and is and was then engaged in the business of interstate commerce, both in the carriage of passengers and freight from, into and through said States; that said defendant did not on said 9th day of October, 1890, nor shortly prior thereto, or since, up to the time of the commencement of this suit, run daily, both ways or either way, over said road through the village of West Cleveland, three regular trains nor more than one regular train each, carrying passengers, which were not engaged in interstate commerce, and that did not have upon them passengers who had paid through fare, and were entitled to ride on said trains going in the one direction from the city of Chicago to the city of Buffalo, and those going in the other direction from the city of Buffalo through said States to the city of Chicago; that on or about the said day the defendant operated but one regular train carrying passengers each way, that was not engaged in carrying such through passengers; and said train did stop at West Cleveland, on the day aforesaid, for a time sufficient to receive and let off passengers; that the through trains that passed through West Cleveland

on the said day were train No. 1, limited express, with two express cars, one coach and three sleepers, from New York to Chicago; train No. 11, fast mail, with five United States mail cars, one coach and sleeper, from New York to Chicago; train No. 21 had one United States mail car, two baggage and express cars, four coaches and one sleeper, from Cleveland to Chicago — these were western trains; that the eastern trains were limited express No. 4, with one baggage and express car and three sleepers from Chicago to New York; train No. 6, with one baggage and express car, three coaches and two sleepers, from Chicago to New York; train No. 24, with one United States mail, two baggage and express cars and seven coaches, from Chicago to Buffalo; train No. 14, with three United States mail cars and one sleeper, from Chicago to New York. That the average time of delay necessarily required to stop a train of cars and sufficient time to receive and let off passengers would be three minutes; and that the number of cities and villages in the State of Ohio, containing three thousand inhabitants each, through which the aforesaid trains of the defendant passed on said day, were thirteen."

It is, therefore, a conceded fact in the case that the through trains, which the legislature of Ohio seeks to compel to stop at prescribed villages and towns in that State, are engaged in carrying on interstate commerce by the transportation of freight and passengers. It is obvious, further, that such trains are within section 5258 of the Revised Statutes of the United States, authorizing such railroad companies "to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

It is also plain that the defendant railroad company and such of its trains as were engaged in interstate commerce are within the scope and subject to the regulations contained in the "act to regulate commerce," approved February 4, 1887, creating the Interstate Commerce Commission.

The theory on which passenger trains to traverse several States, or the entire continent, is prepared, is necessarily and widely different from that followed in making up ordinary trains to do a wayside business. There must be provision for sleeping at night, and for furnishing meals. In order that each and every passenger may receive the accommodation for which he pays, the seats are sold in advance, and with reference to the number of through passengers. To enable such trains to maintain the speed demanded, the number of the cars for each train must be limited, and they are advertised and known as "limited" trains. A traveller purchasing tickets on such trains has a right to expect that he will be carried to his journey's end in the shortest possible time, consistent with safety. The railroad companies compete for business by holding out that they run the fastest trains and those most certain to arrive on time. A company which, by its own regulations or under coercion of a state legislature, stopped its through trains at every village, would soon lose its through business, to the loss of the company and the detriment of the travelling public.

Nor must the necessity of the speedy transit of the United States mails be overlooked. The Government has not thought fit to build and operate railroads over which to transport its mails, but relies upon the use of roads owned by state corporations operating connecting roads. And it appears, from the findings in this case, that the defendant's through trains are engaged by the Government in the transportation of its mails. The business, public and private, that depends on hourly and daily communication by mail is enormous, and it would be intolerable if such necessary rapidity of intercourse could be controlled and trammelled by legislation like that in question.

It was pointed out in *Hall* v. *De Cuir* that, although the statute of Louisiana, which sought to regulate the manner in which white and colored passengers should be carried, was restricted by its own terms to the limits of the State, yet that such regulation necessarily affected steamboats running through and beyond the State, because such regulations might change at every state line.

A similar but much greater inconvenience would be occasioned by attempting by state legislation to interfere with the movements of through trains. If, for instance, and as is often the case, the through trains were full of through passengers, there would be no advantage to local travel for them to stop at the way stations, for there would be no room or accommodation for the occasional passengers. Nor would that difficulty be obviated by attaching to each train coaches for use at the way stations. Such additional coaches would impede the speed of the through trains, and interfere with the business of the local trains.

In *Wabash Railway Company* v. *Illinois*, it was said, replying to the argument that the state statute applied in terms only to transportation within the State: "Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation, and if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. . . . As restricted to a transportation which begins and ends within the limits of the State, it, the regulation, may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in freights, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated."

In *Illinois Central Railroad* v. *Illinois*, stress was justly

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

A similar purpose has been manifested by Congress, in the legislation hereinbefore referred to, by authorizing the formation of continuous lines of transportation, by creating a permanent commission to supervise the transactions of railroad companies so far as they affect interstate commerce, and by employing such continuous and connecting roads for the transportation of its mails, troops and supplies.

These views by no means result in justifying the railroad company defendant in failing to supply the towns and villages through which it passes with trains adequate and proper to transact local business. Such failure is not alleged in this case, nor found to be a fact by the trial court. And if the fact were otherwise, the remedy must be found in suitable legislation or legal proceedings, not in an enactment to convert through into local trains.

Some observations may be ventured on the reasoning employed in the opinion of the court. It is said:

"In what has been said we have assumed that the statute is not in itself *unreasonable*. In our judgment this assumption is not unwarranted. The requirement that a railroad company whose road is operated within the State shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city or village, of three thousand inhabitants, for a time sufficient to receive and let off passengers, so far from being *unreasonable*, will subserve the public convenience."

But the question of the *reasonableness* of a public statute is never open to the courts. It was not open even to the Supreme Court of the State of Ohio to say whether the act in question was reasonable or otherwise. Much less does the power of the legislature of Ohio to pass an act regulating a railroad corporation depend upon the judgment or opinion of *this* court as to the reasonableness of such an act.

And again: "It was for the State of Ohio to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was not bound to ignore the convenience of its own people, whether travelling on this road from one point to another within the State, or from places in the State to places beyond its limits, or the convenience of those outside the State who wish to come into it, and look only to the convenience of those who desired to pass through the State without stopping."

It was, I respectfully submit, just such action on the part of the State of Ohio, and just such reasoning made to support that action, that are forbidden by the Constitution of the United States and by the decisions of this court, hereinbefore cited. If each and every State, through which these interstate highways run, could take into consideration all the circumstances affecting passenger travel within its limits, and make such regulations as, in the opinion of its legislature, are "*just and for the convenience of its own people*," then we should have restored the confusion that existed in commercial transactions before the adoption of the Constitution, and thus would be overruled those numerous decisions of this court, nullifying state legislation proceeding on such propositions.

Again it is said:

"Any other view of the relations between the State and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean not only that such directors were the exclusive directors of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation, by reason of being engaged in interstate commerce, could build up cities and towns at the ends of its line, or at favored points, and by that means destroy or retard the growth and prosperity of intervening points. It would mean that the defendant railway company could, beyond the

power of the State to prevent it, run all of its trains through the State without stopping at any city within its limits, however numerous the population of such cities."

I am unable to perceive, in the views that prevailed in the *Louisiana* and *Illinois cases*, any foundation whatever, for such observations. In those cases it was expressly conceded that, in the regulation of commerce within the State and in respect to the management of trains so engaged, the authority of the state legislature is supreme. And, in the argument in behalf of the defendant company in this case, a similar admission is made.

It is fallacious, as I think, to contend that the Ohio legislation in question was enacted to promote *the public interest.* That can only mean the public interest of the State of Ohio, and the reason why such legislation is pernicious and unsafe is because it is based upon a discrimination in favor of local interests, and is hostile to the larger public interest and convenience involved in interstate commerce. Practically there may be no real or considerable conflict between the public interest that is local and that which is general. But, as the state legislatures are controlled by those who represent local demands, their action frequently results in measures detrimental to the interests of the greater public, and hence it is that the people of the United States have, by their constitution and the acts of Congress, removed the control and regulation of interstate commerce from the state legislatures.

Countenance seems to be given, in the opinion of the majority, to the contention that the power of Congress over the regulation of interstate commerce is not exclusive, by the observation that "the plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might, from time to time, establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us is in itself a regulation of interstate commerce when applied to trains carrying passengers from one State to another."

But it has already been shown that Congress has legislated expressly in relation to interstate trains and railroads, has made rules and regulations for their control, and has established a tribunal to make other rules and regulations.

Besides, as was observed by Mr. Webster, in his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1, 17: "The State may legislate, it is said, whenever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power. It has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as in its judgment the case requires, and those rules, whatever they are, constitute the system. All useful regulations do not consist in restraint; and that which Congress sees fit to leave free is a part of the regulation as much as the rest."

Attention is called to the fact that in the cases of *Hall* v. *De Cuir*, *Wabash Railway Company* v. *Illinois* and *Illinois Railroad* v. *Illinois*, there were no specific regulations by Congress as to providing separate accommodations for white and black passengers, as to rates of freight to be charged on interstate commerce, or as to stopping through trains at prescribed places, yet legislation by the States on those subjects was held void by this court as a trespass on the field of interstate commerce.

"The power of Congress to regulate commerce among the several States when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free, except as Congress might impose restraint. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States." *In re Rahrer*, 140 U. S. 545.

Mr. Justice White dissenting.

The statute is held not to be repugnant to the Constitution of the United States, because it is assumed to be but an exer-

cise of the lawful police power of the State, providing for the local convenience of its inhabitants. On this hypothesis, the statute is held valid, although it is conceded that it indirectly touches interstate commerce and remotely imposes a burden thereon. To my mind the Ohio statute, however, does not come within the purview of the reasoning advanced to support it, and therefore such considerations become irrelevant, and it is unnecessary to form any judgment as to their correctness.

My conception of the statute is that it imposes, under the guise of a police regulation for local convenience, a direct burden on interstate commerce, and, besides, expressly discriminates against such commerce, and therefore it is in conflict with the Constitution, even by applying the rules laid down in the authorities which are relied on as upholding its validity. Now, what does the statute provide? Does it require all railroads within the State to operate a given number of local trains and to stop them at designated points? Not at all. It commands railroads, *if they run three trains a day*, to cause at least three of such trains to be local trains, by compelling them to stop such trains at the places which the statute mentions. It follows then that under the statute one railroad, operating in the State, may be required to run only one local train a day and to stop such train, as the statute requires, and another railroad, reaching exactly the same territory and passing the same places, may be required to operate three trains a day and make the exacted stops with each of such trains. That is to say, although the same demands and the same local interest may exist as to the two roads, upon one is imposed a threefold heavier burden than upon the other. That this result of the statute is a discrimination it seems to me, in reason, is beyond question. If then the discrimination is certain, the only question which remains is, is it a discrimination against interstate commerce? If it is, confessedly the statute is repugnant to the Constitution of the United States. Whence then does the discrimination arise and upon what does it operate? It arises, alone, from the fact that the statute bases its requirement, not upon the demands of local con-

venience, but upon the volume of business done by the road, since it requires the road operating three trains to stop three as local trains, and the road operating one train to stop only one. But the number of trains operated is necessarily dependent upon the amount of business done, and the amount of business embraces interstate commerce as well as local business. But making the number of local trains dependent upon the volume of business is but to say that if a railroad has enough interstate business, besides its local business, to cause it to run one local and two interstate commerce trains each way each day, the increased trains thus required for the essential purposes of interstate commerce shall be local trains, whilst another railroad, which has no interstate commerce but only local business, requiring but one train a day, shall continue only to operate the one local train.

Whilst the power of the State of Ohio to direct all the railroads within its territory, to operate a sufficient number of local trains to meet the convenience of the inhabitants of the State may be *arguendo* conceded — although such question does not arise in this case and is not therefore necessary in my opinion to be decided — that State cannot, without doing violence to the commerce clause of the Constitution of the United States, impose upon the railroads operating within its borders a burden based, not upon local convenience, but upon the amount of interstate commerce business which the roads may do, thereby causing every interstate commerce railroad to have a burden resting upon it entirely disproportioned to local convenience and greatly more onerous than that resting upon roads doing a local business, and which have not a sufficient interstate business to compel them to operate three trains. To answer this reasoning by saying that the statute does not compel roads to operate the three trains and stop them, since it only compels them to stop them if they operate them, is to admit the discrimination, and to state the fact that the duty is not made by the statute dependent upon the local convenience, but upon the whole volume of business, which of course therefore includes interstate commerce business.

As the statute makes its exaction depend not upon a rule

by which the local wants are ascertained and supplied, but upon the business done, it therefore directly operates upon the volume of business, and only indirectly considers the possible local convenience. Under a law which thus proceeds, my mind refuses the conclusion that the law directly considers local convenience and only indirectly and remotely affects interstate commerce, when the reverse, it seems to me, is patent on the face of the statute. The repugnancy of the statute to the Constitution of the United States is shown by the principle decided by this court in *Osborne* v. *Florida*, 164 U. S. 650. In that case the State of Florida imposed a license on the business of express companies. In construing the statute, the Supreme Court of the State held that it applied only to business done solely within the State and not to business interstate in its character. This court, in reviewing and affirming the decision of the state court, said that as construed by the Florida court the statute was not repugnant to the Constitution, because it applied to business done solely within the State, and that the contrary would have been manifestly the case if, for the purpose of taxation, the State had taken into consideration the whole volume of business, including that of an interstate character. Now, if a taxing law of a State is repugnant to the Constitution because it operates upon the whole volume of business, both state and interstate, a law of the character of that now under consideration, which operates upon the whole volume of business of a railroad, state and interstate, is equally repugnant to the Constitution of the United States.

Whether in the enactment of the statute it was intended to discriminate is not the question, for, whatever may have been the intention of the lawmaker, if the necessary effect of the criterion established by the law is to cause its enforcement to produce an unlawful discrimination against interstate commerce by imposing a greater burden on the roads engaged in such commerce than upon other roads which do a purely local business, the statute is, I think, repugnant to the Constitution of the United States, and should not be upheld.

For these reasons, without meaning to imply that I do not assent to the conclusions stated by my brethren who have also,

on other grounds, dissented, I prefer to place my dissent on what seems to me the discrimination which the statute inevitably creates.

NUGENT *v.* ARIZONA IMPROVEMENT COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 119. Argued and submitted January 10, 11, 1899. — Decided February 20, 1899.

Under the act of March 8, 1895, of the legislature of the Territory of Arizona, relating to convict labor and the leasing of the same, the board of control thereby created and given charge of all charitable, penal and reformatory institutions then existing, or which might thereafter be created in the Territory, could not dispense with the bond required by the statute to be given by the person or persons leasing the labor of the convicts, for the faithful performance of their contract; and no contract made by the board leasing the labor of the convicts could become binding upon the Territory, until a bond, such as the statute required, was executed by the lessee and approved by the board.

In this case as it appears that no such bond was executed, the plaintiff was not in a position to ask relief by mandamus.

THE case is stated in the opinion.

Mr. Charles F. Ainsworth, Attorney General of Arizona, and *Mr. L. E. Payson* for appellant, submitted on their brief.

Mr. Eugene S. Ives for appellee. *Mr. L. H. Chalmers* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By an act of the legislative assembly of the Territory of Arizona, approved March 8, 1895, the governor and auditor of the Territory, together with one citizen to be appointed by the governor with the advice and consent of the council, were constituted a board of control and given charge of all charitable, penal and reformatory institutions then existing or which might thereafter be created in the Territory.

It was provided by the ninth section of the act that the

board of control, after qualifying and entering upon their duties, should have full control over the territorial insane asylum, the territorial reform school and territorial prison, together with all property, buildings and lands belonging thereto or that should thereafter be acquired. That section further provided: "Sixty days after the passage of this act they shall have the power and authority to enter into an agreement or agreements with a responsible person or persons, to lease on shares or for cash the property, buildings and lands or any part thereof now belonging to the Territory, wherever said buildings and lands may be located, or that may hereafter be acquired for the purpose of furnishing employment for the inmates of the said territorial prison and the said territorial reform school. The said board shall have the authority to contract with a responsible person or persons to furnish the labor of the inmates now within the said reform school or said prison, or that may hereafter be confined therein, or any number of them, for the best interests of the Territory; provided, however, that at no time shall the labor of the inmates of the said territorial prison or territorial reform school be leased to any person or persons when the labor of the inmates of said institution is required upon any buildings or properties of the aforesaid institutions, and no lease or contract shall be made that will obligate the Territory to furnish tools, machinery or money, or make other expenditure other than the labor of the inmates, properly clothed and fed, and the proper guards for same, together with the use of the property, buildings and lands heretofore mentioned; provided, that no contract or lease shall be made to extend for a term of more than ten years from the time of making said lease or contract. And the said board may contract to allow such labor to be performed at any place either inside or outside the prison walls or the confines of the reform school, but if a contract be made to allow labor to be performed outside of the prison walls or confines of the reform school, it must be done under proper restrictions, having regard for the safety of the prisoners or inmates. A good and sufficient bond must be given by the person or persons leasing the labor of inmates of the

aforesaid institutions for the faithful performance of such contract; said bond to be approved by the board of control." Laws of Arizona, 1895, pp. 20, 22.

This statute being in force, a written agreement was made December 2, 1896, between "the Territory of Arizona, by L. C. Hughes, Governor, C. P. Leitch, auditor, and M. H. McCord, constituting the board of control of the Territory of Arizona," of the first part, and the State of Arizona Improvement Company, of the second part. That agreement contained among other provisions the following:

"The party of the second part having submitted its good and sufficient bond for the faithful performance of this contract, which said bond has been approved by the said board of control, and each of its members, and is herewith delivered and accepted, the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, reserved and contained on their part, and on behalf of the said party of the second part to be done and kept and performed, hath granted, bargained, demised, leased and to farm letten to said party of the second part, its successors and assigns, all that certain real estate; . . . also all the labor of the male convicts now in the territorial penitentiary, or who may hereafter be confined therein, to have and to hold the labor of said penitentiary convicts unto said party of the second part, and to its assigns, for the term of ten years from the date of these presents; and the lands and premises above described for and during and until the end of the full term of ten years to be fully completed and ended, and it is further stipulated and agreed by and between the parties hereto that in the event of the removal of the territorial prison from Yuma County, Territory of Arizona, to any other portion of the Territory, such removal will in no way, manner, shape or form interfere with the conditions, stipulations and covenants of this contract and lease.

"It is further understood, stipulated and agreed by and between the parties hereto, that the party of the second part is to have the exclusive control of the labor of the convicts in the territorial prison from 8 o'clock A.M. to 5 o'clock P.M.,

during the said term of ten years from the date of these presents, Sundays and legal holidays excepted.

"It is further agreed by and between the parties hereto that the party of the first part, or its agent or agents, will furnish the said convict labor to the party of the second part, at the place or places designated by the said party of the second part, or its agents, in Yuma County, Arizona Territory, properly guarded, clothed, fed and ready to commence work at the hours and terms heretofore mentioned, and the party of the first part shall properly guard said convicts during the hours of labor. The party of the second part is to furnish all the tools and machinery necessary for the use of the convicts while at work under the conditions of this contract and lease, but the said party of the first part shall not be compelled to take outside of the prison, under guard, parties of less than five convicts. . . .

"The superintendent of the prison or agent of the Territory having the convicts in charge shall be required to furnish the convicts in such numbers as may be required from time to time up to the amount of all the able-bodied male convicts; to deliver them at such points or places in Yuma County, as may be demanded of him, by the party of the second part, its agent or agents. The party of the second part further agrees to keep a current and accurate account of the number of days worked by convicts, and on the first Monday of each calendar month to make a statement of the total number of days done the previous month by all the convicts employed by the said party of the second part, and shall furnish a copy of the said statement to the Superintendent of the territorial prison, properly verified by an agent of the company.

"The said party of the second part agrees to compensate the party of the first part for such convict labor as follows, to wit: The value of each convict's labor shall be placed at 70 cents per day, and as soon as the party of the first part has furnished convict labor at the rate of 70 cents per day, aggregating the sum of sixteen hundred dollars, the party of the second part shall issue its perpetual water-right deed for eighty

acres of land, of the water in its canal, when such canal is completed. . . .

"It is further covenanted and agreed, by and between the parties hereto, that after the water rights hereinbefore provided for are earned by said party of the first part, then as soon as the labor of convicts at the rate of 70 cents per day, for each day's labor, amounts to sixteen hundred dollars, the party of the second part shall issue water-right certificates for one eighty-acre water right. . . .

"It is further stipulated by and between the parties hereto in consideration of the covenants herein contained, that the said party of the second part is to use such of said convicts' labor —— this contract and lease as it may from time to time require, and such party of the second part need not commence to use any of said labor sooner than five months from the date hereof.

"It is further stipulated and agreed by and between the parties hereto, in consideration of the covenants herein contained, to be performed by each of the parties hereto, and in consideration of the convict labor herein mentioned, that the lease of the lands herein described shall commence on and from the day when the water shall be conducted in the canal of the party of the second part to lands, convenient for the said water to be conducted upon the said lands hereinbefore described, and shall terminate ten years thereafter; and that the party of the second part shall pay to the party of the first part, as rent therefor, an annual sum, to be hereafter determined upon in cash, or at the option of the party of the second part, one half of the net products of the said lands; provided, however, that the said lease shall commence to run within four years from date.

"It is further agreed, covenanted and declared that these presents are made, executed and delivered for the best interest of the Territory of Arizona, and for the purpose of furnishing employment for the inmates of the said territorial prison — the labor of said inmates being not required upon any buildings or properties of any institution of said Territory."

On the 22d day of April, 1896, it was agreed in writing

between the parties as follows: "The time for commencing work under this contract is hereby extended to the 10th day of June, 1896, and it is fully understood and agreed by the parties hereto that this extension is in no way to affect the legal status of said contract. It is understood and agreed that the rights of the parties thereto are to remain in *statu quo*, and the extension herein made is not intended to ratify, alter or impair said contract or to give it any validity whatsoever that it does not before the signing of this instrument possess."

Later, a supplemental agreement in writing was made between the same parties, but in the view which the court takes of this case it need not be set out in this opinion.

On the 26th day of May, 1896, the State of Arizona Improvement Company filed its complaint in the district court of the third judicial district of the Territory in and for the county of Yuma, in which reference was made to the above agreements with the board of control, and in which it was alleged that it was a corporation organized under the laws of the Territory; that M. J. Nugent, a resident of Yuma County, was the superintendent of the territorial prison at Yuma, and as such had full control of the prisoners confined in that prison, subject only to the direction of the board of control of the Territory; that on the 25th day of May, 1896, the plaintiff company demanded in writing of said Nugent, superintendent aforesaid, that in pursuance of the contract between it and said board of control he furnish to plaintiff on the 2d day of June, 1896, at 8 A.M., ten able-bodied male convicts out of the territorial prison at Yuma, properly guarded, on the outside of the gate of the territorial prison; that on the next day Nugent served a written notice on the plaintiff, whereby he peremptorily declined to furnish the convict labor at such time and place or at any time and place; and that the plaintiff had not a plain, speedy or adequate remedy in the ordinary course of law.

The complaint was supported by the affidavit of the president of the plaintiff company.

The relief asked was that a writ of mandamus issue, directed

to Nugent, superintendent of the territorial prison, directing and commanding him to furnish to the plaintiff ten able-bodied male convicts out of the territorial prison at Yuma, on the 2d day of June, 1896, on the outside of the prison gate at Yuma, properly guarded; and that plaintiff have such other and further relief as to the court seemed meet and just.

An alternative writ of mandamus was issued, and Nugent, as superintendent of the prison, excepted to the sufficiency of the complaint, and demurred thereto upon these grounds: 1. That the complaint did not state facts sufficient to authorize a writ of mandamus. 2. That the plaintiff sought to compel the performance of an act by the respondent as superintendent of the territorial prison which the law did not specially enjoin upon him as a duty resulting from his office. 3. That the petition sought to compel the performance of a contract made by others and not by respondent. 4. That the alleged contract was void, because authorized only by a pretended law which was void.

Nugent also filed an answer, alleging, among other things, that there was a want of proper parties defendant; that the Territory had no power to hire out the convicts confined in the territorial prison who had not been sentenced to punishment with hard labor, nor to authorize the convicts to be taken out and away from the territorial prison where punishment and sentence was by confinement in such prison; that the board of control had no power to make the contract sought to be enforced; that the contract was itself without consideration and in violation of the act of March 8, 1895, in that it was for a period of over ten years; that the contract took the entire convict labor for the period just named in violation of the provisions of the act providing that said labor should not be leased out when it was needed to work on the buildings and premises of the territory; and that the contract was against public policy in authorizing all the prisoners to be taken from the prison and to remain away from it in many cases for the entire period of their sentence.

The answer also averred "that as the duly appointed, qualified and acting superintendent of the territorial prison at

Yuma, Arizona, previous to the service of the alternative writ herein, this defendant was advised and informed by the Honorable B. J. Franklin, as Governor of the Territory of Arizona, that the said pretended contract mentioned in the application herein was and is of no valid force and effect, and further advised and informed in substance and to the effect that said contract was not of any legal force or binding effect upon said Territory or said board of control, and, among other things concerning the same, the said Honorable B. J. Franklin, acting as such Governor, authorized and directed this defendant in substance and to the effect that in the event that the said State of Arizona Improvement Company should, by its officers or agents, make a demand upon this defendant to do or perform anything under the provisions of said contract, and especially if such demand should be made for the delivery of any prisoners confined in or inmates of said penitentiary to the said company, its officers or agents, at the gate of said prison or elsewhere, that this defendant, acting as such superintendent, should politely, but firmly, refuse such request or any request made or to be made under the provisions of said pretended contract; that acting under the advice and information given by the Honorable B. J. Franklin, Governor of this Territory, and of the direction of the head of the executive department of this Territory, this defendant alleges that he made the refusal complained of in the application herein and not otherwise. . . . Respondent further avers and gives the court to know that the State of Arizona Improvement Company has not, before the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any of the courts of this Territory for the faithful performance of said contract, as required by said pretended board of control act."

The case was heard in the district court on the complaint and the demurrer and answer. The demurrer of the defendant was overruled, and the contracts set forth in the complaint were the only evidence adduced at the trial. The defendant having declined to amend the pleadings or to offer further evidence, and having elected to stand upon the pleadings, the

court found for the plaintiff, and ordered a peremptory writ of mandamus to issue.

A new trial having been refused, the case was carried to the Supreme Court of the Territory, where the judgment of the district court was affirmed.

We are of opinion that the Supreme Court of the Territory erred in affirming the judgment of the district court awarding a writ of mandamus against the defendant Nugent.

The statute under the authority of which the board of control made the contracts referred to in the complaint expressly required a good and sufficient bond to be given by the person or persons leasing the labor of inmates of the territorial prison for the faithful performance of such contract, which bond was to be approved by the board. The complaint asking for a mandamus against the superintendent of the prison did not distinctly allege the execution of such bond. But the answer of Nugent alleged that the defendant in error had not, prior to the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any court of the Territory for the faithful performance of its contract, as required by the act of March 8, 1895. That act it is true did not in terms require the execution and delivery of a bond prior to or contemporaneously with the making of a contract with the board of control. But it is clear that the board could not dispense with the bond, and that no contract made by them leasing the labor of the convicts could become binding upon the Territory until a bond such as the statute requires was executed by the lessee and approved by the board. The recital in the agreement of December 2, 1896, that the lessee had submitted, and that the Board had approved, a good and sufficient bond for the faithful performance of that agreement, may have been made in the expectation that such a bond would be executed before the agreement became effective as between the parties. But as the case was heard upon the pleadings, without any evidence except the written agreements between the board of control and the Improvement Company, the mere recital referred to cannot be taken as sufficient to disprove the averment in the answer as to the non-

execution of the required bond. If the plaintiff was entitled to the relief asked by a proceeding against the superintendent, without bringing the members of the board of control before the court, it should have shown by allegation and proof that the required bond had been executed. If no bond was executed as required by the statute, the plaintiff was not in a position to ask relief by mandamus. The superintendent of the prison may not have been charged by law with knowledge of the provisions of the statute, but he was aware of its provisions, and was bound not to allow the convicts to go beyond his control under an agreement that did not conform to the statute. An agreement unaccompanied by the required bond would not justify him in surrendering custody and control of the convicts or any of them. As it must be taken upon the present record that the Improvement Company never executed the bond required by the statute, the district court erred in giving any relief.

Under the circumstances, it may not be inappropriate to say that in the printed brief of the Attorney General of Arizona it is distinctly stated that no bond had ever been executed, and that statement is not disputed in the printed brief subsequently filed for appellee, nor was it disputed by counsel for appellee in oral argument.

Without expressing any opinion in reference to other questions discussed by counsel, some of which are important, the judgment of the Supreme Court of the Territory is for the reasons stated

Reversed, with directions to remand the case to the district court for such further proceedings as may be consistent with this opinion and with law, and it is so ordered.

Counsel for Parties.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* CLAYTON.

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

No. 222. Argued January 27, 1899. — Decided February 20, 1899.

The Texas and Pacific Railway Company received at Bonham, in Texas, 467 bales of cotton for transportation to Liverpool. It was to be taken by the company over its road to New Orleans, and thence to Liverpool by a steamship company, to which it was to be delivered by the railway company at its wharf in New Orleans. Each bill of lading contained the following, among other clauses: "The terms and conditions hereof are understood and accepted by the owner, viz.: (1) That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss." The cotton reached New Orleans in safety, and was unloaded at the wharf, and the steamship company was notified; but before it was taken possession of by that company it was destroyed by fire at the wharf. The owners in Liverpool having brought suit against the railway company to recover the value of the cotton, that company, on the facts detailed at length in the opinion of the court, contended that the cotton had passed out of its possession into that of the steamship company; or, if the court should hold otherwise, that its liability as common carrier had ceased, and that it was only liable as a warehouseman. *Held*, that the goods were still in the possession of the railway company at the time of their destruction; and that that company was liable to their owners for the full value as a common carrier, and not as a warehouseman.

THE case is stated in the opinion.

Mr. Rush Taggart and *Mr. Arthur H. Masten* for plaintiff in error.

Mr. Treadwell Cleveland for defendants in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the defendants in error, subjects of the Queen of Great Britain and Ireland, against the Texas and Pacific Railway Company, a corporation existing under an act of Congress approved March 3, 1871, c. 122, 16 Stat. 573, and engaged in the business of a common carrier of merchandise for hire. Its object was to recover the value of four hundred and sixty-seven bales of cotton destroyed by fire.

The complaint alleged that in the month of October, 1894, at Bonham, Texas, the plaintiffs delivered to the defendant railway company 500 bales of cotton, which it agreed to carry safely and securely at a through price or rate from the place of shipment to Liverpool, England, by way of New Orleans and there deliver the same on the payment of the freight; that the defendant failed to keep its agreement and to carry safely 467 of the bales of cotton to Liverpool, and there to deliver the same, although the plaintiffs had duly demanded delivery thereof and had been at all times ready and willing to pay the freight for the carriage; that through its negligence and carelessness and without the fault of the plaintiffs those 467 bales, worth $17,314.43, were on or about November 12, 1894, wholly destroyed by fire at Westwego, Louisiana, "at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier;" and that the defendant has refused upon plaintiffs' demand to pay the value of the cotton so destroyed.

The defendant admitted the destruction of the cotton by fire at the time and place named, but made such denial of the material allegations of the complaint as put the plaintiffs on proof of their case.

The plaintiffs having read in evidence the bills of lading, and made proof of the value of the cotton as shown by certain stipulations between the parties, rested their case. Thereupon the defendant moved the court to direct the jury to render a verdict in its behalf. That motion was denied with exceptions to the defendant. At the close of all the evidence the jury by direction of the court returned a verdict in favor

of the plaintiffs for the sum of $14,068, and judgment for that sum with costs was entered against the defendant company. Upon writ of error to the Circuit Court of Appeals that judgment was affirmed. 51 U. S. App. 676.

The action was based upon four bills of lading issued by the railway company. Two of them were dated October 10th, and the others October 15th and October 23d respectively. They are alike in form, and identical in respect of the terms and conditions of the contract. Each one showed a receipt by the railway company of a given number of bales, "in apparent good order and well conditioned, of Castner & Co., for delivery to shippers' order or their assigns, at Liverpool, England, he or they paying freight and charges as per margin;" also, that the cotton received was to be carried "from Bonham, Texas, to Liverpool, England, route, via New Orleans and Elder, Dempster & Co. steamship line."

Each bill of lading contained also the following clauses:

"The terms and conditions hereof are understood and accepted by the owner.

"Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz.:

"1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; *and* in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery *at its final destination*, whereby any legal liability is incurred by *any* carrier, that carrier *alone* shall be held liable therefor in whose *actual custody* the cotton shall be at the time of such damage, detriment or loss.

"2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this

contract in other respects, or to bind the Texas and Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate. . . ."

"5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton or claimant to establish that such injury resulted from the fault of the carrier.

"6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at the usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease."

The facts out of which the case arises are these: The railway company had warehouses and yards in New Orleans where its road terminated. Westwego is a branch station or terminal opposite that city. The company had a wharf with tracks and an office and sheds on it — the wharf having been constructed over the Mississippi River so that cars could be run upon the railroad tracks in its rear and unloaded, and so that vessels could come to its front to receive freight placed on it. The cotton in question was unloaded at the wharf at various dates from October 22, to November 4, 1894, and was burned while on the wharf in the evening of November 12, 1894.

On each of the bills of lading are the following words: "T. & P. contract No. 44." It does not appear that the shippers were informed what were the terms of that contract.

It was in proof, however, that it was in substance a contract with the Elder, Dempster & Co. steamship line to connect with the Texas and Pacific Railway Company and receive from the latter 20,000 bales of cotton during the months of October, November and December, 1894, on the conditions specified on the reverse side of the contract. Those conditions do not affect the questions here presented, but it was proved that the railway and the steamship companies agreed that the place of delivery of the cotton under the contract between them should be the wharf at Westwego.

The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a "skeleton" would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a "check clerk," and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this

way to ascertain that the amounts, marks and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas and Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a "transfer sheet" that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the vessel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready.

This was conceded to have been substantially the method of business between the railway company and the steamship company.

Counsel for the railway company correctly states that on the morning of the fire, and on other occasions prior thereto both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf ready for the steamship com

pany to take away and made request that the same should be removed; that the attention of the officers of the steamship company was called to the amount of cotton on the wharf which they had contracted to carry, and they were requested to move it at the earliest possible moment and to comply with their contract; and that in reply they said, in substance, that their ships had been delayed, the principal cause being certain labor troubles then existing in New Orleans with employés of the steamship companies, and another cause being the bad weather.

It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company.

So far as the management of the wharf and the protection of the cotton against fire were concerned, the evidence failed to show any negligence on the part of the railway company.

The defendant moved for a verdict in its behalf upon two grounds: 1. The evidence showed a delivery of the cotton to the connecting carrier before the fire occurred. 2. If no delivery took place before the fire, there had been a sufficient tender of the cotton to the steamship carrier, and thereafter, in view of the facts, the railway company should be deemed to have held it as a warehouseman, and as there was no proof of negligence it was not liable for the value of the cotton.

The principal question arises out of that clause in the bill of lading providing that in case of any loss, detriment or damage done to or sustained by the cotton before its arrival and delivery at its final destination, whereby liability was incurred by any carrier, that carrier *alone* should be held liable therefor in whose *actual* custody the cotton should be at the time of such damage, detriment or loss. The Circuit Court of Appeals and the Circuit Court concurred in the view that the cotton when burned was, within the meaning of the contract, in the actual custody of the railway company. It will not be disputed that in determining this question regard must be had to all the provisions of the contract. The clause declaring that the railway company should be deemed to have fully performed its part of the contract "upon delivery of said cotton

to its next connecting carrier" must be taken with the clause immediately following which makes that carrier alone liable who had actual custody of it at the time of the loss. The first thought suggested by these clauses, taken together, is that the parties recognized the possibility that it might be often difficult to determine what, as between carriers, in view of their relations to each other, would constitute a sufficient delivery to the connecting carrier. And in order to meet that difficulty the clause relating to actual custody was added, so as to indicate that the delivery intended, so far as liability to the shipper for loss was concerned, was not a constructive one, but such a delivery as involved actual custody of the cotton by the connecting carrier. We do not understand that counsel for the railway company dispute this general view. But they insist that within the meaning of the contract, and under the facts disclosed by the evidence, the steamship company had actual custody of the cotton at the time it was burned. In support of their contention they rely principally upon *Pratt* v. *Railway Company*, 95 U. S. 43, 46, and the cases upon which that case largely rests — *Merriam* v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, and *Converse* v. *Norwich & New York Transportation Co.*, 33 Conn. 166.

It is important to understand what were the facts upon which the judgment in *Pratt* v. *Railway Company* was based. According to the report of that case they were these:

The Grand Trunk Railway Company, engaged as a carrier in the transportation of property, had received at Montreal to be carried to Detroit certain goods shipped at Liverpool for St. Louis. The goods reached Detroit in the cars of that company on the 17th day of October, 1865, and were destroyed by fire in the night of the succeeding day.

The company had no freight room or depot at Detroit, but it used there a single section or apartment in the freight depot of the Michigan Central Railroad Company, a building several hundred feet long, three or four hundred feet wide, and all under one roof. Its different sections were without partition walls between them. In the centre of the building there was a railroad track for cars to be loaded with freight. The sec-

tion in that building used by the Grand Trunk Company was used only as a place for depositing goods and property that came over its road or that were delivered for shipment over it. In common with the rest of the building, that section was under the control and supervision of the Michigan Central Company.

The Grand Trunk Company employed in its section two men, who checked freight coming into it. But all freight that came into that section was handled exclusively by the employés of the Michigan Central Company, and the Grand Trunk Company paid that company a fixed compensation per hundredweight for such work as well as for the use of its section.

Goods coming into that section from the Grand Trunk Railroad to be carried over the road of the Michigan Central Company, after being unloaded were deposited by the employés of the latter company in a certain place in the Grand Trunk section, from which they were loaded into the cars of the Michigan Central Company by its own employés, whenever that company was ready to receive them; and after being so placed the employés of the Grand Trunk Company did not further handle such goods.

Whenever the agent of the Michigan Central Company saw any goods deposited in the section of the freight building used by the Grand Trunk Company and which were to be carried over the line of the former company, he would call on the agent of the latter company in the building, and from the way bill exhibited by the agent of the Grand Trunk Company take a list of such goods, and would then for the first time learn their place of destination, together with the amount of freight charges due thereon. From the information thus obtained a way bill would be made out by the Michigan Central Company for transportation of the goods over its line of railway, and not before.

The goods referred to in the *Pratt case* were taken from the Grand Trunk cars on the 17th day of October, 1865, and deposited in the apartment of the freight building used by the Grand Trunk Company in the place assigned for goods so destined.

Opinion of the Court.

At the time the goods were forwarded from Montreal the way bill in accordance with usage in such cases was made out in duplicate, on which were entered a list of the goods, the names of the consignees, the places to which they were consigned, and the charges against them from Liverpool to Detroit. The conductor having charge of the train containing the goods would take one of these way bills, and on arriving at Detroit would deliver it to the checking clerk of the Grand Trunk Company, "from which said clerk checked said goods from the cars into said section." The other copy would be forwarded to the agent of the Grand Trunk Company at Detroit. "It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods, and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

This court, in view of these facts, said: "We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated. 1. They were placed within the control of the agents of the Michigan Company. 2. They were deposited by one party and received by the other for transportation, the deposit being accessory merely to such transportation. 3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company. 4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, 'P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the city of St. Louis; and such was the understanding of both parties." Referring to the section of the freight building specially used by the Grand Trunk Company, the court said: "It was a por-

tion of the freight house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on its cars at its convenience, without further orders from the defendant."

We do not think that the judgment in *Pratt* v. *Railway Company* controls the determination of the present case. In many important particulars the two cases are materially different. In the *Pratt case* the court proceeded upon the ground that the goods were deposited in a section of a freight building set apart by the connecting carrier, the owner of the building, for goods coming over the line of the first carrier to be transported in the cars of the connecting carrier to the place to which they were consigned, the goods having been unloaded by the employés of the connecting carrier and by them deposited in that section, to be put by such employés into the cars of that carrier at its convenience. It was a case in which the goods passed under the complete control and supervision and into the actual custody of the connecting carrier from the moment they were deposited in the section set apart for them.

In the case at bar, the facts plainly indicate that although the goods had been placed by the first carrier upon the wharf, and although that was the place at which the steamship company was to receive or usually received goods from the railway company for further transportation, they were not in the actual possession or under the actual control of the connecting carrier at the time of the fire. The connecting carrier had not given a mate's receipt for the cotton or assumed control of it. True, it had received notice that the goods were on the wharf and could be taken into possession, but such notice did not put the cotton into the actual custody of the connecting carrier. The opportunity given it to take possession or its mere readiness to take possession was not under the contract equivalent to placing the cotton in the actual

custody of the steamship line. The undertaking of the railway company was to transport safely and deliver to the next connecting carrier. But its further express agreement was, in substance, that if any carrier incurred liability to the shipper in respect of the goods, that carrier alone was to be liable who, at the time the cotton was damaged or lost, had it in actual custody. In other words, the delivery to the connecting carrier which would, as between the first carrier and the shipper, terminate the liability of such carrier, must have been a delivery that put the cotton into the actual, not constructive, custody of the connecting carrier. To hold otherwise is to eliminate from the contract the clause relating to actual custody. The entire argument of the learned counsel for the railway company in effect assumes that the contract means no more than it would mean if that clause were omitted. But the court cannot hold that that clause is meaningless, or that it was inserted in the contract in ignorance of the meaning of the words "actual custody." Nor can it be supposed that the parties understood the contract to mean that the connecting carrier was to be deemed to have actual custody from the moment it could have taken actual custody if it had seen proper to do so. So far as the shipper was concerned, the actual custody of the first carrier could not cease until it was in fact displaced by the actual custody of the connecting carrier. It may be that the railway company has good ground for saying that, as between it and the connecting carrier, the latter was bound to take actual custody whenever the railway company was ready to surrender possession, and thereby relieve the latter from possible liability to the shipper in the event of the loss of the cotton while in its custody. That is a matter between the two carriers, touching which we express no opinion. But we adjudge that the shipper cannot be compelled, when seeking damages for the value of his cotton destroyed by fire in the course of its transportation, to look to any carrier except the one who had actual custody of it at the time of the fire. One of the conditions imposed upon him by the contract was that if any carrier became liable to him he should have no remedy except against the one having such

actual custody. That remedy should not be taken from him by a construction of the contract inconsistent with the ordinary meaning of the words used.

The two cases in the Supreme Court of Connecticut which were cited in *Pratt* v. *Railway Co.*, undoubtedly sustain the principles announced in that case, but they do not militate against the views we have expressed in this case.

Merriam v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, 360, was an action on the case for negligence on the part of a railroad company in the transportation and delivery of certain goods, and in which it was a question whether the goods had been delivered to the company before their destruction. After stating the general rule to be that, in order to charge a common carrier for the loss of property delivered to it for transportation, the property must be delivered into the hands of the carrier itself or its servant or some person authorized by the carrier to receive it, and that if it was merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or in the carrier's cart, vessel or carriage, without the knowledge and acceptance of the carrier, its servants or agents, there would be no sufficient delivery to charge the carrier, the court said: "But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made, they, and not the general law, are to govern. If therefore they agree that the property may be deposited for transportation at any particular place, without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if, in this case the defendants had not agreed to dispense with the express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there, merely, would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt, that the proof by the plaintiff of a constant and habitual practice and usage of the

defendants to receive property at their dock for transportation, in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case, sufficient to show a public offer, by the defendants, to receive property for that purpose and in that mode; and that the delivery of it there accordingly by the plaintiff in pursuance of such offer should be deemed a compliance with it on his part, and so to constitute an agreement between the parties by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any other notice. Such practice and usage were tantamount to an open declaration, a public advertisement, by the defendants, that such a delivery should of itself be deemed an acceptance of it by them for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud."

Converse v. *Norwich and New York Transportation Co.*, 33 Conn. 166, 181, involved the question whether certain goods had been delivered to the connecting carrier prior to their destruction by fire. The wharf and depot building in which the goods were deposited by the first carrier were owned by the connecting carrier, and the first carrier paid an annual rental for its use in its business. The court, among other things, said: "We have no difficulty in determining, indeed we must hold, that there was a mutual agreement, or tacit understanding equivalent to such an agreement, that the transportation company should place the through freight at that precise spot, and that the Northern road should take it from thence at a time convenient to them. The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company in the first and every instance of delivery by them placed their freight, and the transportation company at their convenience took it away and carried it on board their boat. And so the trans-

portation company in like manner, in the first and every instance, placed there the freight for the Northern road; and they at their convenience put it in their cars and took it away. And the usage was precisely the same with the Worcester road. . . . Upon this wharf and into the enclosure the Northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this enclosure, and obviously in the precise manner actually pursued. . . . It is clear then that both the transportation company and the Northern road contemplated that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other."

It is to be observed that neither in the *Pratt case* nor in the *Converse* and *Merriam cases* was there any clause in the contract between the parties to the effect that the shipper, in enforcing his claim for liability, should look alone to the carrier who had the actual custody of the goods at the time they were lost or destroyed. It is the clause of that character in the bill of lading now in suit which makes the judgments in the *Pratt*, *Converse* and *Merriam cases* inapplicable to the present case.

A further contention of the defendant is that at the time of the fire it held the goods, if at all, only as a warehouseman and not as a common carrier, and that the Circuit Court erred in not so instructing the jury. We cannot assent to this view. As the goods had not at the time of the fire passed into the actual custody of the steamship company, and as the contract expressly declared that if any carrier was liable for their destruction that one alone should be liable in whose actual custody the goods were when destroyed, the defendant could not escape responsibility by showing that the connecting carrier could by reasonable diligence have taken actual custody prior to the fire. In other words, it could not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them

into its actual custody. Even if this were not so, the suggestion that the railway company had become a warehouseman before the fire occurred can be disposed of on the grounds stated by the Circuit Court of Appeals. Speaking by Judge Wallace, that court said: "There is no room for the contention that the defendant had ceased to be a carrier and became a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it 'as soon as practicable' was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire." 51 U. S. App. 676, 686.

Under the views expressed in this opinion, it is unnecessary to enter upon a review of the numerous cases cited by counsel for the railway company in their able and elaborate brief to support the different propositions discussed by them.

We are of opinion that the Circuit Court did not err in directing a verdict for the plaintiff, and the judgment is

Affirmed.

UNITED STATES *v.* JOHNSON.

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

No. 59. Submitted November 10, 1898. — Decided February 27, 1899.

In proceedings taken by a District Attorney of the United States, by order of the Attorney General at the request of the Secretary of War, and conducted under directions of the latter, to secure the condemnation of private lands within the limits of his district for the purpose of erecting

fortifications thereon for the use of the United States, he is performing his official duties as District Attorney of the United States, and is not entitled to any extra or special compensation for them.

THE case is stated in the opinion.

Mr. Assistant Attorney General Boyd for the United States.

Mr. Jesse Johnson in person for Johnson.

MR. JUSTICE HARLAN delivered the opinion of the court.

In the Circuit Court of the United States for the Eastern District of New York a judgment was rendered against the Government and in favor of the defendant in error Johnson for the sum of $6513.95. Of that amount $6500 represented the value of legal services rendered for the United States by Johnson, while he held the office of District Attorney for that district in proceedings in that court for the condemnation of certain lands for public purposes.

The case having been carried by writ of error to the Circuit Court of Appeals, certain questions of law arose as to which instructions are desired from this court — the controlling question being whether Johnson was entitled, for the services rendered, to any compensation beyond the salary and emoluments attached to his office.

The sections of the Revised Statutes (Title XIII, c. 16) upon the construction of which the answers to the questions propounded more or less depend are the following:

"SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy-yard, customhouse, lighthouse or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The District Attorneys of the United States, upon the application

of the Attorney General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney General, shall procure any additional evidence of title which may be deemed necessary, and which may not be in possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

"SEC. 767. 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 for the United States in such District. . . ."

"SEC. 770. The District Attorney for the Southern District of New York is entitled to receive quarterly for all his services a salary at the rate of six thousand dollars a year. For extra services the District Attorney for the District of California is entitled to receive a salary at the rate of five hundred dollars a year, and the District Attorneys *for all other districts* at the rate of two hundred dollars a year.

"SEC. 771. 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."

"SEC. 823. The following *and no other compensation* shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, *to District Attorneys*, clerks of the Circuit and District Courts, marshals, commissioners, witnesses, jurors and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solici-

tors and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

"SEC. 824. . . . For examination by a District Attorney, before a Judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed. *For each day of his necessary attendance in a court of the United States on the business of the United States*, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term. . . .

"SEC. 825. There shall be taxed and paid to every District Attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

"SEC. 827. When a District Attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury."

"SEC. 833. Every District Attorney, clerk of a District Court, clerk of a Circuit Court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments

received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them.

"SEC. 834. The preceding section shall not apply to the fees and compensation allowed to District Attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees, charges and emoluments to which a District Attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.

"SEC. 835. No District Attorney shall be allowed by the Attorney General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, *a sum exceeding six thousand dollars a year*, or exceeding that rate for any time less than a year."

"SEC. 844. Every District Attorney, clerk and marshal shall, at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; *and no allowance or compensation shall be made for any extra services whatever, which any officer* or clerk *may be required to perform, unless expressly authorized by law.*

"SEC. 1765. *No officer in any branch of the public service*, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive *any additional pay, extra allowance or compensation*, in any form whatever, for the disbursement of public money, *or for any other service or duty whatever unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.*"

By section 3 of the act of June 20, 1874, c. 328, 18 Stat. 85, 109, it was provided that "*no civil officer of the Government* shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States *beyond his salary or compensation allowed by law: Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of District Attorneys as now allowed by law for the performance of services *not covered by their salaries or fees.*"

The facts to be considered in connection with these statutory provisions are set forth in a statement accompanying the certificate of questions. They may be thus summarized:

By the fortification act of August 18, 1890, c. 797, 26 Stat. 315, 316, appropriations were made for gun and mortar batteries, as follows: "For construction of gun and mortar batteries for defence of Boston Harbor, two hundred and thirty-five thousand dollars; New York, seven hundred and twenty-six thousand dollars; San Francisco, two hundred and sixty thousand dollars."

The same act contained the following provision: "For the procurement of land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defences, five hundred thousand dollars, or so much thereof as may be necessary, and hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defences, such proceedings to be prosecuted in accord-

ance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land, or rights pertaining thereto, required for the above-mentioned purposes: *And provided further*, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contracts for the future payment of money, in excess of the sums appropriated therefor."

By the subsequent act of July 23, 1892, c. 233, 27 Stat. 257, 258, five hundred thousand dollars, or so much thereof as was necessary, was appropriated "for the procurement of land, or right pertaining thereto, needed for the site, location, construction or prosecution of work for fortifications and coast defences."

In the year 1891, at the special written request of the Secretary of War, Johnson, being then United States District Attorney for the Eastern District of New York, was instructed by the Attorney General of the United States to institute proceedings on behalf of the Government of the United States for the condemnation for a mortar battery of certain lands on Staten Island, New York, adjacent to Fort Wadsworth in that district. With such instructions the Attorney General enclosed a copy of the Secretary's request, and stated that he acted agreeably thereto.

Proceeding under the above employment in the name of the Government of the United States, Johnson took steps to acquire such lands by proceedings for their condemnation, and obtained decrees against the persons interested in them. In order to carry on such proceedings it was necessary that he should search and ascertain, and he did search and ascertain, the titles to the lands sought to be condemned. After rendering these services, he presented two bills against the Government, which were approved and allowed by the Attor-

ney General, one being for $4000, and the other for $2500. These services were rendered by him in 1892 and were worth those sums respectively.

In the statement that accompanies the questions certified it is said that for many years before 1892, and for many years prior to Johnson's employment, it was the custom and usage of the Government to pay to District Attorneys, under like employment and for like services, compensation outside of their annual salaries as fixed by statute at the sum of two hundred dollars.

Johnson had received from the United States for services (other than those above mentioned) rendered for the Government in the year 1892, either as District Attorney or under employment or directions of the Attorney General, the sum of $2250.

In 1891 he rendered services to the Government in and about the acquisition of other lands in his district by condemnation proceedings. These services were rendered under employment similar to that above stated in acquiring lands for like purposes. For the services thus rendered in 1891 he was paid by the Government a sum exceeding six thousand dollars. He had also been paid for other services rendered to the Government in 1891 further and additional sums. The aggregate so paid for services in 1891 exceeded six thousand dollars by a sum which, together with the amounts paid to him as above stated for services rendered in 1892, equalled the sum of six thousand dollars. Such excess over six thousand dollars existed and appeared after crediting and allowing on the sums so received by him the necessary expenses of his office, including the necessary clerk hire, as audited and allowed to him in the years 1891 and 1892.

After the services rendered in 1892, and after the above sum of six thousand five hundred dollars had been allowed by the Attorney General as stated, the accounting officers of the United States caused a warrant on funds appropriated for the War Department to be drawn for the sum of six thousand five hundred dollars and "conveyed into the Treasury of the United States." That warrant "was drawn and conveyed"

against and in payment of the amount which Johnson, for services rendered in 1891, had been paid in excess of the maximum fixed by section 835 of the Revised Statutes. Such conveyance and application were made by the Government without his consent, and except as above stated his claim for six thousand five hundred dollars has not been allowed or paid.

After the above services were rendered in 1892, Johnson requested that the amounts so allowed be paid by the officers of the Treasury, but those officers refused to audit or allow his bills or any part of the same except as above stated, and refused to allow or pay to him any part of the same.

Upon the trial in the Circuit Court it was admitted that the expense account of Johnson was $1018.23, which was allowed by the Attorney General; that if the amounts he received for services in obtaining lands in said district (which services were similar in nature, employment, etc., to those here claimed for) are to be computed as part of the amount limited by section 835 of the Revised Statutes, then he had received in excess of the amount so limited for the year 1891 a sum which, added to the amounts received by him for the year 1892, (and which are fees and emoluments referred to by section 835 of the Revised Statutes,) equalled the sum of six thousand dollars and the legitimate office expenses of his office; and that if the services involved in this action and the other similar services stated above are to be accounted as a part of the maximum fixed by section 835 of the Revised Statutes, and if the Government, having paid him for one year in excess of such maximum, has the right to recoup, set off or counterclaim such overpayment against an amount otherwise due, then Johnson had no cause of action as set forth in his present suit.

The Circuit Court of Appeals desires information upon the following questions of law arising out of the above facts:

1. Whether Johnson is entitled to be paid the said sum of six thousand five hundred dollars for the services rendered by him in the year 1892? This question is submitted without reference to the provisions of section 835 of the Revised Statutes.

2. Whether, if the first question be answered in the affirmative, such compensation should be included in the fees and emoluments of claimant's office within the meaning of sections 834, 835 and 844 of the Revised Statutes.

3. Whether, if both of the above questions are answered in the affirmative, the Government of the United States can, under the circumstances stated, apply the six thousand five hundred dollars as such sum was applied, on account of the payments made by the United States for services rendered by Johnson in the year 1891.

The Government contends that the services in question were such as the law required the District Attorney to render, and consequently that he could receive no special compensation therefor.

In support of this proposition the Assistant Attorney General refers to *Gibson* v. *Peters*, 150 U. S. 342, 347. That was an action against the receiver of a national bank to recover the value of legal services alleged to have been rendered or offered to be rendered by a District Attorney of the United States in a suit brought in the name of the receiver against one McDonald. In its opinion in that case this court referred to section 380 of the Revised Statutes providing that "all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the District Attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury," and observed that the suit against McDonald was one embraced by that section, and that the receiver was, within its meaning, an officer and agent of the United States.

After referring also to sections 770, 823 to 827 inclusive, 1764 and 1765, the court said: "It ought not to be difficult under any reasonable construction of these statutory provisions to ascertain the intention of Congress. A distinct provision is made for the salary of a District Attorney, and he cannot receive, on that account, any more than the statute prescribes. But the statute is equally explicit in declaring, in respect to compensation that may be 'taxed and allowed,' that he shall

receive no other than that specified in sections 823 to 827 inclusive, 'except in cases otherwise expressly provided by law.' It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance or compensation, in any form whatever, for any service or duty, unless the same is expressly authorized by law, or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation. No room is left here for construction. It is not expressly provided by law that a District Attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties. Without such express provision, compensation for services of that character cannot be taxed, allowed or paid. Nor can the expenses of the receivership be held to include compensation to the District Attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a District Attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named. Nothing in the last clause of section 823 militates against this view. On the contrary, the proper interpretation of that clause supports the conclusion we have reached. Its principal object was to make it clear that Congress did not intend to prohibit attorneys, solicitors and proctors, representing individuals in the courts of the United States, from charging and receiving, in addition to taxable fees and allowances, such compensation as was reasonable under local usage, or such as was agreed upon between them and their clients. But to prevent the application of that rule to the United States, the words 'other than the Government' were inserted. The introduction of those words in that clause emphasizes the purpose not to subject the United States to any system for compen-

sating District Attorneys except that expressly established by Congress, and, therefore, to withhold from them any compensation for extra or special services, rendered in their official capacity, which is not expressly authorized by statute. Whatever legal services were rendered or offered to be rendered by the plaintiff in the McDonald suit were rendered or offered to be rendered by him as United States District Attorney, and in that capacity alone. As such officer he is not entitled to demand compensation for the services so rendered or offered to be rendered."

The full scope of the decision in *Gibson* v. *Peters* is shown by this extract from the opinion in that case. The point in judgment was that the services rendered by Gibson were in discharge of duties imposed upon him by law in relation to suits of a particular kind, and as no statute made provision for additional or special compensation for such services, his claim against the United States for extra pay could not be allowed.

In *United States* v. *Winston*, 170 U. S. 522, 525, which involved the question whether the District Attorney of the United States for the District of Washington could be allowed special compensation for services rendered by direction or at the instance of the Attorney General in a case in the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, it was held that the duties of the claimant as District Attorney of the United States were limited by the boundaries of his district; and that while he was required to discharge all his official duties within those boundaries, he was not required to go beyond them. The court said: "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."

In *Ruhm* v. *United States*, 66 Fed. Rep. 531, 532, it was held that as it is the duty of a District Attorney to prosecute in his district all civil actions in which the United States are concerned, he is not entitled to extra compensation for conducting a suit to recover pension money fraudulently secured.

The controlling question, therefore, in the present case is, whether Johnson was under a duty imposed upon him as District Attorney to perform the services for which he here claims special compensation. If such was his duty as defined by law, then he is forbidden by statute from receiving any special compensation on account of such services — this, for the reason that no appropriation for such compensation has been made by any statute explicitly stating that it was for such additional pay, extra allowance or compensation. §§ 1764, 1765. On the other hand, if his duties as District Attorney did not embrace such services as he rendered, and for which he here claims special compensation, then he is entitled to be paid therefor without reference to the regular salary, pay or emoluments attached to his office.

What relations did the District Attorney have, by virtue of his office, with the proceedings instituted in his district for the condemnation of land under the act of 1890 relating to gun and mortar batteries for the defence of New York? That act authorized the Secretary to cause condemnation proceedings to be instituted, in the name of the United States — such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property in the States wherein the proceedings were instituted. The application of the Secretary to the Attorney General was doubtless made under the provisions of the act of August 1, 1888, c. 728, 25 Stat. 357, providing that in every case in which the Secretary of the Treasury, "or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for

the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." By the same act it was provided that "the practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This statute being in force, the Attorney General directed the defendant in error as District Attorney to institute on behalf of the Government the condemnation proceedings desired by the Secretary of War. It was of course not contemplated by Congress that the Attorney General should be away from the National Capital in order to give his personal attention to the conduct of such proceedings. He therefore directed the District Attorney of the district in which the lands were situated to institute and prosecute the required proceedings. Could the District Attorney have declined to represent the United States in such proceedings upon the ground that he was not required by law to do so in his official capacity? The answer to that question depends upon the construction to be given to section 771 of the Revised Statutes which defines generally the duties of District Attorneys. That section, as we have seen, makes it the duty of every District Attorney to prosecute in his district, not only all crimes and offences cognizable under the authority of the United States, but "all civil actions in which the United States are concerned." We are of opinion that within the reasonable meaning of that section the proceedings instituted in the Federal court by Dis-

trict Attorney Johnson to condemn the lands in question for the benefit of the United States constituted a civil action in which the Government was concerned; and that in following the directions of the Attorney General to institute such proceedings and have the lands referred to condemned for the United States, he was only discharging an official duty imposed upon him by statute. It would involve a very narrow construction of section 771 to hold that judicial proceedings in a court of the United States to condemn lands for the use of the Government were not civil actions in which the United States was concerned. We think that when he attended court in the prosecution of those proceedings he was, within the meaning of section 824, "on the business of the United States."

Under the interpretation placed by us upon sections 771 and 824, it results that according to the principle announced in *Gibson* v. *Peters* the defendant in error having been under a duty to represent the United States in the condemnation proceedings referred to, and there being no statute explicitly allowing him extra compensation for the services rendered by him in and about those proceedings, his present claim must be disallowed.

This conclusion it is contended is not consistent with the usage and custom which has obtained in the Executive Departments of the Government for many years prior to the year 1892. How long such usage or custom prevailed, upon what specific grounds it rested, and in what way it is evidenced, does not appear from the statement of facts accompanying the certificate of questions. The opinions of Attorneys General to which our attention has been called by counsel certainly do not cover the precise question now before us. Some of them hold that a District Attorney is entitled to special compensation for representing the interests of the United States in suits in state courts — services in such courts not being required by the statutes regulating his official duties. That is a question not involved in the present case. We perceive no reason for holding that there has been any such long-continued practical interpretation by the Executive Depart-

ments of the Government of sections 1764 and 1765 of the Revised Statutes, brought forward from the acts of March 3, 1839, c. 82, 5 Stat. 337, 349, § 3; August 23, 1842, c. 183, 5 Stat. 510, § 2; and August 26, 1842, c. 202, 5 Stat. 525, § 12; as to justify this court in departing in any degree from such an interpretation of those sections as is required by the obvious import of the words found in them. Such a practice may be resorted to in aid of interpretation, but it cannot be recognized as controlling when the statute to be interpreted is clear and explicit in its language and its meaning not doubtful. *United States* v. *Graham*, 110 U. S. 219, 221; *United States* v. *Healey*, 160 U. S. 136, 141.

It may, however, be observed that some of the opinions of Attorneys General rest upon rules of construction that forbid the allowance of the claim of the defendant in error. In 1855, special or extra compensation was claimed by a District Attorney for services rendered under employment by the Navy Department in a certain case in a Circuit Court of the United States in which the Government was a party. Attorney General Cushing referred to the act of February 26, 1853, regulating "the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and District Courts of the United States, and for other purposes." 10 Stat. 161, c. 80. That act declared, among other things, that in lieu of the compensation then allowed to the officers named, no other compensation should be taxed and allowed. It also established for District Attorneys a fee for each day "of his necessary attendance in a court of the United States on the business of the United States." The provisions of the act of 1853 have been preserved in Chapter sixteen of Title XIII of the Revised Statutes. After referring to some former opinions given by him, Mr. Cushing said: "But in a matter like that now before me, which is of the direct official business of a District Attorney in the court of the United States for his district, which is of the very class of business for which the act of 1853 expressly and in plain terms provides, and as to which any other compensation is emphatically excluded by the strong terms of that act, it does not appear to me that

any extra or special compensation can be lawfully paid to the District Attorney. Nor, in my judgment, is the case taken out of the general rule by the fact that the suit concerns immediately the business of the Navy Department, and has been the subject of instructions from the Secretary of the Navy. All the civil business of the Government concerns some one of its Departments, and may require the attention of its Head. It cannot be that a suit in the name of the United States, pending in the District or Circuit Court, is out of the scope of the regular duty of a District Attorney because of its arising in the business of the Navy Department rather than the Treasury or any other Department; nor that in such a case the service of the District Attorney becomes that of counsel specially retained by the Department. This latter enactment must have been designed, it seems to me, for contingencies, where a Head of Department needs professional services in a case not provided for by the particular terms of the law, and the special compensation to a District Attorney for the performance of such a service must depend on that fact, not on the fact that he has been instructed by the Head of the Department. A contrary construction would lay the foundation for extra compensation to District Attorneys in almost every case in which they appear in civil actions in which the United States are concerned." 7 Op. 84, 86.

At a later date, May 25, 1858, Attorney General Black had before him an application for special allowance to a District Attorney for services rendered by him. The claim, he said, involved three questions, the first of which was: Can the District Attorney, in any case, charge more for his services than the fee-bill expressly allows? He said: "The first question does not, for a moment, admit of any other reply than a direct negative: the District Attorney can receive such compensation, and such only, as the fee-bill gives. This is not only the general policy of the Government, but it is expressly declared to be the will of Congress by the act of 1853. When, therefore, a District Attorney makes a charge against the Treasury for services, he must support it by showing some clause in the fee-bill which authorizes him to receive what he

claims. When a duty is enjoined upon him by the law of his office and not merely by the request of a Department, he is bound to perform it and take as compensation what the law gives him. That is his contract; and if it be a bad one for him he has no remedy but resignation. The subject is not open to a new bargain between him and any other officer of the Government. All criminal prosecutions and all civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can be legally allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee-bill is altogether inadequate. I cannot make out, in any way satisfactory to my own mind, the ingenious distinction which would pay the officer as attorney what the fee-bill gives, and then pay him besides a *quantum meruit* for managing the same case as counsel." 9 Op. 146, 147.

In an opinion rendered March 13, 1888, Attorney General Garland, upon an extended review of the adjudged cases, said: "From these authorities it may be derived that the elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation, whose amount is fixed by law or regulation, shall be provided for their payment." 19 Op. 121, 125, 126.

The same views were expressed by the Second Comptroller of the Treasury in an opinion delivered by him as late as 1893 in *Earhart's case.* Cousar's Dig. 12.

We are of opinion that Congress intended by sections 1764 and 1765 to uproot the practice under which, in the absence of any statute expressly authorizing it, extra allowances or special compensation were made to public officers for services which they were required to render in consideration only of the fixed salary and emoluments established for them by law. Our duty is to give effect to the legislation of Congress, and not to defeat it by an interpretation plainly inconsistent with the words used.

Syllabus.

The conclusion is that as the defendant in error was under a duty as District Attorney to represent the United States in the condemnation proceedings referred to (§ 771); as his attendance in court on those proceedings was on the business of the United States (§ 824); as no statute provides for extra or special compensation for services of that character; and as the existing statutes declare that no officer in any branch of the public service shall directly or indirectly, or in any form whatever, receive from the Treasury of the United States any additional pay, extra allowance or compensation, unless the same be authorized by law and the appropriation therefor expressly states that it is for such additional pay, extra allowance or compensation, Rev. Stat. §§ 1764, 1765, act of June 20, 1874, c. 328, the claim of the defendant in error must be rejected, and judgment rendered for the United States.

For the reasons stated the first question is answered in the negative; and under the certificate the answer to the other questions becomes both unnecessary and immaterial. It will be so certified.

Mr. Justice Shiras and Mr. Justice Peckham dissented.

UNITED STATES v. MATTHEWS.

APPEAL FROM THE COURT OF CLAIMS.

No. 79. Argued December 8, 1898. — Decided March 6, 1899.

The authority conferred upon the Attorney General by the act of March 3, 1891, c. 542, 26 Stat. 985, to offer rewards for the detection and prosecution of crimes against the United States, preliminary to the indictment, empowered him to authorize the marshal of the Northern District of Florida to offer a reward for the arrest and delivery of a person accused of the committal of a crime against the United States in that district, the reward to be paid upon conviction; and a deputy marshal, who had complied with all the conditions of the offer and of the statute, was entitled to receive the amount of the reward offered.

THE case is stated in the opinion.

Mr. Assistant Attorney General Pradt for appellants. *Mr. John G. Capers* was on his brief.

Mr. Richard R. McMahon and *Mr. George A. King* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The court below held that the plaintiffs were entitled to recover the sum by them claimed, 32 C. Cl. 123, and the United States prosecutes this appeal. The origin of the controversy and the facts upon which the legal conclusion of the court was rested are these: The two plaintiffs were, one a regular and the other a specially appointed deputy marshal. They claimed five hundred dollars, the sum of a reward offered by the Attorney General for the arrest and conviction of one Asa McNeil, who was accused of having been concerned in the killing of one or more revenue officers at a village in Holmes County, Florida. McNeil was arrested by the officers in question, tried and convicted. This suit was brought in consequence of a refusal to pay the reward. The act of March 3, 1891, c. 542, 26 Stat. 948, 985, "making appropriations for sundry civil expenses of the government for the fiscal year ending June the thirtieth, eighteen hundred and ninety-two, and for other purposes," under the heading "Miscellaneous," contained the following appropriation: "Prosecution of crimes; for the detection and prosecution of crimes against the United States, preliminary to indictment . . . under the direction of the Attorney General, . . . thirty-five thousand dollars." Under the authority thus conferred the Attorney General, on July 31, 1891, addressed a letter to the marshal of the Northern District of Florida, saying: "Your letter of July 24 is received. You are authorized to offer a reward of five hundred dollars (500) for the arrest and delivery to you, at Jacksonville, of Asa McNeil, chief of conspirators, who fired upon revenue deputies at Bonifay, Holmes County, last fall, this reward

to be paid upon conviction of said McNeil." A capias for the arrest of McNeil was executed by the deputies in question on the 11th day of July, 1892, the court below finding that the arrest was due to their exertions.

Beyond doubt the appropriation empowered the Attorney General to make the offer of reward, and hence in doing so he exercised a lawful discretion vested in him by Congress. It is also clear that the offer of the reward made by the Attorney General was broad enough to embrace an arrest made by the deputies in question. If then the right to recover is to be tested by the provisions of the statute and by the language of the offer of reward, the judgment below was correctly rendered. The United States, however, relies for reversal solely on two propositions, which it is argued are both well founded. First. That as at common law it was against public policy to allow an officer to receive a reward for the performance of a duty which he was required by law to perform, therefore the statute conferring power on the Attorney General and the offer made by him in virtue of the discretion in him vested, should be so construed as to exclude the right of the deputies in question to recover, since as deputy marshals an obligation was upon them to make the arrest without regard to the reward offered. Second. That even although it be conceded that the officers in question were otherwise entitled to recover the reward, they were without capacity to do so because of the general statutory provision forbidding "officers in any branch of the public service or any other person whose salary, pay or emoluments are fixed by law or regulations," from receiving "any additional pay, extra allowance or compensation in any form whatever," (Rev. Stat. § 1765,) and because of the further provision "that no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law. . . ." Act of June 20, 1874, c. 328, 18 Stat. 85, 109. The first of these contentions amounts simply to saying that though the act of Congress vested the amplest discretion on the subject

in the Attorney General, and although that discretion was by him exercised without qualification or restriction, it becomes a matter of judicial duty in construing the statute and in interpreting the authority exercised under it to disregard both the obvious meaning of the statute and the general language of the authority exercised under it by reading into the statute a qualification which it does not contain and by inserting in the offer of reward a restriction not mentioned in it, the argument being that this should be done under the assumption that it is within the province of a court to disregard a statute upon the theory that the power which it confers is contrary to public policy. It cannot be doubted that in exercising the powers conferred on him by the statute, the Attorney General could at his discretion have confined the reward offered by him to particular classes of persons. To invoke, however, judicial authority to insert such restriction in the offer of reward when it is not there found, is to ask the judicial power to exert a discretion not vested in it, but which has been lodged by the lawmaking power in a different branch of the Government. Aside from these considerations the contention as to the existence of a supposed public policy, as applied to the question in hand, is without foundation in reason and wanting in support of authority.

It is undoubted that both in England and in this country it has been held that it is contrary to public policy to enforce in a court of law, in favor of a public officer, whose duty by virtue of his employment required the doing of a particular act, any agreement or contract made by the officer with a *private individual*, stipulating that the officer should receive an extra compensation or reward for the doing of such act. An agreement of this character was considered at common law to be a species of quasi extortion, and partaking of the character of a bribe. *Bridge* v. *Cage*, Cro. Jac. 103; *Badow* v. *Salter*, Sir Wm. Jones, 65; *Stotesbury* v. *Smith*, 2 Burr. 924; *Hatch* v. *Mann*, 15 Wend. 44; *Gillmore* v. *Lewis*, 12 Ohio, 281; *Stacy* v. *State Bank of Illinois*, 4 Scam. 91; *Davies* v. *Burns*, 5 Allen, 349; *Brown* v. *Godfrey*, 33 Vt. 120; *Morrell* v. *Quarles*, 35 Ala. 544; *Day* v. *Putnam Ins. Co.*, 16

Minn. 408, 414; *Hayden* v. *Souger*, 56 Ind. 42; *Matter of Russell's Application*, 51 Conn. 577; *Ring* v. *Devlin*, 68 Wis. 384; *St. Louis &c. Railway* v. *Grafton*, 51 Ark. 504. The broad difference between the right of an officer to take from a private individual a reward or compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority and sanctioned by the executive officer to whom the legislative power has delegated ample discretion to offer the reward, is too obvious to require anything but statement.

Nor is there anything in the case of *Pool* v. *Boston*, 5 Cush. 219, tending to obscure the difference which exists between the offer of a reward by competent legislative and executive authority and an offer by one not having the legal capacity to do so. In that case, the plaintiff, a watchman in the employ of the city of Boston, while patrolling the streets, in the ordinary performance of his duty, discovered and apprehended an incendiary, who was subsequently convicted. The action was brought to recover the amount of a reward which the city government had offered "for the detection and conviction of any incendiaries" who had set fire to any building in the city, or might do so, within a given period. Solely upon the authority of decisions denying the right of a public officer to recover from a private individual a reward or extra compensation for the performance of a duty owing to the party sought to be charged, it was held that there could be no recovery. The city government of Boston, acting in its official capacity, and in the exercise of the general powers vested in cities and towns by the law of Massachusetts, doubtless had authority to offer rewards for the detection and conviction of criminals. *Freeman* v. *Boston*, 5 Met. 56; *Crawshaw* v. *Roxbury*, 7 Gray, 374. But no act of the legislature, expressly or by implication, had intrusted municipal authorities with the discretion of including in an offer of reward public officers whose official duty it was to aid in the detection and conviction of criminals. There is not the slightest intimation contained in the opinion in that case that if the reward in

question had been offered within the limits of a discretion duly vested by the supreme legislative authority of the Commonwealth that the court would have considered that it was its duty to deny the power of the Commonwealth, or by indirection to frustrate the calling of such power into play, by reading into the legislative authority by construction a limitation which it did not contain.

Looking at the question of public policy by the light of the legislation of Congress, on other subjects, it becomes clear that the expediency of offering to public officers a reward as an incentive or stimulus for the energetic performance of public duty has often been resorted to. As early as July 31, 1789, in chapter 5 of the statutes of that year, a portion of the penalties, fines and forfeitures which might be recovered under the act, and which were not otherwise appropriated, were directed to be paid to one or more of certain officers of the customs. Like provisions were embodied in section 69 of chapter 35 of the act of August 4, 1790; section 2 of chapter 22 of the act of May 6, 1796; and section 91 of chapter 22 of the act of March 2, 1799. Similar provisions are also contained in the one hundred and seventy-ninth section of chapter 173, act of June 30, 1864, and the amendatory section, No. 1, of chapter 78 of the act of March 3, 1865. So, also, by section 3 of the Anti-moiety Act, chapter 391, June 22, 1874, a discretion was vested in the Secretary of the Treasury to award to officers of the customs as well as other parties, not exceeding one half of the net proceeds of forfeitures incurred in violation of the laws against smuggling. As said by Mr. Justice Grier, delivering the opinion of the court in *Dorsheimer* v. *United States*, 7 Wall. 166, 173: "The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes."

The fact that the statute vested a discretion in the Attorney General to include or not to include, when he exercised the power to offer a reward, particular persons within the offer by him made, and that in the instant case the discretion was so availed of as not to exclude deputy marshals from taking

the offered reward, renders it unnecessary to determine whether a deputy marshal is an officer of the United States within the meaning of section 1765 of the Revised Statutes and section 3 of the act of June 20, 1874, to which reference has already been made. As the reward was sanctioned by the statute making the appropriation and was embraced within the offer of the Attorney General, it clearly, under any view of the case, was removed from the provisions of the statutes in question. The appropriation act being a special and later enactment operated necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred on the Attorney General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the provisions of the later and special act.

Judgment affirmed.

Mr. Justice Brown concurring in the result only.

Did the opinion of the court rest solely upon the ground stated in the opinion of the Court of Claims, that a deputy marshal is not an "officer," or "other person whose salary, pay or emoluments are fixed by law or regulations," as specified in Revised Statutes, section 1765; nor a civil officer receiving from the United States a salary or compensation allowed by law, and therefore not within the act of June 20, 1874, 18 Stat. 109, I should have been disposed, though with some doubt, to acquiesce in the opinion. While I think a deputy marshal is beyond all peradventure an officer of the United States, yet as his compensation is by fees not paid directly by the Government, but by agreement with the marshal, subject only to the limitation that such fees "shall not exceed three fourths of the fees and emoluments received or payable" to the marshal "for services rendered by him," (such deputy,) I think it a grave question whether he is within the spirit of either of the sections above quoted. I consider it a reasonable construction to hold that these sections are limited to those who receive a salary or other compensation directly from the Government, or one of its departments, and doubt their appli-

cation to one who, although holding a permanent appointment as an officer, receives no pay directly from the Government, but only such compensation as his superior may choose to allow him. *Douglas* v. *Wallace*, 161 U. S. 346.

But I cannot concur in so much of the opinion as intimates that, under an act of Congress making an appropriation for the prosecution of crime, under the direction of the Attorney General, the Attorney General has a discretion to direct any portion of it to be paid to one of a class of persons who are forbidden by a previous act from receiving any additional pay or compensation beyond such as is allowed to them by law. This could only be done upon the theory stated in the opinion that the appropriation act, being a special and later enactment, operated necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred upon the Attorney General. I do not think the two acts stand in the relation of a prior general statute and a subsequent special one, but rather the converse. The prior acts are general acts, applicable to all officers of Government whose salaries or compensations are fixed by law; the latter act makes a particular appropriation for the detection of crime, and vests the Attorney General with power to direct to whom it shall be paid. But there can be no inference from it that he has a discretion to pay it to any one who is forbidden by law to receive it. I had assumed it to be the law that a later act would not be held to qualify or repeal a prior one, unless there were a positive repugnancy between the provisions of the new law and the old, and even then the prior law is only repealed to the extent of such repugnancy. This was the declared doctrine of this court in *Wood* v. *United States*, 16 Pet. 342; in *McCool* v. *Smith*, 1 Black, 459; in *Daviess* v. *Fairbairn*, 3 How. 636; in *Cope* v. *Cope*, 137 U. S. 682; in *Furman* v. *Nichol*, 8 Wall. 44; in *Ex parte Yerger*, 8 Wall. 85; in *United States* v. *Sixty-seven Packages*, 17 How. 85; and in *Red Rock* v. *Henry*, 106 U. S. 596.

In this case I see no intent whatever on the part of Congress to vary or qualify the prior law. Both enactments may properly stand together, and the prior ones be simply regarded as limiting the application of the later.

Syllabus.

In justice to the Attorney General it ought to be said that his offer of $500 for the arrest and delivery of McNeil was a general one; and that he did not assume to say that any officer of the Government, who was forbidden by law from receiving extra compensation, should receive any portion of the reward. There was no attempt on his part to disregard the previous limitation or to offer it to any one who was forbidden by law from receiving it. The subsequent action of the Acting Attorney General in refusing to pay Matthews the reward upon the ground that the arrest of McNeil was performed in the line of his duty is a still clearer intimation that no such construction as is put by the court upon the offer of reward was intended by the Attorney General.

For these reasons I cannot concur in the opinion, though I do not dissent from the result.

Mr. Justice Harlan and Mr. Justice Peckham dissented, upon the ground that the offering or payment of a reward to a public officer, for the performance of what was at all events nothing more than his official duty, was against public policy, and the act of Congress authorizing the Attorney General to offer and pay rewards, did not include or authorize the offer or payment of any reward to a public officer under such circumstances.

ALLEN *v.* SMITH.

SMITH *v.* ALLEN.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Nos. 168, 176. Argued January 19, 1899. — Decided March 6, 1899.

The manufacturer of the sugar, and not the producer of the sugar cane, is the person entitled to the "bounty on sugar" granted by the act of March 2, 1895, c. 189, to "producers and manufacturers of sugar in the United States."

Statement of the Case.

This was a controversy arising over the distribution of the estate of Richard H. Allen, a large sugar planter of La Fourche Parish, Louisiana, who died September 14, 1894, leaving a will of which the following clauses only are material to the disposition of this case:

"I give to my wife, Bettie Allen, one half of my Rienzi plantation and one half of all tools, mules, etc. The names of my executors, etc., will be named hereafter. My executors shall have from one to five years to sell and close up the estate, as I fear property will be very low and dull. They can sell part cash, part on time, eight per cent interest with vendor's lien. I will that my wife do have one half of everything belonging to Rienzi, except the claim due me by the United States; that and other property I will speak of further on. I appoint as my executors, Ogden Smith and W. F. Collins, residing on Rienzi plantation. I also appoint Mrs. Bettie Allen, executrix. I give them full power to sell Rienzi plantation whenever they find a good offer for all the property there belonging. When it is sold half of all the proceeds, cash, notes, etc., is to belong to my dear wife, Bettie Allen. The other half will be spoken of hereafter. As I fear property will be very low, I give my executors five years to work for a good price. In the meantime that they are waiting to sell, the place can be rented or worked so as to pay all taxes and other charges; any over that to go to Mrs. Bettie Allen's credit."

Letters testamentary were issued to William F. Collins, Ogden Smith and M. Elizabeth Greene, the widow, better known as Bettie Allen, who were authorized by special order to carry on and work the plantation, etc.

The executors did not agree as to the disposition of the estate; Mrs. Allen and Collins filing a provisional account of their administration and praying for its approval, while Smith filed a separate account, prayed for its approval, and stated that he disagreed with his coexecutors in several particulars, and therefore filed an account in which his coexecutors did not concur. The principal dispute seems to have been over the cash left by the deceased, which Mrs. Allen claimed under the will, and Smith insisted belonged to the legal heirs who

were not cut off by the will. Mrs. Allen also claimed the crop of the Rienzi plantation, while Smith insisted it belonged to the legatees named in the will, to whom the realty was bequeathed. Opposition to the approval of both accounts were also filed by various parties interested in the estate, and for various reasons not necessary to be here enumerated. Judgment was delivered by the district court, June 10, 1895, settling the questions in dispute between the parties interested, and an appeal was taken to the Supreme Court of Louisiana, which rendered an opinion March 9, 1896, varying the decree of the court below to the extent of holding Mrs. Allen entitled to the net proceeds of the crop for the year 1894, but affirming it in other respects. 48 La. Ann. 1036. No reference, however, was made in the proceedings up to this time to the Government bounty upon sugar, amounting to $11,569.35, which was collected by Mrs. Allen, and which forms the subject of the present litigation.

This suit was initiated by a petition filed August 18, 1896, by Collins and Mrs. Allen for the approval of their final account, and of the proposed distribution of the undistributed assets, among which was the bounty granted by Congress for sugar produced on the Rienzi plantation for the year 1894, the portion received, $11,569.35, being all that the estate was entitled to out of the appropriation made by Congress for this purpose. "This amount the accountants proposed to turn over to Mrs. Bettie Allen as the owner of the net proceeds of the crop of 1894 on the Rienzi plantation, under the will of the testator and the decree of the Supreme Court."

Smith also filed a final account and an opposition to that of Mrs. Allen and Collins, particularly opposing giving any part of the bounty to Mrs. Allen, stating that "this money formed no part of the crop of 1894, is an unwilled asset, and must be distributed among the legal heirs who have not been cut off by the will, in accordance with the petitioner's final account filed herewith." These heirs, as stated by him in his account, were (1) the estate of Thomas H. Allen, Sen., a deceased brother of the testator, represented by J. Louis Aucoin, administrator; (2) two children of Mrs. Myra Turner, a deceased

Counsel for Mrs. Allen.

sister; (3) five children of Mrs. Cynthia Smith, a deceased sister. Opposition was also filed by these several classes of heirs to the accounts of Mrs. Allen and Collins, and by certain other heirs who were not recognized by the executors, to that of Smith. Upon consideration of these various pleadings and the testimony introduced in connection therewith, the district court was of opinion that the bounty formed no part of the crop proper or the proceeds thereof. "Though based on the crop as a means of calculation, and conditioned on the production of the crop by the owner of the plantation, under certain rules, it was a pure gratuity from the Government;" that it did not therefore go to Mrs. Allen under the will, but to the heirs as an unwilled portion.

An appeal was taken to the Supreme Court by the Smith heirs, by Ogden Smith, executor, and by Mrs. Allen and Collins. That court first held that the bounty was a gratuity from the Government, though based upon an estimate of the crop as a means of calculation; that its allowance was conditioned on the fulfilment by the deceased of certain prerequisites; that the equitable claim of the deceased to the bounty had been created during his lifetime, the license obtained and all conditions precedent complied with; that it formed no part of the crops of 1894 or 1895, nor of their proceeds; that the executors did nothing but make the necessary proofs preparatory to its collection and receive payment of the money. "It must consequently be classed as an unwilled asset of the deceased, and not as part of the net proceeds of the crop of 1894, passing, under the will, to Mrs. Bettie Allen;" and that it must pass to the account of the legal heirs. 49 La. Ann. 1096. Upon a rehearing, applied for by both parties, that court modified its views, and adjudged that the bounty money in controversy be divided equally; that one half be distributed among the heirs as an unwilled portion, and that the other half be delivered to Mrs. Allen as legatee. From this decree both parties sued out a writ of error from this court. 49 La. Ann. 1096, 1112.

Mr. J. F. Pierson for Mrs. Allen. *Mr. Charlton R. Beattie* and *Mr. Taylor Beattie* filed a brief for same.

Mr. Albert P. Fenner for Aucoin. *Mr. Charles E. Fenner*, *Mr. Samuel Henderson, Jr.*, and *Mr. Charles Payne Fenner* were on the brief.

Mr. Henry Chiapella for Turner and Smith. *Mr. L. F. Suthon* filed a brief for Smith's heirs.

Mr. Justice Brown, after making the above statement, delivered the opinion of the court.

This case involves the question whether, under the act of Congress and the will of Richard H. Allen, the bounty of eight tenths of one per cent per pound, granted by Congress to the "producer" of sugar, was payable to his widow or to his heirs at law.

In the course of the litigation in the state courts a large number of questions were raised and decided which are not pertinent to this issue. So far as these questions depend upon the construction of state laws or of the will of Mr. Allen, they are beyond our cognizance. So far as the question of bounty depends upon the construction of that law, the decision of the Supreme Court is equally binding upon us; but so far as it depends upon the construction of the act of Congress awarding such bounty, it is subject to reëxamination here.

The course of legislation upon the subject of the sugar bounty is set forth at length in the opinion of this court in *United States* v. *Realty Co.*, 163 U. S. 427, and is briefly as follows:

By the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, it was provided in paragraph 231 that on and after July 1, 1891, and until July 1, 1905, there should be paid "to the producer of sugar" a variable bounty, dependent upon polariscope tests, "under such rules and regulations as the Commissioner of Internal Revenue . . . shall prescribe." Then follow three paragraphs requiring the producer to give notice to the Commissioner of Internal Revenue of the place of production, the methods employed, and an estimate of the amount to be produced, together with an application for a license and an accompanying bond. The Commissioner was required to issue

this license, and to certify to the Secretary of the Treasury the amount of the bounty for which the Secretary was authorized to draw warrants on the Treasury. This act was repealed August 27, 1894, c. 349, 28 Stat. 509, while the crop of 1894 was in progress of growth, and about a fortnight before the death of Mr. Allen. But by a subsequent act of March 2, 1895, c. 189, 28 Stat. 910, 933, it was enacted that there should be paid to those "producers and manufacturers of sugar" who had complied with the provisions of the previous law a similar bounty upon sugar manufactured and produced by them previous to August 28, 1894, upon which no bounty had been previously paid. As the sugar in question in this case was not manufactured and produced prior to August 28, 1894, this provision was not applicable; but there was a further clause (under which the bounty in this case was paid) to the effect that there should be paid to "those producers who complied with the provisions" of the previous bounty law of 1890, by filing an application for license and bond thereunder required, prior to July 1, 1894, and who would have been entitled to receive a license as provided for in said act, a bounty of eight tenths of a cent per pound on the sugars actually manufactured and produced during that part of the fiscal year ending June 30, 1895, comprised in the period commencing August 20, 1894, and ending June 30, 1895, both days inclusive. The constitutionality of this act was affirmed by this court in *United States* v. *Realty Co.*, 163 U. S. 427.

At the time of Mr. Allen's death, September 19, 1894, and for many years prior thereto, he was the owner of a valuable sugar plantation, upon which he was engaged in the cultivation of cane and the manufacture of sugar. At this time there was standing in his fields a large crop of cane nearly ready for harvesting. In anticipation of this crop and of the manufacture of sugar therefrom, Mr. Allen had complied with all the provisions of the bounty law, and would, but for the repeal of the act of 1894, about one month prior to his death, have been entitled to collect the bounty. While, then, there was no bounty provision in force at the time of his death,

Congress, in March of the following year, enacted the bounty law above specified in fulfilment of its moral obligation to recompense those who had planted their cane upon the supposition that the bounty granted by the act of 1890 would be continued. The crop of cane upon his plantation at his death was harvested by his executors at the expense of the funds in their hands, which expense was deducted from the gross proceeds of the sugar.

The material provisions of his will are as follows:

1. "I give to my wife, Bettie Allen, one half on my Rienzi plantation and one half of all tools, mules, etc."

2. "My executors shall have from one to five years to sell and close up the estate."

3. "I will that my wife do have one half of everything belonging to Rienzi plantation, except the claim due me by the United States." (This was not the claim for bounty.)

4. "When it" (the plantation) "is sold half of all the proceeds, cash, notes, etc., is to belong to my wife, Bettie Allen." "As I fear property will be very low, I give my executors five years to work for a good price."

5. "In the meantime, that they are waiting to sell, the place can be rented or worked to pay all taxes and other charges, any over that to go to Mrs. Bettie Allen's credit."

Under the last clause of the will the executors, while awaiting a favorable opportunity to sell the plantation, were authorized to work it so as to pay all taxes and other charges, and to place the net proceeds to Mrs. Allen's credit. In construing this clause the Supreme Court of Louisiana held, upon the first hearing, 48 La. Ann. 1036, that Mistress Bettie was entitled to the net proceeds of the crop of the Rienzi plantation for the years 1894–1895. At the time of the filing of their first account by the executors, the crop of 1894 had not been sold by them, and the bounty granted by the act of March 2, 1895, had not been collected; consequently these two items were reserved to be afterwards accounted for by the executors. A further question, however, arose, and that was as to whether, in making up the net proceeds of the crop of 1894, the expenses incurred prior to the death of the tes-

tator should be deducted, as well as those incurred by the executors after the death of the testator. Both the district court and the Supreme Court were of opinion that the will contemplated and dealt with the renting or cultivation of the plantation after the death of the testator, and during such a period of time as it might remain under the administration of the executors pending a sale; that the date at which the expenses were to begin was evidently that at which the administration of the executors commenced, and only those incurred during their administration should be deducted from the proceeds of the crop, in order to ascertain the net proceeds thereof, including the expenses of making the sale. 49 La. Ann. 1096.

The Supreme Court was further of the opinion that the bounty money which was collected from the Government by the executors formed no part of the crops of 1894 and 1895, nor of their proceeds; that it was not *in esse* at the time those crops were grown and gathered; that the executors did nothing but make the necessary proofs preparatory to its collection and received payment of the money, and that it should therefore be classed as an unwilled asset of the deceased, and not as part of the net proceeds of the crop of 1894, passing, under the will, to Mrs. Allen. 49 La. Ann. 1096. But, upon a rehearing of this question, 49 La. Ann. 1112, the Supreme Court modified its views to a certain extent, treated the case as one depending upon the question who was the producer of the crop within the meaning of the act of Congress, and held that the producer of the cane was to be the first to receive the benefit of the bounty on complying with certain formalities; that the act placed the manufacturer of the sugar, in the matter of the bounty laws, in a secondary position; but that both production and manufacture were essential in order to enable the producer to recover the bounty; that to determine who was the producer it was necessary to consider the questions of title and ownership; that the crop had been planted and cultivated by Allen, and all expenses to the date of his death were paid from his funds; that he had earned the value of the crop on that date,

and had also earned a proportionate share of the bounty, not because the bounty was a part of the crop or its proceeds, but because it was granted to the producer of the crop; that in determining who was the producer, it could not exclude from consideration the labor applied under the direction of the owner of the plantation and the amount expended by him; that Mistress Bettie was not the exclusive producer, and was, therefore, not entitled to the whole bounty of the Government granted to the producer who produced the entire thing — a crop.

In its opinion upon the rehearing the Supreme Court adjudged that under the will of Allen the proceeds of the manufacture of sugar carried on after his death were for the account of Mrs. Allen and not for that of the estate, and that as a consequence of this construction Mrs. Allen was the manufacturer of the sugar made in the sugar house; that is to say, that whilst the executors may have manufactured the sugar they did so as the agents and for the account of Mrs. Allen, and she was therefore the producer of the sugar, in so far as the manufacture thereof was concerned. In delivering the opinion the court used the following language: "But there are other clauses of the will which, in our view, extend her right and show that she was the producer after the death of Mr. Allen. She paid all the expenses of the crop; she was to receive the proceeds under the terms of the will; indeed, she was the owner of the crop. She can well be considered, as we think, the producer. We desire it to be well understood that, in our opinion, the bounty money is no part of the crop or proceeds of the crop. The question was: Who was the owner and producer of the crop after the death of the testator?"

Having thus determined that under the will of Mr. Allen she, through the executors, was entitled to all the proceeds of the manufacture of sugar in the sugar house, the court proceeded to take away from Mrs. Allen a part of these proceeds upon the theory that, by the act of Congress, the bounty was given, not to the manufacturer of the sugar, but to the producer of the cane. In doing this it necessarily took from Mrs.

Allen a part of the bounty belonging to her as manufacturer of sugar under the act of Congress, and gave it to the legal heirs of Allen, because they had produced the cane from which the sugar had been manufactured. This, therefore, necessarily raised a Federal question, since it involved a construction of the act of Congress. The theory upon which the court did this is thus stated in the opinion: "The end of the bounty was to encourage the production of cane. It devolved upon us to determine by whom the cane was produced. In our judgment, after carefully reading the act, it is evident that the producer was to be the first to receive the benefit of the bounty. . . . The act (although it includes the manufacture of cane into sugar as one of the essentials) places the manufacture of the sugar in matter of the bounty scheme in a secondary position. In other words, in our view production was a first and manufacture a secondary consideration. Each, however, was essential in order to enable the producer to recover the bounty." The conclusion of the court was that, as the cost of cultivation was about equal to the cost of manufacture, the heirs at law were entitled to one half of the bounty and Mrs. Allen the other half.

The correctness of this construction is the question presented for our consideration. In the final production of sugar there are two distinct processes involved: (1) The raising of the cane; (2) the manufacture of the sugar from the cane so raised. If the cane be raised and the sugar be manufactured by the same person, he is beyond peradventure the "producer" of the sugar within the meaning of the statute; but if the cane be raised by one person and the sugar manufactured by another, which is the producer within the intent of the act? Or, if, as in this case, the cane be raised by the testator and he die while the crop is growing, and his executors reap it and convert it into sugar, which is the producer and which is entitled to the net proceeds of the crop? Conceding the question of what are the net proceeds of the crop is one determinable by the state courts alone, it is so commingled with the Federal question, who, under the act of Congress, was the producer of this crop, that it is scarcely possible to give a construction to the

one without also taking into consideration the bearing of the other. In this particular the case is not unlike that of *Briggs* v. *Walker*, 171 U. S. 466, in which, where certain moneys had been collected of the United States by Briggs' executors, this court assumed to determine who were the "legal representatives" of Briggs, and for whose benefit under the act of Congress the money had been collected.

It is quite evident that Allen himself was not the producer of the sugar. He had planted the crop of cane upon his own plantation. He had given notice and a bond to the Commissioner of Internal Revenue, and had applied for a license; but he had done nothing toward the production of the sugar at the time of his death beyond raising the cane, which certainly would not have entitled him to be considered a producer of the sugar. The word "producer" does not differ essentially in its legal aspects from the word "manufacturer," except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market. In the case of sugar a process of strict manufacture is also involved in converting the cane into its final product. In a number of cases arising in this court under the revenue laws, it is said that the word "manufacture" is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. That such product is often the result of several processes, each one of which is a separate and distinct manufacture, and usually receives a separate name; or, as stated in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 216: "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, and several of which may be required to make the final product. Thus logs are first manufactured into boards, planks, joists, scantling, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for

which the article so manufactured receives a different name." So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. That appellation is reserved for him who turns out the finished product.

Neither can Mrs. Allen, nor the heirs of her husband, be said to be the direct producers of the sugar. Neither of them was the owner of the crop, which belonged to the plantation while growing, and would, as hereinafter stated, have passed to the purchaser, had a sale been made while the cane was still uncut. One half of the plantation passed under the will to Mistress Bettie, and the other half to the heirs of her husband.

There remain only the executors who, as between the estate of Allen and the Government, must be deemed the producers of the sugar. By the will they were authorized to rent or work the plantation as they pleased, to pay all taxes and other charges, and to put the residue to the credit of Mrs. Allen. The inchoate right to the bounty obtained by Allen before his death was a personal asset, which undoubtedly passed to the executors, who subsequently perfected that right and received the money.

Of course this money did not belong to the executors personally. They held it for the benefit of the estate and as agents for all persons interested therein; and the question as between the different heirs and legatee who shall be deemed the producer of the sugar remains to be settled. We are all of opinion that this question must be answered in favor of Mistress Bettie. If the cane when cut had been sold, the proceeds, over and above all expenses incurred since her husband's death, would have belonged to her, but not the bounty *eo nomine*, since the sugar had not been produced nor the bounty earned. But if such sale had been made, the cane undoubtedly would have fetched a price largely increased by the fact that the purchaser would receive a bounty upon the manufacture of the sugar. It is impossible to suppose that the price of the cane would not be seriously affected by the promise of the bounty, though perhaps not to the full amount of such

bounty. In this way Mrs. Allen would have received indirectly the benefit of the bounty, although she did not produce the sugar. On the other hand, if the cane be converted into sugar, it is equally just that she should receive the bounty. To deny it to her would place her in a worse position than she would have been in if the executors had sold the cane when it was cut. Whether she received it directly or indirectly makes no difference in principle.

The difficulty with the position of the Supreme Court of Louisiana is this: That if A should raise the cane and sell it to B, who manufactured it into sugar, A and B would be entitled to share in the bounty, although A may have received a much larger price for his cane than he would have received if there had been no bounty. Under the terms of the will Mistress Bettie was entitled to receive the entire proceeds of the crop, over and above the expenses, taxes and other charges; and whether these came from a price received from the cane increased by the offer of a bounty, or from the bounty actually received upon the production of the sugar, is wholly immaterial. To give to one who raises the cane and sells it to a manufacturer any part of the bounty, is in reality to give him a double bounty, since he must necessarily receive one in the enhanced price given for the cane. On the other hand, the manufacturer of the sugar is entitled to the proceeds of his sugar and to whatever the law has annexed thereto as an incident.

To return to the illustration of manufactures. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it; and yet, if the producer of the cane be entitled to any portion of the

bounty, why are not the manufacturers of the constituent parts of a finished product?

The Supreme Court of Louisiana held that the widow was not chargeable with any part of the expense of the crop incurred prior to her husband's death, but that does not change her attitude to the sugar as its actual producer, nor deprive her of the benefit of the bounty; nor do we think that her right to such bounty is affected by the fact that the bounty law in existence when Allen applied for his license was repealed before his death, and another law passed in the following spring renewing the bounty applicable to the crop of the previous year. Such act was passed, as was held by this court, in *United States* v. *Realty Co.*, 163 U. S. 427, in recognition of a moral obligation to those who had put in their crop the previous year upon the faith of the bounty law then in existence. It was not so much a gift by the Government as a reward paid in consideration of expenses incurred by the planters upon the faith of the Government's promise to pay a bounty to the manufacturers and producers of sugar. As applied to this case, we think the act of 1895 should be construed as a continuation of the prior bounty. To say that it is an "unwilled asset" is practically to hold that it is a gift from the Government "without anything in the nature of a consideration," and that the amount of sugar produced is only to be considered as the measure of the bounty. This dissociates the bounty altogether from the motive which actuated Congress in granting it, and turns it into a mere donation of so much money, which it cannot be presumed to have made, even if it had the power. Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized. To grant a bounty irrespective altogether of these considerations would be an act of pure agrarianism; and to determine who is entitled to the benefit of the bounty is but little more than to determine who has rendered the consideration.

Opinion of the Court.

The act giving the supplementary bounty to replace that which should have been paid under the original act clearly did not contemplate giving a bounty to any other producer than the one designated by the original act. That act plainly gives the bounty only to the manufacturer and not to the grower. It follows, therefore, that the court, accepting its construction of the will as unquestionable, declared that although Mrs. Allen was a manufacturer of the sugar and the successor of Mr. Allen in that regard, was yet not entitled to the whole bounty, because, under its construction of the act of Congress, the grower of the cane was the primary person intended to be benefited by the act. As it is obvious that the person intended to be benefited by the act of Congress was the manufacturer, it follows that the Supreme Court of Louisiana, after finding that Mrs. Allen was the manufacturer, has taken from her a portion of the bounty to which she was entitled under the act of Congress, on the erroneous theory that that act gave the bounty to the grower of the cane instead of to the manufacturer.

We do not undertake to say that the crop of growing or maturing cane passed to Mrs. Allen at the date of her husband's death, since if the executors had chosen to sell the plantation the next day, this cane would have passed to the vendee. In this the common law and the civil law agree. (1 Washb. on Real Prop. 5th ed. 11; Code Napoleon, art. 520.) The same principle is incorporated in the Civil Code of Louisiana: "Art. 465. Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached. As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables." But what she did own was the proceeds of the crop; the right in case the plantation was not sold to have this crop harvested for her benefit, and if manufactured into sugar, to have the proceeds of such sugar and all the incidents thereto placed to her credit.

For the reasons above given, we think she must be considered as the producer of the sugar, and that it is immaterial that she

was not the producer of the cane, since the two are distinct and separate articles of production.

It results from this that the decree of the Supreme Court of Louisiana must be reversed, and the cases remanded to that court for further proceedings in consonance with this opinion.

ST. LOUIS, IRON MOUNTAIN AND ST. PAUL RAILWAY COMPANY *v.* PAUL.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 120. Submitted January 10, 1899. — Decided March 6, 1899.

The act of the legislature of Arkansas of March 25, 1889, entitled an act to provide for the protection of servants and employés of railroads, is not in conflict with the provisions of the Constitution of the United States.

THIS action was commenced in a justice's court in Saline Township, Saline County, Arkansas, by Charles Paul against the St. Louis, Iron Mountain and Southern Railway Company, a corporation organized under the laws of the State of Arkansas, and owning and operating a railroad within that State, to recover $21.80 due him as a laborer, and a penalty of $1.25 per day for failure to pay him what was due him when he was discharged. The case was carried by appeal to the Circuit Court of Saline County and there tried *de novo*. Defendant demurred to so much of the complaint as sought to recover the penalty on the ground that the act of the general assembly of Arkansas entitled "An act to provide for the protection of servants and employés of railroads," approved March 25, 1889, Acts Ark. 1889, 76, which provided therefor, was in violation of articles five and fourteen of the Amendments to the Constitution of the United States, and also in violation of the constitution of the State of Arkansas. The demurrer was overruled, and defendant answered, setting up certain matters not material here, and reiterating in its third paragraph the

objection that the act was unconstitutional and void. To this paragraph plaintiff demurred, and the demurrer was sustained. The case was then heard by the court, the parties having waived a trial by jury, and the court found that the plaintiff was entitled to recover the sum claimed and the penalty at the rate of daily wages from the date of the discharge until the date of the commencement of the suit, and entered judgment accordingly. Defendant appealed to the Supreme Court of the State of Arkansas, which affirmed the judgment, 64 Arkansas, 83, and this writ of error was then brought.

The act in question is as follows:

"SECTION 1. Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such non-payment, the wages of such servant or employé shall continue at the same rate until paid. *Provided*, Such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"SEC. 2. That no such servant or employé who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"SEC. 3. That any such servant or employé whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.

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

Mr. John F. Dillon, *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* for plaintiff in error.

Mr. A. H. Garland and *Mr. R. C. Garland* for defendant in error.

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

Plaintiff in error was a corporation duly organized under the laws of Arkansas and engaged in operating a railroad in that State.

The state constitution provided: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporators." Art. XII, § 6. This constitution was adopted in 1874, but, prior to that, the constitution of 1868 had declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; and all such laws may, from time to time, be altered or repealed." Art. V, § 48.

In *Leep* v. *Railway Co.*, 58 Arkansas, 407, section one of the act of March 25, 1889, was considered by the Supreme Court of Arkansas, and was held unconstitutional so far as affecting natural persons, but sustained in respect of corporations as a valid exercise of the right reserved by the constitution "to alter, revoke or annul any charter of incorporation."

The court conceded that the legislature could not under the power to amend take from corporations the right to contract,

but adjudged that it could regulate that right by amendment when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.

As the constitution expressly provided that the power to amend might be exercised whenever in the opinion of the legislature the charter might "be injurious to the citizens," and as railroad corporations were organized for a public purpose; their roads were public highways; and they were common carriers; it was held that whenever their charters became obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended; and as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to secure that result. And the court said: "If the legislature, in its wisdom, seeing that their employés are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employés when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." But the court added that it did not follow that the legislature could by amendment fix or limit the compensation of employés, and particularly not as the right to amend was to be exercised so "that no injustice shall be done to the corporators;" that, however, this act was not obnoxious to that objection, as it left "to the corporations the right of making contracts with their employés on advantageous terms."

In respect of the provision that the unpaid wages then

earned at the contract rate were to become due and payable on the cessation of the employment, "without abatement or deduction," the court held that that did not "require the corporation to pay the employé all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby;" but that it meant "that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment."

Construing the statute thus, and, by elimination, confining it to the corporations described, its validity was sustained as within the reserved power of amendment; and the case was approved and followed in that before us.

The scope of the power to amend, and the general subject of the lawfulness of limitations on the right to contract were considered at length, with full citation of authority, in both these decisions.

The contention is that as to railroad corporations organized prior to its passage, the act was void because in violation of the Fourteenth Amendment. Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied. *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205.

The question then is whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution.

The power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to

possession of contracts lawfully made," Waite, C. J., *Sinking Fund cases*, 99 U. S. 700; but any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights," Gray, J., *Commissioners* v. *Holyoke Water Power Company*, 104 Mass. 446, 451; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347.

This act was purely prospective in its operation. It did not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named.

In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the Supreme Court held the regulation, as promoting the public interest in the protection of employés to the limited extent stated, to be properly within the power to amend reserved under the state constitution.

Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the Fourteenth Amendment. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis & San Francisco Railway* v. *Matthews*, 165 U. S. 1.

Gulf, Colorado and Santa Fé Railway v. *Ellis*, 165 U. S. 150, 159, is not to the contrary, and was properly distinguished from this case by the Supreme Court of Arkansas. There a state statute provided for the assessment of an attorney's fee of not exceeding ten dollars against railroad companies for failure to pay certain debts, and the exaction was held to be a penalty, although no specific duty was imposed for the nonperformance of which it was inflicted. This court said: "The

statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties — duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State." The conclusion was that the subjection of railroad companies only, to the penalty, was purely arbitrary, not justifiable on any reasonable theory of classification, and that the statute denied the equal protection of the law demanded by the Fourteenth Amendment. In this case the act was passed "for the protection of servants and employés of railroads," and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid.

Judgment affirmed.

PRICE *v.* FORREST.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 105. Argued January 3, 4, 1899. — Decided March 6, 1899.

In 1850 Price, a purser in the Navy and fiscal agent for that Department, advanced $75,000 to the Government, from his private fortune, to meet emergencies. His right to receive it back was questioned, and was not settled until 1891, when Congress passed an act directing the Secretary of the Treasury to adjust his account "on principles of equity and justice," and to pay to him "or to his heirs" the sum found due him on such adjustment. It was adjusted by the Secretary, and in August, 1892, it was decided that there was due to Price from the United States $76,204.08. Meanwhile Forrest had recovered in the courts of New Jersey, of which Price was a citizen and resident, a judgment against him for $17,000. Forrest died in 1860 without having collected the amount of this judgment. In 1874 his widow, having been appointed administratrix of his

estate, caused the judgment to be revived by writ of *scire facias* and asked for the appointment of a receiver. Price appeared and answered, and then the cause slept until August, 1892, when Mrs. Forrest filed a petition, stating that money was about to be paid to Price by the United States on his claim, and asking for the appointment of a receiver of the Treasury draft, and that Price be ordered to endorse it to the receiver, to the end that the amount might be received by him as an officer of the court and disposed of according to law. A receiver was appointed, gave bond and entered on his duties. Price died in 1894. He left no will. No letters of administration were granted, but the New Jersey court appointed an administrator *ad prosequendum*. The bill in this case was then filed. The relief sought was, the revival of the bill of 1874, that the administrator *ad prosequendum* be made a party, and that the other parties be enjoined from receiving the money from the Treasury, and that the receiver be authorized to receive and dispose of it under the orders of the court. The heirs of Price set up their claims to it. The court held that the plaintiffs were entitled to the moneys in the Treasury and its judgment was affirmed by the highest court in the State. *Held*, that the receiver, and not the heir, was the person entitled to recover the money from the United States; and that the case did not come within the prohibitory provisions against assignments of claims against the United States, contained in Rev. Stat. § 3477.

The case is stated in the opinion.

Mr. John C. Fay and *Mr. Flavel McGhee* for plaintiffs in error.

Mr. Cortlandt Parker and *Mr. R. Wayne Parker* for defendants in error. *Mr. Frank W. Hackett* was on their brief.

Mr. Justice Harlan delivered the opinion of the court.

The ultimate question in this case is whether the plaintiffs in error, as heirs of Rodman M. Price, are entitled to receive from the United States the amount standing to the credit of the deceased on the books of the Treasury, and which represents the balance of a sum found in his lifetime under the authority of a special act of Congress to be due him upon an adjustment of his accounts as a purser in the Navy.

The facts out of which arise the questions of law discussed by counsel are as follows:

In the year 1848 the decedent was assigned to duty on the Pacific Coast in California as purser and fiscal agent of the

United States for the Department of the Navy. He acted in that capacity until about December, 1849, or January, 1850, when he was detached from such service and ordered to transfer all public money and property remaining in his hands to his successor, or to such other disbursing officer of the Navy as might be designated by the commanding officer at the naval station at California, and immediately after such transfer to report at the city of Washington for the purpose of settling his accounts.

A. M. Van Nostrand was his successor, in California, as acting purser in the Navy.

About December 31, 1849, Commodore Jones of the Navy, commanding the United States squadron at San Francisco, directed Van Nostrand to receive from Price all books, papers, office furniture and funds on hand belonging to the purser's department at that city. Thereupon Price turned over to Van Nostrand as acting purser of the Navy at San Francisco, forty-five thousand dollars, that being all the public money remaining in his hands.

Subsequently on the 14th day of January, 1850, and out of his private funds alone, Price advanced to Van Nostrand seventy-five thousand dollars, taking a receipt therefor as follows: "San Francisco, January 14, 1850. Received from Rodman M. Price, purser U. S. Navy, seventy-five thousand dollars, for which I hold myself responsible to the United States Treasury Department, $75,000. (Duplicate.) A. M. Van Nostrand, acting purser." This money was so advanced without the approval and signature of Commodore Jones.

Van Nostrand never returned the $75,000 or any part of it to Price, nor did he account for it to the Government.

Price insisted that the United States should reimburse him for the amount so advanced by him, but the officers of the Government denied its liability to him on that account. In an elaborate opinion, given March 12, 1854, Attorney General Cushing held that, while the appointment of Van Nostrand as acting purser was lawful and valid under the circumstances, the Government could not be charged with the private funds paid to him by Price, although the latter be-

lieved at the time that his advance of money to the former was an accommodation to the Government in the then unsettled condition of California. 6 Opin. Atty. Gen. 357.

Finally, by an act approved February 23, 1891, c. 279, 26 Stat. 1371, entitled "An act for the relief of Rodman M. Price," the Secretary of the Treasury of the United States was "authorized and directed to adjust upon principles of equity and justice the accounts of Rodman M. Price, late purser in the United States Navy and acting navy agent at San Francisco, California, crediting him with the sum paid over to and receipted for by his successor, A. M. Van Nostrand, acting purser, January 14, 1850, and pay to said Rodman M. Price, or his heirs, out of any money in the Treasury not otherwise appropriated, any sum that may be found due him upon such adjustment."

Under the authority conferred by that act the Secretary of the Treasury, in August, 1892, adjusted the accounts of Price; and in that adjustment he was credited with the sum advanced to Van Nostrand, leaving due to him from the Government the sum of $76,204.08, which of course included the above sum of $75,000.

In order that the precise questions to be determined upon this writ of error may be clearly apprehended we must now refer to certain matters occurring in the courts of New Jersey both prior to and shortly after the passage of the above act of February 23, 1891.

In the year 1857 Samuel Forrest recovered in the Supreme Court of New Jersey a judgment against Rodman M. Price for the sum of $17,000 and costs. Execution upon that judgment was returned unsatisfied. Forrest died in 1860 intestate. In 1874 his wife, one of the present defendants in error, was appointed and qualified as administratrix of his estate. In the same year she sued out a writ of *scire facias* to revive the above judgment, and it was revived. In the bill seeking a revivor of the judgment she alleged facts tending to show that Price had an interest in certain lands, and also that he had equitable things in action or other property to the amount of many thousand dollars, exclusive of all claims thereon and

of all exemptions allowed by law, which she had been unable to reach by execution on the above judgment. By that bill the administratrix also prayed discovery from Price of all property, real or personal, whether in possession or action, belonging to him, with full particulars in relation thereto, and that the same under the order of court be appropriated in satisfaction of such judgment; further, that a receiver be appointed in the cause to collect and take charge of the property, money or things in action found to belong to Price, or to which he was in any way entitled, either in law or equity, with power to convert the same into money, and with such other powers as were usually granted to receivers in similar cases; and that Price be enjoined from assigning, transferring or making any other disposition of the real estate and personal property to which he was in anywise entitled and from receiving any moneys then due or to become due to him, except where the same were held in trust or the funds held in trust proceeded from other persons than himself.

The defendants to that bill were Price and his wife and son, the latter being alleged to claim some interest in the property described in the bill. They appeared and filed an answer, Price denying that any part of the properties mentioned in the bill belonged to him, or that he had any interest in them.

After the filing of that answer the cause slept until August 9, 1892, when Mrs. Forrest, as administratrix of the estate of her husband, filed a petition stating that since the filing of her bill of complaint in that cause no payment had been made on the judgment against Price, and that neither she nor her solicitors had been able to find any personalty or real estate belonging to Price by levy upon and sale of which any part of the amount due on the judgment could be obtained; that it had lately come to her knowledge that about $45,000 was about to be paid to Price by officers of the Treasury of the United States as the sum found to be due him by an accounting then lately had between him and the Government; that that sum was to be paid by the delivery to Price or to his attorneys of a draft of the Treasurer of the United States or some other negotiable security made or issued by its financial

officers and drawn payable to his order, the rules of the Department forbidding that it be made payable to the order of any other person or that said sum should be paid in any other way, and that said draft or negotiable security was to be made and the transaction closed on the 15th day of August thereafter; and that if Price obtained said money from the United States he would, unless restrained, put the same beyond the reach of the petitioner. The prayer of the petition was that a receiver of the draft or other negotiable security be appointed, and that Price be ordered and directed immediately on the receipt of such draft or security to endorse the same to the receiver, to the end that the amount thereof might be received by him *as an officer of the court and disposed of according to law.*

On the presentation of the petition with affidavits in its support, the Chancellor on the 8th day of August, 1892, issued a rule returnable at chancery chambers September 12, following, that Price show cause why the prayer of the petition should not be granted, and an injunction issue, and a receiver appointed pursuant to that prayer, which rule further directed that Price should be and was thereby restrained and enjoined from making any indorsement of the draft referred to in the petition.

A duly certified copy of that order, pursuant to directions therein, was served upon Price on the 10th day of August, 1892. Nevertheless, after that date Price received from the Assistant Treasurer of the United States at Washington and without permission of the court collected four several drafts signed by that officer for the respective sums of $2704.08, $13,500, $20,000 and $9000, in all the sum of $45,204.08, leaving in the hands of the United States of the amount due on the settlement of Price's accounts the sum of about $31,000.

On the 10th day of October, 1892, Charles Borcherling was appointed by the Chancery Court receiver in said cause of the property and things in action belonging or due to or held in trust for Price at the time of issuing said executions, or at any time afterwards, and especially of said four drafts, with authority to possess, receive and sue for such property and

things in action and the evidence thereof; and it was made the duty of the receiver to hold such drafts *subject to the further order of the court.* The receiver was required to give bond in the sum of $40,000, conditioned for the faithful discharge of his duties. At the same time Price was ordered to convey and deliver to the receiver all such property and things in action and the evidence thereof, and especially forthwith to endorse and deliver the drafts to him, and he and all agents or attorneys appointed by him were enjoined and restrained from intermeddling with the receiver in regard to said drafts, and ordered, if in possession or control thereof, to deliver them to the receiver with an indorsement to that officer or to the clerk of the court for deposit; provided, the order should be void if the drafts other than the one for $9000 were delivered with Price's indorsement to the clerk, the proceeds to be deposited to the credit of the cause. Price was expressly enjoined from making any indorsement or appropriation of the drafts other than to the receiver or the clerk for deposit.

The receiver gave the required bond, and having entered upon the duties of his office, he caused a copy of the above order to be served upon Price, and demanded compliance with its provisions.

In 1892, the particular day not being stated, the Chancery Court issued an attachment against Price for contempt of court in disobeying the order of August 8, 1892. By an order made May 18, 1894, the court held him to be guilty of such contempt and he was directed to pay to the receiver the sum of $31,704.08 and a fine of $50 and costs, and in default of obedience to that order to be imprisoned in the county jail until it was complied with. 7 Dickinson, (52 N. J. Eq.) 16, 31. Upon appeal to the Court of Errors and Appeals the order of the Chancery Court was affirmed. 8 Dickinson, (53 N. J. Eq.) 693.

It is stated that the balance due on the settlement of Price's accounts, about $31,000, was withheld by the officers of the Government in the belief that there was a counterclaim against Price. But it having been determined to pay such balance, the Chancery Court made another order on the

18th day of May, 1894, by which Price was directed to execute two instruments in writing, which he had been previously required by the court to sign, seal and deliver, one of them consenting that the balance from the Government should be paid to the receiver, such consent to be filed with the Treasurer of the United States, and by the other assigning all his property, real and personal, and all his rights and credits.

These last two orders were served upon Price while he was sick, and he died June 8, 1894, without complying with either of them. So far as was known, he left no will, and no application had been made for the appointment of an administrator of his estate, as in case of intestacy. But letters of administration *ad prosequendum* were granted by the Prerogative Court of New Jersey to Allen L. McDermott.

The present bill was filed in the Chancery Court July 5, 1894, in the name of the administratrix of Samuel Forrest and of the receiver Borcherling. The principal defendants are the children and heirs of Rodman M. Price. The other defendants are John C. Fay and McDermott, the latter as administrator *ad prosequendum*.

That bill alleged that on the 9th day of June, 1894, the defendants executed powers of attorney to the defendant Fay, who was one of the attorneys in the litigation respecting the drafts, authorizing him to apply to the Secretary of the Treasury to pay to them the balance to the credit of Price under the act of February 23, 1891, — they claiming that such balance belongs to his *heirs*, and not to the receiver. It appears from the bill that in addition to the above four drafts, the United States paid to Price and his attorneys the further sum of $9000, reducing the balance apparently on the books of the Treasury under the above settlement to the sum of about $23,000. It was further alleged that the officers of the Treasury Department were desirous of doing right and justice in the premises ; that demand had been made by the receiver upon the Treasurer of the United States for the payment to him of said balance of money, and that the Treasurer neither consented nor refused to do so, but awaited the determination

by some lawful tribunal of the right of the receiver in the premises.

The relief asked was: 1. That the cause commenced by the bill of 1874 be revived, and the administrator *ad prosequendum* be adjudged a proper party thereto. 2. That the defendants, the children and heirs of Rodman M. Price, together with Fay, be perpetually enjoined from making any demand upon or application to the United States or from receiving any part of the money awarded to the deceased then remaining in the Treasury of the United States. 3. That the parties above named be decreed to pay to the plaintiff Borcherling, receiver, to be by him disposed of *under the orders of the court*, any part of the money they might have respectively received or might receive. 4. That the administrator *ad prosequendum*, or any executor or administrator of Price thereafter admitted as defendant in the cause, deliver to the receiver all the property of the deceased, whether in possession or action, which might come to their hands.

The heirs of Price filed pleas asserting their right to the benefit of the act of February 23, 1891. The case was heard upon the bill and pleas, and the pleas were overruled by Chancellor McGill. The defendants were thereupon ordered to answer the bill.

Upon appeal to the Court of Errors and Appeals, the order of the Chancery Court was affirmed, and the cause was remitted to that court with directions to proceed therein according to law. *Price* v. *Forrest*, 9 Dickinson, (54 N. J. Eq.) 669.

The heirs then filed an answer, in which they denied that there was any jurisdiction in the Chancery Court to sequester the moneys in dispute in the Treasury of the United States, and insisted that whatever amount remained in the Treasury as the balance due on the adjustment of the accounts of Rodman M. Price belonged under the act of Congress to the defendants as his heirs.

The case was heard upon bill and answer, and the Chancery Court was of opinion that the plaintiffs were entitled to the relief asked so far as it related to the collection by the defendants of the moneys mentioned in the bill of complaint and still

in the Treasury of the United States. It was therefore "ordered and decreed, that the said defendants and each of them be and they are hereby perpetually enjoined and restrained from making any demand upon or application to the Government of the United States, or the Secretary of the Treasury of the United States or any officer of the said Treasury, or from receiving from the United States, or its said Secretary of the Treasury or any officer thereof, any part of the money remaining in the Treasury of the United States at the time of filing said bill of complaint, and which was awarded to Rodman M. Price, deceased, as in the said bill stated, or now there remaining." This judgment was affirmed by the Court of Errors and Appeals of New Jersey, 56 N. J. Eq.; and the judgment of affirmance is here for review.

1. The first proposition of the plaintiffs in error is that consistently with the statutes of the United States the defendants in error cannot take anything under the orders adjudging that Borcherling, the receiver appointed by the state court, was entitled as between him and the heirs of Price to receive the money remaining to his credit on the books of the Treasury.

This contention is based upon section 3477 of the Revised Statutes of the United States, providing that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read

and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

It is insisted that the orders in the state court assume to transfer or assign Price's claim against the United States in violation of, or without regard to the requirements of the statute, in that no assignment of the claim has ever been freely made; that no warrant for the payment thereof had been issued when those orders were made; and that the indorsement or assignment that Price was ordered to make did not fall within any of the established exceptions under section 3477, such as assignments in bankruptcy and insolvency, and assignments by operation of law.

Are these propositions supported by the decisions of this court in which it has been found necessary to construe that section?

In *United States* v. *Gillis*, 95 U. S. 407, 416, the question was as to the validity of a voluntary transfer of the legal title to a claim under the Abandoned and Captured Property Act of March 12, 1863, for the proceeds of certain cotton seized by the military forces of the United States. The suit was brought by the transferee in the Court of Claims which found in his favor. By this court it was adjudged that he could not maintain the action. While holding that the act of February 26, 1853, c. 81, 10 Stat. 170, from which section 3477 was taken, was of universal application and covered all claims against the United States in every tribunal in which they might be asserted, this court stated that "there are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law," to which the statute did not apply.

In *Erwin* v. *United States*, 97 U. S. 392, 397, which was also an action to recover the proceeds of certain cotton captured by the military forces of the United States, it appeared that the original claimant became a bankrupt, and assigned his property to an assignee in bankruptcy. One of the questions was whether the claim for these proceeds, even if it constituted a demand against the Government, was capable of assignment under the above statute. This court said:

"The act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States, which was the subject of consideration in the *Gillis case*, applies only to cases of voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims."

In *Goodman* v. *Niblack*, 102 U. S. 556, 560, where the question was whether the above statute embraced voluntary assignments for the benefit of creditors, this court, referring to *Erwin* v. *United States*, said: "The language of the statute, 'all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein,' is broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853."

The doctrine of these cases has not been modified by any subsequent decision. Nor, as the argument at the bar implied, is that doctrine inconsistent with the decision subsequently rendered in *St. Paul & Duluth Railroad* v. *United States*, 112 U. S. 733. Nothing more was adjudged in that case than that a voluntary transfer by way of mortgage of a claim against the United States for the security of a debt, and finally completed and made absolute by a judicial sale, was within the purview of the prohibition contained in section 3477, and could not be made the basis of an action against the Government in the Court of Claims. Such a voluntary assignment to secure a specific debt was held to be within the mischiefs which that section was intended to remedy. To the same class belongs *Ball* v. *Halsell*, 161 U. S. 72, 79, which was the case of a voluntary transfer of part of a claim against the United States on account of the depredations of certain Indians on the property of the claimant.

While the present case differs from any former case in its facts, we think that the principle announced in *Erwin* v. *United States* and *Goodman* v. *Niblack* justified the conclusion reached by the state court. That court held that it had jurisdiction under the laws of the State, and as between the parties before it, to put into the hands of its receiver any chose in action of whatever nature belonging to Price and of which he had possession or control. The receiver did not obtain from Price in his lifetime an assignment of his claim against the United States. But having full jurisdiction over him, the court adjudged that as between Price and the plaintiffs who sued him the claim should not be disposed of by him to the injury of his creditors, but should be placed in the hands of its receiver subject to such disposition as the court might determine as between the parties before it and as was consistent with law. The suit in which the receiver was appointed was of course primarily for the purpose of securing the payment of the judgment obtained by Samuel Forrest in his lifetime against Rodman M. Price. But that fact does not distinguish the case in principle from *Goodman* v. *Niblack;* for the transfer in question to the receiver was the act

of the law, and whatever remained, whether of property or money, in his hands after satisfying the judgment and the taxes, costs or expenses of the receivership as might be ordered by the court, would be held by him as trustee for those entitled thereto, and his duty would be to pay such balance into court to the credit of the cause "to be there disposed of according to law." Revision of N. J. Laws, 1877, sec. 26, p. 394.

As this court has said, the object of Congress by section 3477 was to protect the Government, and not the claimant, and to prevent frauds upon the Treasury. *Bailey* v. *United States*, 109 U. S. 432; *Hobbs* v. *McLean*, 117 U. S. 567; *Freedman's Savings Co.* v. *Shepherd*, 127 U. S. 494, 506. There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the Government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor, forbid the claimant from collecting his demand except through a receiver who should hold the proceeds subject to be disposed of according to law under the order of court, we are unable to say that such action would be inconsistent with section 3477. It may be that the officers charged with the duty of allowing or disallowing claims against the Government are not required to recognize a receiver of a claim appointed by a court, and may, if the claim be allowed, refuse to make payment except as provided in section 3477. Upon this subject, the Second Comptroller of the Treasury, in his opinion, rendered July

11, 1894, construing the act of February 23, 1891, and in which he held that Price was entitled to receive in his lifetime, whatever sum was found to be due him on the adjustment of his accounts, but if he died before such adjustment was made his heirs would take, not by virtue of the act of Congress, but according to the laws of descent at the domicil of the deceased, said: "I do not presume for a moment that the Chancery Court of New Jersey could issue an execution and compel payment of this money, nor could any of its powers be brought to bear to compel, without at least additional legislation by Congress, the Comptroller to pay its judgment; but while that is true, yet on the other hand the Comptroller, so far having awaited the adjudication of that Chancery Court, ought to abide by the result of that litigation, and await a final adjudication and certification of the amount, as to who are entitled under the laws of that State. This comes more from comity, and from a disposition on the part of the Treasury officers to obey the laws of the land, and to help to enforce the decrees of the courts that have jurisdiction over matters in litigation of this kind, than from any actual authority that a court may have over the Comptroller to compel him to make payment. In conclusion, then, the Comptroller will not at this time act in this matter, but will say to the gentlemen, that they must fight it out in the courts of New Jersey, and that this court will follow the final decision that may be rendered there. . . . Hence this matter will be suspended until such time as the Comptroller may be put into possession of the final decree, either of the New Jersey Chancery Court, or such court as may have appellate jurisdiction therefrom." Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and void, as between those who are parties to the cause and who are before the court.

It only remains to say touching this part of the case that if section 3477 does not embrace the passing or transfer of claims to heirs, devisees or assignees in bankruptcy, as held

in *Erwin* v. *United States*, nor a voluntary assignment by a debtor of his effects for the benefit of his creditors, as held in *Goodman* v. *Niblack*, it is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver to be held subject to the order of court for the benefit of those entitled thereto, can be regarded as prohibited by that section.

2. Were the *heirs* of Rodman M. Price entitled upon his death, by virtue of the act of February 23, 1891, to such balance as then remained to his credit in the Treasury of the United States on the adjustment made of his accounts under that act? If they were so entitled, then the final judgment of the Court of Errors and Appeals affirming the judgment of the Chancery Court denied to the plaintiffs in error a right specially set up and claimed by them under the above act; and therefore the jurisdiction of this court to reëxamine that final judgment cannot be doubted. Rev. Stat. § 709.

The plaintiffs in error insist that *Emerson* v. *Hall*, 13 Pet. 409, 413, 414, is decisive in their favor. Although this contention is not without some force, we are of opinion that the judgment in that case does not control the determination of the present case. Emerson, surveyor, Chew, collector, and Lorrain, naval officer, at the port of New Orleans, having seized a brig for a violation of the laws prohibiting the importation of slaves, instituted proceedings that resulted in the condemnation of such vessel and slaves. It had been previously decided in *The Josefa Segunda*, 10 Wheat. 312, that the proceeds could not be paid to the custom-house officers, but vested in the United States. Emerson and Lorrain having died, Congress, on the 3d day of March, 1831, passed an act entitled "An act for the relief of Beverly Chew, the *heirs* of William Emerson, deceased, and the *heirs* of Edward Lorrain, deceased." That act directed the proceeds in court to be paid over to the said Beverly Chew and "the legal representatives" of Emerson and Lorrain, respectively. The question was whether the Emerson part of the proceeds belonged to his heirs, or were assets primarily liable for his

debts. This court, after observing that Emerson had not acted under any law, nor by virtue of any authority, and that his acts imposed no obligation, legal or equitable, on the Government to compensate him for his services, said: "Had Emerson become insolvent and made an assignment, would this claim, if it may be called a claim, have passed to his assignees? We think, clearly, it would not. Under such an assignment, what could have passed? The claim is a nonentity. Neither in law nor in equity has it any existence. A benefit was voluntarily conferred on the Government; but this was not done at the request of any officer of the Government, or under the sanction of any law or authority, express or implied. And under such circumstances, can a claim be raised against the Government, which shall pass by a legal assignment, or go into the hands of an administrator as assets? . . . A claim having no foundation in law, but depending entirely on the generosity of the Government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the Government, from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation — a donation made it is true in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the Government. In the present case, the Government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And it has, under the title of an act, 'for the relief of the heirs of Emerson,' directed, in the body of the act, the money to be paid to his legal representatives. That the heirs were intended by this designation is clear; and we think the payment which has been made to them under this act has been rightfully made, and that the fund cannot be considered as assets in their hands for the payment of debts."

Now, it is said that the grounds upon which in *Emerson* v. *Hall* the claim of the heirs was sustained, exist in the present case; that Price did not act under any law, nor in virtue of any authority, and that his acts imposed no obligation in law or equity upon the Government that could have been enforced even if suit could have been maintained against it. And the conclusion sought to be drawn is that Congress must have intended by the act of 1891, as it was held to have intended by the act in *Emerson's case*, to legislate for the benefit of the heirs or next of kin of the decedent and not for his personal representatives. But there were other facts in the *Emerson case* which placed that case upon peculiar grounds. Emerson and Lorrain were both dead when the act of March 3, 1831, was passed, and therefore Congress must have had in mind the question whether the Emerson and Lorrain portions of the money on deposit in court should be given to their respective heirs or not. And the question was solved as indicated by the preamble to that act. The preamble distinctly shows that Congress had in view the *heirs*, and not those who would administer the estate of the two persons whose meritorious services were recognized. Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. *United States* v. *Fisher*, 2 Cranch, 358, 386; *United States* v. *Palmer*, 3 Wheat. 610, 631; *Beard* v. *Rowan*, 9 Pet. 301, 317; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550. In *Emerson's case* the decision was placed partly on the ground that the title of the act of 1831 indicated that Congress, in using the words "legal representatives" in the body of the act, had in mind the heirs of Emerson and Lorrain, and not technically their personal representatives. It is a fact not without significance

that the money awarded by the above act of 1831 did not replace any moneys taken by Emerson and Lorrain from their respective estates for the benefit of the Government. They had only rendered meritorious personal services for the public upon which no claim of creditors could be based, but which services Congress chose to recognize by making a gift to the heirs. This was substantially the view taken of the case of *Emerson* v. *Hall* in the recent case of *Blagge* v. *Balch*, 162 U. S. 439, 458.

The case before us differs from the *Emerson case* by reason of circumstances which we must suppose were not overlooked by Congress when it passed the act of 1891. By advancing to Van Nostrand seventy-five thousand dollars to be used for the Government, Price's ability to meet his obligations to creditors was to that extent diminished. As he had acted in good faith, and in the belief that he was promoting the best interests of the Government, the purpose of Congress was to make him whole in respect of the amount he had in good faith advanced to his successor for public use. He was then alive, and there was no occasion for Congress to think of making any provision for those who might be his heirs. We think that the legislation in question had reference to his financial condition, and there is no reason to suppose that Congress intended that the amount if any found due him upon the adjustment of his accounts should not constitute a part of his absolute personal estate, to be received and applied in the event of his death by his personal representative as required by law.

We concur with the state court in the view that the act of 1891 was not intended to confer a mere gratuity upon Price, but was a recognition of a moral and equitable, if not legal, obligation upon the part of the Government to restore to him moneys advanced in the belief at the time that they would be repaid to him in the settlement of his accounts as a disbursing officer; and that the use of the words "or his heirs" in the act was not to make a gift to the heirs of such sum as upon the required adjustment of his accounts was found to be due their ancestor, and thereby exclude his creditors from

all interest in that sum, but to provide against the contingency of death occurring before the adjustment was consummated, and thus to make it certain that the right to have his accounts credited with the amount paid to Van Nostrand, upon principles of "equity and justice," should not be lost by reason of such death. Under this interpretation of the act, the words "or his heirs" must be held to mean the same thing as personal representatives. We do not perceive either in the words of the act, or in the circumstances attending its passage, anything to justify the belief that Congress had any purpose in the event of the death of Price to defeat the just demands of creditors.

Reference was made in argument to the recent case of *Briggs* v. *Walker*, 171 U. S. 466, 473, 474. It differs in some respects from both the *Emerson case* and the present case, but the decision is in accord with the views herein expressed. It arose under "an act for the relief of the estate of C. M. Briggs, deceased," and the principal question was whether the right given by the act to Briggs' "legal representatives" was for the benefit of his next of kin to the exclusion of his creditors. This court said: "The act of Congress nowhere mentions heirs at law, or next of kin. Its manifest purpose is not to confer a bounty or gratuity upon any one; but to provide for the ascertainment and payment of a debt due from the United States to a loyal citizen for property of his, taken by the United States; and to enable his executor to recover, as part of his estate, proceeds received by the United States from the sale of that property. The act is 'for the relief of the estate' of Charles M. Briggs, and the only matter referred to the Court of Claims is the claim of his 'legal representatives.' The executor was the proper person to represent the estate of Briggs, and was his legal representative; and as such he brought suit in the Court of Claims, and recovered the fund now in question, and consequently held it as assets of the estate, and subject to the debts and liabilities of his testator to the defendants in error." It is to be observed that the court in that case looked both to the body of the act and the preamble in order to ascertain the intention of Congress.

It results that the plaintiffs in error, as heirs of Rodman M. Price, were not denied by the final judgment of the state court any right secured to them by the act of 1891.

Something was said in argument which implied that Price had wrongly resisted the collection of the Forrest claim and judgment. It is proper to say that so far as the record speaks on that subject, the course of the deceased was induced by the belief on his part that it was a claim which he was not bound in law or justice to pay. Our conclusion does not rest in any degree upon the character of that claim, but entirely upon questions of law arising out of matters that were concluded, so far as this court is concerned, by the action of the state court, and which we have no jurisdiction to review.

We find in the record no error of law in respect of the Federal questions presented for consideration, and therefore the decree below must be

Affirmed.

SMITH *v.* BURNETT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 112. Argued January 6, 9, 1899. — Decided March 13, 1899.

Undoubtedly there was jurisdiction in admiralty in this case, in the courts below.

Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the conditions of the berths thereat, and, if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths; at the same time the master is bound to use ordinary care, and cannot carelessly run into danger.

This court is unable to decide that the Court of Appeals of the District of Columbia was not justified in holding, on the evidence, that appellants were liable for negligence and want of reasonable care, and that the master was free from contributory negligence, and therefore affirms the decree of the Court of Appeals which agreed with the trial court on the facts.

Statement of the Case.

THIS was an appeal from the Court of Appeals for the District of Columbia affirming a decree of the Supreme Court of the District, sitting in admiralty, whereby appellees, original libellants in the cause, were awarded damages, and a cross libel filed by appellants was dismissed. 10 D. C. App. 469. As stated by the Court of Appeals, the libel was filed by appellees against appellants for an alleged injury to their vessel, the schooner Ellen Tobin, while moored in berth at appellants' wharf on the bank of the Potomac at Georgetown, for the purpose of being loaded by and for appellants; and the injury complained of was averred to have been occasioned by appellants negligently allowing a dangerous rock to remain in the bed of the river within the limits of the berth at the wharf, which the vessel was invited to take, the obstruction being unknown to the master of the vessel, and he having been moreover assured by appellants through their agent that the depth of water in the berth in front of the wharf was sufficient and that the berth was safe for the loading of the vessel.

The facts, in general, found by that court were: That appellants were lessees of wharf and water rights extending to the channel of the river, and the berth assigned to and taken by the schooner for the purpose of loading was in front of their wharf and within the leased premises; that appellants were engaged in the business of crushing and shipping stone from the wharf to different points; and that the schooner had been brought up the river by prearrangement with a ship broker in Georgetown in order to be loaded by appellants at their wharf with crushed stone to be taken to Fortress Monroe, in Virginia, to be used in government work at that place. That the vessel was stanch and in good repair; was a three masted schooner of six hundred tons capacity; was registered at the New York custom house as a coasting vessel of the United States, and was owned by appellees at the time of the injury complained of. It was further found "that the vessel was sunk on [Sunday,] the 6th of August, 1893, as she was moored in the berth at the wharf, while receiving her cargo of crushed stone from the wharf, by means of a chute extended from the wharf to the hatchway of the vessel. The vessel

was about two thirds loaded, having received about four hundred tons of her cargo, before signs were discovered of her distressed condition. She was then taking water so rapidly that the pumps could not relieve her, nor could the extra assistance employed by the master avail to save her from breaking and sinking in the berth. The work of loading was stopped on Saturday evening, with the intention of resuming the work of loading on the following Monday morning; and the captain of the vessel, at the time of stopping work on Saturday, made soundings around the vessel and supposed that she was then lying all right. But on Sunday morning it was discovered that there was so much water in her that she could not be relieved by her pumps; and by 5 o'clock on the afternoon of that day she had filled with water, and broke in the middle, and sank in her berth, where she remained, with her cargo under water, until the 1st of November, 1893, when the stone was pumped out of her, and she was then condemned as worthless, and was afterwards sold at auction for $25 to one of the owners." Other findings of fact appeared in the opinion.

Appellants denied all negligence, and insisted that they were in no way responsible for the disaster; and in a cross libel asserted a claim for damages caused by the fault of appellees in allowing the vessel to sink in the river in front of their wharf and to remain there for an undue time. The evidence was voluminous and conflicting.

Mr. R. D. Benedict for appellants. *Mr. James S. Edwards*, *Mr. Job Barnard* and *Mr. Nathaniel Wilson* were on his brief.

Mr. William G. Choate for appellees.

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

Undoubtedly there was jurisdiction in admiralty in the courts below, and the applicable principles of law are familiar.

Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care, and cannot carelessly run into danger. *Philadelphia, Wilmington &c. Railroad* v. *Philadelphia &c. Steam Towboat Co.*, 23 How. 209; *Sawyer* v. *Oakman*, 7 Blatchford, 290; *Thompson* v. *N. E. R. R. Company*, 2 B. & S. 106; *S. C.* Exch. (1860,) 119; *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Carleton* v. *Franconia Iron and Steel Company*, 99 Mass. 216; *Nickerson* v. *Tirrell*, 127 Mass. 236; *Barber* v. *Abendroth*, 102 N. Y. 406.

Carleton v. *Franconia Iron and Steel Company*, 99 Mass. 216, is so much in point that we quote from it, as did the Court of Appeals. The case was in tort for injury to plaintiffs' schooner by being sunk and bilged in the dock adjoining defendants' wharf which fronted on navigable waters, where the tide ebbed and flowed. Defendants had dredged out the adjoining space to accommodate vessels which were accustomed to come with iron and coal for defendants' foundries, situated on the wharf. There was in the space dredged a large rock, sunk in the water and thereby concealed from sight, dangerous to vessels, and so situated that a vessel of the draft to which the water at the wharf was adapted, being placed at high water at that part of the wharf, would lie over the rock, and at the ebb of the tide would rest upon it. Defendants had notice of the existence and position of the rock and of its danger to vessels, but neglected to buoy or mark it or to give any notice of it to plaintiffs or any one in their employment, though their vessel came to the wharf by defendants' procurement, bringing a cargo of iron for them under a verbal charter. Mr. Justice Gray, among other things, observed:

"It does not indeed appear that the defendants owned the soil of the dock in which the rock was embedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf; and such vessels were

accustomed to occupy it, and could not discharge at that point of the wharf without doing so. . . . Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway."

And as to the degree of care required of the master or vessel owner, the same court in *Nickerson* v. *Tirrell* rightly said: "The true rule was stated to the jury, that the master was bound to use ordinary care, and could not carelessly run into danger. We cannot say, as matter of law, that he was negligent because he did not examine or measure the dock and berth. It was for the jury to determine whether the conduct and conversation of the defendant excused the master from making any more particular examination than he did make, and whether, upon all the evidence, he used such care as men of ordinary prudence would use under the same circumstances."

The cases necessarily vary with the circumstances. In *The Stroma*, 42 Fed. Rep. 922, the libellant sought to recover damages received by its steamer, while moored alongside respondent's pier, by settling, with the fall of the tide, on the point of a spindle, part of a derrick attached to a sunken dredge. Work was proceeding for the removal of the dredge, and several buoys had been set to indicate the place of its several parts. The agent of the steamer knew of the location of the wreck;

sought permission to moor outside of it; and undertook to put the ship in position. The liability to danger was as well known to the steamer as to the wharfinger, who made no representation and was free from negligence. The libel was dismissed, and the decree was affirmed by this court. *Panama Railroad Company* v. *Napier Shipping Company*, 166 U. S. 280.

In *The Moorcock*, 13 P. D. 157, defendants, who were wharfingers, agreed with plaintiff for a consideration to allow him to discharge his vessel at their jetty which extended into the river Thames, where the vessel would necessarily ground at the ebb of the tide. The vessel sustained injury from the uneven condition of the bed of the river adjoining the jetty. Defendants had no control over the bed, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. It was held that, though there was no warranty, and no express representation, there was an implied undertaking by defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to a vessel, and that they were liable. The judgment was sustained in the Court of Appeal, 14 P. D. 64, and was approved by the House of Lords in *The Calliope*, (1891) App. Cas. 11, though in the latter case it was ruled, on the facts, that there was no sufficient evidence of any breach of duty on the part of the wharfingers, and that the injury to the vessel was caused by the captain and pilot attempting to berth her at a time of the tide when it was not safe. The berth was in itself safe, but it was held that, under the particular circumstances disclosed by the proofs, the ship owner had assumed as to the approaches the risk of reaching the berth; while the general rule in respect of the duty of wharfingers was not questioned. The Lord Chancellor remarked: "In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the

vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided." Lord Watson: "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay." And Lord Herschell: "I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with the condition of the bed of the river in itself dangerous — that is to say, which is such as necessarily to involve danger to a vessel coming to use a wharf in the ordinary way; and we are not dealing with a case of what I may call an abnormal obstruction in the river — the existence of some foreign substance or some condition not arising from the ordinary course of navigation."

We are remitted then to the consideration of the facts, and as to them the rule is firmly established that successive decisions of two courts in the same case, on questions of fact, are not to be reversed, unless clearly shown to be erroneous. *Towson* v. *Moore*, 173 U. S. 17; *The Baltimore*, 8 Wall. 377, 382; *The S. B. Wheeler*, 20 Wall. 385, 386; *The Richmond*, 103 U. S. 540. And when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere.

Tested by this rule we must assume on the record that the vessel in question was chartered by appellants, through a ship

broker duly authorized, for the purpose of being loaded with a cargo of crushed stone, which would be about six hundred tons, by appellants at their wharf, to be discharged at Fortress Monroe; that the contract, which was oral, did not expressly name the number of tons to be loaded, nor guarantee the depth of water, nor the position of the vessel at the wharf, nor embody as part thereof the representations alleged to have been made in respect of the depth of the water; that there was a ridge of rock in the berth assigned to the vessel by appellants, projecting above the bottom of the river and endangering her safety, even when only partially loaded; and that the vessel, though stanch, strong and seaworthy, was wrecked by grounding on that rock.

We also think that the conclusions of the Court of Appeals, set forth in its opinion, that no ordinary skill or effort on the part of the master or owners could have been exercised effectively to save the vessel from total loss, and that the injury was not increased, nor the damages enhanced, by delay in attempting to raise and remove the vessel, cannot reasonably be questioned; and that we are not required to pass on the conflicting evidence in respect of the value of the vessel at the time of the injury. In other words, it must be held that the cross libel was properly dismissed, and that the amount of damages awarded is not open to inquiry.

As to knowledge or notice of the obstruction by appellants, the evidence tended to show that they had been for some years in the use of the wharf and of this particular berth; that they had under lease perhaps two and a half miles of river front, containing stone quarries, some of which they were working; that their business was large, and that during the year 1893, before the accident, they had loaded from fifteen to twenty vessels at the same place; that the capacity of the crusher for loading vessels through the chute was from one hundred and fifty to two hundred tons a day; that they employed from one hundred and fifty to three hundred men, and at times many more, and had bins into which they ran crushed stone to be carried off in various ways. It further appeared that in December, 1892, the two masted schooner

Baird, carrying five hundred tons, and when loaded drawing fourteen feet, grounded in the same berth, manifestly on a rock, and that that fact and the character of her injuries were known to appellants. There was much other evidence bearing on this point of knowledge or notice, which fully sustained the Court of Appeals in its conclusion that appellants knew of the existence of the rock, and its dangerous nature; or, if not, that absence of investigation amounted, under the circumstances, to such negligence as to impute notice.

But the stress of the argument is that the master was guilty of negligence which contributed to the injury, and chiefly in not ascertaining the condition of the bottom of the berth and taking precautions, as advised. Yet on this, as on other branches of the case, the evidence was conflicting, and we cannot say that the finding of the Court of Appeals that the evidence failed to establish "that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel, while she was moored at the wharf for the purpose of being loaded," was clearly erroneous. The master came to the berth on appellants' business; and there was evidence to the effect that the broker, with whom the engagement was made, and appellants' foreman were both informed that the vessel would draw when loaded from fourteen to fourteen and one half feet, and that the master was assured by both that there was plenty of water; that the berth had been dredged out to between fourteen and fifteen feet; and that there was fourteen feet "sure at low water." The evidence also tended to show that the foreman suggested on Friday to the master to make some soundings for himself; that there might have been something dropped over from a lighter that he did not know of; that the captain did make soundings and found sufficient water as the vessel then lay; that one of the appellants told the foreman "to tell the captain of the Tobin that he had better sound around the vessel and make sure that it was laying all right;" that the foreman "said the vessel was laying all right, but he would tell the captain," as he afterwards reported he had; that the captain sounded around the vessel on Saturday

and discovered no dangerous condition; that the vessel did not commence leaking until Sunday morning; and that the master thereupon did all he could to save her. It does not appear that the master was informed that the bottom was a rock bottom, or that the fact was mentioned that the Baird had previously got on an obstruction in the berth; and there was nothing in what was said to lead the captain to suppose that there was danger provided there was water enough around the vessel. He rather thought the vessel touched bottom on Saturday evening at low tide, but that, if so, did not in itself constitute cause for alarm. In fact, the danger was the existence of the rock in the middle of the berth under the vessel. The evidence is voluminous in respect of the extent and manner of the loading; of what passed between the parties; of the different soundings, and so on; but it is unnecessary to recapitulate it, as we are satisfied that no adequate ground exists for disturbing the result reached.

At all events, we are unable to decide that the Court of Appeals was not justified in holding on the evidence that appellants were liable for negligence and the want of reasonable care, and that the master was free from contributory negligence; and the decree must, therefore, be

Affirmed.

YERKE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 664. Submitted February 20, 1899. — Decided March 13, 1899.

Under the clause in the act of March 3, 1885, c. 341, regarding claims "on behalf of citizens of the United States, on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States," no claim can be received and considered by the Court of Claims which is presented on behalf of a person who was not a citizen of the United States when the act was passed, but who, a foreigner, had then duly declared his intention to become such citizen, and did subsequently become such.

When the language of a statute is clear, it needs no construction.

Opinion of the Court.

THE case is stated in the opinion.

Mr. C. N. Carter and *Mr. T. H. N. McPherson* for appellant.

Mr. Assistant Attorney General Thompson and *Mr. Lincoln B. Smith* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant (petitioner in the court below) claimed $3400.00 under the act approved March 3, 1891, c. 538, 26 Stat. 851, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations." He alleged that he was a native of Prussia, and came to the United States in 1828, and declared his intention to become a citizen of the United States on the 8th of January, 1842, and was recognized as a voter of Cochise County, Arizona, from 1884 to 1886; that he made application for and was adjudged and declared a citizen of the United States December 16, 1896; that in March, 1872, he was the owner of certain property (which was described) of the value of $3400.00, in Arizona Territory, "which was taken, used and destroyed by the Apache Mohave Indians," who were in amity with the United States "when the depredation was committed." He further alleged "that he presented his claim to the honorable Commissioner of Indian Affairs March 8, 1882, but that no action was had thereon; that said claim has not been paid nor any part thereof, nor has any of the property been returned either by the said Indians or the United States."

The United States filed a general traverse.

The court dismissed the petition for want of jurisdiction. This ruling is assigned as error.

The act of March 3, 1891, gives jurisdiction to the Court of Claims to "inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:"

First. "All claims for property of citizens of the United

States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States. . . ."

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act approved March 3, 1885, c. 341, 23 Stat. 362, 376, and under subsequent acts.

The "subsequent acts" do not affect the question; and that part of the act of March 3, which it is necessary to quote, provides as follows:

"For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department, and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending, but not yet examined on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, . . . to be made and presented to Congress at its next regular session. . . ."

Is the demand of appellant within any of these clauses?

1. In *Johnson* v. *United States*, 160 U. S. 546, it was held that citizenship at the time of the depredation was an essential condition of the jurisdiction of the Court of Claims of demands under the first clause.

2. Speaking of the second clause, it was said: "By that jurisdiction is extended to 'cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress' of March 3, 1885, and subsequent acts."

The appellant's case was not of the former kind. His claim had not "been examined and allowed by the Interior Department." It had only been filed with the Commissioner of Indian Affairs. Was it hence a case of the second kind? To have been that it must have been one then "pending but not yet examined," and must have been on behalf of a citizen of

the United States. It was on file, and hence may be said to have been "pending," but it was not on behalf of a citizen of the United States. Appellant was not then a citizen. He did not become such until December 16, 1896.

But appellant urges that the act of 1891 applies to claimants who were inhabitants at the time of the depredations, and that their naturalization afterwards should be held to relate to that time. This view is attempted to be supported by analogy to sections 2289 and 2319 of the Revised Statutes, which respectively give to citizens and to those who have declared their intention to become such the right to enter agricultural or mineral lands, and the practice of the Land Department in such cases to give retroactive effect to a declaration of intention. The answer is ready, and may be brief. The act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other statutes or from the practice under other statutes. The rule is elemental that language which is clear needs no construction. *Lake County* v. *Rollins*, 130 U. S. 662. Under both of the clauses of the act of 1891, the claims of which jurisdiction was given were strictly identified. Under the first clause, by citizenship at the time of the depredations. May be also under the act of 1885, which provides the cases of the second clause. But whether, as was said in *Johnson* v. *United States*, the different phraseology of the act of March 3, 1885, would include claims in favor of those not citizens at the time of the depredations by the Indians, it was decided that they must be claims *then* "pending" — that is, pending at the time of the act on behalf of citizens. And as it was such cases which "were authorized to be examined" under the act of 1885, it was to such cases that the jurisdiction of the Court of Claims was extended by the second clause of the act of 1891.

Judgment affirmed.

REMINGTON PAPER COMPANY *v.* WATSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 146. Argued January 17, 18, 1899. — Decided March 13, 1899.

On the facts stated in the opinion, the court holds that the plaintiff in error, a New York corporation, having, of its own motion, sought to litigate its rights in a state court of Louisiana, and having been given the opportunity to do so, no Federal question arises out of the fact that the litigation there resulted unsuccessfully, and without the decision of a Federal question which might give this court jurisdiction; following *Eustis* v. *Bolles*, 150 U. S. 370, in holding that when a state court has based its decision on a local or state question, the logical course here is to dismiss the writ of error.

THE case is stated in the opinion.

Mr. E. T. Merrick for plaintiff in error. *Mr. Albert Voorhies* filed a brief for same.

Mr. Alexander Porter Morse for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

It is objected that the record presents no Federal question.

In an action brought in the civil district court for the parish of Orleans, State of Louisiana, John Watson, one of the defendants in error, was appointed, on the 17th day of May, 1893, receiver of the property and assets of the Louisiana Printing and Publishing Company, a corporation created under the laws of the State of Louisiana. As such receiver he took possession of such assets and property. There was no appeal taken from the order of appointment.

The plaintiff in error, a corporation created under the laws of New York, and having its residence in that State, brought an action in the United States Circuit Court for the District of Louisiana against the Louisiana Printing and Publishing Company, to recover $3863.55, for paper furnished the company, and sued out writs of sequestration and attachment, by

authority of which, on the 29th day of May, 1893, the United States marshal seized certain property of the company and took the same from the possession of Watson.

On May 30, 1893, Watson as receiver filed a motion in said Circuit Court to quash the attachment and sequestration sued out, "and said rule or motion concluded with an order which the mover in the rule desired the court to adopt;" and thereupon the judge of the court made the following order:

"Let this rule be filed, and let the Remington Paper Company, through their attorneys, Merrick & Merrick, show cause on Thursday, June 1, at 11 A.M., why the above motion should not be granted."

To which motion the Remington Paper Company filed the following:

"The plaintiff in this case, for the purpose only of objection to the regularity of the rule taken by John W. Watson, calling himself receiver, by way of exception, says:

"That said mover as a pretended receiver cannot interfere in the progress of this suit in the informal and summary manner attempted by him in his said rule, nor has he any right to be heard to demand by the judgment of this court anything of this court without coming into court by regular process and proceedings and in the mode allowed by law, wherein the plaintiff will be entitled to a trial of questions of law and fact in the mode and manner guaranteed by the Constitution and prescribed by law.

"Wherefore this plaintiff says that this rule taken by said John W. Watson should and ought to be dismissed at the cost of said mover.

"MERRICK & MERRICK, *Att'ys.*

"And in the event the foregoing exception to said rule is overruled and this plaintiff is required by your honorable court to answer the same, and not otherwise, this plaintiff denies the allegations contained in said rule and denies that said John W. Watson, the pretended receiver, has any legal right or authority under the *ex parte* proceeding on which he relies to take possession of the property attached in this case nor to

hinder or delay your petitioner from collecting its just debt against said defendant.

"MERRICK & MERRICK, *Att'ys.*"

The plaintiff prayed the court to decide the exception to said rule before proceeding further or hearing any testimony on the rule taken.

The court, however, decided to hear the testimony on the allegations of said rule, and after hearing the same, on the 6th day of June, 1893, made the following order:

"This cause having been heard and submitted upon a rule taken by John W. Watson, appointed a receiver of the defendant by the civil district court for the parish of Orleans, to set aside the writs of attachment and sequestration issued in this cause, and upon the exception thereto filed by the plaintiff, and the same having been considered by the court, it is now ordered, for the reasons assigned in the written opinion on file, that the marshal restore the property seized in this cause under the writs of attachment and sequestration to John W. Watson, receiver, unless within five days the plaintiff applies for and ultimately receives authority from the civil district court which appointed Watson or from the appellate court to hold same under said writs."

The opinion of the court referred to in the order recites that Watson had been "appointed receiver upon a petition of a creditor and on the intervention of the attorney general; which original and intervening petitions averred that all the officers of the defendant corporation had resigned and that in fact it was a vacant corporation." It was further said:

"I do not think this court can deal at all with the alleged irregularity in the appointment of the receiver, such as the alleged want of an execution, etc., preceding the appointment. It appearing to this court that a court of concurrent jurisdiction has appointed a receiver who was in actual possession, this court has no right to attempt to dispossess him. All the matter as to irregularity of the appointment must be dealt with by the court that appointed. I understand the doctrine of the comity of courts to be this — that where a court

has jurisdiction of a cause and property and through its proper officer is in possession, it is the duty of all other courts to refrain altogether from the attempt to take that property into possession except by permission of the court in possession. It is not a question of the validity of process, but a question of public order, and the rule of comity is based upon the duty of courts to abstain from anything that might lead to violence. There having been a receiver appointed by a court of competent jurisdiction and he being in possession of the property attempted to be seized by the marshal, and which was in fact seized, I think the duty of this court is to restore the property practically to the situation in which it was when the property was interfered with by the marshal."

The bill of exceptions signed by the Circuit Judge shows that Watson was in possession of the property, engaged in making an inventory of it when it was seized by the marshal, and had taken the oath of office but had filed no bond.

On the 9th day of June, 1893, three days after the order of the Circuit Court, the Remington Company filed in the civil district court for the parish of Orleans a petition and action of nullity and for damages under the laws of the State against Watson, receiver, Pope, petitioning creditor, and the Louisiana Printing and Publishing Company.

The petition alleged the indebtedness of the latter company to petitioner, the action by the latter in the United States Circuit Court, the attachment of property, the motion of Watson as hereinbefore stated, and the ruling and order of the court thereon; that the effect thereof will be to prevent the execution of any judgment rendered, and that "Watson was without right to stand in the way of a just debt because he had given no bond at the date of the seizure of property under the attachment nor complied with the order of the court, nor had proceedings been had to perfect his appointment or to give him the right to control the property or to prevent any suit from being brought or any court from subjecting the property of said defendant by due course of law to the payment of its debts, and the conduct of the said Watson, Frank H. Pope and those confederating with them in attempting to

screen the property from payment of debts was collusive and a constructive fraud upon petitioner and a violation of its rights under the laws and Constitution of the United States of America." That the order appointing him was null and void because obtained "upon the collusive petition of Frank H. Pope without citation to any one, without oath or affidavit or any proof and without contest." It was further alleged that the so-called intervention of the attorney general did not cure the nullity of the proceedings of Pope and Watson, and that the State was without authority to intrude itself in that manner into the controversies of private persons. There was a prayer for citation and that the order appointing Watson receiver be declared as against petitioner null and void and of no effect, and the same be ineffectual as a bar to said attachment or sequestration or other proceedings on the part of the petitioner in the Circuit Court of the United States, and that said Watson and Pope be condemned, as *in solido* or otherwise, to pay petitioner the sum of $3863.55 damages caused it by the obstruction of its proceedings in the Circuit Court, and for general relief.

The petition was subsequently amended, amplifying somewhat the charges of illegality in Watson's appointment, and alleging with more detail his action in the Circuit Court, and averring "that said *ex parte* order of this court, dated the 17th day of May, 1893, purporting to appoint John W. Watson receiver of the Louisiana Printing and Publishing Company, Limited, was obtained in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in this, that said decree was obtained without due process of law, it being *ex parte* and without affidavits, bond or proof, as more at large alleged in the original petition, and the said unconstitutional and void order and decree is set up and alleged by the defendants as a bar and a defence to prevent your petitioner from recovering and having its said just and valid debt from its said debtor, the said Louisiana Printing and Publishing Company, Limited, and thus depriving petitioner of its claim duly secured by due and legal process of law on the property of its said debtor, and seized under said

writs from said Circuit Court of the United States, and said defendants seek through said void *ex parte* order of the 17th day of May, 1893, to effect the transfer and —— of the possession and property of said Louisiana Printing and Publishing Company under the seizure of petitioner under its writs to said John W. Watson, thereby screening the same from ordinary and legal pursuits of creditors in the modes pointed out by law, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States."

To the petition Watson answered, denying all and singular its allegations except his appointment as receiver, and "assuming the attitude of plaintiff in reconvention," alleged that the Remington Paper Company was a non-resident corporation, and that by its "unlawful and unwarranted seizure of the property of said Louisiana Printing and Publishing Company, Limited, which seizure has been released, said Remington Paper Company has damaged the creditors of said Louisiana Printing and Publishing Company, Limited, for whose benefit *ut universi* this reconventional demand is now prosecuted."

The damages were itemized and alleged to have amounted to $3847.15.

The answer concluded as follows:

"Wherefore said John W. Watson prays that said plaintiff's petition be dismissed; that he be quieted in his position as receiver; that his appointment be ratified and confirmed as prayed for by said Louisiana Printing and Publishing Company and by a large majority of its stockholders and its board of directors, and that, as the representative of the creditors of said company, he have judgment on his reconventional demand against plaintiff in the sum of $3847.15 and all costs of this suit."

Upon the hearing judgment was rendered as follows:

"1st. In favor of John W. Watson and Frank H. Pope, rejecting and dismissing the suit of the Remington Paper Company for damages.

"2d. That the demand of the Remington Paper Company against John W. Watson, Frank H. Pope and the Louisiana Printing and Publishing Company, represented by John W.

Watson, receiver, of the nullity of the order appointing said Watson receiver, etc., be also rejected and dismissed, and that said appointment and order be maintained.

"3d. That the reconventional demand for money claimed by Watson as receiver herein be dismissed as of non suit, and that the Remington Paper Company be condemned to pay all costs of this suit."

The Supreme Court affirmed the judgment (49 La. Ann. 1296) and the case was brought here.

The Supreme Court, after reciting the proceedings taken by the respective parties and stating their contentions, said that the record showed that the Remington Company did not comply with the order of the United States Circuit Court, "but, on the contrary, this action of nullity and claim for damages was resorted to instead of such an application," and it was held that the action depended necessarily upon a claim for damages, and that the company had no such claim. It was further said:

"Addressing ourselves to the question of damages, we are of opinion that the plaintiff was plainly at fault in not employing the proper means to protect its own rights, (1) first, because it used no effort to avail itself of the permission granted by the Circuit Court whereby the seizure might have been retained on the property; (2) second, because it took no means or proceedings looking to the protection and preservation of its alleged vendors' lien upon the property after it had passed into the custody and control of the receiver, either by injunction against a sale by the receiver or a third opposition claiming the proceeds of sale, under a separate appraisement and sale.

"In our view, such measures could have been easily resorted to on the part of the plaintiff, without prejudice to this or its Circuit Court suit, and, failing in this, an insurmountable obstacle has been raised to its claim for damages.

"For surely the plaintiff cannot be heard to say that Watson and Pope have perpetrated upon it damages resulting from a loss and injury it has occasioned through its own fault.

"The plaintiff's recourse against property stricken by a ven-

dor's lien was just as efficacious against it in the hands of the receiver as it was in that of the marshal; and, had it made proper and seasonable application to the judge *a quo*, possibly he might have permitted the marshal to retain in his possession the property seized under the writ of attachment in the Circuit Court. However vain and nugatory such an effort may have proven, it was none the less its duty to have made the effort at least.

"Surely the receiver cannot be said to have committed a wrong or trespass upon the plaintiff's rights by advertising and making a sale of corporate assets in pursuance of an order of court to pay debts, especially when such sale was neither enjoined nor opposed by it.

"Presumably the proceeds of the sale are yet in the hands of the receiver for distribution according to law, and plaintiff can exercise its rights thereon.

"In our opinion, this is not a case in which we are called upon to examine and scrutinize the legality of the appointment of a receiver, for the reason that the complaining creditor has not suffered any injury thereby and is itself seeking a preference.

"We think the ends of justice would be best subserved by preserving and maintaining the *status quo*."

The assignments of error are somewhat involved in statement, but they are based on the ground that the order appointing Watson receiver was null and void because the ownership of property of the Louisiana Printing and Publishing Company, the debtor of plaintiff, "could not be divested to the prejudice of creditors on an arbitrary order without due process of law," and the use of such order to obtain the ruling of the United States Circuit Court, which directed the United States marshal to restore to him the property attached, deprived the plaintiff in error of a right without due process of law, and that therefore the judgment of the lower court was erroneous.

The appointment of a receiver to take possession of the property of an insolvent corporation upon the petition of a creditor is certainly "due process." This, of course, is not denied, but

the invalidity of the order of appointment is asserted because it was made *ex parte*, and because Watson had not fully qualified. It is hence argued that the appointment was a nullity —constituted "no legal obstacle" to the proceedings in the United States Circuit Court.

This view was not entertained by that court, but, on motion of Watson, the court ordered the property which had been attached restored to him and remitted the plaintiff (plaintiff in error here) to the state court. Its order was "that the marshal restore the property seized in this court under the writs of attachment and sequestration to John W. Watson, receiver, unless within five days the plaintiff applies for and ultimately receives authority from the civil district court which appointed Watson or from the appellate court to hold same under said writs." If this was error its review cannot be had on this record.

The plaintiff did not apply to "the civil district court which appointed Watson," the Supreme Court in its opinion says, but brought an action for nullity of the order of appointment under the code of the State (Code of Practice of Louisiana, Art. 604 *et seq.*) and for damages.

The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.

The plaintiff in error thus sought in the state court, and was given opportunity, to ligitate the rights claimed by it, and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9, 26; *Morley* v. *Lake Shore &c. Railway Co.*, 146 U. S. 162, 171; *Bergmann* v. *Backer*, 157 U. S. 655.

It follows that this writ of error cannot be maintained.

The rule was announced in *Eustis* v. *Bolles*, 150 U. S. 361, 370, "that when we find it unnecessary to decide any Federal

question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error." See also *Fort Smith Railway* v. *Merriam*, 156 U. S. 478; *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *Castillo* v. *McConnico*, 168 U. S. 674.

Writ of error dismissed.

MR. JUSTICE WHITE took no part in this decision.

Ex parte HENRY WARD.

ORIGINAL.

No number. Submitted February 20, 1899. — Decided March 20, 1899.

Where a court has jurisdiction of an offence and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer *de facto;* and the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of *habeas corpus;* this rule is well settled, and is applicable to this case.

The title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked.

THIS was an application for leave to file a petition for a writ of *habeas corpus.* The case is stated in the opinion.

Mr. R. C. Garland and *Mr. W. W. Wright, Jr.*, for the petitioner.

No one opposing.

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

Ward was tried and found guilty before Edward R. Meek, Judge of the District Court of the United States for the Northern District of Texas, for "having in his possession counterfeit moulds," and was sentenced October 22, 1898, to

the penitentiary at Fort Leavenworth, Kansas, at hard labor for a period of one year and one day, and committed accordingly to the custody of the warden of said prison. He now makes application for leave to file a petition for *habeas corpus* on the ground that the sentence was void because Judge Meek was appointed July 13, 1898, after the adjournment of the previous session of the Senate of the United States, and commissioned by the President to hold office until the end of the next succeeding session of the Senate; and that from the date of the appointment and commission, until after the conviction and the sentence, there was no session of the Senate, though it is not denied that the appointment was afterwards confirmed.

By the act of February 9, 1898, 30 Stat. 240, c. 15, provision was made for an additional judge for the Northern Judicial District of the State of Texas, to be appointed by the President, by and with the advice of the Senate, and that when a vacancy in the office of the existing District Judge occurred, it should not be filled, so that thereafter there should be only one District Judge. It is stated that Judge Rector was District Judge of the Northern District of Texas when the statute was passed (February 9, 1898), that he died (April 9, 1898) before Judge Meek's appointment and while the Senate was still in session; and argued that the appointment could not be treated as one to fill the vacancy caused by Judge Rector's death, because that was forbidden by the act, and must be regarded as an appointment to the office of "additional District Judge" created thereby. Clause three of section two of article two of the Constitution provides that "the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session;" but it is insisted that the office in this instance was created during a session of the Senate, and that it could not be filled at all save by the concurrent action of the President and the Senate.

And it is further contended that the President could not during the recess of the Senate and without its concurrence,

by his commission invest an appointee with any portion of the judicial power of the United States Government as defined in article three of the Constitution, because that article requires that judges of the United States courts shall hold their offices during good behavior, and hence that no person can be appointed to such office for a less period and authorized to exercise any portion of the judicial power of the United States as therein defined.

We need not, however, consider the elaborate argument of counsel in this behalf, since we regard the well settled rule applicable here that where a court has jurisdiction of an offence, and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer *de facto;* and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of *habeas corpus.*[1]

---

[1] *Note by Reporter.* — The following historical facts have some bearing on the constitutional questions which the court was shut out from considering.

On the 1st day of July, 1795, the Senate having on the 26th day of the previous June "adjourned without day," the resignation by Mr. Jay of the office of Chief Justice of the United States took effect. President Washington wrote to Mr. Rutledge of South Carolina:

"I directed the Secretary of State to make you an official offer of this honorable appointment; to express to you my wish that it may be convenient and agreeable to you to accept it; to intimate in that case my desire, and the advantages that would attend your being in this city the first Monday in August, at which time the next session of the Supreme Court will commence; and to inform you that your commission as Chief Justice will take date on this day, July the 1st, when Mr. Jay's will cease, but that it would be detained here, to be presented to you on your arrival."

In the third volume of Dallas, under the head of "August Term, 1795," it is said: "A commission bearing date the 1st of July, 1795, was read, by which, during the recess of Congress, John Rutledge, Esquire, was appointed Chief Justice until the end of the next session of the Senate." Two important cases are reported in that volume as decided at this term. In the first, *United States* v. *Peters*, the decision is announced "by the court." In the second, *Talbot* v. *Jansen*, the justices give their opinions *seriatim*, Chief Justice Rutledge closing and announcing the decree.

The Senate met on the 9th of December, 1795, and the nomination of Mr. Rutledge "to be Chief Justice of the Supreme Court of the United States

In *Griffin's case*, Chase's Decisions, 364, 425, this was so ruled, and Mr. Chief Justice Chase said: "This subject received the consideration of the judges of the Supreme Court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by a judge *de*

---

vice John Jay, resigned" was sent in on the 10th of that month, and on the 15th of the same month the Senate refused to concur in it.

Rutledge's biographer says that the nomination was rejected because "when the Senate met in December his mind had become diseased;" but Jefferson, writing on the 31st of December, 1795, said: "The rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the [Jay's] treaty."

Busts of the deceased Chief Justices have been placed in the court room, through appropriations made by Congress for the purpose.

The first appropriation was made March 2, 1831, "for employing John Frazee to execute a bust of John Jay for the Supreme Court room, four hundred dollars." Frazee then resided in New York.

The second, made June 30, 1834, authorized a contract to be made "with a suitable American artist for the execution, in marble, and delivery in the room of the Supreme Court of the United States, a bust of the late Chief Justice Ellsworth," and appropriated eight hundred dollars therefor. The bust was made by H. Augur, then living in New Haven.

The third, made May 9, 1836, appropriated "for a marble bust of the late Chief Justice Marshall, five hundred dollars." The bust was executed by Hiram Powers, who lived in Washington from 1835 to 1837.

The fourth, made January 21, 1857, authorized the making of "a contract with a suitable artist for the execution, in marble, and delivery in the room of the Supreme Court of the United States, a bust of the late Chief Justice John Rutledge, and appropriated therefor eight hundred dollars." The bust was made by A. Galt.

The fifth, made January 29, 1874, authorized the Joint Committee on the Library "to procure and place in the room of the Supreme Court busts of the late Chief Justice Roger Brooke Taney, and of the late Salmon Portland Chase," and appropriated two thousand five hundred dollars for the purpose. The bust of Taney is by Rinehart, and that of Chase by Jones.

The latest appropriation, made March 2, 1889, was "to procure and place in the room of the Supreme Court of the United States a bust of the late Chief Justice, Morrison Remick Waite, one thousand five hundred dollars." The bust is by St. Gaudens of New York.

See also the Act of October 2, 1888, c. 1069, 25 Stat. 505, 547, appropriating for portraits of Rutledge, Ellsworth, and Waite, to be hung "on the robing room of the court with those of the other Chief Justices already there."

facto, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, cannot be properly discharged upon *habeas corpus*." And to that effect see *Sheehan's case*, 122 Mass. 445; *Fowler* v. *Bebee*, 9 Mass. 231, 235; *People* v. *Bangs*, 24 Illinois, 184, 187; *In re Burke; In re Manning*, 76 Wisconsin, 357, 365; *In re Manning*, 139 U. S. 504; Church on Habeas Corpus, §§ 256, 257, 269, and cases cited.

In *McDowell* v. *United States*, 159 U. S. 596, one of the Circuit Judges in the Fourth Circuit designated the judge of one of the District Courts of North Carolina to hold a term in South Carolina, and his power to act was challenged by an accused on his trial and before sentence. The cause was carried to the Court of Appeals for that circuit, which certified questions to this court. We decided that whether existing statutes authorized the designation of the North Carolina District Judge to act as District Judge in South Carolina was immaterial, since he must be held to have been a judge *de facto*, if not *de jure*, and his actions as such so far as they affected other persons were not open to question. *Cocke* v. *Halsey*, 16 Pet. 71, 85, 86; *Hussey* v. *Smith*, 99 U. S. 20, 24; *Norton* v. *Shelby County*, 118 U. S. 425, 445; *Ball* v. *United States*, 140 U. S. 118, 128, 129.

The result of the authorities is that the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked; and as Judge Meek acted, at least, under such color, we cannot enter on any discussion of propositions involving his title to the office he held.

Leave denied.

Thus it appears that Washington appointed Rutledge Chief Justice *ad interim;* that the other members of the court acted with him as such without objection; and that both Houses of Congress have recognized him as one of the Chief Justices.

THIRD STREET AND SUBURBAN RAILWAY COMPANY *v.* LEWIS.

APPEAL FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 212. Submitted March 10, 1899. — Decided March 20, 1899.

Under the act of August 13, 1888, c. 866, a Circuit Court of the United States has no jurisdiction, either original, or by removal from a state court, of a suit as one arising under the Constitution, laws or treaties, of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim.

If it does not appear at the outset that a suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence.

When jurisdiction originally depends upon diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings.

THIS was a supplemental bill of complaint filed October 9, 1895, in the Circuit Court of the United States for the District of Washington. The original bill does not appear in the record, but the supplemental bill alleged —

"Meyer Lewis, a citizen of the city and county of San Francisco in the State of California, with leave of court first had and obtained, brings this, his supplemental bill, against the Third Street and Suburban Railway Company, a corporation duly organized and existing under the laws of the State of Washington, defendant, with its principal place of business in the city of Seattle, in said State; the original bill herein being brought by this plaintiff against Western Mill Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, in said State, John Leary and J. W. Edwards, citizens of Washington and residents of Seattle, James Oldfield, citizen of Washington and a resident of Seattle, Malcolm McDonald, a citizen of Washington and a resident of Fort Blakeley, in said State, the city of Seattle, a municipal corporation duly organized and existing under the laws of the

State of Washington, Washington Savings Bank, a corporation duly organized and existing under the laws of Washington, with its principal place of business in Seattle, in said State, and other defendants, against whom decrees *pro confesso* have been entered in the above-entitled cause prior to the bringing of this supplemental bill."

And set forth in paragraph one:

"That at all times hereinafter mentioned the defendant, Third Street and Suburban Railway Company, was and it now is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in the city of Seattle, in said State."

The supplemental bill then stated that the Western Mill Company, in May, 1884, and certain other defendants as sureties, made and delivered to plaintiff their note, to secure the payment of which, and the interest thereon and attorneys' fees, it executed a certain mortgage, which plaintiff sought by his bill to foreclose.

The eighth paragraph was as follows:

"That on or about the 14th day of October, 1891, the defendant, Western Mill Company, mortgagor herein, by its certain deed of sale, sold said mortgaged premises and every part thereof to the Ranier Power and Railway Company, a corporation organized under the laws of Washington, and having its principal place of business in Seattle; that thereafter, and on or about the 13th day of February, 1895, in the cause of *A. P. Fuller* v. *The Ranier Power & Railway Company*, No. —, then pending before this honorable court, Eben Smith, Esq., the duly appointed, qualified and acting master in chancery in said cause, made, executed and delivered to A. M. Brookes, Angus McIntosh and Frederick Bausman, purchasers of said premises, at a sale theretofore had, to satisfy a decree in said cause theretofore rendered by this court, a deed of sale to said mortgaged premises and each and every part thereof; that thereafter, on the 12th day of February, 1895, for a valuable consideration, said Angus McIntosh, A. M. Brookes and Frederick Bausman duly bargained and sold

by their deed of sale, their right, title and interest in and to said premises, and every part thereof to the Third Street and Suburban Railway Company, defendant herein, who now claims some interest in or lien upon said mortgaged premises through said deed of purchase, so made subsequent to the commencement of plaintiff's action, but that said interest in or lien upon said property is subsequent, subject and inferior to the lien of plaintiff's mortgage."

Thereupon plaintiff prayed judgment against the parties to the note for the sum alleged to be due with interest and attorneys' fees; that a decree for the sale of the mortgaged premises be entered, the proceeds to be applied in payment of the amount found due on the note and mortgage; that the railway company, and all persons claiming under it, be barred and foreclosed from setting up any claim or equity therein thereafter; and that plaintiff have judgment over for any deficiency on the sale. The defendant, the railway company, answered; a demurrer was sustained to its answer; and a decree was entered against the parties to the note for the amount due thereon and for the sale of the premises mortgaged, with judgment against them for any deficiency; and also for the distribution of any surplus that might remain after the application on the mortgage of the proceeds from the sale.

The case was carried on appeal to the Circuit Court of Appeals for the Ninth Circuit, and the decree below was by that court affirmed. 48 U. S. App. 273. And from its decree this appeal was allowed.

Mr. Frederick Bausman for appellant.

Mr. J. W. Blackburn, Jr., and *Mr. George E. Hamilton* for appellee.

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

Although the record does not contain the original bill, it is apparent that the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, and that the

interest of appellants in the mortgaged premises was acquired after the commencement of the action.

This supplemental bill made appellant a party defendant as claiming an interest, but the jurisdiction still rested on diversity of citizenship. The decree of the Circuit Court of Appeals was, therefore, made final by the statute, and the appeal cannot be sustained.

But it is said that because plaintiff saw fit to set forth the manner in which appellant obtained its interest, and it appeared that appellant claimed under a conveyance from the purchasers at a sale made pursuant to a decree of the Circuit Court, the jurisdiction was not entirely dependent on the citizenship of the parties. The averments, however, in respect to the acquisition of its interest by appellant, were no part of plaintiff's case, and if there had been no allegation of diverse citizenship the bill unquestionably could not have been retained. The mere reference to the sale and foreclosure could not have been laid hold of to maintain jurisdiction on the theory that plaintiff's cause of action was based on some right derived from the Constitution or laws of the United States.

It is thoroughly settled that under the act of August 13, 1888, c. 866, 25 Stat. 434, the Circuit Court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454; *Metcalf* v. *Watertown*, 128 U. S. 586, 589; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138. If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And so when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings. *Ex parte Jones*, 164 U. S. 691.

Appeal dismissed.

TURNER v. WILKES COUNTY COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 642. Submitted February 20, 1899. — Decided March 20, 1899.

On a writ of error to a state court this court cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject.

This court is bound by the decision of a state court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question; though other principles obtain when the writ of error is to a Federal court.

This was a motion to dismiss. The case is stated in the opinion.

Mr. A. C. Avery for the motion.

Mr. Richard N. Hackett opposing.

Mr. Justice Peckham delivered the opinion of the court.

This action was commenced in the superior court of Wilkes County in the State of North Carolina, by the Board of Commissioners of Wilkes County and C. C. Wright, against Clarence Call. Mr. Wright was a taxpayer of the county, while the defendant Call was its treasurer. The action was brought to test the validity of certain bonds issued by the county of Wilkes in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company.

The defendants Turner and Wellborn were the owners of some of the bonds, and after the bringing of this action they were, on their own motion, brought in as parties defendant, and they invited all other bondholders to come in and join them in resisting the action.

It was claimed by the holders of the bonds that authority for their issue existed under an ordinance chartering the Northwestern North Carolina Railroad Company, which ordinance was adopted by the constitutional convention of North Carolina, March 9, 1868, the constitution being itself ratified April 25, 1868. It was also insisted that the bonds were authorized under sections 1996 to 2000 of the code of North Carolina, as enacted in 1869, and subsequently ratified in 1883; also that the charter of the railroad company, as amended in 1879, and again in 1881, authorized the issuing of the bonds. The bonds were in fact issued in 1890, and therefore subsequent to all the legislation above referred to. The bonds recited on their face that they were issued under the act of 1879.

As grounds for their contention that the bonds were invalid, the plaintiffs below asserted that neither the above mentioned act of 1879, nor the amended act of 1881, had been constitutionally passed; that the bonds were not issued under the ordinance adopted by the constitutional convention; and that by the doctrine of estoppel the bondholders could not claim that the bonds were issued under such ordinance or by virtue of any other authority than that recited on their face, viz., the act of 1879.

The Supreme Court of the State held that the bonds were void because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the constitution. The court further held that the bonds were not authorized by the above sections of the code, and that as they purported, by recitals on their face, to have been issued under the act of 1879, the bondholders were estopped from setting up any other authority for their issue, such as the ordinance of the constitutional convention above mentioned.

The bondholders have brought the case here, claiming that by the decision below their contract has been impaired, because, as they allege, the Supreme Court of the State had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their issue, and that in holding the contrary after the issue of these bonds the state court had impaired the obligation of the contract,

and its decision raised a Federal question proper for review by this court.

But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the state court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question. Other principles obtain when the writ of error is to a Federal court.

The difference in the jurisdiction of this court upon writs of error to a state as distinguished from a Federal court, in questions claimed to arise out of the contract clause of the constitution, is set forth in the opinion of the court in *Central Land Company* v. *Laidley*, 159 U. S. 103, and from the opinion in that case the following extract is taken (p. 111) :

"The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did ; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits and reversed by this court, for misconstruction of the constitution of Iowa. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206. But a writ of error to review one of those decisions of

the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the Constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Railroad Co.* v. *McClure*, 10 Wall. 511, 515."

An example of the jurisdiction exercised by this court when reviewing a decision of a Federal court with regard to the same contract clause is found in the same volume. *Folsom* v. *Ninety-six*, 159 U. S. 611, 625.

This case is governed by the principles laid down in *Central Land Company* v. *Laidley*, *supra*, and the writ of error must, therefore, be

Dismissed.

UNITED STATES *v.* NEW YORK INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 697. Submitted January 30, 1899. — Decided March 20, 1899.

After the hearing of the former appeal in this case, 170 U. S. 1, and after the decree of this court determining the rights of the parties, and remanding the case to the Court of Claims 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, etc., and after the Court of Claims had complied with this mandate, in accordance with its terms, a motion on the part of the United States to this court to direct the Court of Claims to find further facts comes too late.

As the judgment of the Court of Claims now appealed from was in exact accordance with the mandate of this court, the appeal from it is dismissed.

This case arose from a motion by the Indians to dismiss the appeal of the United States for want of jurisdiction, or, in the alternative, to affirm the judgment of the Court of Claims, upon the ground that the question involved is so frivolous as not to need further argument; and also from a counter motion by the United States for an order upon the Court of Claims to make a further finding of facts.

Statement of the Case.

By an act of Congress, passed January 28, 1893, c. 52, 27 Stat. 426, the Court of Claims was authorized to hear and determine, and to enter up judgment upon the claims of the Indians "who were parties to the treaty of Buffalo Creek, New York," of January 15, 1838, 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.

In its findings of fact the Court of Claims decided that the Indians described in the jurisdictional act, above referred to 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 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."

Upon the whole case, however, the Court of Claims found as a conclusion of law from the facts that the Indians had abandoned their claim, and accordingly dismissed their petition. On appeal to this court, under the act of Congress above mentioned, the judgment of the Court of Claims was reversed, 170 U. S. 1, this court being of opinion:

1. That the title acquired by the Indians under the treaty was a grant *in præsenti* of a legal title to a defined tract, described by metes and bounds, containing 1,824,000 acres in the now State of Kansas;

2. That there was no uncertainty as to the land granted or as to the identity of the grantees;

3. That 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 Broth-

ertowns, residing in the State of New York, as found in the first finding of fact by the Court of Claims;

4. That the grant to the Indians was of the entire tract as specified in article two of the treaty, and not an allotment to them of 320 acres for each emigrant;

5. That the Government had 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;

6. That the Indians had neither forfeited nor abandoned their interest in the Kansas lands, and that they were entitled to a judgment.

Thereupon the case was remanded to the Court of Claims 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 land upon the basis of which settlement was made with the Tonawandas, and less 10,240 acres allotted to the thirty-two New York Indians as set forth in finding 12, together with such 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."

In obedience to this mandate the Court of Claims on November 14, 1898, made certain further findings of fact, set forth in the margin,[1] and as a conclusion of law decreed

[1] *Findings.*

Assuming that the claimants were entitled to 1,824,000 acres of land under the treaty of January 15, 1838, the court finds that of these lands the defendants sold 84,453.29 acres, for which they received the sum of $1.25 per acre. They otherwise disposed of the balance of said lands in granting the same for public purposes, and for the lands disposed of for public purposes they could have obtained the sum of $1.25 per acre.

The land at $1.25 per acre amounts to the sum of $2,280,000. The court in finding that the defendants could have sold the land at $1.25 does not take into consideration any increased value given to such lands because of

that the claimants recover from the United States the sum of $1,967,056; whereupon the United States took this appeal, and now move the court that the Court of Claims be ordered to further find and certify to this court:

"First. What constituted the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees and Brothertowns, parties to the treaty of Buffalo Creek, as proclaimed April 4, 1840;

"Second. Whether or not the Oneidas at Green Bay, Stockbridges, Munsees and Brothertowns resided in the State of

---

any donation of land for public purposes; and the court finds that the price at which the defendants sold the land was not increased because of any donation of other lands for public purposes. The court finds that the cost and expense of surveying and platting said lands was the sum of $45,600. The court finds that the number of acres allowed the Tonawanda band of the claimants in the settlement of their claim was 208,000 acres, which, at the price of $1.25 per acre, less the proportionate cost and expense of surveying and platting, amounts to the sum of $254,800. The number of acres allotted to the 32 Indians as set forth in finding twelve was 10,340 acres, which, at the rate of $1.25 per acre, less the proportionate cost and expense of surveying and platting, amounts to $12,544.

The court further finds that, after deducting the costs and expense of surveying and platting said lands, the amount paid by the defendants in the settlement with the Tonawanda band and the value of the allotment to the 32 Indians, there remains of said $2,280,000 the sum of $1,967,056.

The court further finds: The New York Indians who were parties to the treaty of Buffalo Creek of 1838, as amended and proclaimed, were the following:

Senecas	2309
Onondagas on Senecas' reservation	194
Cayugas	130
	2633
Onondagas at Onondaga	300
Tuscaroras	273
Saint Regis in New York	350
Oneidas at Green Bay	600
Oneidas in New York	620
Stockbridges	217
Munsees	132
Brothertowns	360
Total	5485

New York when the treaty of Buffalo Creek was proclaimed, or when they became parties thereto."

Mr. Solicitor General, *Mr. Assistant Attorney General Pradt* and *Mr. Charles C. Binney* for the United States.

Mr. Jonas H. McGowan and *Mr. Guion Miller* for the New York Indians.

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

As a disposition of either one of these motions will practically dispose of the other, both may properly be considered together.

The preamble to the treaty of Buffalo Creek of January 28, 1838, 7 Stat. 550, recites that "the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen and warriors are hereto subscribed, and those who may hereafter assent to this treaty in writing, within such time as the President shall appoint." The second article of the treaty also recites that "it is understood and agreed that the above described country" (the land ceded) "is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns residing in the State of New York, and the same is to be divided equally among them according to their respective numbers, as mentioned in the schedule hereunto annexed." The treaty purports to be signed by the headmen of the Senecas, Tuscaroras, Oneidas residing in the State of New York as well as at Green Bay, St. Regis, Onondagas residing on the Seneca reservation, the principal Onondaga warriors, Cayugas and the principal Cayuga warriors; but the schedule, immediately following the signatures, contains also the names of the Stockbridges, Munsees and Brothertowns. The commissioner on behalf of the United States certifies that this schedule was made before the execu-

tion of the treaty. Following this there are certain certificates by the commissioner to the effect that the treaty was assented to by the Senecas, Tuscaroras, St. Regis, Oneidas, Cayugas and Onondagas. On January 22, 1839, the President sent the treaty to the Senate with the following message:

"To the Senate of the United States:

"I transmit a treaty negotiated with the New York Indians which was submitted to your body in June last and amended.

"The amendments have, in pursuance of the requirement of the Senate, been submitted to each of the tribes assembled in council, for their free and voluntary assent or dissent thereto. In respect to all the tribes, except the Senecas, the result of this application has been entirely satisfactory. It will be seen by the accompanying papers that of this tribe, the most important of those concerned, the assent of forty-two out of eighty-one chiefs has been obtained. I deem it advisable, under the circumstances, to submit the treaty in its modified form to the Senate for its advice in regard to the sufficiency of the assent of the Senecas to the amendment proposed.

"(Signed) M. Van Buren.

"Washington, 21st January, 1839."

The assent of the Senecas having been procured, the treaty was afterwards ratified.

The question was thus presented to the Court of Claims whether the Stockbridges, Munsees and Brothertowns — who did not actually sign the treaty — gave their assent, and the Court of Claims found as a fact that they were actually parties to it. There was certainly some evidence in support of this finding which also accorded with the opinion of this court in *Fellows* v. *Blacksmith*, 19 How. 366, 372, in which an objection was taken on the argument to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians was not represented by the chief and headmen of the band in the negotiations and execution of it. "But," said the court, "the answer to this is, that the treaty, after executed and

ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress."

But we are now asked to direct the Court of Claims to find:

First. What constituted the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees and Brothertowns parties to the treaty of Buffalo Creek, as proclaimed April 4, 1840?

Second. Whether or not the Oneidas at Green Bay, Stockbridges, Munsees and Brothertowns resided in the State of New York when the treaty of Buffalo Creek was proclaimed, or when they became parties thereto?

But if these be material facts, they were equally so when the findings were made at the first hearing, and the attention of the court should have been called to the matter, and a more particular finding requested. The motion contemplates an order upon the court to send up the testimony upon which it had found the ultimate fact that these three tribes were parties to the treaty, and inferentially for us to pass upon the sufficiency of that testimony to establish such ultimate fact. If the finding of these probative facts were deemed material within the case of *United States* v. *Pugh*, 99 U. S. 265, application should have been made when the case was first sent here for a finding of such facts. In the *Pugh case* the Court of Claims found certain circumstantial facts, and the question this court was called upon to decide was whether those facts were sufficient to support the judgment. But this court did not hold that, where the Court of Claims was satisfied that the evidence before it fully established a fact, it was bound to insert all the evidence upon that point, if the losing party thought the court made a mistake. This court has repeatedly held that the findings of the Court of Claims in an action at law determines all matters of fact, like the verdict of a jury, and that where there is any evidence of a fact which they find, and no exception is taken, their finding is final; *Stone* v. *United States*, 164 U. S. 380; *Desmare* v. *United States*, 93

U. S. 605; *Talbert* v. *United States*, 155 U. S. 45; and in *McClure* v. *United States*, 116 U. S. 145, this court distinctly held that it would not remand a case to the Court of Claims with directions to return whether certain distinct propositions, in requests for findings of fact, presented to that court at the trial of the case, were established and proved by the evidence, if it appeared that the object of the request to have it so remanded was to ask this court to determine questions of fact upon the evidence. In *The Santa Maria*, 10 Wheat. 431, 444, it was said by Mr. Justice Story: "We think, therefore, that upon principle every existing claim which the party has omitted to make at the hearing upon the merits, and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the court, if they had been previously brought to its notice." See also *Hickman* v. *Fort Scott*, 141 U. S. 415.

But it is difficult to see how the proposed findings, if made, could be deemed material. This court held that the treaty of Buffalo Creek was a grant *in præsenti* of a certain tract of land in Kansas, described by metes and bounds. The second article of the treaty indicates that the grant was made upon the basis of 320 acres for each inhabitant, the recital "being 320 acres for each soul of said Indians as their numbers are at present computed." But the grant was not of 320 acres for each soul, but of a tract of land *en bloc*. Under the decision of the court a present title thereto passed to the Indians. This being the case, the United States are in no position to show that the Government erred in its computation of souls, or that certain tribes who are named in the treaty did not assent to it. If the land passed under the treaty, then it is only a question between the Indians themselves who were signatories thereto or assented to its terms. The only object of the proposed order, though it is but faintly outlined in the briefs, must be to show that if the Stockbridges, Munsees and Brothertowns

never assented to the treaty, the grant should be reduced in the proportion of 320 acres to each member of these tribes. But this is an indirect attack upon the decree. The case was remanded to the Court of Claims, not to determine who were actually parties to the treaty, or to recompute the number of souls, or in any other way to reduce the extent of the grant, but to render a judgment for the amount received by the Government for the Kansas lands, less an amount of lands upon the basis of which settlement had been made with the Tonawandas, and less the 10,240 acres allowed to thirty-two New York Indians, "together with such other deductions as may seem to the court below to be just." But there is nothing to indicate that the Court of Claims was at liberty to redetermine who were parties to the treaty, and entitled to the benefit of its provisions. That question had already been settled beyond recall. The motion for additional findings must therefore be denied.

The denial of this motion practically disposes of the appeal, as the action of the court below in its supplemental findings was in strict conformity with the mandate of this court. It found the amount of land sold by the United States, the cost and expense of surveying and platting said lands, the number of acres allowed to the Tonawanda band, the number allotted to the thirty-two Indians, and, after deducting the expense of surveying and platting, the amount paid by the United States in settlement of the Tonawanda band and thirty-two Indians, there remained of the value of the land at $1.25 per acre the sum of $1,967,056. The court further found who the New York Indians were, who were parties to the treaty, and as a conclusion of law judgment was entered for the above amount. This court has repeatedly held that a second writ of error does not bring up the whole record for reëxamination, but only the proceedings subsequent to the mandate, and if those proceedings are merely such as the mandate command, and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. *The Santa Maria*, 10 Wheat. 431; *Roberts* v. *Cooper*, 20 How. 467; *Tyler* v. *Magwire*, 17

Wall. 253; *The Lady Pike*, 96 U. S. 461; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Stewart* v. *Salamon*, 97 U. S. 361.

In *Stewart* v. *Salamon*, *supra*, Mr. Chief Justice Waite observed: "An appeal will not be entertained by this court from a decree entered in the Circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with proper directions for the correction of the error. The same rule applies to writs of error." *Humphrey* v. *Baker*, 103 U. S. 736; *Clark* v. *Keith*, 106 U. S. 464; *Mackall* v. *Richards*, 116 U. S. 45.

The appeal will therefore be

Dismissed.

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

BROWN *v.* HITCHCOCK.[1]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 581. Argued February 23, 24, 1899. — Decided April 3, 1899.

Under the act of September 28, 1850, c. 84, 9 Stat. 519, known as the Swamp Land Act, the legal title to land passes only on delivery of a patent, and as the record in this case discloses no patent, there was no passing of the legal title from the United States, whatever equitable rights may have vested. Until the legal title to land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department.

Although cases may arise in which a party is justified in coming into the

[1] The docket title of the case is *Brown* v. *Bliss*. Mr. Bliss having resigned as Secretary of the Interior, his successor was substituted in his place.

Statement of the Case.

courts of the District of Columbia to assert his rights as against a proceeding in the land department, or when that department refuses to act at all, yet, as a general rule, power is vested in the department to determine all questions of equitable right and title, upon proper notice to the parties interested, and the courts should be resorted to only when the legal title has passed from the Government.

On May 10, 1898, the appellant, as plaintiff, filed in the Supreme Court of the District of Columbia his bill, setting forth, besides certain jurisdictional matters, the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519; the extension of that act to all the States by the act of March 12, 1860, c. 5, 12 Stat. 3; a selection of lands thereunder by the State of Oregon (evidenced by what is called "List No. 5,") and an approval on September 16, 1882, of that selection by the Secretary of the Interior; a purchase in 1880 from the State by H. C. Owen, of certain of those selected lands, and subsequent conveyances thereof to plaintiff. Then, after showing the appointment of Hon. William F. Vilas, as Secretary of the Interior, the bill proceeds:

"That, as plaintiff is informed and believes, on the 27th day of December, A.D. 1888, the said Secretary of the Interior, then the said William F. Vilas, made and entered an order annulling, cancelling and revoking the said 'List number 5,' and the approval thereof, and annulling and revoking the said judgment and determination so made by his said predecessor in said office, the said Henry M. Teller, whereby his said predecessor had adjudged and determined that the lands aforesaid were swamp and overflowed lands within the meaning of the acts aforesaid, and made and entered an order purporting to adjudge and determine that certain of the lands described in said 'List number 5,' including the lands hereinbefore described, were not swamp and overflowed lands within the meaning of the acts aforesaid.

"That thereafter, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the general land office of the United States by the State of Oregon and by the grantors of this plaintiff to set aside and have held for naught the orders and rulings so made

Statement of the Case.

by the said William F. Vilas as such Secretary of the Interior, which proceedings came to an end within one year last past.

"That, as plaintiff is informed and believes, since the said proceedings last aforesaid came to an end, the defendant, as such Secretary of the Interior, is proceeding to put in force and to carry out the orders and rulings so as aforesaid made by the said William F. Vilas as such Secretary of the Interior and to hold the lands hereinbefore described to be public lands of the United States and subject to entry under the laws of the United States, and threatens and intends to receive and permit the officers of the land department of the United States to receive applications for and allow entries of the lands aforesaid as public lands of the United States."

After alleging the invalidity of these proceedings, the bill goes on to aver that the proceeding thus initiated by Secretary Vilas throws a cloud upon appellant's title, "and is likely to cause many persons to attempt to settle upon the said lands and to enter the same in the land department of the United States as public lands of the United States subject to such entry, and that plaintiff will be unable to remove such persons from said lands or to quiet his title thereto as against them without a multiplicity of suits, and that therefore this plaintiff is entitled in this court to an order enjoining and restraining the defendant, as such Secretary of the Interior, and his subordinate officers of the land department of the United States, from in any way carrying said last mentioned orders and rulings into effect, and from permitting any entries upon said lands or holding the same open to entry, and from in any way interfering with or embarrassing the plaintiff in his title and ownership of the lands aforesaid."

Upon these facts plaintiff prayed a decree cancelling the order of December 27, 1888, restraining the officers of the land department from carrying it into effect, and forbidding the defendant and his subordinates from holding the lands to be public lands of the United States or subject to entry under the general land laws. To this bill a demurrer was filed, which was sustained, and the bill dismissed. Plaintiff appealed to the Court of Appeals of the District, and upon an affirmance

of the decree by that court brought the decision here for review.

Mr. W. B. Treadwell for appellant. *Mr. Charles A. Keigwin* was on his brief.

Mr. Assistant Attorney General Van Devanter for appellee.

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

Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, "at the request of said Governor [the Governor of the State,] cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State." *Rogers Locomotive Works* v. *American Emigrant Company*, 164 U. S. 559, 574; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592.

In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department. In *United States* v. *Schurz*, 102 U. S. 378, 396, which was an application for a mandamus to compel the delivery of a patent, it was said:

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

While a delivery of the patent was ordered, yet that was so

ordered because it appeared that the patent had been duly executed, countersigned and recorded in the proper land records of the land department and transmitted to the local land office for delivery, and it was held that the mere manual delivery was not necessary to pass the title, but that the execution and record of the patent were sufficient. And yet from that conclusion Chief Justice Waite and Mr. Justice Swayne dissented. The dissent announced by the Chief Justice only emphasizes the proposition laid down in the opinion, as heretofore quoted, that so long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts. See in support of this general proposition *Michigan Land & Lumber Co.* v. *Rust*, *supra*, (which, like the present case, arose under the Swamp Land Act,) and cases cited in the opinion. Indeed, it may be observed that the argument in behalf of appellant was avowedly made to secure a modification of that opinion. We might well have disposed of this case by a simple reference to that decision; but in view of the earnest challenge by counsel for appellant of the views therein expressed, we have reëxamined the question in the light of that argument and the authorities cited. And after such reëxamination we see no reason to change, but on the contrary we reaffirm the decision in *Michigan Land & Lumber Co.* v. *Rust*. As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such Departments and carried into the courts; those Departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. When the legal title to these lands shall have been vested in the State of Oregon, or in some individual claiming a right superior to that of the State, then is inquiry permissible in the courts, and that inquiry will appropriately be had in the courts of Oregon, state or Federal.

We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to

assert his rights as against a proceeding in the land department or when the department refuses to act at all. *United States* v. *Schurz*, *supra*, and *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, are illustrative of these exceptional cases.

Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

"The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." *Cornelius* v. *Kessel*, 128 U. S. 456, 461. "The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department." *Orchard* v. *Alexander*, 157 U. S. 372, 383.

But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on.

In the case before us there is nothing to show that proper

notice was not given; that all parties in interest were not fully heard, or that the adjudication of the administrative department of the Government was not justified by the facts as presented. The naked proposition upon which the plaintiff relies is that upon the creation of an equitable right or title in the State the power of the land department to inquire into the validity of that right or title ceases. That proposition cannot be sustained. Whatever rights, equitable or otherwise, may have passed to the State by the approval of List No. 5 by Secretary Teller, can be determined, and should be determined, in the courts of Oregon, state or Federal, after the legal title has passed from the Government. The decree of the Supreme Court of the District of Columbia, sustained by the opinion of the Court of Appeals of the District, was right, and is

Affirmed.

Mr. Justice McKenna took no part in the consideration and decision of this case.

ALLEN v. SOUTHERN PACIFIC RAILROAD COMPANY

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 144. Argued January 17, 1899. — Decided April 3, 1899.

The sixth section of the act of March 3, 1891, c. 517, did not change the limit of two years as regards cases which could be taken from Circuit and District Courts of the United States to this court, and that act did not operate to reduce the time in which writs of error could issue from this court to state courts.

As a reference to the opinion of the Supreme Court of California makes patent the fact that that court rested its decision solely upon the construction of the contract between the parties to this action which forms its subject, and decided the case wholly independent of the Federal questions now set up; and as the decree of the court below was adequately sustained by such independent, non-Federal question, it follows that no issue is presented on the record which this court has power to review.

Statement of the Case.

THIS suit, commenced by the Southern Pacific Railroad Company, (the defendant in error here,) against Darwin C. Allen, who is plaintiff in error, was based on eighty-four written contracts entered into on the first day of February, 1888. All these contracts were made exhibits to the complaint and were exactly alike, except that each contained a description of the particular piece of land to which it related. By the contracts the Southern Pacific Company agreed to sell and Darwin C. Allen to buy the land described in each contract upon the following conditions: Allen paid in cash a stipulated portion of the purchase price and interest at seven per cent in advance for one year on the remainder. He agreed to pay the balance in five years from the date of the contracts. The deferred payment bore interest at seven per centum per annum, which was to be paid at the end of each year. He moreover bound himself to pay any taxes or assessments which might be levied on the property. The contracts provided:

"It is further agreed that upon the punctual payment of said purchase money, interest, taxes and assessments, and the strict and faithful performance by the party of the second part, [Allen, the purchaser,] his lawful representatives or assigns, of all the agreements herein contained, the party of the first part [the Southern Pacific Company] will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land."

There was a stipulation that the purchaser should have a right to enter into possession of the land at once, and by which he bound himself until the final deed was executed not to injure the property by denuding it of its timber. The contracts contained the following:

"The party of the first part [the Southern Pacific Company] claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will

Statement of the Case.

use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all, or any of the tracts herein described, it will, upon demand, repay [without interest] to the party of the second part all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages, or costs, in case of his failure to obtain and keep such possession."

It was averred that after the execution of the contracts Allen, the purchaser, had entered into possession of the various tracts of land, and so continued up to the time of the commencement of the suit. The amount claimed was three annual instalments of interest on the deferred price which it was alleged had become due in February, 1889, 1890 and 1891. The prayer of the complaint was that the defendant be condemned to pay the amount of these respective instalments within thirty days from the date of decree, and in the event of his failure to do so that himself, his representatives and assigns, "be forever barred and foreclosed of all claim, right or interest in said lands and premises under and by virtue of said agreements, and be forever barred and foreclosed of all right to conveyance thereof, and that said contracts be declared null and void."

The defendant, whilst admitting the execution of the contracts, denied that he had ever taken possession of any of the land, and charged that the contracts were void because at the time they were entered into and up to the time of the institution of the suit the seller had no ownership or interest of any

kind in the land, and therefore that no obligation resulted to the buyer from the contracts. By way of cross-complaint it was alleged that the defendant had been induced to enter into the contracts by the false and fraudulent representations of the complainant that it had a title to or interest in the property; that, in consequence of the error of fact produced by these misrepresentations of the plaintiff, the defendant had paid the cash portion of the price and the interest in advance for one year on the deferred instalment; that, owing to the want of all title to or interest in the land on the part of the complainant, the defendant had been unable to take possession thereof, and that some time after the contracts were entered into the defendant had an opportunity to sell the land for a large advance over the amount which he had agreed to pay for it, which opportunity was lost in consequence of the discovery of the fact that the complainant had no title whatever to the property. The prayer of the cross-complaint was that the moneyed demand of the plaintiff be rejected; that the contracts be rescinded, and that there be a judgment against the plaintiff for the amount paid on account of the purchase price and for the damage which the defendant had suffered by reason of his failure to sell the property at an advanced price. The complainant put the cross-complaint at issue by denying that it had made any representations as to its title to or interest in the land except as stated in the contracts. It denied that at the time of the contracts it had no interest in the land, or that the defendant had been prevented from taking possession or had been prevented from selling at an advanced price because of a want of title.

Upon these issues the case was heard by the trial court, which made a specific finding of fact embracing, among other matters, the following: That the contracts sued on had been entered into as alleged and the instalments claimed thereunder were due despite demand; that no representations had been made by the plaintiff as to its title other than those which were recited in the contract; that the defendant had not lost the opportunity to sell at an advanced price, as alleged in the cross-complaint.

Statement of the Case.

As to the title to the land embraced in the contracts, the facts were found to be as follows:

"That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July 27, 1866. That all of said lands, save sec. 5, in township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said sec. 5 being within 20 miles of said railroad.

"That the loss to plaintiff of odd-numbered sections within said granted limits, *i.e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt.

"That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first named order, and restoring said lands to the public domain for the usual sale and settlement thereof. The first said order of withdrawal is set forth in vol. — of 'Decisions of the Secretary of the Interior' at p. —, and the said second order in vol. 6 of said 'Decisions' at pp. 84–92; and which said orders as so set forth are here referred to, and made a part of this finding. That plaintiff is the owner of said lands in fee under the provisions of said act of Congress; that patents or a patent therefor have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper Department of the Government of the United States, instituted by plaintiff, to obtain patents or

a patent for said lands and premises, and the whole thereof. That plaintiff has not been guilty of any want of ordinary diligence in instituting or prosecuting said proceedings to obtain said patents or patent."

There was a decree allowing the prayer of the complaint and rejecting that of the cross-complaint. On appeal the case was first heard in Department No. 1 of the Supreme Court of California, and the decree of the trial court was in part reversed. In accordance with the California practice the cause was transferred from the court in department to the court in banc, where the decree of the trial court was affirmed. 112 California, 455. To this decree of affirmance this writ of error is prosecuted.

Mr. Wilbur F. Zeigler for plaintiff in error. *Mr. Edward R. Taylor* filed briefs for same.

Mr. Maxwell Evarts for defendant in error. *Mr. William F. Herrin* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

It is asserted that the record is not legally in this court because the writ of error was allowed by the Chief Justice of the State after the expiration of the time when it could have been lawfully granted. It was allowed within two years of the decree by the state court, but after more than one year had expired. The contention is that writs of error from this court to the courts of the several States cannot now be lawfully taken after the lapse of one year from the final entry of the decree or judgment to which the writ of error is directed.

This rests on the assumption that the act of March 3, 1891, c. 517, 26 Stat. 826, not only provides that writs of error or appeals in cases taken to the Supreme Court from the Circuit Courts of Appeals created by the act of 1891, shall be limited to one year, but also fixes the same limit of time for writs of error or appeal in cases taken to the Supreme Court from the

Circuit and District Courts of the United States, thereby repealing the two years' limitation as to such Circuit and District Courts previously established by law. Rev. Stat. § 1008. As this asserted operation of the act of 1891 produces a uniform limit of one year for writs of error or appeals as to all the courts of the United States, in so far as review in the Supreme Court is concerned, the deduction is made that a like limit necessarily applies to writs of error from the Supreme Court to state courts, since such state courts are, Rev. Stat. § 1003, subject to the limitation governing judgments or decrees of "a court of the United States." The portion of the act of 1891 from which it is claimed the one year limitation as to writs of error and appeal from the Supreme Court to all courts of the United States arises is the last paragraph of section 6 of that act. The section of the act in question in the portions which precede the sentences relied upon, among other things, defines the jurisdiction of the Circuit Courts of Appeals established by the act of 1891, and determines in what classes of cases the jurisdiction of such courts is to be final. After making these provisions the concluding part of section 6 provides as follows:

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

It is apparent that the language just quoted relates exclusively to writs of error or appeal in cases taken to the Supreme Court from the Circuit Courts of Appeals. The statute, in the section in question, having dealt with the jurisdiction of the Circuit Courts of Appeals and defined in what classes of cases their judgments or decrees should be final and not subject to review, follows these provisions by conferring on the Supreme Court the power to review the judgments or decrees of the Circuit Courts of Appeals, not made final by the act. To construe the section as relating to or controlling the review by

error or appeal, by the Supreme Court, of the judgments or decrees of Circuit or District Courts of the United States, would not only disregard its plain letter but do violence to its obvious intent. Relating only, then, to writs of error or appeal from the Supreme Court to the Circuit Courts of Appeals, it follows that the limitation of time, as to appeals or writs of error, found in the concluding sentence, refers only to the writs of error or appeal dealt with by the section and not to such remedies when applied to the District or Circuit Courts of the United States, which are not referred to in the section in question. This is made manifest by the statement, not that all appeals or writs of error to the Supreme Court from all the courts of the United States shall be taken in one year, but that "no such appeal shall be taken unless within one year," etc. If these words of limitation were an independent and separate provision of the act of 1891, thereby giving rise to the implication that the words "no such appeal or writ of error" qualified and limited every such proceeding anywhere referred to in the act of 1891, the contention advanced would have more apparent force. As, however, this is not the case, and as, on the contrary, the words "no such appeal or writ of error" are clearly but a portion of section 6, it would be an act of the broadest judicial legislation to sever them from their connection in the act in order to give them a scope and significance which their plain import refutes, and which would be in conflict with the meaning naturally begotten by the provision of the act with which the limitation as to time is associated. Nor is there anything in section 4 of the act of 1891, destroying the plain meaning of the words "such appeal or writ of error," found in the concluding sentence of section 6. The language of section 4 is as follows:

"All appeals by writ of error or otherwise, from said District Courts, shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby es-

tablished according to the provisions of this act regulating the same."

This section refers to the jurisdiction of the courts created by the act of 1891, and to the changes in the distribution of judicial power made necessary thereby. If the concluding words of section 4, "according to the provisions of this act regulating the same," were held to govern the time for writs of error or appeal to the Supreme Court from the District or Circuit Courts of the United States, the argument would not be strengthened, since there is no provision in the act governing the time for such writs of error or appeal. The contention that Congress cannot be supposed to have intended to fix two distinct and different limitations for review by the Supreme Court, one of two years as to the Circuit and District Courts of the United States, and the other of one year as to the Circuit Courts of Appeals, affords no ground for disregarding the statute as enacted, and departing from its unambiguous provisions upon the theory of a presumed intent of Congress. Indeed, if it were conceded that the provisions of section 4 referred to the procedure or limit of time in which appeals or writs of error could be taken, in cases brought to the Supreme Court, from the Circuit or District Courts of the United States, such concession would be fatal to the contention which we are considering, for this reason. The concluding portion of section 5 of the act of 1891 is as follows:

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

Whilst this language clearly relates to jurisdictional power and not to the mere time in which writs of error may be taken, yet the same reasoning which would impel the concession that section 4 related to procedure and not to jurisdictional authority would give rise to a like conclusion as to the provision in section 5 just quoted. It follows, therefore, that the only reasoning by which it is possible to conclude that the act of 1891 was intended to change the limit of time in which writs of error could issue from the Supreme Court to the Cir-

cuit or District Courts, or in which appeals could be taken from such courts to the Supreme Court, would compel to the conclusion that the act of 1891 had expressly preserved the two years' limitation of time then existing as to writs of error from state courts to the Supreme Court.

From the conclusion that the sixth section of the act of 1891 did not change the limit of two years as regards the cases which could be taken from the Circuit and District Courts of the United States to the Supreme Court, it follows that the act of 1891 did not operate to reduce the time in which writs of error could issue from the Supreme Court to the state courts. That period was two years, in analogy to the time limit established by statute with reference to writs of error to the District and Circuit Courts of the United States, which courts, at the time of the passage of the act of 1891, answered to the designation of "a court of the United States" contained in section 1003 of the Revised Statutes, regulating the subject of writs of error to state courts. The circumstance that Congress, in creating a new court of the United States, affixed a different limitation as to the time for prosecuting error to such court and left unchanged the limitation as to the time within which error might be prosecuted to the courts whose practice in this particular governed the practice in state courts, irresistibly warrants the inference that it was intended that the practice in the state courts as to the time of suing out writs of error should continue unaltered. The writ of error in this case having been allowed within two years from the final decree, was therefore seasonably taken.

We are brought, then, to consider whether there arises on the record a Federal question, within the intendment of Rev. Stat. § 709. The claim is that two distinct Federal issues are presented by the record or are necessarily involved therein. They are: First. That by a proper construction of the act of Congress granting land to the railroad, 14 Stat. 292, no title to lands which were beyond the place limits, but in the indemnity limits, passed to the railroad until approved selections of such lands had taken place, hence that it was not only drawing in question the validity of an authority exercised

under the United States, but also denying a privilege or immunity claimed under the statute of the United States to decide that the railroad had, before such approved selection, any right to contract to sell the lands in question. Second. That it was drawing in question the validity of an authority exercised under a law of the United States, and denying a privilege or immunity claimed under such law to hold that the right of the railroad to the lands in question had not been irrecoverably adversely determined by the action of the Secretary of the Interior, revoking his previous action withdrawing such lands, even although, at the time of such cancellation of the prior general withdrawal, there were pending in the Land Department claims of the railroad to the land in question which at that time were not finally disposed of.

Conceding *arguendo* only that the contentions thus advanced would give rise to the Federal questions as claimed, it becomes wholly unnecessary to consider them if it be disclosed by the record that the state court rested its decision upon grounds wholly independent of these contentions, and which grounds are entirely adequate to sustain the judgment rendered by the state court without considering the Federal questions asserted to arise on the record. *McQuade* v. *Trenton*, 172 U. S. 636; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425.

In inquiring whether this is the case we are unconcerned with the conclusions of the trial court, or with those of a department of the Supreme Court of California, and consider only the final action of the Supreme Court of the State in disposing of the controversy now before us. A reference to the opinion of the Supreme Court of California makes patent the fact that that court rested its decision solely upon a construction of the contract, and therefore that it decided the case upon grounds wholly independent of the Federal questions now claimed to be involved. The court held that the contract disclosed that both parties dealt with reference to the existing state of the title to the lands, the vendor selling his hope of obtaining title and the vendee buying such expectation; that the result of the contract was that the vendor in advance agreed to sell such title, if any, as he might obtain

in the future, and that the vendee agreed for the sake of obtaining in advance the right to the title, if the vendor could procure it, to pay the amount agreed upon, subject to the return of the price in the event it should be finally determined that the hope of title in the vendor, as to which both parties were fully informed, should prove to be illusory. On these subjects the court said:

"The defendant further contends that the contracts were void *ab initio*, for want of mutuality or consideration, or amounted at most to mere offers to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these premises defendant agreed to purchase when a patent should be issued, paid at once one fifth of the purchase price and one year's interest on the balance, and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment without interest in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff by its contract surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they, therefore, furnish a consideration for defendant's promise to pay."

Upon the question of the final determination of the hope of title upon which the return of the price was by the contract made to depend, the court concluded as follows:

"The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land or to pay the remainder of the purchase price, unless the

plaintiff should, *within the five years*, obtain a patent for the land; and that, as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But clearly the contracts will not bear any such construction. The defendant contracted unconditionally to pay the remainder of the purchase price 'on or before' a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only 'upon the receipt of a patent,' and was to repay the money only 'in case it be *finally determined* that patent shall not issue.' The defendant, therefore, was not entitled to terminate the contract or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be 'finally determined.' The findings state that proceedings are now pending in the United States Land Department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial."

We cannot say that the state court has erroneously construed the act of Congress, since its decree rests alone upon the conclusion reached by it, that by the contracts between the parties there existed a right to recover whatever may have been the existing state of the title. The conclusion that the parties were competent to contract with reference to an expectancy of title involved no Federal question. The decision that the final determination of title, referred to in the contracts, related to the proceedings in the Land Department which were pending at the time the contracts were entered into and not to the cancellation by the Secretary of the Interior of the withdrawal order, which had been made by that officer before the date of the contracts, precludes the conception that the state court erroneously denied the legal consequence flowing from the order of withdrawal. It follows then that as the decree of the court below was adequately

sustained by an independent non-Federal question, there is no issue presented on the record which we have the power to review, and the cause is therefore

Dismissed for want of jurisdiction.

MEDBURY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 225. Argued March 17, 1899. — Decided April 3, 1899.

Under the act of June 16, 1880, c. 244, the Court of Claims has jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant, which grant was, after the payment, forfeited by act of Congress for nonconstruction of the road.

When in such case, by reason of the negligence of the railroad company for many years to construct its road, Congress enacts a forfeiture of the grant, the Government is under no obligation to repay the excess of price paid by the purchaser of such lands in consequence of their being within the limits of the forfeited grant.

The appellant herein filed her petition in the Court of Claims and sought to recover judgment by virtue of the provisions of the act approved June 16, 1880, c. 244, 21 Stat. 287.

The Attorney General denied all the allegations of the petition, and the case was tried by the court upon the following agreed statement of facts: Congress made a grant of lands to the Wisconsin Central Railroad Company by the act of May 5, 1864, c. 80, 13 Stat. 66, which contained the condition that the railroad should be built as therein provided. After the grant the price of the lands reserved within its place limits was raised from $1.25 per acre to $2.50 per acre under the authority of law and by the direction of the Secretary of the Interior. In 1872, one Samuel Medbury made an entry of more than seven thousand acres of land, within the place limits of that grant and at the double minimum price of $2.50

per acre, and he died in 1874, leaving his widow, the appellant herein, and a son and daughter, who subsequently conveyed to the appellant all their interest in the claim herein made.

The conditions upon which the grant of lands was made to that particular section of the proposed railroad were never complied with and the proposed railroad was never constructed, for which reason the grant was by the act of Congress of September 29, 1890, c. 1040, 26 Stat. 496, forfeited to the United States. By reason of this failure to build the railroad, and because of the forfeiture of the land grant by Congress, the lands purchased by Medbury ceased to be alternate sections of land within a railroad land grant, although they were such when he purchased them. Thereafter, and on the 14th of November, 1894, Lucetta R. Medbury, as the widow and heir of Samuel Medbury, made application to the Secretary of the Interior for the repayment of the excess of $1.25 per acre upon the seven thousand and odd acres of land entered by her husband, the application being made under the second section of the act of June 16, 1880, c. 244, 21 Stat. 287, and on October 5, 1897, the application was denied by the Secretary. Upon these findings of fact the Court of Claims decided, as a conclusion of law, that the petition should be dismissed for want of jurisdiction. From that decision the claimant has appealed to this court.

Mr. Russell Duane and *Mr. Harvey Spalding* for appellant. *Mr. E. W. Spalding* was on the brief.

Mr. George Hines Gorman for appellees. *Mr. Assistant Attorney General Pradt* was on his brief.

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

Two questions arise in this case: (1) Whether the Court of Claims had jurisdiction of the claim; and (2) if it had, what is the true construction of the act of June 16, 1880, requiring the repayment to the purchaser, of the excess of $1.25 per acre

where the land purchased has afterwards been found not to be within the limits of a railroad land grant.

The ground upon which the learned Court of Claims decided that it had no jurisdiction in the case was that the remedy afforded by the act of 1880 to obtain the repayment of the excess of the price was exclusive of any other. Thus if the Secretary of the Interior erroneously construed the act and refused payment in a case where the claimant was justly entitled thereto, under its provisions, the claimant would be without redress, even though there were no dispute in regard to the facts, and the decision of the Secretary was a plain mistake in regard to the law. In this construction as to the jurisdiction of the Court of Claims, we are unable to agree.

The first section of the act of June 16, 1880, does not refer to such a case as this. Section 2 of that act reads in full as follows:

"In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office, *and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.*"

Section 3 authorizes the Secretary of the Interior to make the payments provided for in the act out of any money in the Treasury not otherwise appropriated, and by section 4 the Secretary is authorized to draw his warrant on the Treasury in order to carry the provisions of the act into effect.

The portion of section 2, which is in italics, is the part of the act upon which this claim is founded. The question is whether the Court of Claims has jurisdiction in this case upon the facts found.

By the act of March 3, 1887, c. 359, 24 Stat. 505, the Court of Claims is given jurisdiction to hear and determine, among other things, all claims founded upon any law of Congress. As the claim in this case is founded upon the law of Congress of 1880, it would seem that under this grant of jurisdiction the Court of Claims had power to hear and determine the claim in question. The act of 1887 was not, however, the first act giving jurisdiction to the Court of Claims in regard to a law of Congress. It had the same power when the case of *Nichols* v. *United States*, 7 Wall. 122, was decided, and a question of jurisdiction arose in that case. It there appeared that Nichols & Company were merchants in New York, and they made in 1847 an importation from abroad upon which duties were imposed on the quantity invoiced. The importation consisted of casks of liquor, and a portion of the liquor had leaked out during the voyage, and was thus lost, and consequently was never imported in fact into the United States. Notwithstanding these circumstances Nichols & Company paid the duties as imposed under the invoice, and without any deduction for leakage, and made no protest in the matter. An act of Congress of February 26, 1845, provided that no action should be maintained against any collector to recover duties paid unless a protest had been made in writing and signed by the claimant at the time of the payment. Where a protest had been made the importer could thereafter bring a suit against the collector for a recovery of the money so paid, and the suit would be tried in due course of law. The importers having made no protest, and being therefore unable under the provisions of the law to bring suit against the collector, brought suit in the Court of Claims to recover back the overpayment, upon the ground that the court had power to hear and determine all claims founded upon any law of Congress, or upon any regulation of the executive department, or upon any contract, express or implied, with the Government of the

United States. This court held that the Court of Claims had no jurisdiction, and in the course of the opinion of the court, which was delivered by Mr. Justice Davis, and in giving the grounds upon which the court denied jurisdiction, it was said:

"Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment."

And again the court said:

"Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy? The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws."

The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and that the act giving

jurisdiction to the Court of Claims had no application. The principle asserted in the case cited has no application to this case.

Although the right to recover back the excess of payment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We cannot suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right.

If there were any disputed questions of fact before the Secretary his decision in regard to those matters would probably

be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the Court of Claims has jurisdiction of such a case.

We have been referred to no case in this court which holds views contrary to those herein presented. We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute, and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not, in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute.

This case bears more resemblance to *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, than it does to *Nichols* v. *United States*, 7 Wall. 122.

In *United States* v. *American Tobacco Company*, 166 U. S. 468, the statute permitted the holder of stamps which he had paid for and not used, and which were spoiled or destroyed, etc., to apply to the Commissioner of Internal Revenue to redeem or make allowance for such stamps. Application was so made, but the Commissioner refused to redeem or make the allowance because of other facts stated in the case. The applicant filed his petition in the Court of Claims, and that court gave him judgment which was here affirmed. It is true that no question of jurisdiction was raised, but if the case at bar was properly decided by the court below, the court in that case had no jurisdiction, because the right to obtain redemption or payment was given by the same statute which provided the procedure to secure it, and the so-called remedy would have been exclusive in that case, as it is held to be exclusive in this. The party had to apply to the Commissioner and to comply with regulations, etc., all of which was but a part of the right which was granted, and when the Commissioner

erroneously refused to make the redemption as provided for by the statute, the claimant, founding his claim upon a law of Congress, pursued his only remedy in the Court of Claims, and obtained it without any question of jurisdiction. We think the court had jurisdiction in that case, and that it also existed in this.

We come now to the question as to the true construction of the act itself, and whether it is applicable to the facts in this case.

It is conceded by the appellant that at the time the entry was made and the double minimum price paid for the lands, they were within the place limits of the grant to the Wisconsin Central Railroad. The payment therefore was a proper payment, and necessary to have been made in order to obtain the lands. There was no mistake or misunderstanding of the facts at the time the entry was made. It was made eight years after the passage of the land grant by Congress, March 5, 1864, and at the time the payment was made the railroad had not been built. The Government of course was no guarantor that the railroad ever would be built, and the party thus making an entry of lands within the place limits of a railroad grant necessarily took his chances of the future building of the road. That it was not certain to be built was sufficiently apparent at the time of the entry, for eight years had then elapsed, and no road had been built at that time. It was not until eighteen years after the entry, viz., in 1890, that the Government finally forfeited the lands because of the failure of the company to build the road. With reference to these facts, we think that the construction placed upon the act of 1880 by the Secretary of the Interior is the correct one.

The Secretary decided that the act does not apply to a case such as this, where at the time of the entry the lands were within the limits of the railroad land grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the Government consequent upon such failure that the land then ceased to be within such limits.

Whatever may have been the reason of Congress in making

the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. Whether the railroad would fulfil its obligations and in good time build its road through the land grant was a matter which the future alone could determine, was a matter which the entryman could judge of as well as the Government, and was a matter in regard to which the Government gave no guaranty, express or implied. Hence, when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the Government was under no obligations whatever by virtue of the act of 1880 or otherwise to repay the difference in price for these lands.

While we agree with the Court of Claims in the dismissal of the petition, it is for a different reason. The petition should have been dismissed upon the merits, but we do not think it necessary to reverse the judgment on that account, as we can modify it so that it shall provide for dismissing the petition on that ground.

Judgment modified, and as modified affirmed.

BLYTHE *v.* HINCKLEY.

APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 367. Submitted January 30, 1899. — Decided April 3, 1899.

It appearing from the opinion of the Circuit Judge that the various bills in this case were dismissed on the grounds: (1) That the jurisdiction of the Circuit Court could not be maintained because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence Blythe to inherit an estate which that court was called upon to distribute under the laws of the State, and that other propositions contended for by the complainants were for the same reason deemed insufficient to take this case out of the general rule that after a court of a State, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined; and (2) That the remedy of complainants, if any, was at law, and not in equity. *Held*, As neither ground went to the jurisdiction of the Circuit Court as a court of the United States, the appeal could not be sustained as within any class mentioned in § 5 of the Judiciary Act of 1891; and, if error was committed this was not the proper mode for correcting it.

This was a "complaint to quiet title," brought in accordance with the Code of Civil Procedure of California by John W. Blythe and Henry T. Blythe, citizens of the States of Kentucky and Arkansas, respectively, against Florence Blythe Hinckley, Frederick W. Hinckley and the Blythe Company, all citizens of California, which alleged that complainants were owners as tenants in common of the real property described therein, and that the defendants, "and each of them, claim that they have or own adversely to plaintiffs some estate, title or interest in said lands; but plaintiffs allege that said claims of defendants are false and groundless and without warrant of law, and their claims to said lands are a cloud upon plaintiffs' title thereto." Then followed an amended complaint, which repeated the allegations of the original complaint, with some other averments, among them, "that at the

time of the commencement of this suit neither one of the parties was in possession of said lands nor any part thereof." Thereafter a "second amended and supplemental bill in equity" was filed, which, among other things, set forth that Thomas H. Blythe was the owner of the real estate described at the time of his death; that he died in the city and county of San Francisco, April 4, 1883, being a citizen of the United States, and of the State of California, and a resident of said city and county; and that "after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same;" that Florence Blythe Hinckley was born in England, the child of an unmarried woman; that the mother was a British subject; that Florence remained in England until after the death of Thomas H. Blythe, when and in 1883, she came to California, being then an infant ten years old, and "ineligible to become a citizen of the United States;" and that she was "when she arrived in California a non-resident alien."

It was then averred that the laws in force in California in 1883 relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of a deceased citizen of the State of California, were the treaty of 1794 between His Britannic Majesty and the United States, the naturalization laws of the United States, and section seventeen of article one of the constitution of California of 1879, which was made mandatory and prohibitory by section twenty-two; that there were at the death of Blythe certain laws in force in said State, to wit, sections 230 and 1387 of the Civil Code, providing for the adoption and legitimation, and institution of heirship, of illegitimate children; that there was not at any time during Blythe's lifetime any law in force in England under or by force of which he could have legitimated the said Florence or made her his heir at law, or under which he could have absolved the said Florence from allegiance to her sovereign, or, without bringing said Florence into California, have changed her status from a subject of England to that of a *bona fide* resident of California.

Statement of the Case.

It was further alleged that on a direct proceeding in the Superior Court of San Francisco, sitting in probate, brought on behalf of said Florence to determine the question of heirship, and to which action and proceeding complainants appeared, denying and contesting her application, that court adjudged in favor of Florence, and "decided, in substance and effect, that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence;" that from that decree complainants appealed to the Supreme Court of the State, and that court "in substance and effect, decided that said Thomas H. Blythe did not adopt or legitimate the said Florence under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir under and pursuant to the provisions of section 1387 of said Civil Code." And it was charged that neither the Superior Court nor the Supreme Court had jurisdiction to render judgment in the matter, and that the decision of the Supreme Court was in violation of the constitution of the State of California, and inconsistent with numerous former decisions of that court.

The bill then set forth that said Florence filed in the Superior Court in the matter of the estate of Thomas H. Blythe a petition for distribution, to which complainants appeared, and the court on hearing granted a decree of partial distribution, which complainants charged was void for want of jurisdiction; that thereafter and after the marriage of said Florence to defendant Hinckley, she filed in the Superior Court her petition for final distribution of the estate, which was resisted by complainants, but the court entered thereon a decree of final distribution, which complainants charged was void for want of jurisdiction.

It was further stated that when the original bill was filed neither party was in possession of the land described, but that the same was in the possession of the public administrator of said city and county of San Francisco, and that since then Florence had secured and was now in possession of the property. The bill prayed for a decree quieting complainants' alleged title; for an accounting as to rents and profits; for a receiver; and for general relief.

Statement of the Case.

After the filing of the second amended and supplemental bill, Mrs. Hinckley moved to dismiss the suit for want of jurisdiction, which motion was sustained by the Circuit Judge, for reasons given in an opinion filed December 6, 1897. 84 Fed. Rep. 246.

After the court ordered the dismissal of the suit, the record shows that leave was given to complainants "to amend their bill upon the understanding that it would not necessitate any further argument, but should be subject to the prior motion to dismiss the second amended and supplemental bill and to the order for a final decree entered thereon." Accordingly on December 22, 1897, complainants filed their "third amended and supplemental bill in equity." This bill was substantially the same as that immediately preceding, though it set up reasons why an action at law would not be an adequate remedy, and amplified certain matters alleged to bear on the jurisdiction of the state courts. It averred that section 671 of the Civil Code of California, providing that "any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this State;" and section 672, providing: "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred;" were void as to aliens, because encroachments upon the treaty making power of the United States, and in conflict with section ten of article one of the Constitution of the United States, and with section 1978 of the Revised Statutes, and that therefore those courts were without jurisdiction; and also that when the state courts adjudged in favor of Florence because of Blythe's action under section 1387 of the Code, reading "every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child," that section was made to operate in favor of Florence outside of the geographical jurisdiction and boundaries of California, and, as thus applied, was in violation of section ten, article one, of the Federal Constitution, and of section 1978 of the Revised Statutes, and an invasion of the jurisdiction of international intercourse, wherefore the adjudication was without

jurisdiction; and complainants further said that sections 671, 672 and 1387 of the Code were in conflict with treaties between the United States and Russia, France, Switzerland and England, and with the Constitution of the United States; and hence that the Circuit Court had jurisdiction "on the ground that the construction and application of the Federal Constitution are involved as well as on the ground of diverse citizenship of the parties, and because said section of said Civil Code violated the Federal Constitution as herein stated." On the same day, December 22, 1897, the final decree was entered in the case, the third paragraph of which was as follows: "That the original 'complaint' of the complainants, John W. Blythe and Henry T. Blythe, filed December 3, 1895, and also the 'amended complaint' of said complainants, filed December 12, 1895, and also the 'second amended and supplemental bill in equity' of said complainants, filed January 14, 1897, and also the complainants' third amended and supplemental bill, filed by leave of court this 22d day of December, 1897, after the rendition of the decision of the court upon the matters determined herein, but before the signing of this decree, be, and the same are each hereby, finally dismissed as against each and all of the parties named therein respectively as defendants, and in all respects and in every particular, for want of either Federal or equity jurisdiction and without prejudice to complainants' right to bring or maintain an action at law."

From this decree John W. Blythe and Henry T. Blythe prayed an appeal to this court, which was allowed and bond given March 2, 1898, and on the same day the Circuit Judge filed a certificate, certifying "to the Supreme Court of the United States pursuant to the Judiciary Act of March 3, 1891," fifteen questions of law, which it was stated arose "upon the face of said third amended and supplemental bill and upon said motion," namely, the motion to dismiss.

The first ten of these questions set forth that the Circuit Court sustained the motion to dismiss for want of jurisdiction to entertain the suit, and ordered it to be dismissed accordingly. The remaining five contained no statement as to their disposition.

Opinion of the Court.

It appears from the opinion of the Circuit Judge that the various bills were dismissed on the grounds: First, that the jurisdiction of the Circuit Court could not "be maintained because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence to inherit an estate which that court was called upon to distribute under the laws of the State;" and that "the other propositions contended for by complainants are for the same reason deemed insufficient to take this case out of the general rule that after a court of a State, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined."

Second, that the remedy of complainants, if any, was at law, and not in equity.

A motion was made to dismiss or affirm the appeal.

Mr. Frederic D. McKenney, *Mr. W. H. H. Hart*, *Mr. John Garber* and *Mr. Robert Y. Hayne* for the motion.

Mr. S. W. Holladay, *Mr. E. B. Holladay*, *Mr. Jefferson Chandler* and *Mr. L. D. McKisick* opposing.

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

We have heretofore determined that review by certificate is limited by the act of March 3, 1891, to certificates by the Circuit Courts, made after final judgment, of a question in issue as to their own jurisdiction; and to certificates by the Circuit Courts of Appeal of questions of law in relation to which the advice of this court is sought. *United States* v. *Rider*, 163 U. S. 132.

Appeals or writs of error may be taken directly from the Circuit Courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this

court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of the United States. *Smith* v. *McKay*, 161 U. S. 355; *Blythe Company* v. *Blythe*, 172 U. S. 644.

The Circuit Court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts.

If we were to take jurisdiction on this certificate, we could only determine whether the Circuit Court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect.

Nor can we take jurisdiction on the ground that the case involved the construction or application of the Constitution of the United States, or that the validity or construction of a treaty was drawn in question, or that the constitution or law of a State was claimed to be in contravention of the Constitution of the United States, within the meaning of the Judiciary Act of March 3, 1891.

The Circuit Court by its decree passed on none of these matters, unless it might be said that they were indirectly involved in holding the judgments of the state courts to be a bar; and, moreover, the decree rested on the independent ground that the remedy was at law.

Even if the decree had been based solely on the binding force of the state judgments, still we cannot hold that an appeal directly to this court would lie.

The Superior Court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction "of all matters of probate," and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco and left an estate therein; and that court repeatedly decreed

that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the Supreme Court of the State. So far as the construction of the state statutes and state constitution in this behalf by the state courts was concerned, it was not the province of the Circuit Court to reëxamine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees that Florence did inherit, and that judgment covered the various objections in respect of section 1978 of the Revised Statutes, and the tenth section of article one of the Constitution of the United States, and any treaty relating to the subject.

We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power, or were in conflict with the Constitution or laws of the United States, or any treaty with the United States; but it is enough for the present purpose that the state courts had concurrent jurisdiction with the Circuit Courts of the United States, to pass on the Federal questions thus intimated, for the Constitution, laws and treaties of the United States are as much a part of the laws of every State as its own local laws and constitution, and if the state courts erred in judgment, it was mere error, and not to be corrected through the medium of bills such as those under consideration.

Appeal dismissed.

Syllabus.

NICOL *v.* AMES.

NO. 435. APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

In re NICHOLS.

NO. 4. ORIGINAL.

SKILLEN *v.* AMES.

NO. 625. APPEAL FROM THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

INGWERSEN *v.* UNITED STATES.

NO. 636. ERROR TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 435 and 4 Original argued, and Nos. 625 and 636 submitted, December 13, 1898. — Decided April 3, 1899.

When an act of Congress is claimed to be unconstitutional, the presumption is in favor of its validity, and it is only when the question is free from any reasonable doubt that this court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest.

The tax authorized by the act of June 13, 1898, by the board of trade or exchanges upon the sale of property is not a direct tax, nor a tax upon the business itself which is so transacted, but is a duty upon the facilities made use of and actually employed in the transaction of the business, separate and apart from the business itself, and is a constitutional exercise of the powers of taxation granted to Congress.

A sale at an exchange forms a proper basis for a classification which excludes all sales made elsewhere from taxation.

The means actually adopted by Congress, in the act in question, do not illegally interfere with or obstruct the internal commerce of the States, and are not a restraint upon that commerce, so far as to render illegal the means adopted.

There is no difference, for the purposes of this decision, between the Union Stock Yards and an exchange or board of trade.

Statement of the Case.

These cases involve the validity and construction of some of the provisions of section 6, and a portion of schedule "A," therein referred to, of the act of Congress approved June 13, 1898, c. 448, 30 Stat., entitled "An act to provide ways and means to meet war expenditures, and for other purposes," commonly spoken of as the War Revenue Act. The cases come before the court in this way:

No. 435 is an appeal to this court from an order made by the Circuit Court of the United States for the Northern District of Illinois, discharging a writ of *habeas corpus* and remanding the petitioner to the custody of the marshal. The petition to the Circuit Court for the writ alleged that the petitioner Nicol had been convicted in the United States court for the Northern District of Illinois, upon an information duly filed charging him with selling, at the Chicago Board of Trade and at its rooms, two carloads of oats, "without then and there making and delivering to the buyer any bill, memorandum, agreement or other evidence of said sale, showing the date thereof, the name of the seller, the amount of the same and the matter or thing to which it referred, as required by the act of Congress," above mentioned. He was sentenced to pay a fine and to be imprisoned until paid. He refused to pay, and was taken into custody by the marshal. That part of the act referring to the making and delivering of a bill or memorandum, etc., the petitioner claimed was unconstitutional. The Circuit Court, after argument, held the law valid and the conviction legal.

No. 4 Original is an application to this court for leave to file a petition for a writ of *habeas corpus* to bring before the court the petitioner George R. Nichols, and for a rule requiring the marshal for the Northern District of Illinois, in whose custody the petitioner is, to show cause why the writ should not issue. The petition states that Nichols was convicted and sentenced, under the act of Congress above mentioned, upon an information filed in the District Court of the United States for the Northern District of Illinois, for selling at the Chicago Board of Trade, of which he was then a member, for immediate delivery to one Roloson, also a member of such board,

ten tierces, or three thousand pounds of hams, then in Chicago, at a price named, amounting to $195, and on the sale unlawfully making and delivering to Roloson a bill and memorandum of the sale showing the date thereof, the name of the seller, the amount of the same and the matters and things to which it referred, without having the proper stamps affixed to said bill or memorandum denoting the internal revenue accruing upon said sale, bill or memorandum, as required by law, but on the contrary unlawfully refusing and neglecting to affix any such stamps to said bill or memorandum. Upon the trial the jury rendered a verdict finding the petitioner guilty as charged in the information, and the court sentenced him to pay a fine of $500 and to be committed to the county jail until such fine and costs should be paid. The petitioner refused to pay the fine and an order of commitment was made out and placed in the hands of the marshal, who arrested the petitioner and he is now in the custody of the marshal. The petitioner upon the trial claimed that the act in regard to the matters named in the information was unconstitutional, and therefore no offence was charged in the information; that the court had no jurisdiction to try him, and that his conviction and subsequent arrest and detention were wholly without jurisdiction. The petitioner gives as a reason for his application to this court for the writ of *habeas corpus* that one James Nicol (the appellant in No. 435) had been convicted of substantially the same offence in the District Court for the Northern District of Illinois, and that he had made application for a writ of *habeas corpus* to the Circuit Court held in that district, which court, after a hearing upon the writ, decided against Nicol and in favor of the constitutionality of the act of Congress herein questioned, and the petitioner herein alleges that it would be a vain act to apply for a writ of *habeas corpus* to the same Circuit Court which had already, after a hearing, decided the question in a way unfavorable to the claims of the petitioner herein.

No. 625 is also an appeal to this court from an order of the Circuit Court of the United States for the Northern District of Illinois, discharging a writ of *habeas corpus* and remand-

Counsel for Parties.

ing the petitioner Skillen to the custody of the marshal. The petitioner was convicted upon an information of the same nature as is above set forth in No. 435, excepting that the information in this case alleged that the contract was for future delivery of 5000 bushels of corn, and that Skillen unlawfully failed and refused to make and deliver to the buyer any bill or memorandum as required by the act. The petitioner was convicted upon a trial had upon such information, and the court imposed upon him a fine in the sum of $500 besides costs, and directed that he should be committed to the county jail until such fine and costs were paid. The same proceedings were then taken as are set forth in No. 435.

No. 636 is a writ of error to the District Court of the United States for the Northern District of Illinois, to review a conviction of the plaintiff in error upon an information charging him with making a sale of certain cattle at the Union Stock Yards, Chicago, and delivering the same without making any written memorandum, etc., as required by the act of Congress. The information also charged in a second count a sale, at the same place, of certain live stock and a delivery of a memorandum of the kind mentioned in the act of Congress and a failure and refusal to affix the stamps as provided for in such act. Upon the trial a *nolle prosequi* was duly entered upon the first count. The plaintiff in error claims that the act of Congress is unconstitutional on the same grounds mentioned in the other cases, and sets up as a special and separate defence that a sale at the stock yards is not included in the act of Congress, as it is not an "exchange or board of trade or other similar place," within the meaning of that act.

Mr. Henry S. Robbins and *Mr. John G. Carlisle* for appellants in Nos. 625 and 435, and for petitioner in No. 4 Original.

Mr. John S. Miller and *Mr. Merritt Starr* for plaintiff in error in No. 636.

Mr. Solicitor General for appellee in Nos. 625 and 435, and for defendants in error in No. 636.

Opinion of the Court.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

These cases may be considered together, because they involve substantially the same question, only the last one includes, in addition, a question of construction as distinguished from a question of the validity of the statute.

That portion of the act which is involved is set forth in the margin.[1] 30 Stat. 448, 451, 458.

---

[1] ADHESIVE STAMPS.

SEC. 6. That on and after the first day of July, 1898, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

SCHEDULE A. — STAMP TAXES. (30 Stat. 448–458.)

. . . Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence of such sale, agreement of sale or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale or agreement to sell, deliver any such products or merchandise without a bill, memorandum or other evidence thereof, as herein required, or who shall deliver such bill, memorandum or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing

It is seen that the cases embrace the facts of a member of the board of trade of Chicago, selling for immediate delivery, products or merchandise: (*a*) without making a memorandum; (*b*) making a memorandum but omitting to put stamps on it; (*c*) making a sale for future delivery and failing to put stamps on the memorandum.

In the *Nicol case*, (No. 435,) the sale was by a citizen to a citizen of the State of Illinois.

The case of sales at the Union Stock Yards at Chicago is also included where a memorandum is delivered, but the vendor neglects and refuses to affix the stamps to the memorandum.

The objections to the validity of the act are, stated generally, that it is a direct tax, and is illegal because not apportioned as required by the Constitution. If an indirect tax, it is a stamp tax on documents not required to be made under state law in order to render the sale valid, and Congress has no power to require a written memorandum to be made of transactions within the State for the purpose of placing a stamp thereon. It is not a privilege tax within the meaning of that term, because there is no privilege other than that which every man has to transact his own business in his own house or in his own office under such regulations as he may choose to adopt, and such a choice cannot be in any fair use of the term a privilege which is subject to taxation.

These questions are involved in each case, while in the last one it is further objected that the sales at the stock yards are not included in the terms of the act, and evidence was adduced upon the trial as to the nature of the business conducted at the stock yards, and the manner in which it was performed. It will be adverted to hereafter when we come to a discussion of the meaning and proper construction of the act.

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been

---

provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts and excises, in order to pay the debts and provide for the common defence and general welfare, and the only constitutional restraint upon the power is that all duties, imposts and excises shall be uniform throughout the United States, and that no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any State. (Constitution, article 1, sec. 8, and sec. 9, subdivisions 4 and 5.) As thus guarded, the whole power of taxation rests with Congress.

The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be

indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on.

Coming to a consideration of the objections raised to this statute it is well to first consider the nature of an exchange or board of trade, and then to inquire more in detail as to the validity of the act with reference to sales at such places. The Chicago board of trade may be taken as a type of the

others in existence throughout the country, because the same features exist in all of them, while the size and importance of the Chicago institution serve only to make such features more prominent and their effect more easily discernible. We say the same features exist in all of the exchanges or boards of trade because we have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country, and while we could not take notice without proof as to any particular constitution or by-law of a body of this description, yet we are not thereby cut off from knowledge of the general nature of those bodies and of the manner generally in which business therein is conducted.

It appears in this record that the Chicago board of trade is a voluntary association of individuals who meet together at a certain building owned by the association for the purpose of there transacting business. This particular board is incorporated under an act of the legislature of Illinois, though its corporate character does not, in our judgment, form a material consideration in the inquiry. The members of the association meet daily between certain business hours for the purpose of buying and selling flour, wheat, corn, oats and other articles of food products, and for the transaction of such other business as is incident thereto. Among its members are some whose business it is to purchase in the country or to receive on consignment from persons in the country some or all of the articles which are dealt in on the floor of the exchange, and there are other members whose business it is to buy such articles upon the exchange either for themselves or on commission, and to deliver or ship the same to consumers or distributors throughout the country and in Europe.

It is common knowledge that these exchanges encourage and promote honest and fair dealing among their members; that they provide penalties for the violation of their rules in that regard, and that contracts between members relating to business on the exchange have the advantage of the sanction provided by the exchange for such purposes. They furnish a

meeting place for those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other until, by what has frequently been termed, the "higgling" of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes place through the medium of boards of trade or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the Government or by a State, ought nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit matters for taxation.

We will now examine the several objections that have been offered to this statute.

It may be stated, of course, that if the tax herein is a direct tax within the meaning of the Constitution, it is void, for there is no apportionment as required by that instrument.

It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown* v. *Maryland*, 12 Wheat. 419, down to those involving the validity of the income tax, 157 U. S. 429; 158 U. S. 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the

taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. The tax laid in the same act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker, while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an excise. The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. A tax on professional receipts was recognized by the present Chief Justice in delivering the opinion of the court on the first hearing of the *Income Tax case*, 157 U. S. 429, 579, as an excise or duty and

therefore indirect, while a tax on the income of personalty he thought might be regarded as direct. And upon the rehearing, 158 U. S. 601, it was distinctly held that the tax on personal property or on the income thereof was a direct tax. This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or board of trade.

It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else. This however assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale.

We do not see that any material difference exists when the sale is for future delivery. The thing agreed to be sold is the same, whether for immediate or future delivery, and the fact that the sale for future delivery may subsequently be carried out by the actual payment of the difference between the agreed and the market price at the time agreed upon for such delivery does not affect the case. The privilege used is the same whether for immediate or future delivery, and the same rule applies to both.

Passing these grounds of objection, it is urged that if this is an indirect tax, it is not uniform throughout the United States as required by the Constitution. Sales at an exchange or board of trade, it is said, are singled out for taxation under this act, although they differ in no substantial respect from sales at other places, and there is therefore no just ground for segregating or classifying such sales from those made elsewhere. A sale at an exchange or board of trade, it is claimed, is not a privilege or facility which can or justly ought to be taxed while all other sales at all other places are exempted from

taxation, and there is no reasonable ground therefore for the assertion that such a tax is uniform within the meaning of the Constitution. It is said not to be uniform because it is unequal, taxing sales at exchanges and exempting all other sales, while at the same time there is no natural basis for any distinction between such sales, the distinction made being purely arbitrary and unreasonable.

This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word "uniform" is to be understood in what has been termed its "geographical" sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax, we think this tax is valid within either meaning of the term. In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a State or by Congress. In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government. The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, Colorado &c. Railway* v. *Ellis*, 165 U. S. 150–155; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294. If the classification be proper and legal, then there is the requisite uniformity in that respect.

A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by Government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale

elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject-matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.

In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things, whether at an exchange or elsewhere.

Another objection taken is that Congress taxes only those who make sales and not those who make purchases, and those who sell products or merchandise and not those who sell bonds, stocks, etc. These are discriminations, it is said, which do not follow the rule of uniformity, and hence render the tax void.

A purchase occurs whenever a sale is effected, and to say that a purchaser at an exchange sale must be taxed for the facilities made use of in making the purchase, or else that the tax on the seller is void, is simply to insist upon doubling the tax.

Nor is it necessary to tax the use of the privilege under all circumstances in order to render the tax valid upon its use in particular cases. We see no reason why it should be necessary to tax a privilege whenever it is used for any purpose, or else not to tax it at all. It is not in its nature indivisible. A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. It may be the same privilege, but when it is used in different cases to accomplish sales of wholly different things, between which there is no relation whatever, one use may be taxed and the other not, and no rule of uniformity will thereby be violated.

It is also objected that there is no power in Congress to require a party selling personal property, in the course of commerce within the State, to make a written note or memorandum of the contract, and to punish him by fine and imprisonment for a failure to do so; if the State do not require a memorandum on a sale, Congress cannot in the exercise of the taxing power compel a citizen to make one in order that it may be taxed by the United States.

In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp, which by the laws of the State would otherwise be valid. It does not assume to enact anything in opposition to the law of any State upon the subject of sales. It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secures by proper penalties the making of

the memorandum. Instead of a memorandum, Congress might have required a sworn report with the proper amount of stamps thereon to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.

The means actually adopted do not illegally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means for collecting the tax which would prove less troublesome or annoying to the taxpayer, can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

We come now to the special objection raised in the *case of Ingwersen*, No. 636, and which applies to this case alone.

The sales were made at the Union Stock Yards, and it is claimed the statute does not cover the case of sales there made, because it is not an exchange or board of trade or other similar place.

The facts upon which the question arises are found in the record, and it shows that the Union Stock Yard and Transit Company of Chicago is a corporation which was incorporated under the laws of the State of Illinois in 1865. Under that charter the company had power to maintain cattle yards for the reception and safekeeping, feeding, weighing and transfer of cattle and other matters connected therewith, which are set out in full in the charter. The character of the business and the manner in which it is conducted are fully set forth in the record, from which the following extract is taken:

"The Union Stock Yards described in this information, at the respective times therein mentioned and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street and Forty-seventh

street and Halstead street and Ashland avenue, in the city of Chicago, in the county of Cook and State of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs or other live stock at the Union Stock Yards consigned to the commission merchant at the Union Stock Yards, such cattle, hogs or other live stock are placed by the owner or consignee thereof or his or its agents, in one or more of the pens, and are there cared for, fed and watered by such owner or consignee. Any person is at liberty to send, take or to receive cattle, hogs or other live stock into the Union Stock Yards, and there place or have the same placed in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs and other live stock in the yards are at private sale. Commission merchants having cattle, hogs or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock; and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs and sheep in the yards are by weight, and upon a sale thereof being made such live stock is taken by the owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock

Yard and Transit Company, and are there weighed by a weighmaster employed by the Union Stock Yard and Transit Company and in charge of the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined."

The corporation has nothing to do with the selling or purchasing of stock of any kind. The market at the Union Stock Yards is unquestionably the largest in the country.

The plaintiff in error at these yards as agent for a corporation then carrying on the business of a live stock commission character and which was a dealer in live stock, sold to another as agent for the Eastman Company, also a corporation created for the purpose of dealing in live stock, a certain amount of merchandise for present delivery without affixing any stamp to the memorandum.

We cannot see any real distinction sufficient in substance to call for a different decision between the Union Stock Yards and an exchange or board of trade. We think it is a "similar place" within the meaning of the statute under consideration.

It is true that there are no sales or purchases of stock made by members of the stock yards company as such. Any one is accorded the right to bring his cattle to the stock yards upon payment of the regular fees and compliance with the regulations made by the company, and having brought his cattle he has the right accorded him by the company to have them kept, fed, watered, etc., and to sell them himself or by a commission merchant who need not be a member of the stock yards company.

It is plain to be seen that the privilege or facility for a sale of the cattle or other stock at the yards of such company is of precisely the same nature and character as that which exists at an exchange or board of trade which is so described in terms. That the sales are made by the owners of the cattle or by commission merchants who are not members of the

stock yards company, is not material. The facilities for a sale exist and are made use of in each case, and are in truth the same in each. A perusal of the facts contained in the record in the case shows that those yards answer all the purposes of an exchange or board of trade, and that they in truth amount in substance to the same thing. The differences existing between them are unsubstantial so far as this point is concerned. The sales at that place are accomplished with a facility which it is plain could not exist but for the conditions and advantages afforded by the use of those yards.

The owner of the cattle who brings them to the yards and avails himself of the privilege of selling them at that place does without doubt make use of a privilege which every one knows is an advantage sufficient to constitute a material difference between a sale at the yards and a sale elsewhere. This advantage, although one which any person could use, is yet of precisely the same nature as that existing in the case of an exchange or board of trade, and it is therefore a similar place within the meaning of the statute. Being a similar place, the reasons stated in the foregoing cases apply with equal force here and demand the same judgment.

For the reasons above stated, we make the following disposition of the cases before us:

In Nos. 435 and 625, the orders of the Circuit Court of the United States for the Northern District of Illinois are affirmed.

In No. 4 Original, the petition for a writ of *habeas corpus* is denied.

In No. 636, the judgment of the District Court of the United States for the Northern District of Illinois is affirmed.

So ordered.

Mr. Justice Brown and Mr. Justice White concurred in the result.

GUTHRIE NATIONAL BANK *v.* GUTHRIE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 133. Submitted January 13, 1899.—Decided April 3, 1899.

In ascertaining the jurisdictional amount on an appeal to this court, it is proper to compute interest as part of the claim.

Whether a general law can be made applicable to the subject-matter, in regard to which a special law is enacted by a territorial legislature, is a matter which rests in the judgment of the legislature itself.

The statute in question in this case creates a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, but which the legislature thinks have sufficient equity to make it proper to provide for their investigation, and payment when found proper, and it does not in any way regulate the practice in courts of justice, and it is indisputably within the power of the territorial legislature to pass it, and it does not infringe upon the Seventh Amendment to the Constitution.

The court has the power in the absence of statutory provisions for notice to parties, to make rules regarding it.

THE President of the United States by proclamation dated March 23, 1889, 26 Stat. 1544, declared that the Territory of Oklahoma would be open for settlement on April 22, 1889, subject to the restrictions of the act, approved March 2, 1889, c. 412, 25 Stat. 980, 1004. By that act the lands were to be disposed of to actual settlers under the homestead laws only, and until the lands were open for settlement under the proclamation of the President no person was permitted to enter upon or occupy the same.

By the act, approved May 2, 1890, c. 182, 26 Stat. 81, Congress provided a temporary government for the Territory, and by the act, approved May 14, 1890, c. 207, 26 Stat. 109, provision was made for townsite entries.

From the opening of the Territory, under the proclamation of the President, down to the passage of the act of May 2, 1890, Congress failed to establish any government for it. During that period settlers had come into the Territory and a number

of townsites had been located and settled upon by them. Many persons located and took up their residence upon the land contained in the present boundaries of the city of Guthrie. The lands were surveyed into streets, alleys, squares, blocks and lots, and what were known as provisional municipal governments were formed. By the general consent of these residents four distinct provisional municipal corporations or villages, denominated Guthrie, East Guthrie, Capitol Hill and West Guthrie, comprising some 320 acres each, were created. They were all without any law governing them, although officers were selected by the people occupying the lands, and a form of government was carried on by a kind of mutual understanding. The persons chosen as officers incurred indebtedness in administering the affairs of the municipalities, but there was no authority to raise the necessary revenues by taxation or otherwise to pay the same. These officers exercised in fact the powers usually delegated to municipal corporations. Public improvements, such as grading streets, constructing bridges, and erecting buildings were made, laws and ordinances were adopted, and offenders were punished. Schools were maintained, and the right of possession of the various claimants to town lots within their respective boundaries was regulated and certificates were issued by the local tribunals constituted by the municipal authorities for determining the rights of settlers and occupants of the various lots within the limits of the municipal governments, and the certificates thus issued were by the second section of the townsite act, above mentioned, 26 Stat. 109, to be taken as evidence of the occupancy of the holder thereof of the lot or lots therein described, except that where there was an adverse claim to the property the certificate was to be only *prima facie* evidence of the claim or occupancy of the holder.

The claims mentioned in the act of the territorial legislature hereafter spoken of arose out of these circumstances and represented the expenditures of the provisional governments for some or all of the objects above enumerated.

In December, 1890, a code of laws for the permanent government of the Territory was enacted by the territorial

legislature, and these provisional village governments, lying adjacent to one another, were incorporated under that authority into the regularly organized village of Guthrie, and on April 7, 1893, the city of Guthrie became the successor of the village of that name.

On December 25, 1890, the territorial legislature passed an act, chapter 14, of the laws of that year, for the purpose of providing a method by which to raise the necessary funds to pay the indebtedness incurred by the provisional governments of the four villages above named. The act is set forth in the margin.[1]

---

[1] Chapter 14. — City Indebtedness.

An Act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie and Capitol Hill, now consolidated into the village of Guthrie.

Article I. — Guthrie, East Guthrie, West Guthrie and Capitol Hill.

Sec. 1. That the district judge of Logan County is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

Sec. 2. That the owners and holders of any kind of scrip, warrants or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a *bona fide* claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same, did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock P.M., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of publication mentioned in this section shall be forever precluded from so doing hereafter.

Statement of the Case.

Pursuant to the provisions of that act the district judge duly appointed the commission, which proceeded to hear the cases, and on September 1, 1891, it filed in the district court of Logan County its final report. That report contained, among other things, a reference to the various claims which were therein said to be owned by the Guthrie National Bank, and it showed the allowance of such claims, separately and in detail, and that they were all based upon warrants which had been issued by the provisional governments. The report also showed that the city attorney of the city of Guthrie appeared at the hearing and allowance of the claims and defended for the city. The amount allowed against the city in favor of the bank was $4315.22. Other claims in favor of other parties were allowed and many were disallowed by the commission. On the coming in of this report the case was docketed as a pending case in the district court, and was continued from time to time until March 17, 1893, when the bank made a motion to approve the findings of the commission as regards the claims held by it, which motion was not then decided. On April 7, 1893, the city filed exceptions to the report of the commission. Nothing further was done until March 28, 1896, at which time the city attorney filed a motion in the

---

Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in instalments each of the amounts to be in one, two, three, four and five years, to bear interest at the rate of six per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie and Capitol Hill according to the amount of indebtedness created by the city councils, the mayors and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of said cities to be liable for and taxable under this act for the amount of indebtedness created by them.

district court to dismiss the proceedings by the bank and all other proceedings based upon the act of the territorial legislature creating the commission, for the reason, as stated, that the act and all proceedings under it were void. On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission and the motion of the city to dismiss the proceedings, and on the last-named day the court sustained the motion of the city and dismissed the proceedings upon the ground that the act under which the commission was appointed was wholly void. This decision of the court was excepted to by the bank, and thereupon it prosecuted a writ of error from the Supreme Court of the Territory to reverse such decision. On June 11, 1897, that court affirmed the decision of the district court, and rendered judgment against the bank for costs. To reverse this judgment an appeal has been taken to and a writ of error sued out from this court.

Mr. Henry E. Asp and *Mr. John W. Shartel* for plaintiff in error and appellant.

Mr. John K. Richards, *Mr. John L. Lott*, *Mr. W. J. Hughes* and *Mr. D. R. Widmer* for defendant in error and appellee.

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

A motion is made in this case to dismiss the appeal and writ of error on the ground that the sum involved is not sufficient to give jurisdiction to this court. Act of May 2, 1890, c. 182, 26 Stat. 81, § 9. It is claimed that the amount is less than $5000, and that this fact appears from the report of the commission, which allowed but $4315.22 as the amount due from the city to the bank.

Section 4 of the act of the territorial legislature, under which the commission acted, provides that claims which are allowed and approved by the district judge are to be certified to the mayor and council of the village of Guthrie, who are directed to issue warrants upon the village for the amounts,

which bear interest at the rate of 6 per cent from the date of the allowance by the commission, and a tax is to be levied as therein provided for the payment of the warrants.

On March 28, 1896, when the city of Guthrie filed its motion in the district court to dismiss the proceeding by the bank, over four years and six months' interest had accrued upon the claim reported by the commission, and as by the terms of the act interest was to be allowed from the filing of that report up to the time of the issuing of the warrant, which could not issue until after the report had been approved by the district court, it is plain that more interest had then accrued than was necessary to bring the amount then in issue beyond the sum of $5000. It is proper to compute interest as part of the claim. *Woodward* v. *Jewell*, 140 U. S. 247. We think this is an answer to the motion to dismiss.

Other objections are made to the act by the representatives of the city which will be noticed.

It is claimed that it violates the act of Congress, approved July 30, 1886, c. 818, 24 Stat. 170, prohibiting the passage of local or special laws in the Territories. That act, among other things, provides that where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the territorial legislatures thereof, and it also provides that the territorial legislatures shall not pass local or special laws in any of the cases therein enumerated, among which is a law to regulate the practice in courts of justice. Both of these provisions are said to have been violated in the passage of the act in question.

Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial legislature, is a matter which we think rests in the judgment of the legislature itself. *State ex rel.* v. *Hitchcock*, 1 Kansas, 178, 184. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the legislature.

Neither does the act in this case regulate the practice in courts of justice. The prohibition of the statute of Congress relates to the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice in some particular locality or in some special case, thus altering in such locality or for such case the ordinary course of practice in the courts.

The statute here in question is of an entirely different nature. It creates a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city. Such an act does not in any way regulate the practice in courts of justice.

The important question in this case is whether the territorial legislature, by virtue of the grant to it of legislative powers, had authority to create this commission and to provide for the payment of claims of the nature mentioned in the act.

By section 6 of the above-mentioned act of Congress of May 2, 1890, c. 182, 24 Stat. 81, the legislative power of the Territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Some other limitations are mentioned, not material to be here considered. The same power is also granted to all the Territories by section 1851, Revised Statutes of the United States.

This territorial act was passed by the legislature with reference to the circumstances set forth in the statement of facts.

It was said by the Supreme Court of Oklahoma in *Guthrie* v. *The Territory*, 1 Oklahoma, 188, 194, that "These provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common among

civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts or bind any one else."

The services performed for and the materials furnished these provisional governments under the circumstances stated would certainly be regarded as proper and as beneficial, probably as absolutely necessary, for the well-being of the people living there. The villages which were subsequently incorporated under the law of the Territory succeeded to and enjoyed these benefits, and passed them on to their successor, the city of Guthrie, the present defendant in error and appellee. These facts give great force and strength to the moral consideration supporting claims of the nature here existing. Though they could not be enforced at law, the question is, whether the territorial legislature was unequal to the task of providing for their payment by the city which has received the benefit as above described.

This territorial act shows that only claims of a municipal character and of a *bona fide* nature could be allowed. It is also plain that the use of the words "district judge" therein does not mean to distinguish between the judge and the court. There being but one judge of that court the words are seemingly used interchangeably with the district court, and to mean the same as the latter expression.

We regard the power of the territorial legislature to pass this act as indisputable. It comes within the grant to that legislature contained in the act of Congress and in the Revised Statutes above cited.

In *United States* v. *Realty Company*, 163 U. S. 427, 439, the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, while they were not of a legal character, were nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims of the nature described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a mu-

nicipal corporation and a political subdivision of the State, and what the State could do itself it has the power to direct its agent, the municipality, to do.

In *New Orleans* v. *Clark*, 95 U. S. 644, Mr. Justice Field, in delivering the opinion of the court, and speaking of municipal corporations, at page 653, said: "The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured." And on page 654: "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent;" citing *The People* v. *Burr*, 13 California, 343; *Town of Guilford* v. *Supervisors &c.*, 13 N. Y. 143. In the latter case the legislature passed an act directing commissioners to determine and award the amount paid and expended by certain highway commissioners, and directing the board of supervisors of the county to assess the amount thus awarded upon the taxable property of the town and to cause it to be paid in satisfaction of the claim. This was held to be a valid act, although the claim had been rejected in a suit brought to obtain its payment, and a previous legislature had passed an act directing the claim to be submitted to the electors at a town meeting, and declaring their decision should be final and conclusive, and upon such submission the claim had been rejected. It was said that the legislature of the State had power to levy a tax upon the taxable property of the town and appropriate the

same to the payment of the claim made by an individual against the town, even though the claim, to satisfy which the tax was levied, was not recoverable by action against the town; and it was held that the State could recognize claims founded in equity and justice in the larger sense of these terms or in gratitude or charity.

It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone. The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or by its predecessors from whom it took such benefits. The legislature might have decided the facts for itself, but instead of that it appointed this tribunal.

In *Read* v. *Plattsmouth*, 107 U. S. 568, the words of Mr. Justice Field in *New Orleans* v. *Clark*, 95 U. S. 644, were quoted with approval. In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the Government, and is based upon the power of the State as sovereign to itself recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition.

There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law, and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.

The cases of *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet.

492; *American Publishing Company* v. *Fisher*, 166 U. S. 464, and *Salt Lake City* v. *Tucker*, 166 U. S. 707, were cases of suits at common law, and *Thompson* v. *Utah*, 170 U. S. 343, was a criminal case. Those cases therefore do not apply here.

It is also stated that these claims were not incurred by officers of either a *de jure* or *de facto* government, and that hence there was no power in the legislature to compel the city of Guthrie to pay claims which it never agreed to pay either as a corporation *de jure* or *de facto*. But the cases above cited were cases where there was no legal obligation to pay the claims, and the acts in effect compelled their payment. The city here was under a plain moral duty to provide payment for honest and proper claims of this nature, and it seems as if it ought to be entirely ready to pay them. If any claims were without merit or fraudulent, there was opportunity to show such fact before the commission and also before the district court upon the hearing provided for by the act. The defendants in error say that there is by the act no opportunity provided for any investigation of these claims by the district court after the commission has reported the claims to that court, because the act does not give the court power to make any investigation for itself. We do not see that this is material even if true. We are of opinion, however, that the district court has such power. The statute provides in section 4 that the commission shall make a report to the district court, showing the names of the claimants and the amounts allowed by the commission, and also all the claims and the names of persons and amounts disallowed by them, and this report the statute directs shall be made "for the approval or disapproval of the district court." The report need contain nothing but what has just been stated, and it is obvious that on such a report alone the district court would be entirely without means of determining whether to approve or disapprove the decision of the commission in any particular claim. But as the report of the commission is to be made to the district court for its approval or disapproval, it follows as of necessity that the court has power to investigate for itself the facts upon which the claims were founded in order that it may intelli-

gently approve or disapprove of the decisions of the commission. It is not to be supposed that the provision in the act for making a report to the district court and for its approval or disapproval was a purely formal matter, and that the court might arbitrarily, unreasonably or improperly approve or disapprove any claim. If not, then the court must have power, in the necessary discharge of its duty to approve or disapprove, to ascertain the facts necessary to an intelligent discharge of that duty. These facts may be found by the court without a jury. As the statute does not provide for a report of the facts found by the commission upon which it based the allowance or disallowance of the claims or any of them, the court must itself find them, in order to approve or disapprove.

Although the act makes no provision for notice to the parties interested as to the time or manner in which the district court will proceed to investigate the character of the claims, yet in the absence of any such provision the court having the duty to investigate would have power to regulate the time of the hearing and provide for reasonable notice by its rules, so as to prevent surprise. This, in substance, was held in *United States* v. *Ritchie*, 17 How. 525, 533, where a similar lack of provision for notice in a certain section of the act was referred to and the power of the court to make rules in regard to it was asserted.

Whether the act is to be construed as making the decision of the district court upon the merits of any claim final, it is not now necessary to decide. The district court has refused to exercise any jurisdiction under the act, because it decided the act was invalid. Upon such a judgment we think a writ of error was properly sued out from the territorial Supreme Court under the ninth section of the act, c. 182, 26 Stat. 85, and under the same section a writ of error from this court to the latter court may properly issue.

The other questions set forth in the brief of counsel for the defendant in error, relating to parties and matters of procedure, we have examined, and regard them as without merit.

We are of opinion that the district court erred in dismissing these proceedings on the ground of the invalidity of the

act under which they were taken, and that the Supreme Court of the Territory erred in affirming that judgment of dismissal, and

We therefore reverse the judgment of the latter court and remand the case with directions to that court to reverse the judgment of the district court, with directions to the district court to proceed to a hearing of the claims upon their merits.

MR. JUSTICE HARLAN dissented.

THE CHATTAHOOCHEE.

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

No. 27. Argued March 6, 1899. — Decided April 3, 1899.

The Golden Rule, a Canadian topsail schooner with twelve sails, all of which with a small exception she was carrying, was sailing off Nantucket Shoals at a speed of seven knots an hour, in a fog so dense that the hull of another vessel could not be seen more than a few hundred feet off. The Chattahoochee, an American steamer, came up at an angle in the opposite direction with a speed of ten or twelve knots an hour. The schooner was sounding a foghorn, and the steamer a steam whistle. When the steam whistle was heard on the schooner she kept on her way at full speed. When the foghorn was heard on the steamer, order was given and obeyed to stop and reverse, and the wheel was put hard-a-port. Upon seeing the schooner the steamship engines were put at full speed ahead, for the purpose of clearing it; but a collision took place, and the schooner sank almost immediately. The sunken vessel had a valuable cargo on board. It was held below that both vessels were in fault for immoderate speed, and the District Court, ruling that the damages should be divided, made a decree respecting such division which was modified by the Court of Appeals as hereafter stated. *Held:*

(1) That there can be no doubt as to the liability of the steamer, and, as no appeal was taken on her part she is estopped from denying that liability here;

(2) That the schooner, also, was proceeding at an immoderate speed, and was properly condemned therefor; and the cases bearing

Statement of the Case.

upon the question of what is immoderate speed in a sailing vessel, under such circumstances, are cited and reviewed;

(3) That the Court of Appeals did not err in deducting half the value of the cargo from half the value of the sunken schooner, and in limiting a recovery to the difference between these values; and in reaching this conclusion the court cites and reviews several cases, in deciding which the act known as the Harter Act has been considered and applied.

This was a libel for a collision which took place in the early morning of July 20, 1894, southeast of Nantucket Shoals, between the Canadian schooner Golden Rule and the American steamship Chattahoochee, resulting in the total loss of the schooner and her cargo.

The Golden Rule was a topsail schooner hailing from Liverpool, Nova Scotia, of about 200 tons burden, and rigged with twelve sails, including one double square sail on the foremast. Her length over all was 110 feet. She was bound on a voyage from Porto Rico to Boston with a full cargo of sugar and molasses, and, at the time of the collision, was sailing on her port tack, upon a course north by east, one half east, with a free and fresh wind five to six points abaft the beam. She was under full sail, except one half of the square sail forward, which was taken in about two hours before the collision. Her speed was the main point in dispute. At the time of the collision the weather was foggy, the wind blowing in moderate breezes from the southwest, and the mate was sounding a mechanical foghorn forward.

The Chattahoochee was an iron screw steamship of 1887 tons burden, 300 feet in length, and running on a line between Boston and Savannah. She left Boston in the afternoon of the 19th, and when off Cape Cod, her master, owing to the foggy weather, decided to take the outside passage by Nantucket, instead of her regular course through Vineyard Sound. The outside course was much clearer of vessels. Before the collision the steamship was eighteen miles off the South Shoal Lightship, on a course southwest half west, proceeding at her full speed of from ten to twelve knots an hour, and blowing her whistle at the statutory intervals after 12.30 o'clock. The

master and the first officer with the quartermaster were in the pilot-house, and a man was on the lookout forward.

From the above statement it will be seen that the two vessels were approaching upon courses which converged at an angle of about three points.

The officers of the schooner heard the steamship's whistle from two to four points off the starboard bow, a fact which was duly reported to the officer of the deck. The whistles of the steamship continued to be heard on the starboard bow until she came in sight some four or five lengths off, the schooner keeping her course and speed until the collision.

The master and lookout of the steamship heard the fog signal of the schooner about two minutes before the collision, apparently a point off their port bow. The order was immediately given and obeyed to stop and afterwards to reverse, and the wheel was put hard-a-port in order to locate the sound. When they first saw the sails of the schooner they bore one and one half points on the port bow of the steamer. During this time the helm of the steamer was hard-a-port. Upon seeing the schooner, the steamship, which was then swinging to starboard under her port helm, ordered her engines full speed ahead for the purpose of clearing the schooner. The schooner kept her course and the vessels came together at an angle of four points, the steamship striking the schooner forward of the foremast on the starboard side, sinking her almost immediately. The collision resulted in a total loss of the schooner with all her cargo and property on board. The steamship was uninjured.

The District Court was of opinion that both vessels were in fault for immoderate speed, and that the damages should be divided.

Damages were awarded to the libellants, as bailees for the owners of the cargo, to the amount of $17,215.17, and to the libellants, as owners of the vessel and for the value of certain personal effects of the crew, in one half the total amount of their loss, namely, $9205.45; and it was further ordered that the owners of the steamship might recoup from the said amount of $9205.45 the sum $8607.58, being one half of the

total damages to the cargo. An execution was ordered against the claimants of the steamship and its stipulators for the sum of $597.87, this being the difference between half the value of the schooner and the personal effects of the crew and half the value of the cargo for which the schooner was thus held responsible.

Upon appeal to the Circuit Court of Appeals, that court affirmed the decree of the District Court upon the merits; but modified the same with reference to the distribution between the owners and master of the Golden Rule on the one side and her mate and crew on the other, finding that, as neither the mate nor her crew were responsible for any fault in her navigation, the several sums awarded the mate and crew should have priority over the amounts awarded the owners and master. 33 U. S. App. 510.

Whereupon an application was made to this court by the libellants for a writ of certiorari, which was granted.

Mr. Eugene P. Carver for the Golden Rule and her owners. *Mr. Edward E. Blodgett* was on his brief.

Mr. Arthur H. Russell for the Chattahoochee and her owners. *Mr. Charles Theodore Russell* was on his brief.

Mr. Justice Brown delivered the opinion of the court.

There can be no doubt whatever of the liability of the steamer, and as she did not appeal, of course she is estopped to deny such liability in this court.

1. Whether the Golden Rule was also liable for excessive speed is a question of more difficulty. She was a topsail schooner, rigged with twelve sails, all of which she was carrying, except one half her double square sail on the foremast, which had been taken in. She was sailing on her port tack with the wind well abaft the beam, through a fog which did not admit of the hull of a vessel being seen more than a few hundred feet distant. It appears to have been a surface fog, as the crew of the schooner are confident they saw the masts

of the steamer some 2000 feet away. The District Court was of opinion that as she was sailing free, with a fresh wind, her speed could not have been less than seven or eight knots an hour. The Court of Appeals found only that she was making substantially all the speed of which she was capable. Her master admits that she was making from five to six knots; but as her log, which was taken in at 4 o'clock, registered twenty-eight miles for four hours, we think her speed may be safely estimated to have been seven miles an hour. While the commerce in this locality was not as great as it was in Vineyard Sound, it was not unlikely that they would encounter other vessels coming down the coast. Was seven miles a moderate rate of speed under the circumstances of this case?

Although the reports of the admiralty courts are extremely fertile of cases turning upon the proper speed of steamers in foggy weather, there is a singular paucity of such as deal with the speed of sailing vessels. Such as there are, however, point to a uniformity of regulation applicable to the two classes. The earliest of these cases is that of *The Virgil*, (1843) 2 W. Rob. 201. This was a collision between two sailing vessels in a dark and hazy night, although there does not seem to have been a fog. As it appeared that the Virgil had the wind free, and was sailing under a full press of canvas, she was held in fault for too great speed. Her actual speed is not given. In the case of *The Victoria*, 3 W. Rob. 49, a vessel running before the wind on a dark and cloudy night at the rate of from five to six knots an hour off the English coast, was held to have been in fault for proceeding at that rate of speed.

Upon the other hand, in the case of *The Morning Light*, 2 Wall. 550, a brig running through Buzzard's Bay in a dark and rainy night, was held not to have been in fault for not shortening sail. The court, commenting on the case of *The Virgil*, observed: "But such a restriction," as was laid down in that case, "can hardly be applied to sailing vessels proceeding on their voyage in an open sea. On the contrary, the general rule is that they may proceed on their voyage although it is dark, observing all the ordinary rules of navigation, and with

such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. They should never, under such circumstances, hazard an extraordinary press of sail, and in case of unusual darkness, it may be reasonable to require them, when navigating in a narrow pathway where they are liable to meet other vessels, to shorten sail if the wind and weather will permit." The actual speed of the Morning Light is not given, although the wind seems to have been blowing a five to six-knot breeze, which would indicate a somewhat lower rate of speed than in this case. In the case of *The Itinerant*, 2 W. Rob. 236, decided in 1844, Dr. Lushington was of opinion that it was the duty of the shipmaster, whether in a dense fog or great darkness, to exercise the greatest vigilance and to put his vessel under command, although such precautions might occasion delay in the prosecution of the voyage. "It may be," said he, "that for such a purpose it would be his duty to take in his studding sails; but such is the constantly varying combination of circumstances arising from locality, wind, tide, number of vessels in the track and other considerations, that the court cannot venture to lay down any general rule which would absolutely apply in all cases." So, too, in *The Pepperell*, Swabey, 12, Dr. Lushington held a ship proceeding in the North Sea at the rate of six and one-half knots an hour during a night so dark that vessels could only be seen at a distance of 100 to 200 yards, was in fault if she knew, or ought to have known, that she was crossing a fishing ground. See, also, *The Lord Saumarez*, 6 Notes of Cases, 600; *The Juliet Erskine*, Ibid. 633.

These cases were all decided before the new steering and sailing rules, which were first adopted in 1863 by a British Order in Council, and in 1864 by an act of Congress. The twenty-first of these rules, as they appear in the Revised Statutes, section 4233, requires that "every steam vessel shall, when in a fog, go at a moderate speed." No mention is made in this rule of sailing vessels, but the courts, both in England and America, so far as they have spoken upon the subject, have adhered to the rule laid down in the earlier cases above cited — that rates

of speed which would be considered immoderate for steamers are open to like condemnation in the case of sailing vessels. See discussion in *The Chancellor*, 4 Ben. 153, 160. In *The Thomas Martin*, 3 Blatchford, 517, a schooner was condemned by Mr. Justice Nelson for racing on a night which was not unusually dark, yet was so overcast and cloudy that a vessel without lights could not be seen at a distance exceeding a half mile. The schooner had all her sails set, with a pretty fresh wind, and was running at a rate of speed that, under the circumstances, he thought could not well be justified considering the character of the night.

In the case of *The Johns Hopkins*, 13 Fed. Rep. 185, it was held by Mr. Justice Harlan and Judge Lowell that, in case of a fog and in a place much frequented by vessels, it was as much the duty of a sailing vessel to go at a moderate rate of speed as it was the duty of a steamer. In this case a brig, sailing with the wind nearly aft and making eight to nine knots through the water, with a current of two knots in her favor, off the coast of Cape Cod, was held to have been in fault for a collision with a steamer in a dense fog. So in *The Wyanoke*, 40 Fed. Rep. 702, it was held by Judge Brown, of the Southern District of New York, that a schooner having nearly all her canvas set and running in a dense fog off Cape May at a speed of six knots an hour, was not going at the moderate speed required by law. In *The Attila*, Cook's Cas. 196, the Vice Admiralty Court at Quebec condemned a sailing vessel for running at a speed of six or seven miles an hour, in a dense fog in the fairway from the Atlantic Ocean, between Cape Ray and St. Paul's Island into the Gulf and the lower waters of the St. Lawrence River, although there was abundance of evidence that this was the customary rate of speed during a fog in this locality.

In 1879 a new code was adopted in England, and in 1885 in this country, article 13 of which provides that "every ship, *whether a sailing ship or steamship* shall, in a fog, mist or falling snow, go at a moderate speed."

In the case of *The Elysia*, 4 Asp. Mar. Law Cas. (N. S.) 540, 544, it was held by the Admiralty Court and by the Court of

Appeal in England, that a speed of five knots in the case of a sailing ship out in the Atlantic Ocean in a fog, is a moderate speed, although at the time she was under all plain sail and going as fast as she could with the wind on her quarter. Lord Justice Brett was of opinion that a moderate speed was not absolutely the same with regard to a steamer as to a sailing vessel. "If you were to say that three knots were a moderate speed for a steamer in which to turn from one point to another when out in the ocean, that does not presume that that would be a moderate speed for a sailing vessel, because a steamer can reduce her speed to a knot and a half. It would, however, be very dangerous for a sailing vessel, under all circumstances, to reduce her speed to anything like three knots, because such a speed would, in certain circumstances, place her entirely out of command."

In *The Zadok*, L. R. 9 P. D. 114, which was a collision between a steamship and a barque in the English Channel, it was held to have been the duty of the barque to reduce her speed so far as she could consistently with keeping steerageway, and as it was shown that she was carrying nearly all her canvas and proceeding at a speed of more than four knots an hour, she was held to be in fault and the steamer exonerated. A like ruling was made by the Master of Rolls, speaking for the Court of Appeal in *The Beta*, L. R. 9 P. D. 134. The collision took place in a dense fog in the Bristol Channel, and it was held that a vessel must not go faster than would enable her to be kept under command.

In the case of *The N. Strong*, (1892) L. R. P. D. 105, which was a collision in the English Channel, it was held that a sailing vessel which was making about four knots an hour in a fog, was not proceeding at a rate of speed beyond what was necessary to keep her well under command.

The cases in the American courts are of the same purport. In *The Rhode Island*, 17 Fed. Rep. 554, it was held by Judge Brown of the Southern District of New York, that a speed of seven knots an hour in a foggy evening in Long Island Sound was not a moderate rate of speed, although the twenty-first rule did not apply in terms to sailing vessels.

No absolute rule can be extracted from these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. It is not perceived why the considerations which demand a slackening of speed on the part of steamers in foggy weather are not equally persuasive in the case of sailing vessels. The principal reason for such reduction of speed is that it will give vessels time to avoid a collision after coming in sight of each other. If two steam vessels are approaching upon converging courses at a combined rate of speed of thirty miles an hour, and are only able to see each other three or four lengths off, it would be practically impossible to avert a collision; whereas, if each were going at the lowest rate of speed consistent with good steerageway, a collision might easily be avoided by stopping and reversing their engines, or by a quick turn of the wheel and an order to go ahead at full speed. While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter, either by changing their course or by such a rate of speed as will prevent the latter from avoiding them. There is also the contingency that a schooner sailing with the wind free, as in this case, may meet a vessel closehauled, in which case the latter has the right of way, and the former is bound to avoid her. Beyond this, however, a steamer usually relies for her keeping clear of a sailing vessel in a fog upon her ability to stop and reverse her engines; whereas, it is impossible for a sailing vessel to reduce her speed or stop her headway without manœuvres which would be utterly impossible after the two vessels come in sight of each other. Indeed she can do practically nothing beyond putting her helm up or down to "ease the blow" after the danger of collision has become imminent. The very fact that a sailing vessel can do

so little by manœuvring is a strong reason for so moderating her speed as to furnish effective aid to an approaching steamer charged with the duty of avoiding her.

In this case the Golden Rule, though not pursuing the most frequented path of coastwise commerce, was sailing through waters where other vessels were frequently met, and not far from the usual track of transatlantic steamers. Her foghorn was heard by the steamer but once, or possibly twice, while if the vessels had been proceeding at the speed required by law, their signals would have been exchanged so many times that the locality and course of each would have been clearly made known to the other. In other words, sufficient time would have been given for the steamer to have taken the proper steps to avoid the schooner. Upon the whole, we are of opinion that the courts below were right in condemning the schooner for immoderate speed.

2. An important question of damages remains to be considered. Libellants, as bailees for the owners of the cargo, proceeded against and were held entitled to recover of the steamship the entire value of the cargo, but the latter was allowed to recoup one half of this amount from one half the amount of damages suffered by the schooner. This appears to have been done upon the authority of *The North Star*, 106 U. S. 17, in which it was held that, where a collision occurred through the mutual fault of two vessels, one of which was sunk and the other of which was damaged, the owners of the sunken vessel were not entitled under the Limited Liability Act to an entire exoneration from liability, but that the damage done to both vessels should have been added together in one sum, and equally divided, and a decree should have been pronounced in favor of the vessel which suffered most against the one which suffered least, for half the difference between the amounts of their respective losses. A similar ruling was made in *The Manitoba*, 122 U. S. 97, and in *The Stoomvaart Maatschappy Nederland* v. *Pen. & Or. Steam Nav. Co.*, 7 App. Cas. 795.

But libellants insist in this connection that the act of February 13, 1893, known as the Harter Act, has modified the

previous existing relations between the vessel and her cargo, and has an important bearing upon this branch of the case. By the third section of that act, the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management. This section is made applicable to "any vessel transporting merchandise or property to or from any port in the United States;" and we know of no reason why a foreign vessel like the Golden Rule, engaged in carrying a cargo from a foreign port to Boston, is not entitled to the benefit of this provision. Had the cargo of the schooner arrived at Boston in a damaged condition, it is clear that the vessel might have pleaded the statute in exoneration of her liability, if the damage had occurred through a fault or error in navigation, such, for instance, as a collision due wholly or partly to her own fault. So, if a vessel and cargo be totally lost by such fault, we know of no reason why the owner of the vessel is not entitled to the benefit of this section, as well as to his exemption under the Limited Liability Act.

The reasons which influenced this court to hold in the case of *The Scotland*, 105 U. S. 24, that the Limited Liability Act applied to owners of foreign as well as domestic vessels, and to acts done on the high seas, as well as in the waters of the United States, apply with even greater cogency to this act. "In administering justice," said Mr. Justice Bradley, p. 29, "between parties, it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the law of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. . . . But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would *prima facie* determine them by its own law, as presumptively expressing the rules of justice; . . . if it

be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. . . . But the great mass of the laws are, or are intended to be, expressive of the rules of justice, and are applicable alike to all. . . . But there is no demand for such a narrow construction of our statute," (as was given by the English courts to their Limited Liability Act,) "at least to that part of it which prescribes the general rule of limited responsibility of shipowners. And public policy, in our view, requires that the rules of maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicil. We think they should not be restricted by construction." It will be observed that the language of the Harter Act is more specific in its definition of the vessels to which it is applicable, than the Limited Liability Act, which simply uses the words "any vessel," whereas, by the third section of the Harter Act, it is confined to "any vessel transporting merchandise or property to or from any port in the United States." Where Congress has thus defined the vessels to which the act shall apply, we have no right to narrow the definition. It may work injustice in particular cases where the exemptions are accorded to vessels of foreign nations which have no corresponding law, but this is not a matter within the purview of the courts. It is not improbable that similar provisions may ultimately be incorporated in the general law maritime. Indeed, the act has been already held by this court applicable to foreign as well as to domestic vessels. *The Silvia*, 171 U. S. 462. See also *The Etona*, 64 Fed. Rep. 880; *The Silvia*, 68 Fed. Rep. 230.

Assuming then that the Harter Act applies to foreign vessels, we are next to inquire into its effect upon the division of damages in this case. It was held by this court in the

case of *The Atlas*, 93 U. S. 302, that an innocent owner of a cargo is not bound to pursue both colliding vessels, though both may be in fault, but is entitled to a decree against one alone for the entire amount of his damages. It was held by the courts below that, while the action by the owner of the cargo would lie against the steamer for the whole amount of damage done, the owners of such steamer were entitled to recoup one half of this amount against one-half of the amount awarded to the owners of the schooner for the loss of their vessel, upon the theory that, under the Limited Liability Act, they were liable for one half this amount, not exceeding the value of the schooner. But libellants insist that as the third section of the Harter Act declares that the owners of a seaworthy vessel shall not be liable in any amount for damage or loss resulting from a fault or error in navigation, the owners of the schooner are entitled to this exoneration, whether the action be directly against the vessel by the owner of the cargo, or by a third party, who is claiming the rights to which he is entitled, and who for that purpose is standing in his shoes. That the exemptions of the act are not intended for the benefit of the steamship or any other vessel, by whose negligence a collision has occurred, but for the benefit of the carrying vessel alone; and if she be held liable in this indirect manner for a moiety of the damages suffered by the cargo, the act is to that extent disregarded and nullified. That the amount which is paid by recoupment from the just claim of the schooner against the steamship is paid as effectually as it would be by a direct action by the owners of the cargo against the schooner; and while in this case it works an apparent hardship upon the steamer, (a hardship more apparent than real, owing to the greater fault of the steamer,) it does not in reality extend her liability, but merely prevents her taking advantage of a deduction to which without the act she might have been entitled.

But the majority of the court are of opinion that the principles announced by us in *The North Star*, 106 U. S. 17; *The Manitoba*, 122 U. S. 97; *The Delaware*, 161 U. S. 459; and *The Irrawaddy*, 171 U. S. 187, are equally applicable here.

The case of the *North Star* is especially pertinent. That case arose from a collision between two steamships, one of which, the *Ella Warley*, went to the bottom, while the other was considerably damaged. The suit was tried upon libel and cross-libel, both vessels found in fault, and the damages ordered to be divided. No question arose with regard to the cargo, but the owners of the *Ella Warley* raised a question as to the amount of their recovery under the Limited Liability Act, which provides (Rev. Stat. § 4283) that "the liability of the owner of any vessel . . . for any loss, damage or injury by collision . . . occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." It seems that, if the vessel be totally lost, the liability of her owner is thereby extinguished. *Norwich Company* v. *Wright*, 13 Wall. 104. The owners of the Ella Warley sought to apply this rule to a case of mutual fault, and contended that, as their vessel was a total loss, the owners were not liable to the *North Star* at all, not even to have the balance of damage struck between the two vessels; but that half of their damage must be paid in full without deduction of half the damage sustained by the *North Star*. But the court held "that where both vessels are in fault, they must bear the damage in equal parts; the one suffering the least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case the duty of payment fell upon the *North Star*, the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule. The contrary view is based on the idea that, theoretically, (supposing both vessels in fault,) the owners of the one are liable to

the owners of the other for one half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. . . . These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties."

In delivering the opinion Mr. Justice Bradley cited and disapproved of the case of *Chapman* v. *Royal Netherlands Navigation Co.*, L. R. 4 P. D. 157, which was much relied upon by counsel for the Ella Warley. It is interesting to note that this case was overruled by the House of Lords three months before the opinion in the *North Star* was delivered, in the case of the *Stoomvart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Co.*, L. R. 7 App. Cas. 795, and the rule laid down in the *North Star* adopted. The same rule was subsequently applied in *The Manitoba*, 122 U. S. 97.

The other cases are not directly in point, but their tendency is in the same direction. In that of *The Delaware*, 161 U. S. 459, it was said that the whole object of the Harter Act was to modify the relations previously existing between the vessel and her cargo, and that it had no application to a collision between two vessels. In *The Irrawaddy*, 171 U. S. 187, it was held that, if a vessel be stranded by the negligence of her master, the owner had not the right, under the Harter Act, to a general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save the vessel, freight and cargo.

But if the doctrine of the *North Star* be a sound one, that in cases of mutual fault the owner of a vessel which has been totally lost by collision is not entitled to the benefit of an act limiting his liability to the other vessel until after the balance

of damage has been struck, it would seem to follow that the sunken vessel is not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability has been fixed upon the principle of an equal division of damages. This is in effect extending the doctrine of the *Delaware case*, wherein the question of liability for the loss of the cargo was not in issue, to one where the vessel suffering the greater injury is also the carrier of a cargo — in other words, if the Harter Act was not intended to increase the liability of one vessel toward the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo.

We are therefore of opinion that the Court of Appeals did not err in deducting half the value of the cargo from half the value of the sunken schooner, and in limiting a recovery to the difference between these values. The decree is

Affirmed.

The Chief Justice and Mr. Justice Peckham dissented.

COOPER *v.* NEWELL.

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

No. 134. Argued January 12, 13, 1899. — Decided April 3, 1899.

In 1850 McGrael, a resident citizen in Brazoria County, Texas, brought an action against Newell, who was alleged to be a citizen and resident in that county, to recover several parcels of land. Swett, an attorney at law, appeared for Newell and a verdict was rendered that McGrael recover the tracts, upon which verdict judgment was rendered in his favor, and he went into possession. At the time when that action was brought Newell had ceased to be a citizen of Texas, and had become a citizen of Pennsylvania, from whence he soon removed to the city of New York, and became a citizen of that State, and spent the remainder of his life there and died there. He was never served with process in

Statement of the Case.

the action in Texas, no notice of it was given him by publication, he never authorized Swett to appear for him, and was ignorant of the whole proceeding. In 1890, upon the matter coming to his knowledge, he brought this action in the Circuit Court of the United States for the Eastern District of Texas against persons occupying and claiming part of the land, setting up the above facts, and asking a decree that the judgment of 1850 was null and void, and not binding upon him. He died before trial could be had, and the action proceeded to trial and judgment in the name of his executors. The jury found a verdict in favor of the executors, judgment was rendered accordingly, and an appeal was taken to the Court of Appeals. In answer to a question certified to this court by the Court of Appeals, it is *Held*, that the said judgment of the district court of Brazoria, Texas, which was a court of general jurisdiction, was, under the circumstances stated, subject to collateral attack in the United States Circuit Court for the Eastern District of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the State of New York and a citizen of the State of Texas by evidence *aliunde* the record of the state court.

The Circuit Court of the United States sitting in the State of Texas was not bound to treat the judgment of the district court of Brazoria County as if it were a domestic judgment drawn in question in one of the state courts, and to therefore hold that it could not be assailed collaterally, but, on the contrary, it was no more shut out from examining into jurisdiction than is a Circuit Court of the United States sitting in another State, or than are the courts of another State.

This is a certificate from the Circuit Court of Appeals for the Fifth Circuit, stating that the "suit was originally brought by Stuart Newell against Eliza Cooper and B. P. Cooper and Fannie Westrope, as defendants, in the Circuit Court in and for the Eastern District of Texas, sitting at Galveston, in the ordinary form of trespass to try title, under the Texas statutes, to recover one hundred and seventy-seven acres of land in Harris County, Texas, described in plaintiff's petition, which said petition was filed on the 5th day of July, 1890. The said Stuart Newell was alleged to be a citizen of New York, and the said defendants all citizens of Texas."

That prior to the trial Stuart Newell died, and the proper persons were duly made parties plaintiff, as well as an additional party defendant, and plaintiffs filed their fifth amended original petition, in which, in addition to the usual averments required to be made by the Texas statutes in an action of trespass to try title, plaintiffs further alleged that defendants

set up title to the land in controversy through a judgment rendered May 21, 1850, in the district court of Brazoria County, Texas, in favor of Peter McGrael and against Stuart Newell, a certified copy of which proceedings was attached to and made a part of said amended petition; and "that said judgment was null and void and was not binding on the said Stuart Newell nor plaintiffs, nor could defendants claim title under said judgment for the following reasons, viz.:

"That at the time of the filing of said suit and the rendition of said judgment said Stuart Newell was not a resident of Brazoria County, Texas, nor of the State of Texas, nor was he then within said Brazoria County or the State of Texas; that at no time did he ever reside in Brazoria County, Texas; that on the 2d day of January, 1848, said Stuart Newell, who then resided in Galveston County, Texas, removed from said Galveston County to the city of Philadelphia, in the State of Pennsylvania, and resided in said city of Philadelphia, in the State of Pennsylvania, continuously from said date until the year 1854, when he removed from said city of Philadelphia to the city of New York, in the State of New York, where he continued to reside up to the time of his death: to wit, April 11, 1891.

"That during the time of his residence in the city of Philadelphia he was a resident citizen of the State of Pennsylvania, and during his residence in the city of New York he was a resident citizen of the State of New York, and has never at any time been a citizen of the State of Texas, nor has he, at any time since the year 1848, when he left Galveston County, been anywhere in the State of Texas, but at all times since said year 1848, up to the time of his death, had resided and been without the limits of the said State of Texas and within the said city of Philadelphia, State of Pennsylvania, and the said city of New York, in the State of New York; that Stuart Newell was never served with citation, process or otherwise notified of the existence of said suit of *Peter McGrael* v. *Stuart Newell;* nor was he a party to said suit with his knowledge, consent or approval; nor did he submit himself to the jurisdiction of the said court; nor did he employ or

authorize any one to represent him or enter an appearance in said suit; nor did he know of the existence of said suit in any manner until just prior to the institution of this suit.

"That if any attorney appeared for said Stuart Newell in said suit he did so without any authority, permission, knowledge, or consent of or from the said Stuart Newell, and that such appearance, if any there was, was through collusion with said attorney and plaintiff in said suit to injure and defraud the said Stuart Newell; and it was expressly denied that I. A. or J. A. Swett had any authority or permission from said Stuart Newell to enter an appearance in said cause, nor was such appearance on the part of the said I. A. or J. A. Swett done with the knowledge, consent or approval of said Stuart Newell; that at the time of the entry of said judgment said Stuart Newell had a meritorious defence to said suit, and was the owner in fee simple to the lands herein sued for by virtue of a deed of conveyance to him from said Peter McGrael, plaintiff in said suit, executed and delivered on August 9, 1848, and that at no time since said date had said Peter McGrael any title or interest in the lands in controversy. Attached to plaintiffs' said petition was a certified copy of the record in the case of *Peter McGrael* v. *Stuart Newell* in the district court of Brazoria County, Texas, to which was attached the certificate of the clerk that said record contained a full, true and correct copy of all the proceedings had in said suit, and which record was afterwards put in evidence on the trial by defendant.

"This record consisted of, 1st, a petition in the ordinary form of trespass to try title, in which Peter McGrael was plaintiff and Stuart Newell was defendant, and in which petition it was alleged that Peter McGrael was a resident citizen of the county of Brazoria, State of Texas, and that Stuart Newell was a resident citizen of the county of Brazoria, State of Texas. A number of different tracts of land, one of which was situated in Brazoria County, were described in said petition, among them the land in controversy, which was alleged to be situated, then as now, in Harris County, Texas. Said petition likewise contained a prayer that Stuart

Newell be cited to appear before the next term of the said district court of said Brazoria County, and that he be condemned to restore to plaintiff the peaceable possession of the said lands, and that he and all other persons be thereafter restrained from disturbing plaintiff in the possession and use thereof, and that defendant be condemned to pay plaintiff five thousand dollars damages for taking possession of said tracts of land, and also be condemned to pay a reasonable rent for the same. Prayer was likewise made for general relief, and that plaintiff be quieted in his title and possession of the said land. This petition was filed on the 20th day of May, 1850, and contained the following indorsement: 'This suit is brought as well to try title as for damages. J. B. Jones, att'y for plaintiff.'

"2d. The following answer, filed May 20, 1850, viz.:

"'In the Honorable District Court, May Term, A.D. 1850.

Peter McGrael
v.
Stuart Newell.

"'And now comes the defendant, Stuart Newell, and says that the matters and things in plaintiff's petition are not sufficient in law for the plaintiff to have or maintain his said action against this defendant. Wherefore he prays judgment.

(Signed) J. A. SWETT,
Att'y for Defendant.

"'And now, at this term of your honorable court, comes the said defendant, Stuart Newell, and defends, etc., and says that he denies all and singular the allegations in said plaintiff's petition contained.

(Signed) J. A. SWETT,
Att'y for Defendant.

"'And for further answer in this behalf the said defendant says that he is not guilty in manner and form as the said plaintiff in his said petition hath complained against him; and of this he puts himself upon the country.

(Signed) J. A. SWETT,
Att'y for Defendant.'

"3d. The following order of court:

'Peter McGrael
v. } No. 1527.
Stuart Newell.

MONDAY, *May* 20, 1850.

"'In this cause both parties being present, by their attorneys, the demurrer of defendant to plaintiff's petition came on and, being heard by the court, was overruled.'

"4th. The following decree:

"'Peter McGrael
v. } No. 1527.
Stuart Newell.

TUESDAY, *May* 21, 1850.

"'This day came the parties, by their attorneys, and the demurrer of the defendant being heard, the same was overruled; and thereupon came the following jury of good and lawful men, to wit (here follow names of the jurors), who, after hearing the evidence and argument, thereupon returned the following verdict:

"'We, the jury, find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition.

E. GIESECKE, *Foreman.*

"'It is therefore ordered, adjudged and decreed by the court that the plaintiff do have and recover of and from the defendant the several tracts of land in plaintiff's petition mentioned and described and all thereof; that the said Stuart Newell be forever barred from having or asserting any claim, right or title to all or any portion of said tracts of land or any part thereof, and that the said plaintiff be forever quieted in the title and in the possession of all the aforesaid tracts of land. It is further considered by the court that the plaintiff recover of the defendant his costs of this suit, and that execution issue for the same.'

"The defendants answered herein, demurring to the plaintiffs' fifth amended original petition upon the ground that it appeared therefrom that the plaintiffs thereby attacked col-

laterally and alleged to be void the judgment of the district court of Brazoria County, in the State of Texas, and within the said Eastern District thereof, a court of general jurisdiction of the parties and the subject-matter connected with and involved in said judgment, and that said judgment was a domestic judgment, assailable only in a direct proceeding to impeach it, and that no proceeding had ever been taken to review, appeal from, vacate or qualify said judgment, and that plaintiffs' right to do so is now barred by limitation and lost by laches. Defendants also answered by plea of not guilty and the statute of limitation of three, five and ten years.

"Upon the trial of the case in the Circuit Court there was evidence offered by the plaintiffs tending to prove that Peter McGrael was the common source of title, and that, as alleged in plaintiffs' petition, the land in controversy had been conveyed by said Peter McGrael to said Stuart Newell in fee simple in 1848, and that said Stuart Newell was not a citizen nor a resident of the State of Texas at the time of the institution of the aforesaid suit of Peter McGrael *v.* said Stuart Newell in the district court of Brazoria County, Texas; that he was never served with any process of any character in said suit; that he had no knowledge of the institution of the said suit until many years thereafter; that J. A. Swett was not his attorney in said suit and had never been employed by him to represent him in said suit, and that any appearance made for him by said Swett in said suit was without the knowledge or consent of said Newell; that in said suit the property in controversy had not been taken into the possession of the court by attachment, sequestration or other process; that said Stuart Newell had never resided in Brazoria County, Texas; that he resided in Texas, in Galveston County, from April, 1838, to November, 1848; that he left Texas in November, 1848, and went to the city of Philadelphia, and resided there until 1853 or 1854, and from that time on up to the date of his death he had resided in the city of New York, in the State of New York, and during said years was first a citizen of the State of Pennsylvania whilst residing

there, and then a citizen of the State of New York whilst residing there.

"The evidence tending to establish the above facts was all objected to by the defendants upon the ground that said judgment in the case of *Peter McGrael* v. *Stuart Newell* was rendered by a domestic court of general jurisdiction, and that said Newell was sued as a citizen of said Brazoria County, and that the record in said suit showed that fact and showed that he was sued therein for the recovery of land, and that he had appeared by his attorney, demurred, pleaded and answered in the suit, and that his demurrer had been contested before the court and a hearing had on the case before a jury and that judgment was rendered in said suit for the plaintiff, and that said proceeding, judgment and record import absolute verity, and that want of jurisdiction in said court could not be established outside of said record in a collateral proceeding such as the suit at bar.

"These objections were overruled, the evidence admitted, and defendants excepted thereto.

"The issue of the validity of said judgment in the case of *Peter McGrael* v. *Stuart Newell* was submitted to the jury by the following charge of the court, viz.:

"'There are only two questions left to your consideration: First, whether or not the judgment rendered in Brazoria County May 21, 1850, in favor of Peter McGrael against Stuart Newell was procured without service and without the authorized appearance of Stuart Newell. If the evidence satisfies your mind that Stuart Newell was not a party to the suit in fact — that is, was not served and did not enter his personal appearance, and did not authorize Mr. Swett to appear for him — you are instructed that the judgment is a nullity and the plaintiffs are entitled to recover this land, unless defendants have it by statute of limitations. If you determine from the testimony in this case that Stuart Newell was represented in that suit by Mr. Swett and he was authorized to represent him, in that event you need not consider the plea of limitation, but return a verdict for the defendants. If Mr. Swett was authorized to appear for Stuart Newell in the

litigation, you need not consider the plea of limitation, but return a verdict for the defendants; but if you find from the testimony that Mr. Swett was not authorized to appear for him, then that judgment is a nullity and the title to this property would be in the executors of Stuart Newell, plaintiffs in this case, unless you find under the plea of limitation which I shall instruct you upon in favor of the defendants. If you find for the plaintiffs, the form of your verdict will be, "We, the jury, find for the plaintiffs against the defendants." If you find for the defendants, the form of your verdict should be, "We, the jury, find for the defendants the land described in the plaintiffs' petition and against the plaintiffs;" and in that event you are further directed to state whether or not you find the Brazoria County judgment was a valid or void judgment, and you will also state whether you find the defendants have title to the property by limitation; and, if so, you will add, "We, the jury, find the defendants have the title to the property by reason of the five years' limitation." Those are two special findings, if you find for the defendants. If you find from the evidence in this case that Stuart Newell authorized Mr. Swett to appear for him in that case, the judgment is valid, but if you find he was not authorized to appear for him, then the judgment is a nullity. The burden of proof is upon the plaintiffs to show nullity of the judgment in Brazoria County.'

"To this charge of the court the defendants duly excepted and asked the court to give to the jury the following instructions:

"'The judgment of the district court of Brazoria County, rendered on May 21, 1850, in the case of *Peter McGrael* v. *Stuart Newell*, put the title to the land now sued for in said McGrael, and McGrael's deed to Westrope on March 2, 1860, put the title in Westrope, and defendants are entitled to your verdict, and you will find for them.'

"This instruction the court refused to give, and to this action of the court defendants duly excepted. The jury brought in the following verdict: 'We, the jury, find for the plaintiffs, as against the defendants, the lands described

in plaintiffs' petition;' which verdict was duly received and upon it judgment rendered for plaintiffs.

"The defendants in time filed their bills of exception, and this case was brought to this court by writ of error. Among other assignments of error it was complained that the Circuit Court had erred in overruling defendants' demurrer to plaintiffs' petition attacking the validity of said judgment in the case of *Peter McGrael* v. *Stuart Newell* and in permitting the introduction of the evidence hereinbefore recited and in charging the jury as hereinbefore recited and in refusing to charge the jury as hereinbefore recited.

"Whereupon, the court desiring the instruction of the honorable Supreme Court of the United States for the proper decision of the questions arising on the record, it is ordered that the following question be certified to the honorable the Supreme Court of the United States, in accordance with the provisions of section 6 of the act entitled 'An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the juridiction of the Circuit Courts of the United States, and for other purposes, approved March 3, 1891,' to wit:

"Was the judgment of the district court of Brazoria County, Texas, (said court being a court of general jurisdiction,) in the case of *Peter McGrael* v. *Stuart Newell*, subject to collateral attack in the United States Circuit Court for the Eastern District of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the State of New York and a citizen of the State of Texas, by evidence *aliunde*, the record of the state court showing that the defendant, Stuart Newell, in said suit in said state court was not a resident of the State of Texas at the time the suit was brought nor a citizen of said State, but a resident citizen of another State, and that he was not cited to appear in said suit, and that he did not have any knowledge of said suit, and that he did not, in fact, appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent."

Opinion of the Court.

Mr. F. Charles Hume for Cooper and others.

No appearance for Newell.

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

The question is whether the judgment entered by the district court of Brazoria County, Texas, in favor of McGrael and against Newell, was open to the attack made upon it in the Circuit Court of the United States for the Eastern District of Texas. The record of the suit in which that judgment was entered showed a petition in the ordinary form of trespass to try title, filed May 20, 1850, alleging McGrael and Newell to be resident citizens of the county of Brazoria, Texas, and describing several different tracts of land, one of which was situated in Brazoria County, and, among the others, the tract in controversy, which was alleged to be situated then as now in Harris County, Texas; a demurrer and pleas signed by a person as "att'y for defendant," filed the same day; a verdict and judgment against Newell rendered and entered May 21, 1850. The record does not show that any process was issued on the petition and served on Newell, or any notice given to Newell by publication or otherwise; or affirmatively that the person signing the demurrer and pleas was authorized to do so.

The evidence on the trial of the present case in the Circuit Court must be taken as establishing that Newell was not a citizen nor a resident of Texas at the time the suit was commenced in the Brazoria County district court; that he was never served with any process in that suit and had no knowledge of its institution until many years thereafter; that the person who signed the pleadings for defendant was not Newell's attorney and had never been employed by him to represent him, and that any appearance made for Newell in the suit was without his knowledge or consent; that in that suit the property in controversy was not taken into the possession of the court by attachment, sequestration or other process; that Newell had never resided in Brazoria County, Texas, though he had resided in Galveston County prior to Novem-

ber, 1848, when he went to the city of Philadelphia, and resided there until 1853 or 1854, when he removed to the city of New York, where he resided up to the date of his death in 1891; and that during the period from November, 1848, to 1891 he was first a citizen and resident of Pennsylvania and then a citizen and resident of New York. This evidence was objected to on the ground that the judgment was rendered by a domestic court of general jurisdiction, and that want of jurisdiction cannot be established *aliunde* the record in a collateral proceeding.

In *Thompson* v. *Whitman*, 18 Wall. 457, a leading case in this court, it was ruled that "neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered;" that "the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist;" and that "want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing."

But while these propositions are conceded, it is insisted that the Circuit Court of the United States for the Eastern District of Texas was bound to treat this judgment rendered by one of the courts of the State of Texas as if it were strictly a domestic judgment drawn in question in one of those courts, and to hold that it therefore could not be assailed collaterally.

We are of opinion that this contention cannot be sustained, and that the courts of the United States sitting in Texas are no more shut out from examining into jurisdiction than if sitting elsewhere, or than the courts of another State. A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. Undoubtedly the judgments of courts of the United States are domestic judgments of the Nation, while in the par-

ticular State in which rendered they are entitled to be regarded as on the same plane in many senses as judgments of the State; and so the judgments of the courts of the several States are not to be treated by each other or by the courts of the United States as in every sense foreign judgments. But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.

The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a State comes under consideration in a court of the United States, sitting in the same State. *Christmas* v. *Russell*, 5 Wall. 290; *Galpin* v. *Page*, 18 Wall. 350; *Pennoyer* v. *Neff*, 95 U. S. 714; *Hart* v. *Sansom*, 110 U. S. 151; *Goldey* v. *Morning News*, 156 U. S. 518.

In *Pennoyer* v. *Neff*, Mr. Justice Field, after discussing the question how far a judgment rendered against a non-resident, without any service upon him, or his personal appearance, was entitled to any force in the State in which it was rendered, said: "Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another State are bound to give to them." 95 U. S. 732.

And in *Goldey* v. *Morning News*, 156 U. S. 518, 521, where the authorities are extensively cited, Mr. Justice Gray said: "It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except

by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. . . . For example, under the provisions of the Constitution of the United States and the acts of Congress, by which judgments of the courts of one State are to be given full faith and credit in the courts of another State, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. . . . If a judgment is rendered in one State against two partners jointly, after serving notice upon one of them only, under a statute of the State providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another State, or in a court of the United States, against the partner who was not served with process. . . . So a judgment rendered in a court of one State, against a corporation neither incorporated nor doing business within the State, must be regarded as of no validity in the courts of another State, or of the United States, unless service of process was made in the first State upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another State, and only casually within the State, and not charged with any business of the corporation there. . . . The principle which governs the effect of judgments of one State in the courts of another State is equally applicable in the Circuit Courts of the United States, although sitting in the State in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments."

It must be remembered that this action was commenced by Newell as a citizen of New York against citizens of Texas, in

the exercise of a right secured to him by the Constitution of the United States, and it would go far to defeat that right if it should be held that he was cut off in the Circuit Court from proving that he was not a citizen and resident of Texas when the controverted action was commenced, and that he had not authorized any attorney to appear for him in that action. As any provisions by statute for the rendition of judgment against a person not a citizen or resident of a State, and not served with process or voluntarily appearing to an action against him therein, would not be according to the course of the common law, it must follow that he would be entitled to show that he was not such citizen or resident, and had not been served or appeared by himself or attorney.

Accordingly, it was held in *Needham* v. *Thayer*, 147 Mass. 536, that a defendant in an action brought in Massachusetts on a judgment *in personam* in that State, might set up in defence that he was at the time the original action was brought a non-resident, and neither was served personally with process nor appeared therein.

And so in New York, when a judgment of a court of that State was drawn in question, which had been entered against a non-resident, who was not during the pendency of the proceedings within the jurisdiction of the State. *Vilas* v. *Plattsburgh and Montreal Railroad Company*, 123 N. Y. 440. There the rule that domestic judgments against a party not served, but for whom an attorney appeared without authority, cannot be attacked collaterally, was adhered to; yet the Court of Appeals declined to apply it to a case where the defendant was a non-resident and not within the jurisdiction during the pendency of the proceedings, such judgments being held to be not strictly domestic but to fall within the principle applicable to judgments of the courts of other States, in respect of which Andrews, J., delivering the opinion of the court, said: "It is well settled that in an action brought in our courts on a judgment of a court of a sister State the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney,

that the appearance was unauthorized, and this even where the proof directly contradicts the record."

We do not understand any different view to obtain in Texas. In *Fowler* v. *Morrill*, 8 Texas, 153, it was held that the acceptance of service of process by an attorney is only *prima facie* evidence of his authority. In *Parker* v. *Spencer*, 61 Texas, 155, the court decided that a judgment did not affect a party who had not been served, but who on the record appeared by an attorney not authorized to so appear, and it was said: "And as he had not been made a party to the suit by any of the modes known to the law, he could not be bound by the judgment. But he had the option either to have it vacated by direct proceeding or else to treat it as void in any collateral proceeding where rights might be asserted against him by reason of the same."

In *Bender* v. *Damon*, 72 Texas, 92, which is much in point, Chief Justice Stayton states the case as follows:

"The petition alleges substantially the facts necessary to be alleged in an action of trespass to try title, and the petition was so endorsed. Had it done this and no more, there could have been no ground for controversy in the court below as to its jurisdiction to hear and determine the cause, nor as to the sufficiency of the petition on general demurrer. The appellant, however, sought to remove cloud from his title, which a judgment in his favor in an action of trespass to try title would have accomplished as against the defendants, and to obtain this relief he undertook to show that appellees were claiming under a sheriff's sale and deed under an execution issued from the district court for Navarro County, on a judgment rendered by that court against him and in favor of S. J. T. Johnson, all of which he claimed were invalid.

"Some of the facts which he alleged to show the invalidity of that judgment, execution and sale, were such as might entitle him, by a proper proceeding, to have had them vacated, but not such as to render them void.

"The petition, however, went further, and alleged facts which, if true, would render the judgment void. It alleged that the plaintiff was a non-resident of this State; that he

never was cited to appear, and did not appear in person or by attorney in the proceeding in which the judgment in favor of Johnson and against himself was rendered; and that appellees claimed through an execution and sale made under a judgment so rendered. If these averments be true the judgment was void, and no one could acquire rights under it."

We think the Circuit Court was clearly right in admitting evidence to contradict the recital that Newell was a citizen and resident of Texas, and to show that the attorney had no authority to represent him.

Nor can this judgment be held conclusive on the theory that the suit of *McGrael* v. *Newell* was in the nature of a proceeding *in rem*. The property was not taken into custody by attachment, or otherwise, and the suit depended entirely on the statutes of Texas providing the procedure for the trial of the title to real estate, which contained at that time no particular provision for bringing in non-residents of the State. There was a statute providing generally that in suits against non-residents service could be had by publication, and that statute provided that if the plaintiff, or his agent, or attorney, when the suit was instituted, or during its progress, made affidavit before the clerk of the court that defendant was not a resident of the State of Texas, or that he was absent from the State, or that he was a transient person, or that his residence was unknown, then a citation should issue which should be published in a newspaper. Acts Texas, 1848, 106, c. 95. This statute was applicable to all suits, and so far as actions against non-residents were personal, judgment on citation by publication would not be conclusive. And the law also required that where any judgment was rendered on service by publication, the court should make out and incorporate with the records of the case a statement of the facts proven therein on which the judgment was founded. Acts Texas, 1846, 395. It is true that "it was within the power of the legislature of Texas to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons." *Hamilton* v.

Brown, 161 U. S. 256, 274; *Arndt* v. *Griggs*, 134 U. S. 316. But it would seem that there was no such statute at the time of the commencement of the McGrael suit, and that suit could only be regarded as a personal action and coming within the rule laid down in *Pennoyer* v. *Neff*, 95 U. S. 714.

Moreover, the record in *McGrael* v. *Newell* shows that the suit was not brought as against a non-resident of the State, it being alleged in plaintiff's petition that defendant resided in Brazoria County, Texas. So that even if it were held that the statutes of the State, taken together, authorized suits of this character to be brought against non-residents as proceedings *in rem*, this cannot be asserted as to this suit; and it affirmatively appeared that no citation by publication could have been had. The citation prayed for was to be addressed to the proper officer of Brazoria County, to be served on defendant as a resident of that county; no citation by publication was asked for, and no record of the facts on which the case was tried was kept as required by statute, and the whole case was tried as a case against a resident of Brazoria County appearing by attorney. The statute at that time provided that "any party to a suit, his agent or attorney, may waive the necessity of the issuance or the service of any writ or process required to be served on him in the suit, and accept such service thereof; provided, that such waiver or acceptance shall be made in writing, signed by such party, his agent or attorney, and filed among the papers of the suit, as a record." Acts Texas, 1846, 367. The record here showed no such acceptance or waiver of service.

Treated as a personal action, brought as against a resident, when the facts appeared that defendant was not a resident of the State of Texas and was not served in that State, and had not appeared by attorney, then the judgment ceased to be binding. The result is the same if the suit were regarded as brought under a statute making provision for the bringing of suits to settle the title to lands in Texas, since that proceeding would have been purely statutory, and not according to the course of the common law, and the record did not show that it was instituted in the manner required by the statute, or ap-

pearance had or waived as required, or that the jurisdiction of the court in fact so attached as to authorize the court to render the judgment. *Galpin* v. *Page*, 18 Wall. 350.

It follows that the question propounded must be

Answered in the affirmative.

POPE *v.* LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

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

No. 303. Submitted January 30, 1899. — Decided April 3, 1899.

When the jurisdiction of a Circuit Court of the United States depends on diverse citizenship, its decree is made final by the act of March 3, 1891, c. 517, 26 Stat. 826.

When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary, so far as the jurisdiction of the Circuit Court, as a court of the United States, is concerned; and where the jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein in the Circuit Court of Appeals therefore becomes final, the judgment and decrees in the ancillary litigation are also final.

The suits in which this receiver was appointed were in the nature of creditors' bills, and the only ground of Federal jurisdiction set up in them was diversity of citizenship; and as, if the decrees therein had been passed upon by the Circuit Court of Appeals, its decision would have been final, the same finality attaches to the decree of the Circuit Court of Appeals in this suit.

Ball and Pettit filed their bill in the Circuit Court of the United States for the Northern District of Illinois alleging that Ball was a citizen of Indiana and that Pettit was a citizen of Wisconsin, and that defendants were citizens of Indiana and Illinois, which suit was discontinued as to Ball, leaving Pettit, a citizen of Wisconsin, the sole complainant. Pope was appointed, in substitution for one Fish, receiver of the

Chicago and South Atlantic Railroad Company of Illinois, the order containing, among other things, the following:

"And it is further ordered that the defendant, the said Chicago and South Atlantic Railroad Company, or whoever may have possession thereof, do assign, transfer and deliver over to such receiver under the direction of Henry W. Bishop, a master in chancery of this court, all the property, real and personal, wheresoever found in this district, and all contracts for the purchase of land, and all other equitable interests, things in action, and other effects which belonged to, or were held in trust for, said defendant railroad company, or in which it had any beneficial interest, including the stock books of said railroad company, in the same condition they were at the time of exhibiting the said bill of complaint in this cause, except as far as necessarily changed in the proper management of said road, or in which it now has any such interest, and that said defendant, Chicago and South Atlantic Railroad Company, deliver over, in like manner all books, vouchers, bills, notes, contracts and other evidences relating thereto, and also the stock books of said railroad company.

"And it is further ordered that the said receiver have full power and authority to inquire after, receive and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its officers and such other persons as he may deem necessary on oath before said master from time to time."

Afterwards a further order was entered, *nunc pro tunc*, as follows:

"And now comes the receiver, Charles E. Pope, of said Chicago and South Atlantic Railroad Company, and on his application it is ordered and directed that said receiver have full power and authority to bring and prosecute any and all necessary suits for the collection of any claims, choses in action and enforcement of any and every kind and nature, and to defend all suits and actions touching the rights or interests of the property or effects of any kind in his possession or under his control as receiver. This order to be entered now as of the date of his appointment and qualification as receiver."

Statement of the Case.

Soon after, Pettit filed his bill in the Circuit Court of the United States for the district of Indiana, averring that he was a citizen of the State of Wisconsin, against "the said Chicago and South Atlantic Railroad Company, a corporation organized under the laws of the State of Indiana and State of Illinois, by the consolidation of an Illinois corporation of the same name of defendant herein, and an Indiana corporation known as 'the Chicago and South Atlantic Railroad Company of Indiana.'" Pope was appointed receiver on that bill, the order being similar in its terms to that entered in the Circuit Court for the Northern District of Illinois. After such appointment, and on July 12, 1881, Pope, as receiver, filed his bill of complaint in the Circuit Court for the District of Indiana, seeking to recover certain property and property rights held and claimed by certain of the defendants, which appellant claimed belonged to the Chicago and South Atlantic Railroad Company and to the ownership of or right to which he had succeeded as such receiver.

The amended bill on which the cause was heard stated that "Your orator, Charles E. Pope, who is receiver of the Chicago and South Atlantic Railroad Company, and who is a citizen of the State of Illinois, brings this his amended bill of complaint — leave therefor having been granted by this honorable court — against" certain companies and individuals, severally citizens of the States of Indiana, Ohio, New York and Kentucky; that he was appointed receiver of the Atlantic Company by the Circuit Court of the United States for the Northern District of Illinois, and also receiver by the Circuit Court of Indiana; and that he was authorized by the express orders of both courts, appointing him receiver, "to bring all suits necessary and proper to be brought to recover possession of said estate and effects and to enforce all claims," etc.

The cause went to hearing, and a money decree was rendered by the Circuit Court in favor of Pope, receiver, against appellee, which appellee was adjudged by that decree to pay. An appeal having been prosecuted to the Circuit Court of Appeals for the Seventh Circuit, a motion was made to dismiss the appeal for want of jurisdiction, and the motion over-

ruled. On final hearing the decree of the Circuit Court was reversed by the Circuit Court of Appeals, with instructions to dismiss the amended bill. The opinion of the Circuit Court of Appeals was filed June 12, 1897. 53 U. S. App. 332. Thereafter a petition for a rehearing was filed and denied. Subsequently Pope, receiver, applied to this court for a writ of certiorari, which application was denied March 7, 1898. 169 U. S. 737. On March 23 Pope moved the Circuit Court of Appeals for leave to file a second petition for rehearing, and the motion was overruled. Pope then applied to the Circuit Court of Appeals for an appeal to this court, which was granted, and the appeal having been docketed, this motion to dismiss was made and duly submitted.

Mr. Henry W. Blodgett, *Mr. G. W. Kretzinger* and *Mr. E. C. Field* for the motion.

Mr. John S. Miller opposing.

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

If the decree of the Circuit Court of Appeals was made final by the act of March 3, 1891, c. 517, 26 Stat. 826, this appeal must be dismissed; and it was so made final if the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

The Circuit Courts of the United States have original jurisdiction of suits of a civil nature, at law or in equity, by reason of the citizenship of the parties, in cases between citizens of different States, or between citizens of a State and aliens; and, by reason of the cause of action, "in cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," as for instance suits arising under the patent or copyright laws of the United States. *Press Publishing Company* v. *Monroe*, 164 U. S. 105.

Diversity of citizenship confers jurisdiction, irrespective of the cause of action. But if the cause of action arises under

the Constitution, or laws, or treaties, of the United States, then the jurisdiction of the Circuit Court may be maintained irrespective of citizenship.

The Circuit Court undoubtedly had jurisdiction of this suit on the ground of diversity of citizenship, not only because that fact existed in respect of complainant and defendants, but because the suit was ancillary to those in which the receiver was appointed. When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final. *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643; *Carey* v. *Houston & Texas Railway Co.*, 161 U. S. 115. It is true that *Rouse* v. *Letcher* and *Gregory* v. *Van Ee* were proceedings on intervention, but *Carey* v. *Houston & Texas Railway Co.* arose on an original bill in the nature of a bill of review. In that case we took occasion to quote from the opinion of Mr. Justice Miller in *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609, in which the distinction is pointed out between supplemental and ancillary, and independent and original, proceedings, in the sense of the rules of equity pleading, and such proceedings "in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the state courts." *Krippendorf* v. *Hyde*, 110 U. S. 276; *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U. S. 505, and other cases were cited; the bill held to be ancillary to the suit the decree in which was attacked; and the rule laid down in *Rouse* v. *Letcher* and *Gregory* v. *Van Ee* applied.

The suits in which this receiver was appointed were in the

nature of creditors' bills alleging an indebtedness due from the Atlantic Company; the insolvency of that company; that certain corporations had in their possession assets of the Atlantic Company; and praying for the appointment of a receiver; the marshalling of assets; the winding up of the Atlantic Company, and the application of its assets to the payment of its debts. The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the Circuit Court of Appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the Circuit Court of Appeals, therein.

And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *In re Jones*, 164 U. S. 691, 693; *Third St. & Suburban Railway Co.* v. *Lewis*, *ante*, 456.

Some further observations may be usefully added, although what has been said necessarily disposes of the motion.

The receiver based his right of recovery on the alleged seizure by one of the defendant companies of certain rights of way, and grading done thereon by the Atlantic Company under two specified contracts, which seizure and appropriation were alleged to have been fraudulently and forcibly made; and it was averred that appellee, the Louisville, New Albany and Chicago Railroad Company, acquired title thereto and possession thereof through its consolidation with another of the defendant companies, which had acquired its title and possession through the foreclosure of a mortgage given by the company which had made the seizure. The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common law rights of action. We cannot accept the suggestion that the mere order of a Federal

court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made.

The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States.

In *Bausman* v. *Dixon*, 173 U. S. 113, we have ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a state court, does not *per se* involve the denial of the validity of an authority exercised under the United States, or of a right or immunity specially set up and claimed under a statute of the United States. That was an action to recover damages for injuries sustained by reason of the receiver's negligence in operating a railroad company of the State of Washington, though the receiver was the officer of the Circuit Court, and we said: "It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived

from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order." That was indeed a writ of error to a state court, but the reasoning is applicable here. Pope was appointed receiver by an interlocutory order of the Circuit Court in the exercise of its general equity powers. He did not occupy the position of a receiver of a corporation created under Federal law as in *Texas and Pacific Railway* v. *Cox*, 145 U. S. 593; or of a marshal of the United States as in *Feibelman* v. *Packard*, 109 U. S. 421; or of a receiver of a national bank as in *Kennedy* v. *Gibson*, 8 Wall. 498. Nor did his cause of action originate or depend on the order of appointment, or assignments made to him by the Atlantic Company pursuant to that order. Nor was any right claimed by him by virtue of his order of appointment or of his deeds of assignment denied or alleged to have been denied. The decrees of the Circuit Court and of the Circuit Court of Appeals dealt solely with the alleged rights of the Atlantic Company as against certain Indiana corporations. It is impossible to hold that these orders of appointment were equivalent to laws of the United States within the meaning of the Constitution.

We agree with counsel for appellee that *Provident Savings Society* v. *Ford*, 114 U. S. 635, 641, is in point in this aspect of the case. There it was ruled that "the fact that a judgment was recovered in a court of the United States does not, in a suit upon that judgment, raise a question under the laws of the United States within the meaning of the act of March 3, 1875." That was a writ of error to the Supreme Court of the State of New York to review a judgment of that court denying a motion for the removal of the cause to the United States Circuit Court. Mr. Justice Bradley delivered the opinion, and, after pointing out that the alleged grounds of removal were insufficient, remarked: "It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a cor-

poration of the United States; and hence that such a suit is removable under the act of March 3, 1875. It is observable that the removal of the cause was not claimed on any such broad ground as this; but, so far as the character of the case was concerned, only on the ground that the defendant had a defence under Rev. Stat. § 739, specifying what the defence was; and we have already shown that that ground of removal, as stated in the petition, was insufficient. But conceding that the defendant is now entitled to take its position on the broader ground referred to, is it tenable and sufficient for the purpose? What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a Treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States — such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised then it is conceded it would be a case arising under the laws of the United States. . . . Without pursuing the subject further, we conclude with expressing our opinion that this last ground of removal, like those already considered, was insufficient."

In *Cooke* v. *Avery*, 147 U. S. 375, jurisdiction was sustained on the ground that the plaintiff's title was derived through the enforcement of a lien, the validity of which depended on the laws of the United States and the rules of the Circuit

Court, and their construction and application were directly involved.

Appeal dismissed.

MR. JUSTICE BROWN took no part in the consideration and disposition of this motion.

GUARANTEE COMPANY *v.* MECHANICS' SAVINGS BANK AND TRUST COMPANY.

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

No. 224. Argued March 16, 1899. — Decided April 3, 1899.

A Circuit Court of Appeals is without jurisdiction to review a decree of a Circuit Court when that decree, as in this case, was not a final one.

THE case is stated in the opinion.

Mr. William L. Granbery for the Guarantee Company. *Mr. Albert D. Marks* was on his brief.

Mr. Edward H. East for Savings Bank & Trust Co.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in this suit — originally brought in the Chancery Court at Nashville, Tennessee, and subsequently removed into the Circuit Court of the United States for the Middle District of Tennessee — is the Mechanics' Savings Bank and Trust Company, a Tennessee corporation suing to the use of James J. Prior, assignee, under a general assignment of all the assets, rights and credits of that company in trust for the benefit of creditors.

The principal defendant is the Guarantee Company of North America, a corporation created under the laws of the Dominion of Canada.

From January 16, 1888, to January 1, 1893, Schardt was

teller and collector and from the latter date until his death was cashier of the plaintiff company.

The object of the present suit is to have an accounting and a decree as to the amount due the plaintiff on two bonds executed by the Guarantee Company of North America to the Mechanics' Savings Bank and Trust Company; one, insuring the latter corporation against such pecuniary loss as it might sustain on account of the fraudulent acts of Schardt as teller and collecter; the other, insuring the same corporation against pecuniary loss by reason of fraudulent acts by him in his office of cashier.

The bill alleges that while acting as teller and collector of the plaintiff company Schardt fraudulently embezzled of its moneys the sum of $78,956.11, of which $50,856.77 was embezzled during the year ending January 1, 1893; and that during the period covered by the bond insuring his fidelity as cashier he fraudulently appropriated of the plaintiff's moneys the sum of $22,817.30.

The bill also alleged that a few days before his death Schardt assigned to the plaintiff company, as additional indemnity for the losses he had brought upon it, certain policies on his life amounting to $80,000; that upon those policies $20,000 had been collected, and the residue was in dispute; and that Schardt did not give any direction as to which of the bonds insuring his fidelity the insurance moneys when collected should be applied.

The Guarantee Company in its answer insisted that by reason of the violation of the terms and conditions upon which the bonds in question were issued it was not liable to the plaintiff in any sum.

By the decree in the Circuit Court it was adjudged that the amount embezzled by Schardt during the years 1890 and 1891 had been paid out of the assets and collections transferred by him to the bank just before his death; that his embezzlements from and after September 1, 1890, and up to January 1, 1893, amounted, principal and interest, to $52,736.17, while his embezzlements during his term as cashier amounted, principal and interest, to $23,128.69; and that the total amount, princi-

pal and interest, of all his embezzlements while occupying the two positions of teller and cashier, was $107,223.36.

The decree continued:

"It appearing that Schardt had assigned to the bank to indemnify it against loss, two lots of land assigned to J. B. Richardson and life insurance policies amounting to $80,000, some of which policies have been paid to the assignee without suit, and others are now in litigation in this court, or pending on appeal or writ of error to the appellate court of this circuit, held at Cincinnati, the court adjudges upon inspection of said guaranty bonds, their terms and various conditions, and the proof submitted, that the bank has complied with the same and all its undertakings thereunder, substantially; and that said Schardt embezzled and fraudulently appropriated the moneys of the bank while he filled said two positions, to the amounts named; and that interest should be calculated upon said sums from the end of his respective terms.

"The court, after considering the various and numerous defences set up by defendant company, why a recovery should not be had upon either of said bonds, or both, in favor of complainant, is pleased to disallow each and all of said defences, and to order, adjudge and decree that complainant have its decree or judgment against the defendant, the Guarantee Company, upon each of said bonds with interest from the time the same should have been paid according to the terms of said bonds, and for the costs.

"That complainant have judgment on the teller's and collector's bond for the sum of ten thousand dollars principal and the further sum of seven hundred and seventy dollars, being interest at six per cent from 9th of April, 1894, to July 1, 1895; and that complainant have judgment on the cashier's bond against defendant Guarantee Company for the sum of twenty thousand dollars principal and the further sum of $1540.00 interest thereon from April 9, 1894, to July 1, 1895, making in the aggregate of principal and interest on both bonds the sum of thirty-two thousand three hundred and ten dollars ($32,310.00) with interest thereon until paid, and the costs of this suit.

"And the court orders and decrees that the liability of the defendant, the Guarantee Company, is secondary to that of John Schardt's estate; and that the bank or its assignee shall account for all collections realized on assets or collaterals turned over to the bank by said Schardt to reimburse it against his shortage, which it has collected, or with due diligence may collect hereafter; and for his fitness, and for convenience, H. M. Doak is appointed master commissioner to report the same to the next term of this court; and the court orders that the same be applied to the shortage of said Schardt in the order in which the same occurred, and in the meantime no execution will issue against defendants for the same, but only for the costs; and the court orders that this cause may be continued upon the docket of this court, for the purpose only of making any orders necessary to apply all collections from the assets of Schardt, held as collateral, in exoneration, to that extent, of the defendant company and of substituting the defendant to the rights of the bank, in case the recovery herein is collected or paid and any of said assets remain above the amount necessary to satisfy the shortage. But the case is retained for no other purpose, and the decree against defendant company is final as fixing its liability on the bonds to make good the shortage, whatever that may be. This decree is entered in lieu of one entered at a former day of the term and the decree formerly entered is hereby vacated." 68 Fed. Rep. 459.

Upon appeal prosecuted by the Guarantee Company to the Circuit Court of Appeals the decree was affirmed. 54 U. S. App. 108. The case is here upon writ of certiorari.

The Circuit Court of Appeals was without jurisdiction to review the decree of the Circuit Court because that decree was not a final one. 26 Stat. 826, 828, c. 517, § 6. The Circuit Court disallowed all of the defences made by the Guarantee Company and adjudged that upon the showing made that company was primarily liable to the extent of the penalty of each bond, with interest. But the liability of the defendant company was held to be secondary to that of Schardt's estate which was in course of administration, and

the amount for which it could be held finally liable on execution was left to be ascertained by a master commissioner who was directed to take into account "all collections realized on assets or collaterals turned over to the bank by Schardt to reimburse it against his shortage," or which the bank "with due diligence may collect hereafter;" and the case was retained for the purpose of fixing the amount of this ultimate liability to make good Schardt's shortage, "whatever that may be." In effect, the Circuit Court only determined that none of the defences were good in law, and that the Guarantee Company was liable on its bonds for such sum as might thereafter be found to be due after crediting the amounts that might be realized from the assets turned over to the plaintiff bank by Schardt. Notwithstanding the company's defences were adjudged to be bad in law, it remained for the Circuit Court by proper orders to accomplish the object of the suit, namely, to ascertain the amount for which the plaintiff was entitled to judgment and execution. When that amount is judicially ascertained and fixed by a final decree, the adjudication of the cause will be completed for all the purposes of an appeal; and if the decree be affirmed the Circuit Court will then have nothing to do but to carry it into execution. *Railroad Co.* v. *Swasey*, 23 Wall. 405, 409; *Green* v. *Fisk*, 103 U. S. 518, 519; *Dainese* v. *Kendall*, 119 U. S. 53, 54; *Lodge* v. *Twell*, 135 U. S. 232, 235.

The decree of the Circuit Court of Appeals affirming the judgment of the Circuit Court is reversed for want of jurisdiction in the former court, and the cause is remanded with directions to dismiss the appeal prosecuted to that court, and for such further proceedings in the Circuit Court as may be consistent with law.

DULUTH AND IRON RANGE RAILROAD COMPANY *v.* ROY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 221. Submitted March 10, 1899. — Decided April 3, 1899.

When a patent of public lands is obtained by inadvertence and mistake, to the injury of a person who had previously initiated the steps required by law to obtain possession and ownership of such land, the courts, in a proper proceeding, will divest or control the title thereby acquired, either by compelling a conveyance to such person, or by quieting his title.

The claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim.

Ard v. *Brandon*, 156 U. S. 537, is decisive of this case.

THIS is an action to quiet title to the northwest quarter of section number three, in township number sixty-one, north of range number fifteen west of the fourth P. M., State of Minnesota.

It was brought in the district court of the eleventh judicial district of the State against the plaintiff in error and one John Megins. One Moses D. Kenyon was afterwards made a party.

The pleadings consisted of the complaint, separate answers of the defendants and replies of the plaintiff, (defendant in error,) which respectively set up the titles, interests and claims of the parties. As there is no point made on them, they are omitted.

The case was tried by the court without a jury and full findings of fact made, and judgment rendered in favor of the plaintiff, (defendant in error,) adjudging and decreeing him to be the equitable owner of the lands in controversy, and that the defendants "and all persons claiming by or through or under them be and they are hereby forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands or any part thereof adverse to the plaintiff and parties claiming under him."

From this judgment an appeal was taken to the Supreme Court, by which it was affirmed. 72 N. W. Rep. 794.

To the judgment of affirmance this writ of error is directed.

Statement of the Case.

The findings of the court established the following:

The lands were patented to the State of Minnesota by the United States as swamp and overflowed lands, and the plaintiff in error is the grantee of the State. The defendant in error claims under the homestead laws. At the time of the passage of the act of 1860, under which the patent was issued, the lands were not swamp, wet or overflowed, or unfit for cultivation, but were and now are "high, dry and fit for cultivation," except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the *bona fide* intention of acquiring the same under the laws of the United States, established his residence thereon, and has ever since continued to be in the actual, exclusive and notorious possession, maintaining his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township in which they were located had not been filed, but was filed subsequently, and after it was filed, to wit, on the 2d of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be ordered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.

He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relied upon the representations of the officers, and acted upon their advice.

On the 5th of August, 1884, he discovered that the State was claiming the lands as swamp lands; thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the State had arisen or was made to said lands, but his offer of entry was rejected on the ground

that the same had inured to the State under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the General Land Office, and were by him received and filed September 1, 1884.

On the 23d of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff (defendant in error).

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons (*a*) that the legal title to the lands was in plaintiff in error, and that there was no finding that there was a mistake of law or fraud on the part of the General Land Office of the United States or of any officers of the United States; (*b*) the finding that the patent to the State of Minnesota was issued through a mistake or inadvertence does not constitute a ground for adjudging defendant in error the equitable owner of the lands; (*c*) the defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota or invoke the action of the courts to determine its validity.

Mr. J. M. Wilson for plaintiff in error.

Mr. J. M. Vale and *Mr. John Brennan* for defendant in error.

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

Do the facts entitle the defendant in error to the relief which was awarded him by the state courts?

It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will divest or control the title, thereby acquired either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. And in two late cases, *Germania Iron Co.* v. *United States*, 165 U. S. 379; *Williams* v. *United States*, 138 U. S. 514, it was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove or established, or even alleged in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in *Bohall* v. *Dilla*, 114 U. S. 47; *Sparks* v. *Pierce*, 115 U. S. 408; *Lee* v. *Johnson*, 116 U. S. 48. The principles are that to enable one to attack a patent from the Government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard* v. *Brandon*, 156 U. S. 537, and in *Morrison* v. *Stalnaker*, 104 U. S. 213. And because of the well-estab-

lished principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle* v. *Arkansas*, 9 How. 314.

It would be arbitrary to apply the principle to some acts and not to others — might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard *Ard* v. *Brandon* as decisive.

In that case the claimant against the patent, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commissioner of the General Land Office and the Secretary of the Interior, and each decided against him. In this case defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the State of Minnesota he instituted a contest, which was pending in the General Land Office, when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard this difference in the cases substantial.

But it is urged defendant in error may not be able to make final proof, and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings by the court show full qualification in the defendant in error and we cannot presume that the Land Department will find against the fact, which the state courts have found, that the lands "were not, at the time of the passage of the act of March 12, 1860, nor were they ever nor are they now, swamp, wet or overflowed, or unfit for cultivation."

In *Ard* v. *Brandon* relief was adjudged against title derived under patents — one from the State of land certified to it by the United States and one directly from the United States. Equally is the defendant in error entitled to relief against the title claimed by plaintiff in error.

Judgment affirmed.

Syllabus.

HENDERSON BRIDGE COMPANY *v.* HENDERSON CITY.

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

No. 32. Argued May 6, 9, 1898. — Decided April 3, 1899.

This court has jurisdiction to review the final judgment of the state court in this case, for the purpose of ascertaining whether it deprived the defendants of any right, privilege or immunity set up by them under the Constitution of the United States.

The city of Henderson had authority to tax so much of the property of the Henderson Bridge Company as was permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River, it being settled that the boundary of Kentucky extends to low-water mark on the Indiana shore.

The declaration of the state court that Kentucky intended by its legislation to confer upon the city of Henderson a power of taxation for local purposes coextensive with its statutory boundary is binding in this court.

In order to bring taxation imposed by a State within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax.

The taxation by the city as property of the Bridge Company, of the bridge and its appurtenances within the fixed boundary of the city, between low-water mark on the two sides of the Ohio River, was not a taking of private property for public use without just compensation, in violation of the Constitution of the United States.

The Bridge Company did not acquire by contract an exemption from local taxation in respect of its bridge situated between low-water mark on the two shores of the Ohio River.

The provision in the city's charter that "no land embraced within the city's limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less, and unless the same is actually used and devoted to farming purposes," has no reference to bridges, their approaches, piers, etc.

The power of Kentucky to tax this bridge is not affected by the fact that it was erected under the authority or with the consent of Congress.

THE statement of the case will be found in the opinion of the court.

Mr. Malcolm Yeaman and *Mr. William Lindsay* for plaintiffs in error. *Mr. H. W. Bruce* and *Mr. John W. Lockett* were on their brief.

Mr. James W. Clay for defendant in error. *Mr. J. F. Clay* was on his brief.

Mr. Justice Harlan delivered the opinion of the court.

This case arises out of the taxation by the city of Henderson, a municipal corporation of Kentucky, of a railroad bridge (with its approaches, piers, etc.,) extending from a point within that city on the Kentucky shore across the Ohio River to low-water mark on the Indiana shore.

The property subjected to taxation belongs to the Henderson Bridge Company, a corporation of Kentucky, but is under the care, management and control of the Louisville and Nashville Railroad Company, also a corporation of that Commonwealth.

Those corporations insist that the final judgment of the Court of Appeals of Kentucky, here for review, affirming a judgment rendered in the circuit court of Henderson County, is in derogation of rights secured to them by the Constitution of the United States. The grounds upon which this contention rests will appear from the statement presently to be made of the history of the litigation between the city of Henderson and the corporations named in respect of taxes assessed upon the bridge property in question.

The city contends not only that the assessment of taxes upon this property was in all respects valid, but that the matters here in dispute, including the questions of constitutional law raised by the Bridge and Railroad Companies, have been conclusively determined in prior litigation between the parties.

The facts which it seems necessary to state in order to bring out clearly and fully the various questions raised by the pleadings and discussed by counsel are as follows:

The Henderson Bridge Company was incorporated by an act of the general assembly of the Commonwealth of Ken-

tucky approved February 9, 1872, c. 264, with authority to construct "a bridge across the Ohio River, extending from some convenient point within the corporate limits of the city of Henderson to some convenient point on the Indiana side of said river, opposite the city of Henderson." Acts Kentucky 1871–2, Vol. 1, 314.

The city's boundary as defined by its charter granted February 11, 1867, extended "to low-water mark on the Ohio River on the Indiana shore," and it had the power (with certain exceptions not material to be noticed here) to levy and collect taxes at a prescribed rate upon all property within its limits made taxable by law for state purposes.

In 1882 an ordinance was passed by the common council of the city granting to the Henderson Bridge Company the right "to construct on or over the centre of Fourth street in the city of Henderson, and of the line thereof extended to low-water mark on the Indiana side of the Ohio River, such approaches, avenues, piers, trestles, abutments, toll-houses and other appurtenances necessary in the erection of and for the business of a bridge over the Ohio River, from a point in the city of Henderson to some convenient point on the Indiana side of said river, and for such purposes the use of said Fourth street is hereby granted, subject to the terms and conditions hereinafter expressed;" also, the right "to use the space between Water street in said city and low-water mark in the Ohio River, extending one hundred feet below the centre of Fourth street extended and three hundred feet above the centre of said street extended to the Ohio River for the purpose required by said company." The company was also permitted to "erect, or authorize or cause to be erected, grain elevators within said space above high-water mark, and may construct therefrom to the river such apparatus and machinery as may be necessary to convey grain from boats to such elevators, and may have the use of said space for the landing of boats laden with freight for such elevators and construct floating docks or use wharf boats within such space for the accommodation of such boats and the conduct of the business of such bridge and of the said elevators free of

wharfage, subject to the terms and conditions hereinafter expressed."

The fourth section of that ordinance declared that it should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said Bridge Company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city."

The fifth section provided that before any of the rights or privileges so granted should inure to the benefit of or vest in the Bridge Company the latter should by proper authority append to a certified copy of the ordinance their acceptance of and agreement to abide by and faithfully keep its terms and conditions, such acceptance and agreement to be acknowledged by the proper authority of the company as provided in the case of a deed under the laws of Kentucky, and delivered to the clerk of the Henderson city council.

The Bridge Company duly accepted the ordinance with its terms and conditions, agreed to abide by and faithfully keep the same, and its acceptance was acknowledged and delivered to the city council.

In 1884, an agreement in writing was entered into between the Bridge Company and the Louisville and Nashville Railroad Company reciting that the former was about to proceed with the erection of a bridge over the Ohio River at or near Henderson, and of a railroad connecting the Henderson division of the Louisville and Nashville Railroad Company at Henderson with the South East and St. Louis Railway in or near Evansville, Indiana; that certain railroads, including the Louisville and Nashville Railroad Company, had by agreement guaranteed to the Bridge Company an income from traffic amounting to two hundred thousand dollars per annum; and that it was deemed for the interest of all parties, and had been requested by the bondholders under the mortgage placed on the bridge, that the Louisville and Nashville Railroad Company should assume the control, management and care of the track of said railroad so to be constructed, and should effect the usual repairs to such bridge caused by

ordinary wear and tear, and pay taxes imposed on said track and the bridge on compensation being made therefor by the Bridge Company. By that agreement the Bridge Company undertook to pay the Railroad Company absolutely and in each year during the continuance of the agreement, in equal quarter-yearly payments, the sum of ten thousand dollars per annum, which amount or such parts thereof as were required the Railroad Company agreed to apply to the maintenance of the track and roadbed of said railroad in good condition and repair, and towards the usual and ordinary repairs of the bridge; and also to pay all taxes imposed on said track or bridge structure and each of them.

On the 8th day of December, 1887, the city by petition filed in the circuit court of Henderson County, Kentucky, — that mode of collecting taxes being authorized by the local law — brought suit against the Henderson Bridge Company to recover the sum of $44,324 as the amount of taxes with penalties thereon due from the Bridge Company under ordinances passed by the city in 1885, 1886 and 1887, levying and assessing taxes for certain purposes. The petition referred to the above ordinance authorizing the construction of the bridge, and among other averments in it were the following:

"The defendant commenced the construction of said bridge in the year 1883 and completed same in the month of July, 1885, and at a cost of about $2,000,000, and on the — day of July, 1885, the first train ran over said bridge. The approach to said bridge is constructed over Fourth street, near the principal portion of said city, commencing at the west line of Main street and extending to the main structure of said bridge at Water street (though, plaintiff claims, not in accordance with the terms of said ordinance). The rights and privileges granted by the plaintiff to the defendant were of great value, and the plaintiff was influenced and induced to so grant them by the belief in the right on the part of the plaintiff to tax said bridge as other property is taxed within the city limits. By the building of said bridge through the rights and privileges so granted by the plaintiff the system of roads north of the Ohio River has been connected with the

Louisville and Nashville Railroad south of the river, and the said Bridge Company's property has become so valuable that its bonds to the amount of about $2,000,000 are worth a premium of 8½ per cent."

The assessment against the Bridge Company on account of the bridge and its approaches was upon a valuation of $600,000 in 1885 and $1,000,000 in each of the years 1886 and 1887. In its petition the city claimed a lien upon the bridge from the beginning of its approach at Main street in the city of Henderson to low-water mark on the Indiana side of the Ohio River for said taxes and the penalties thereon.

The Bridge Company in its answer denied the material allegations of the petition and alleged —

That the city had no authority to levy taxes for the purposes indicated in the ordinances referred to;

That the declaration in the ordinance granting the right to construct the bridge within the city's limits meant and was intended to mean nothing more than that the city did not waive any right to tax then possessed by it;

That the bridge was built only for the purpose of laying a single railroad track on which to move locomotives and cars between Kentucky and Indiana over the Ohio River;

That except as to that part of the bridge commencing at the west line of Main street in the city of Henderson and extending to the main structure at Water street, the Bridge Company derived no assistance or protection from the city, and that part between the Kentucky and Indiana shores upon stone piers and pillars resting upon the bed of the Ohio River was not subject to taxation by the city;

That the bridge was located and constructed in conformity with the two acts of the Congress of the United States, the one entitled "An act to authorize the construction of bridges across the Ohio River and to prescribe the dimensions of the same," approved December 17, 1872, c. 4, 17 Stat. 398; and the other entitled "An act supplemental to an act approved December 17, 1872, entitled An act to authorize the construction of bridges across the Ohio River and to prescribe the dimensions of the same," approved February 14, 1883, c. 44, 22 Stat. 414;

That the whole of said bridge between the Kentucky shore and the Indiana shore, 1968 feet in length, was over the water of the Ohio River, except the piers or pillars that support it;

That the Ohio River was a navigable stream within the entire control and jurisdiction of Congress and the courts of the United States, and that assumption of control by the city of that part of the bridge for purposes of taxation or for any purpose except for executing writs from its police authorities, would be in violation of the Constitution of the United States, the laws of Congress and the rights of the defendants; and,

That, as the bridge derived no profit, protection or advantage from the government of the city, to subject it to city taxation would be to take private property for public use without just compensation, in violation of the Constitution of the United States as well as of the Constitution and laws of Kentucky and of the defendant's rights in the premises.

The answer of the Bridge Company further alleged —

That the Louisville and Nashville Railroad Company was a necessary party to that suit;

That when it constructed its bridge it was the settled law of Kentucky, as shown by the judgment of the Court of Appeals of Kentucky in *Louisville Bridge Co.* v. *Louisville*, 81 Kentucky, 189, that the part of the bridge erected over and across the Ohio River was not liable to municipal taxation;

That relying upon such being the law of Kentucky the defendant and the Louisville and Nashville Railroad Company entered into the above agreement of February 27, 1884; and,

That to grant to the plaintiff the relief prayed for or any part thereof would be a direct impairment of the contract between the Bridge Company and the Railroad Company.

The Railroad Company having been made a party, adopted the answer of the Bridge Company.

The state circuit court adjudged that the bridge being in an incomplete condition on the 10th day of January, 1885, the city was not entitled to tax it for that year. But as to the years 1886 and 1887, it was adjudged that the bridge and the approach thereto were subject to taxation for all the pur-

poses and for the amounts claimed in the city's petition; and that the city had a lien upon the bridge structure, masonry piers and the approach thereto situated within its boundary extending to low-water mark on the Indiana side of the Ohio River, for the taxes assessed for the years 1886 and 1887 with interest and costs expended. The Bridge Company was directed to pay said sums, with interest and costs, to the plaintiff on or before a named day.

In a brief opinion of the state circuit court it was said that the taxable boundary of the city was coextensive with its statutory boundary. Referring to the case of the *Louisville Bridge Co.* v. *Louisville*, 81 Kentucky, 189, the court held that that case decided nothing more than that the legislature did not intend that the bridge *there* in question should be subject to taxation. It was further said: "Several cases are relied on where the Court of Appeals have relieved parties from the payment of taxes on agricultural lands when the city limits had been extended without the owner's consent. The rule, if one has been established by those cases, should not be extended to cases where property has been voluntarily brought within such boundaries. The party thus bringing in his property should be treated as one who sanctioned the extension of a city so as to include his agricultural lands. All that can be deduced from these cases is that in each extension of a town or city the court will hear the complaints of any taxpayer and grant or not grant him relief, as the merits of his particular case may demand. In this case the defendants voluntarily placed their property within the legally established limits of the city and should pay the taxes assessed on other property holders of the city after 1885."

The Bridge Company and the Railroad Company prosecuted an appeal to the Court of Appeals of Kentucky, and the city was granted a cross-appeal from so much of the judgment as disallowed its claim of taxes for 1885.

In the Court of Appeals of Kentucky the judgment was affirmed. In its opinion it is apparently conceded that the city could not under its charter tax the bridge structure over the river for ordinary municipal purposes, that is "for the support

of its government proper." But it was said that if the city was created a taxing district it could do so. Referring to the contract or terms upon which the Bridge Company acquired the right to construct its bridge within its limits, and particularly to the clause declaring that the ordinance should not be construed as waiving the right of the city to tax the bridge and its appurtenances within the corporate limits of the city, the court said:

"The appellant contends it was only meant to reserve the right to tax such property of the appellant as was theretofore subject to taxation by the city government, and, as that part of the bridge situated on the water of the Ohio River was not, for the reason above indicated, subject to taxation, the reservation relates to that part of the bridge, etc., that the appellee had the right to tax under the law. It is evident that the contract was well considered and prudently drafted by men skilled in that kind of work, and it is not presumed that they engaged in a mere *nudum pactum*, but they meant to set forth a business transaction. Now, that business transaction was evidently this: The appellant desired rights and privileges that it did not possess and which it could not possess without the consent of the appellee. So it said to the appellee, Grant these privileges; and you may tax, what? Only the approach to said bridge? No; because the appellee already had the right to tax that, and it had made no concessions that could possibly be construed as waiving that right. What right, then, was granted? Why, the right to tax the 'bridge itself.' The bridge, as distinguished from the abutments and approaches, is that part that is over the water. Now, the appellee, according to the *Louisville Bridge case*, in its municipal capacity, had no right to tax that part of the bridge over the water. Why, then, say that it did not waive the right to tax it? To waive a right there must be a claim of right to waive. Well, it is said, as the appellee had no right to tax the bridge, there was in fact no right to waive. As an abstract proposition of the right to tax the bridge on the water (according to said case), this contention is true. But it is equally true that the appellee had the right, if asserted and

agreed to, to claim that the bridge should be taxed in consideration of the privileges granted. This claim of right, it must be presumed, was asserted and agreed to and expressed in the contract by the term 'not waiving the right.' If the contract does not mean this, then it means nothing. It is not supposed that the contracting parties only meant to reserve a right that they already had and about which there was no possible ground of dispute. But when it is considered that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract, and that the appellee granted to the appellant rights and privileges essential to its enterprise, designed to make money, and is making a large per cent, it is entirely reasonable to suppose that the appellees would contract for the right to thus tax the appellant in consideration of granting these essential rights and privileges, by which the appellant acquired the right to construct and operate so profitable a business enterprise. So it seems much more reasonable to suppose that the contracting parties intended to do this reasonable thing, to wit, to receive some consideration for the grant of privileges rather than indulge in a mere *nudum pactum*. The appellant, at least, for the purpose of collecting taxes, should be considered as a part of a railroad; consequently, falls within the principle announced in *Elizabethtown & Paducah Railroad* v. *Elizabethtown*, 12 Bush, 233, 239." 14 S. W. Rep. 493.

Chief Justice Holt delivered a separate opinion, in which he said: "The legislature by authorizing the imposition and collection of the railroad and school taxes upon the real estate within the city limits created a taxing district. The power to collect these taxes was therefore conferred upon the appellee as such a district, and the appellant's property, being within it, is liable for them. As to the municipal taxes proper, the appellant's property is within the corporate limits, and, in my opinion, receives such benefits from the municipal government as render it both legally and justly liable for them." 14 S. W. Rep. 493, 496.

The Bridge Company and the Railroad Company sued out a writ of error from this court, but the writ was dismissed

upon the ground that although a Federal question may have been raised in the state court, the judgment of the latter court rested upon grounds broad enough to sustain the decision without reference to any such question. Mr. Justice Blatchford, delivering the opinion of the court, said: "The opinion of the state court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the Bridge Company voluntarily agreed that the bridge should be liable to taxation. This does not involve a Federal question, and is broad enough to dispose of the case without reference to any Federal question. This court cannot review the construction which was given to the ordinance as a contract by the state court. There is nothing in the suggestion that the taxation of the bridge is a regulation of commerce among the States, or is the taxation of any agency of the Federal Government. The case of *Louisville Bridge Co.* v. *City of Louisville*, 81 Kentucky, 189, was not decided until May, 1883, more than a year after the ordinance of the city of Henderson was accepted by the Bridge Company, in February, 1882. The contract of February, 1884, between the Bridge Company and the Railroad Company, was made more than two years after the ordinance of February, 1882, came into existence. Neither the opinion of the Court of Appeals in the present case, nor that of Chief Justice Holt, nor that of the circuit court of the State, puts the decision upon any Federal question; and on this writ of error to the state court, we are bound by its interpretation of the contract contained in the ordinance, in view of the Constitution and laws of Kentucky, and cannot review that question." *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679, 689.

By an act of the general assembly of Kentucky, approved April 9, 1888, c. 928, the charter of the city of Henderson was repealed, and the city reincorporated with the following boundaries: "Beginning at a stone on the west side of the Madisonville road; thence north 48° 35′ east, five thousand six hundred and forty-one feet to a stone near the White bridge on the Henderson and Zion Gravel Road; thence in a straight line north 11° 35′ west to the dividing line of the

ten-acre lots Nos. 4 and 5; thence with the dividing line of said lots north 71° west to low-water mark on the Ohio River on the Indiana shore; thence down the river with the meanders thereof at low-water margin to a point opposite the south line of Hancock street; thence across said river south 59° east along the south line of said Hancock street in a straight line to the beginning." Kentucky Acts 1887–8, vol. 2, 937. That act, as did the original charter of the city, gave the common council power, within the limits of the city, to levy and collect taxes at a prescribed rate upon all property in the city subject to taxation under the revenue laws of the State for state purposes, with certain exceptions which need not be stated.

The common council, by an ordinance passed in 1888 and providing for the annual tax levies for that year, imposed an *ad valorem* tax "on all property within the limits of the city of Henderson subject to taxation under the present revenue laws of the State of Kentucky for state purposes, to be paid by the owners of said property, respectively; provided, however, that no land embraced within the city limits and outside of the ten-acre lots as originally laid off shall be assessed and taxed by the council, unless the same is divided and laid off into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes." Similar ordinances were passed providing the annual tax levies for the fiscal years 1889 and 1890. As appears from the ordinances, these taxes were laid for the purpose of raising money sufficient to pay interest on the city's bonded indebtedness, defray the ordinary expenses of the city government, and meet the annual expenses of the public schools of the city.

Under the above ordinances, the city caused the bridge in question to be assessed by the city assessor for taxation to low-water mark on the Indiana side of the Ohio River, as other property in the city, for the years 1888, 1889 and 1890, at a valuation of one million dollars for each of those years.

The present suit was instituted by the city against the Bridge Company and the Louisville and Nashville Railroad

Company to recover the amount of taxes for the years 1888, 1889 and 1890 alleged to be due under the above assessments. It is not disputed that those assessments embraced the bridge and its piers between low-water mark on the Kentucky side of the Ohio River and low-water mark on the Indiana shore.

During the progress of the cause the plaintiff dismissed its suit so far as it related to taxes for the year 1890 without prejudice to any future action by it to recover those taxes.

The Bridge Company filed its answer, in which — after stating some grounds of defence which did not specifically rest on the Constitution or laws of the United States — it was averred —

That when it accepted its charter it was the settled law of Kentucky and had been for more than forty years, as declared in many cases by its highest court, that real estate within the boundaries of a town or city could not be taxed for municipal purposes unless it was capable of being profitably used and converted into town property and also received benefits both actual and presumed from the municipal government seeking to tax such property;

That the defendant constructed its bridge on the faith of the law of the Commonwealth as thus long established, and that the law thus established became a part of the contract between Kentucky and the defendant growing out of the granting and acceptance of its charter;

That it was also the settled law of Kentucky when the bridge in question was constructed that in the case of bridges across the Ohio River from a point in a city or town whose boundary extended to low-water mark on the northern shore of the Ohio River a city or town had no power or authority under a charter duly enacted authorizing the taxation of property by the municipal government within its corporate boundary to tax such bridge beyond low-water mark on the Kentucky or southern side of said river;

That a city boundary fixed at low-water mark on the Indiana shore was not, in the meaning and intent of the legislative act so fixing it, intended to define the taxable boundary

of the city but only to confer upon the city jurisdiction for police purposes upon the waters of the river to the Indiana shore, and that it was further settled by the court in the case of *Louisville Bridge Co.* v. *Louisville*, 81 Kentucky, 189, that such an act, if intended to confer a taxing power over property erected in said stream beyond the low-water mark on the Kentucky side, was in violation of that provision of the Constitution of this State which prohibits the taking of private property for public purposes without just compensation, and of the like provision of the Constitution of the United States, and would, to the extent it conferred on the city such power, be absolutely null and void, and that the city could not tax said property for water works, school or railroad purposes, nor for any municipal purposes whatever;

That the defendant relying upon the law as thus established went forward and built its bridge to low-water mark on the Indiana shore of the Ohio River, and the legislative acts and city ordinances pleaded by plaintiff as authority for the collection of the tax upon that part of the bridge beyond low-water mark of the Ohio River on the Kentucky shore have all been passed since the law of Kentucky was settled as above stated, and are null and void as contrary to that provision of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts, and as contrary to those constitutional provisions, state and Federal, that prohibit the taking of private property for public uses without just compensation;

That the above legislative acts and ordinances constitute the only authority the plaintiff has for the assessment of defendant's property or the levy and collection of the taxes thereon sued for herein, and the said act of April 9, 1888, which constituted the only authority the city of Henderson has to levy or collect taxes for any purposes or upon any property, and the alleged city ordinances of May, 1888, and of April 24, 1889, and of May 24, 1890, were each and all passed and ordained subsequent to the acceptance by the defendant of its charter of incorporation and its expenditure of the large sums of money aforesaid in the construction of its bridge, and to the

extent that the said act or the said ordinances or either of them do or may authorize any portion of defendant's bridge structure situated north of low-water mark on the Kentucky shore to be taxed are null and void because repugnant to the Constitution of the United States;

That the defendant has at all times been willing to pay taxes for the purposes set out in the petition on that portion of its bridge which is in fact and in the sense of the legislative acts referred to within the boundary of the city of Henderson, to wit, from the beginning of the approach on the west side of Main street to low-water mark of the Kentucky shore; and,

That the taxable boundary of the plaintiff on the Ohio River is the low-water mark on the Kentucky shore.

The answer of the Bridge Company further averred: "The territory on both sides of the Ohio River was, prior to the year 1784, a part of the State of Virginia, in which year she ceded to the United States the territory north and west of said river. On the 18th of December, 1789, the Congress of the United States passed the 'Compact with Virginia,' which authorized the establishment of the State of Kentucky, and which compact defined the rights of the said State in and to the Ohio River. By the eleventh section of that compact it is provided 'that the use and navigation of the river Ohio, so far as the territory of the proposed State (Kentucky) or the territory which shall remain within the limits of this Commonwealth (Virginia) lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of this Commonwealth and the proposed State on the river aforesaid shall be concurrent only with the States which may possess the opposite shores of said river;' that by said compact, formed and ratified between the United States and the States of Virginia and Kentucky, the bed of the Ohio River, so far as it is permanently under water, is the common property of the people of the United States; that it forms a great interstate highway of commerce, in which a great part of the country has a direct interest, and cannot be made the subject of taxation by the State of Kentucky nor any municipal government created by said State, and is by the Constitution and

laws of the United States under the exclusive control of the Government of the United States; that said stream is a navigable stream from its source to its mouth, and the defendant's bridge sought to be taxed by this proceeding is located and built under the permission and authority of and as required by an act of the Congress of the United States entitled 'An act to authorize the construction of bridges across the Ohio River and prescribe the dimensions of the same,' approved December 17, 1872, and another act of said Congress entitled 'An act supplemental to an act approved December 17, 1872, entitled An act to authorize the construction of bridges across the Ohio River and prescribe the dimensions of same, approved February 14, 1883,' and the defendant submits that the plaintiff has no jurisdiction over said stream to tax any property placed therein by authority of Congress, and for plaintiff to assume to tax said bridge thus situated would be violative of the Constitution of the United States, the laws of Congress, and of the defendant's rights in the premises."

The Bridge Company defended the action upon the further ground that the relief asked by the city could not be granted without directly impairing the obligation of the contract between it and the Railroad Company; which contract, it was insisted, was to be interpreted in the light of the law of Kentucky as it was when such contract was made and without reference to subsequent legislative acts and ordinances inconsistent with its provisions.

The Railroad Company adopted the answer of the Bridge Company — averring, among other things, that to grant the plaintiff the relief prayed for or any part thereof would be a direct impairment of the obligation of the contract between the Railroad Company and the Bridge Company and a violation of the tenth section of the first article of the Constitution of the United States.

The city filed a reply, in which the material allegations of the answers were controverted. It accompanied its reply with a transcript of the proceedings in the above suit between it and the Bridge and Railroad Companies brought in 1887 to recover the taxes assessed for the years 1885, 1886 and 1887,

including the proceedings in this court on the appeal prosecuted by those companies. The reply concludes: "The plaintiff says that the right of plaintiff to assess and collect the taxes sued for against the defendant the Henderson Bridge Company, its jurisdiction thereon, and all questions raised by the pleadings in this case, except as to the passage of the ordinances alleged, are now *res judicata*, and plaintiff pleads and relies upon same as a bar to defendants' pleas herein, and prays as in its petition."

Judgment was rendered in favor of the city for the taxes (with interest and penalties) for the years 1888 and 1889; and it was adjudged that for the amounts found due the city "has a lien upon the bridge structure, masonry and piers (mentioned in the petition) and the approach thereto situated within the boundary of the State of Kentucky and extending to low-water mark on the Indiana side of the Ohio River." That judgment having been affirmed by the Court of Appeals of Kentucky, the present writ of error was sued out.

1. If the state court had sustained the city's plea of *res judicata* upon some ground that did not necessarily involve the determination of a Federal right, it might be that the present case would come within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a State will not pass upon a Federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such Federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly waived any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defence, namely, that the Constitution of the United States forbade the assessment of that part of the

bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River. This court therefore has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it deprived the defendants of any right, privilege or immunity specially set up by them under that instrument.

2. Whether the city of Henderson had authority to tax so much of the property of the Bridge Company as was permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River depends primarily upon the question whether the boundary of Kentucky extended to low-water mark on the Indiana shore. That question has been settled by judicial decisions. But it may be well to restate here the grounds of those decisions.

Pursuant to a resolution of Congress passed in 1780, recommending to the several States asserting title to waste and unappropriated lands "in the western country" that a liberal cession be made by them to the United States of a portion of their respective claims for the common benefit of the Union, the Commonwealth of Virginia, by an act passed January 2, 1781, surrendered to the United States all her right, title and claim "to the lands northwest of the river Ohio," subject to certain conditions, one of which was that the ceded territory should be laid out into States. 10 Hening's Stat. 564. The United States having accepted that cession substantially according to the conditions named, Virginia by an act passed December 20, 1783, c. 18, authorized her delegates in Congress to convey to the United States all her right, title and claim "as well of soil as jurisdiction" to the territory or tract of country within the limits of the Virginia charter situated "to the northwest of the river Ohio." 11 Hening's Stat. 326. Such a deed was executed in 1784 by Thomas Jefferson, Samuel Handy, Arthur Lee and James Monroe, representing Virginia — the deed describing the territory conveyed as "situate, lying and being to the northwest of the river Ohio." On the 13th day of July, 1787,

Congress passed an ordinance for the government of the territory of the United States "northwest of the river Ohio." That ordinance provided among other things that "no tax shall be imposed on lands the property of the United States," and that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor." 1 Stat. 51, note. Virginia, by an act passed December 20, 1788, c. 79, and which referred to the above ordinance, declared that "the afore-recited article of compact between the original States and the people and States in the territory northwest of the Ohio River, be and the same is hereby ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this Commonwealth to the United States notwithstanding." 12 Hening's Stat. 780. On the 18th day of December, 1789, the General Assembly of Virginia passed the act entitled "An act concerning the erection of the District of Kentucky into an independent State." c. 14. That act provided for a convention in Kentucky to consider and determine whether that district should be formed into an independent State. Its eleventh, fourteenth, fifteenth and eighteenth sections were in these words: "§ 11. That the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this Commonwealth and of the proposed State on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river." "§ 14. That if the said convention shall approve of the erection of the said District into an independent State on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this

Commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed State, and the said articles become a solemn compact, mutually binding on the parties, and unalterable by either without the consent of the other. § 15. *Provided, however*, That, prior to the first day of November, one thousand seven hundred and ninety-one, the General Government of the United States shall assent to the erection of the said District into an independent State, shall release this Commonwealth from all its Federal obligations arising from the said District as being part thereof, and shall agree that the proposed State shall immediately after the day to be fixed as aforesaid, posterior to the first day of November, one thousand seven hundred and ninety-one, or at some convenient time future thereto, be admitted into the Federal Union." "§ 18. This act shall be transmitted by the Executive to the Representatives of this Commonwealth in Congress, who are hereby instructed to use their endeavors to obtain from Congress a speedy act to the effect above specified." 13 Hening's Stat. 17. This was followed by an act of Congress approved February 4, 1791, c. 4, 1 Stat. 189, which referred to the above Virginia act of December 18, 1789, and expressed the consent of Congress that the said District of Kentucky, "within the jurisdiction of the Commonwealth of Virginia, and according to its actual boundaries on the 18th day of December, 1789," should, on the 1st day of June, 1792, be formed into a new State, separate from and independent of the Commonwealth of Virginia.

Early in the history of Kentucky some doubts were expressed as to the location of the western and northwestern boundaries of that Commonwealth, and to quiet those doubts its legislature passed the following act, which was approved January 27, 1810, c. 152: "Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which *Be it enacted by the General Assembly*, That each county of this Commonwealth, calling

for the river Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the mainland opposite thereto, within this State, and the several county tribunals shall hold jurisdiction accordingly." Kentucky Sess. Laws 1810, p. 100.

Next in order of time and as determining the boundary line of Kentucky is the judgment of this court in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 379, 380 (1820), which case involved the question of the western and northwestern boundaries of that Commonwealth. This court adjudged, upon a review of the legislative acts and public documents bearing upon the question — Chief Justice Marshall delivering its opinion — that although a certain peninsula or island on the western or northwestern bank of the Ohio, separated from the mainland by only a narrow channel or bayou which was not filled with water except when the river rose above its banks, was not within Kentucky as originally established, the boundary of that Commonwealth did extend to low-water mark on the western and northwestern banks of the Ohio. "When a great river," said the Chief Justice, "is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State [Virginia] is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created State extends to the river only. The river, however, is its boundary." "Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

The question of boundary was again before this court in *Indiana* v. *Kentucky*, 136 U. S. 479, 505, 519. That was a controversy between Kentucky and Indiana as to the boundary lines of the two States at a particular point on the Ohio River. Mr. Justice Field, delivering the unanimous judgment

of the court, after referring to all the documentary evidence relating to the question and to the decision in *Handly's Lessee* v. *Anthony*, above cited, said: "As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry therefore is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river." Referring to the channel of the Ohio River as it was when Kentucky was admitted into the Union, this court stated its conclusion to be that "the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel."

The same view of the question of boundary was taken by the Court of Appeals of Kentucky in *Fleming* v. *Kenney*, 4 J. J. Marsh, 155, 158; *Church* v. *Chambers*, 3 Dana, 274, 278; *McFarland* v. *McKnight*, 6 B. Mon. 500, 510; and *McFall* v. *Commonwealth*, 2 Met. 394, 396, and by the General Court of Virginia in *Commonwealth* v. *Garner*, 3 Gratt. 655, 667.

Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River.

Such being the case, it necessarily follows that the jurisdiction of that Commonwealth for all the purposes for which any State possesses jurisdiction within its territorial limits is coextensive with its established boundaries, subject of course to the fundamental condition that its jurisdiction must not be exerted so as to intrench upon the authority of the National Government or to impair rights secured or protected by the National Constitution.

3. But the plaintiffs in error insist that although the jurisdiction of Kentucky may extend to low-water mark on the opposite shore of the Ohio River, the city of Henderson cannot assess for taxation any part of the property of the Bridge Company between low-water mark on the Kentucky shore

and low-water mark on the Indiana shore without violating the Constitution of the United States in particulars to be adverted to presently.

In considering this objection so far as it is rested on Federal grounds, we shall assume that the action of the city of Henderson was authorized by the terms of its charter and was in no respect forbidden by any principle of local law. Upon these points we accept the decision of the highest court of Kentucky as conclusive. We accept also as binding upon this court the declaration of the state court that Kentucky intended by its legislation to confer upon the city of Henderson a power of taxation for local purposes coextensive with its statutory boundary. But we may add, as pertinent in the consideration of the Federal questions presented, that if the Commonwealth of Kentucky could tax for state purposes the bridge property so far as it was between low-water mark on the Kentucky shore and low-water mark on the Indiana shore, it could confer upon one of its municipal corporations the power to tax the same property for local purposes. So that a judgment declaring the taxation of such property by the city of Henderson for local purposes, under the authority of the State, to be forbidden by the Constitution of the United States, would in effect declare that like taxation by the State for state purposes would be forbidden by that instrument.

It is said that the bridge property outside of low-water mark on the Kentucky shore is so far beyond the reach of municipal protection by the authorities of the city of Henderson that it cannot be said to receive any benefits whatever from the municipal government, and that to impose taxes for the benefit of the city upon such property is a taking of private property for public use without just compensation, and therefore inconsistent with the due process of law ordained by the Fourteenth Amendment of the Constitution of the United States. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 241. It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation.

But in order to bring taxation imposed by a State or under

its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. In the case before us the state court rejected the idea that the bridge property in question was entirely beyond municipal protection and could not receive any of the benefits derived from the municipal government of the city of Henderson. We cannot adjudge that view to be so clearly untenable as to entitle the defendants to invoke the principle that private property cannot be taken for public use without just compensation.

On the contrary, the property which it is contended was illegally taxed is all within the territorial limits of Kentucky, within the statutory boundary of the city of Henderson, and within reach of the police protection afforded by that city for the benefit and safety of all persons and property within its limits; not perhaps as much or as distinctly so as that part of the bridge on the Kentucky bank south of low-water mark on that shore; but this difference does not constitute a reason why the city may not regard the bridge and its appurtenances within its statutory boundaries as an entirety for purposes of taxation, nor afford any proper ground for holding that the constitutional right to compensation for private property taken for public use has been violated. The Court of Appeals of Kentucky in its opinion in this case said: "Applying the just and equitable rule of making burdens and benefits of government reciprocal, we think the whole bridge structure within the corporate limits of the city of Henderson is liable for municipal taxes, for neither the benefits to the Bridge Com-

pany are lessened nor its corresponding duty to bear its full share of the burden is impaired or affected by the fact that a portion of the bridge is over water." We are unwilling to hold that the state court in so adjudging has prescribed any rule of taxation inconsistent with the supreme law of the land.

In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government. The Court of Appeals of Kentucky, speaking by Chief Justice Marshall, in *Cheaney* v. *Hooser*, 9 B. Mon. 330, 345, after observing that there must necessarily be vested in the legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: "There must be a palpable and flagrant departure from equality in the burden as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others or for purposes in which they have no interest, and to which they are therefore not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

Proceeding upon the ground distinctly affirmed by the highest court of Kentucky that the city of Henderson was authorized by the State to exert its power of taxation as to all property within its statutory boundary, and assuming it to be conclusively established by judicial decisions that the boundary and jurisdiction of Kentucky extends to low-water mark on the Indiana side of the Ohio River, we adjudge that the taxation by the city, as property, of the bridge and its appur-

tenances within the fixed boundary of the city, between low-water mark on the two sides of the Ohio River, was not a taking of private property for public use without just compensation in violation of the Constitution of the United States.

4. Another contention of the defendants is that the acceptance by the Bridge Company of its charter and the construction of the bridge under it created a contract between that company and the State, whereby the bridge structure north of low-water mark on the Kentucky shore of the river was exempted from taxation for any local purpose; and that the tax ordinances of the city of Henderson, on which the taxation in question is based, impair the obligation of that contract, and for that reason are repugnant to the Constitution of the United States.

Did the Bridge Company acquire by contract an exemption from local taxation in respect of its bridge situated between low-water mark on the two shores of the Ohio River? We think not. The charter of the city of Henderson shows that its boundary extended to low-water mark on the Indiana shore of that river, and that the common council was invested with authority to levy and collect taxes at a prescribed rate upon all property "within the limits of the city" which was taxable by law for state purposes, with certain specified exceptions that have no relation to the particular question just stated. So that the grant made in 1882 to the Bridge Company was made subject to the taxing power thus possessed by the municipal authorities of the city of Henderson. And that there was no purpose on the part of the city to waive any right it possessed to tax property for municipal purposes is made clear by the express stipulation that the grant to the Bridge Company should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said Bridge Company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city." This stipulation properly interpreted not only saved any right the city then had to impose taxes, but any right that might subsequently be lawfully conferred upon it. An exemption

from taxation cannot arise from mere implication, but only from words clearly and unmistakably granting such an immunity.

But let it be assumed, for the purposes of the present case, that the stipulation only embraced such right of taxation as the city had at the time it granted authority to construct the bridge within its limits. In that view, the defendants insist that interpreting the charter of the city and the grant to the Bridge Company in the light of the law of Kentucky, as established at the date of that grant by repeated decisions of its highest court, property such as this bridge situated between low-water mark on the two shores of the Ohio River, although within the statutory boundary of the city, was not within the limits of the city for purposes of municipal taxation; for, it is contended, the bridge structure so taxed did not and could not receive from the municipal government any benefits, actual or presumed. The cases in the Court of Appeals of Kentucky, decided before the Bridge Company accepted its charter, upon which defendants rely in support of this contention are *Cheaney* v. *Hooser*, 9 B. Mon. 330 (1848); *Covington* v. *Southgate*, 15 B. Mon. 491, 498 (1854); *Marshall* v. *Donovan*, 10 Bush, 681, 692 (1874); and *Courtney* v. *Louisville*, 12 Bush, 419 (1876). These cases related to the taxation by municipal corporations of lands which, it was alleged, were so situated as not to receive any benefit whatever from the government of such corporations. The general principle to be deduced from them is that the taxation of lands for local purposes which do not receive any benefit, actual or presumed, from the municipal government imposing the taxation is a taking of private property for public use without compensation, and therefore in violation of the constitutional provision on that subject. So that if the charter of the Bridge Company was accepted with reference to the law of Kentucky as it was then judicially declared by its highest court — as may well be assumed — the utmost that can be asserted is that the company had a contract with the State which prohibited it or any municipal corporation acting under its authority from subjecting such of the bridge property to local taxation as could not receive any

benefit, actual or presumed, from the government of that corporation.

In those cases the court wisely refrained from laying down any general rule that would control every controversy that might arise touching the application of the constitutional provision prohibiting — as did the constitution of Kentucky as well as that of the United States — the taking of private property for public use without just compensation. So far as those adjudications are concerned, it is competent for the court to inquire in every case as it arises whether particular property taxed for local purposes is so situated that it cannot receive any benefit, actual or presumed, from the government of the municipal corporation imposing such taxation. The argument of the learned counsel assumes it to be incontrovertible that the bridge property here taxed cannot receive any such benefit from the government of the city of Henderson. As already indicated this court does not accept that view, and is of opinion that the bridge property within the statutory limits of that city, and looked at in its entirety, may be regarded as so situated with reference to the city that it enjoys and must continue to enjoy as long as the bridge exists such benefits from the government of the city that, consistently with the Constitution of the United States, and consistently with the rule heretofore adverted to for determining the validity of legislative enactments, it may be subjected to municipal taxes under any system established by the State for the assessment of property for taxation. In this view there is no ground upon which to base the contention that the ordinance of the city imposing the taxation in question impairs the obligation of any contract between the Bridge Company and the State arising from the acceptance by that company of its charter and the construction of the bridge under it.

What has been said disposes of the contention that to sustain the validity of the ordinances under which the bridge was taxed would impair the obligation of the contract between the Bridge Company and the Louisville and Nashville Railroad Company. It is scarcely necessary to observe that no

contract between the Bridge Company and the Railroad Company could stand in the way of the city exerting, as between it and the Bridge Company, any power of taxation it legally possessed. If the taxation in question did not impair the obligation of any contract between the city and the Bridge Company — and we have held that it did not — it results that the Railroad Company cannot complain of such taxation. The agreement between the Bridge Company and the Railroad Company was necessarily subject to the exercise by the city of any authority it had or might have touching the taxation of the bridge for local purposes.

5. The assignments of error embrace the contention that the judgment below denies to the Bridge Company the equal protection of the laws, "in that its property has been subjected to taxation from which all other land not divided into lots has been exempted, although the only reasons for exemption apply with much greater force to the property of the plaintiff in error than to the property which enjoys the exemption."

This contention is based upon the proviso in the city's charter declaring that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes." Kentucky Acts 1887–88, Vol. 2, p. 991.

We are of opinion that this proviso has no reference to bridges, their approaches, piers, etc., but refers only to lands capable of being cultivated or used and divided into lots upon which buildings may be erected or over which streets or other highways may be constructed. This is the better interpretation of both the old and the new charter of the city. Besides, the construction placed by the state court upon the charter of the city in respect of its power to tax the bridge property necessarily leads to the conclusion that the provision forbidding the taxation of lands not divided into lots of five acres or less does not apply to a bridge erected over the Ohio River within the city's limits. In this view there is no basis for the

suggestion of a denial of the equal protection of the laws, particularly as it is not contended that the city applies to the assessment of the bridge and its approaches for taxation any rule that is not applied to all property within its limits. As in the case of the property of others, the bridge and its approaches are required to be taxed upon their value.

6. Another contention of the plaintiffs in error is that the assertion of the right of the Commonwealth of Kentucky or of any municipal corporation acting under its authority to tax bridge structures permanently located with the consent of Congress in or over the bed of the Ohio River is the assertion of authority over that stream inconsistent with the congressional and legislative compact concerning its use, and inconsistent with the concurrent jurisdiction over the river of the States on either side of it. Indeed, the defendants insist that if the power to tax the bridge structure north of low-water mark on the Kentucky side and south of low-water mark on the Indiana side of the Ohio River exists at all, it rests in Congress and could not be exercised even by the concurrent action of two States, much less by the independent action of one.

The present case does not require any decision by this court as to the extent and character of the jurisdiction which may be exercised over the Ohio River by the States whose boundaries come to low-water mark on its shore opposite to Kentucky. The only question for determination is whether the taxation under the authority of Kentucky of this bridge within its jurisdiction involves any encroachment upon Federal authority, or any infringement of rights secured to the defendants by the Constitution of the United States.

Touching the first branch of this question, it is to be observed that Kentucky was admitted into the Union with its "actual boundaries" as they existed on the 18th day of December, 1789, that is, with its northern and western boundary extending to low-water mark on the opposite side of the Ohio River. That State came into the Union equal in all respects with the States that had accepted the National Constitution and with every power that belonged to any existing State, and therefore its power of taxation was in no respect

limited or restrained, except as its exercise was expressly or impliedly limited or restrained by that instrument. But what clause of that instrument declares that a State may not tax for state purposes any property within its territorial limits which is owned and operated by one of its own private corporations? In *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, it was said by the Chief Justice to be obvious that the power of taxation was an incident of sovereignty, was coextensive with that to which it was an incident, and that "all subjects over which the sovereign power of a State extends are objects of taxation." The subject of taxation in this case is a bridge structure within the territorial limits of Kentucky. It is therefore property over which the State may exert its authority, provided it does not encroach upon Federal power or intrench upon rights secured by the Constitution of the United States. It is none the less property although the State does not own the soil in the bed of the river upon which the piers of the bridge rest. Whatever jurisdiction the State of Indiana may properly exercise over the Ohio River, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that State and permanently within the limits of Kentucky.

Nor do we perceive that the power of Kentucky to tax this bridge structure as property is any the less by reason of the fact that it was erected in and over the Ohio River under the authority or with the consent of Congress. The taxation of the bridge by Kentucky is in no proper sense inconsistent with the power of Congress to regulate the use of the river as one of the navigable waters of the United States. This taxation does not interfere in any degree with the free use of the river by the people of all the States, nor with any jurisdiction that the State of Indiana may properly exercise over that stream.

Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce exempt it from taxation by the State within whose limits it is permanently located. The State cannot by its laws impose direct burdens upon the conduct of interstate commerce carried on over the

bridge. But, as the decisions of this court show, it may subject to taxation property permanently located within its territorial limits and employed in such commerce by individuals and by private corporations. In *Covington &c. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212, it was said: "As matter of fact, the building of bridges over waters dividing two States is now usually done by Congressional sanction. Under this power the States may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself." See also *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 689; *Pittsburgh &c. Railway* v. *Board of Public Works*, 172 U. S. 32. In *Thomson* v. *Pacific Railroad*, 9 Wall. 579, the question was as to the liabilities and rights of a railroad company in respect to taxation under state legislation. It was contended in that case that the road having been constructed under the direction and authority of Congress for the purposes and uses of the United States, and being a part of a system of roads thus constructed, was exempt from taxation under state authority; that the road was an instrument of the General Government and as such not subject to taxation by the State. That contention was overruled, this court saying: "We are not aware of any case in which the real estate, or other property of a corporation, not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, from just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government." "There is a clear distinction between the means employed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means." In the same case the court said that "no one questions that the power to tax all property, business and persons within their respective limits, is original in the States and has never been surrendered," although that power cannot be so used "as to defeat or hinder the operations of the National Government." The

same principles have been maintained in other cases in this court. If a State may tax the property of one of its corporations, engaged in the service of the United States, such property being within its limits, there is no sound reason why the bridge property in question, although erected with the consent of Congress over one of the navigable waters of the United States, should be withdrawn from the taxing power of the State which created the corporation owning it and within whose limits it is permanently located.

The judgment of the Court of Appeals is

Affirmed.

HENDERSON BRIDGE COMPANY *v.* HENDERSON CITY. Error to the Court of Appeals of the State of Kentucky. No. 31. Argued and decided with No. 32.

MR. JUSTICE HARLAN: This was an action by the city of Henderson to recover taxes (with interest and penalties) assessed by it upon the property of the Henderson Bridge Company within the limits of that city for the years 1890, 1891, 1892 and 1893. The case presents substantially the same questions that are disposed of in the opinion just delivered in case No. 32 between the same parties for taxes for the years 1888 and 1889. For the reasons stated in that opinion the judgment of the Court of Appeals of Kentucky in the present case must be

Affirmed.

SECURITY TRUST COMPANY *v.* DODD, MEAD & CO.

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

No. 188. Argued and submitted January 23, 1899. — Decided April 11, 1899.

With regard to the operation of a voluntary or common law assignment of his property by an insolvent debtor for the benefit of his creditors upon property situated in other States, there is a general consensus of opinion that it will be respected, except so far as it comes in conflict with the rights of local creditors, or with the laws or public policy of the State in which it is sought to be enforced.

Statement of the Case.

With respect to statutory assignments of the property of an insolvent debtor, the prevailing American doctrine is, that a conveyance under a state insolvent law operates only upon property within the territory of that State, and with respect to property in another State it is given only such effect as the laws of that State permit, and in general must give way to claims of creditors pursuing their remedies there.

The execution and delivery by Merrill & Company to the Security and Trust Company in Minnesota of an assignment of their property for the benefit of their creditors, made under the insolvent laws of that State, and the acceptance thereof by the assignee and its qualification thereunder, and the notice thereof to Mudge & Sons in Massachusetts, who held personal property belonging to the said assignors, did not vest in the assignee such a title to that property that it could not, after such notice, be lawfully seized by attachment in an action instituted in Massachusetts by creditors of the insolvents who were citizens of New York, and who had notice of the assignment, but had not proved their claims against the assigned estate, nor filed a release thereof.

This was an action originally instituted in the district court for the second judicial district of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the state court to the Circuit Court of the United States for the District of Minnesota, and was there tried. Upon such trial the following facts appeared:

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the State of Minnesota, which assignment was properly filed in the office of the clerk of the district court. The Trust Company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead & Company having full knowledge of the execution and filing of such assignment.

Statement of the Case.

At the date of this assignment, the D. D. Merrill Company was indebted to Dodd, Mead & Company of New York in the sum of $1249.98, and also to Alfred Mudge & Sons, a Boston copartnership, in the sum of $126.80, which they duly assigned and transferred to Dodd, Mead & Company, making the total indebtedness to them $1376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was attached by the sheriff of Suffolk County, as hereinafter stated.

The firm of Alfred Mudge & Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he, Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead & Company, the execution creditors, for the sum of $1000.

Upon this state of facts, the Circuit Court of Appeals certified to this court the following questions:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by

the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the State of Massachusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk County, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the State of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

Mr. Edmund S. Durment, for the Security Trust Company, submitted on his brief.

Mr. James E. Markham for Dodd, Mead & Co. *Mr. Albert R. Moore* and *Mr. George W. Markham* were on his brief.

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

This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that State, by a corporation there resident, is available

to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the State of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common law assignments upon property situated in other States has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the State in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. *Black* v. *Zacharie*, 3 How. 483; *Livermore* v. *Jenckes*, 21 How. 126; *Green* v. *Van Buskirk*, 5 Wall. 307; *Hervey* v. *R. I. Locomotive Works*, 93 U. S. 664;

Cole v. *Cunningham*, 133 U. S. 107; *Barnett* v. *Kinney*, 147 U. S. 476.

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated. *Harrison* v. *Sterry*, 5 Cranch, 289, 302; *Ogden* v. *Saunders*, 12 Wheat. 213; *Booth* v. *Clark*, 17 How. 322; *Blake* v. *Williams*, 6 Pick. 286; *Osborn* v. *Adams*, 18 Pick. 245; *Zipcey* v. *Thompson*, 1 Gray, 243; *Abraham* v. *Plestoro*, 3 Wend. 538, overruling *Holmes* v. *Remsen*, 4 Johns. Ch. 460; *Johnson* v. *Hunt*, 23 Wend. 87; *Hoyt* v. *Thompson*, 5 N. Y. 320; *Willitts* v. *Waite*, 25 N. Y. 577; *Kelly* v. *Crapo*, 45 N. Y. 86; *Barth* v. *Backus*, 140 N. Y. 230; *Weider* v. *Maddox*, 66 Tex. 372; *Rhawn* v. *Pearce*, 110 Illinois, 350; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477. As was said by Mr. Justice McLean in *Oakey* v. *Bennett*, 11 How. 33, 44, "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his Conflict of Laws, § 414.

The statute of Minnesota, under which this assignment was made, provides in its first section that any insolvent debtor

"may make an assignment of all his unexempt property for the equal benefit of all his *bona fide* creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny* v. *Bennett*, 128 U. S. 489.

The construction given to this act by the Supreme Court of Minnesota has not been altogether uniform. In *Wendell* v. *Lebon*, 30 Minnesota, 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *In re Mann*, 32 Minnesota, 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon* v. *Mann*, 33 Minnesota, 412, 414.

In *Jenks* v. *Ludden*, 34 Minnesota, 482, it was held that the courts of that State had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under

the Minnesota statute, have dissolved such an attachment in that State; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable non-resident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the laws of Wisconsin." To the same effect see *Daniels* v. *Palmer*, 35 Minnesota, 347; *Warner* v. *Jaffray*, 96 N. Y. 248.

Upon the other hand, in *Covey* v. *Cutler*, 55 Minnesota, 18, an insolvent debtor who had made an assignment under this statute, had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated, and that such transfers, upon principles of comity, would be recognized as effectual in other States when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green* v. *Van Buskirk*, 7 Wall. 139. The assignment was apparently treated as a voluntary or common law assignment. This ruling was repeated in *Hawkins* v. *Ireland*, 64 Minnesota, 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdic-

tion, from prosecuting an action in a foreign State or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon* v. *Foster*, 4 Allen, 545, and *Cunningham* v. *Butler*, 142 Mass. 47 ; *S. C.*, *sub nom. Cole* v. *Cunningham*, 133 U. S. 107.

The earlier opinions of the Supreme Court of Minnesota to the effect that the statute in question was a bankrupt act, were followed by the Supreme Court of Wisconsin in *McClure* v. *Campbell*, 71 Wisconsin, 350, in which it was held that the assignment could have no legal operation out of the State in which the proceedings were had, and that the decision of the Supreme Court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said : " We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the State in which the insolvency or bankruptcy proceedings were had. . . . While some of them " (the cases) " may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can have no legal operation out of the State in which such proceedings were had."

In *Franzen* v. *Hutchinson*, 94 Iowa, 95 ; 62 N. W. Rep. 698, the Supreme Court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than such as might be paid under the

assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the Supreme Court of that State did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other States than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another State. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other States have passed upon the question, they have generally held that any state law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another State, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors — a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. *Grover* v. *Wakeman*, 11 Wend. 187; *Ingraham*

v. *Wheeler*, 6 Conn. 277; *Atkinson* v. *Jordan*, 5 Hammond, 293; Burrill on Assignments, 232 to 256. As was said in *Conkling* v. *Carson*, 11 Ill. 503: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear* v. *West*, 7 Pet. 608, an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed voluntarily and not *in invitum* is not a controlling circumstance. In some States a foreign assignee under a statutory assignment, good by the law of the State where made, may be permitted to come into such State and take possession of the property of the assignor there found, and withdraw it from the jurisdiction of that State in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the State where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in *Barth* v. *Backus*, 140 N. Y. 230, and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in *Townsend* v. *Coxe*, 151 Illinois, 62. It was said of this statute, (and the same may be said of the statute under consideration,) "it is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that State, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is, therefore, compelled to consent to a discharge as to so much of his debt

as is not paid by dividends in the insolvent proceedings or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are *Upton* v. *Hubbard*, 28 Conn. 274; *Paine* v. *Lester*, 44 Conn. 196; *Weider* v. *Maddox*, 66 Texas, 372; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477; *Boese* v. *King*, 78 N. Y. 471.

In *Taylor* v. *Columbia Insurance Co.*, 14 Allen, 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the State in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another State to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority. *Upton* v. *Hubbard*, 28 Conn. 274.

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to pass title to property both within and without the State, and, in the absence of objections by non-assenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other States. *Bradford* v. *Tappan*, 11 Pick. 76; *Willitts* v. *Waite*, 25 N. Y. 577; *Catlin* v. *Wilcox Silver Plate Co.*, 123 Indiana, 477, and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that State chose to respect it, and that so far as the plaintiff,

as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case, no answer to the first question is necessary.

CITIZENS' SAVINGS BANK OF OWENSBORO *v.* OWENSBORO.

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

No. 669. Argued February 27, 28, 1899. — Decided April 3, 1899.

The questions raised by the eighth and ninth assignments of error, relating to alleged violations of the Fourteenth Amendment to the Constitution of the United States, are not presented by the record, and do not result by necessary intendment therefrom, and are therefore not considered by the court, under the well-settled rules that the attempt to raise a Federal question for the first time after a decision by the court of last resort of a State is too late; and that where it is disclosed that an asserted Federal question was not presented to the state court, or called in any way to its attention, and where it is not necessarily involved in the decision of the state court, such question will not be considered by this court.

The mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect.

The act of the legislature of Kentucky of February 14, 1856, and the act of May 12, 1884, c. 1412, incorporating the Citizens' Savings Bank of Owensboro, and the act of May 17, 1886, commonly known as the Hewitt Act, and other acts referred to, did not create an irrevocable contract on the part of the State, protecting the bank from other taxation, and therefore the taxing law of Kentucky of November 11, 1892, c. 108, did not violate the contract clause of the Constitution of the United States.

THE case was argued with Nos. 148, 149, 150 and 151, the reports of which follow it.

Mr. W. T. Ellis for plaintiff in error. *Mr. J. A. Dean* filed a brief for same.

Mr. Chapeze Wathen and *Mr. J. D. Atchison* for defendants in error.

Mr. Justice White delivered the opinion of the court.

The plaintiff in error, the Citizens' Savings Bank of Owensboro, Kentucky, was created, by an act of the general assembly of the State of Kentucky, approved May 12, 1884, with authority to do a general banking business. The legislative charter provided that the corporation should exist for a period of thirty years from the date of the act, and in section 7 it was provided that on the first day of January in each year the bank should pay "into the state treasury, for the benefit of revenue proper, fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax and bonus thereon of every kind."

At the time this charter was granted there existed on the statute books of Kentucky a law, enacted February 14, 1856, 2 Rev. Stat. Ky. 121, providing as follows:

"Sec. 1. 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.

* * * * *

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

It would seem that from the date of its creation until the year 1886 the bank was called upon to pay only the taxes provided in the seventh section of its charter. In 1886 (Session Acts of Kentucky, 1885–6, pp. 140, 144 to 147, 201) the legislature of Kentucky adopted what is designated in the

briefs of counsel as the Hewitt Act, containing the following provisions as to the taxation of banks:

"SEC. 1. That shares of stock in state and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to $100, or on each $100 of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent of their capital stock, which shall be in full of all tax, state, county and municipal.

* * * * *

"SEC. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks.

"SEC. 5. The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the next general assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

"SEC. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the general statutes.

"SEC. 7. If any bank, state or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to

make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the taxes — state, county and municipal — shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Citizens' Savings Bank accepted the Hewitt Act in the mode provided, and thereafter paid the tax specified therein.

In 1891 Kentucky adopted a new constitution, which contained the following:

"SEC. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses or franchises."

The State of Kentucky, in 1892, enacted a law providing, among other things, for the assessment and taxation by the State, counties and municipalities, of banking and other corporations. This law was in absolute conflict with the Hewitt Act, and by special provision as well as by necessary legal intendment operated, if the constitution had not already done so, to repeal the system of bank taxation established by the Hewitt Act. Without detailing the scheme of taxation created by the law of 1892, it suffices to say that it organized a State board whose duty it was to ascertain and fix the value of what was termed the franchises of banks and other corporations, referred to in the law, and upon the amount so fixed the general state tax was levied. It was besides made

the duty of the board to certify its valuation of the property or franchises to the proper county or municipality in which the corporation was located, so that the sum of this assessment might become the basis upon which the local taxes should be laid. The city of Owensboro, where the Citizens' Savings Bank was located, established by ordinances the rate of municipal taxes for the years 1893 and 1894, and the sum so fixed was assessed upon the valuation of the franchises or property of the bank which had been certified by the state board in claimed conformity to the statute of 1892. The bank refused to pay these taxes, and a levy was made by the tax collector upon some of its property, and garnishment process was also issued against several of its debtors. Thereupon this suit was commenced by a petition, on behalf of the bank, to enjoin the city of Owensboro and its tax collector from enforcing the taxes in question.

The averments of the petition, and of the amendments thereto — for it was twice amended — assailed the validity of the tax on several grounds, all of which are, substantially, included in the following summary:

First. That the board of state valuation had no power under the constitution and laws of the State to make an assessment for local taxation, and, if it had such power, had not exercised it lawfully, because the method of valuation pursued by it was so arbitrary as to cause its action to be void. Second. That no notice of the assessment had been given the officials, as required by the state law. Third. That the taxes violated the equality clause of the state constitution, because, by the method adopted in making the assessment, the property of the bank had been valued by a rule which caused it to be assessed at proportionately one third more than the sum assessed against other property in the city of Owensboro, and by one half more than the valuation at which the property of other taxpayers throughout the State was assessed. Fourth. That the taxes violated the state law and constitution, because based upon an assessment made by the state board, and not on an assessment made by the city, and that they were likewise illegal, because the levy of the tax predicated

upon the assessment, by the state board, was dehors the powers of the city of Owensboro under the state laws. Fifth. That the taxes moreover violated the equality clause of the state constitution, because as there were certain national banks doing business in the city of Owensboro, against whom the franchise tax provided by the state law could not be enforced, without a violation of the law of the United States, therefore these banks could not be taxed for the franchise tax, and not to tax them, whilst taxing the petitioner, would bring about inequality of taxation, and hence be a violation of the state constitution. Sixth. The taxes were expressly and particularly attacked on the ground that the Hewitt Act, and the acceptance of the terms thereof, constituted an irrevocable contract, between the State and the bank, exempting it from all taxation other than as specified in the Hewitt Act, and therefore that the revenue act of 1892 and the levy of the taxes in question by the city of Owensboro violated the contract rights of the bank, which were protected from impairment by the Constitution of the United States.

In further support of this ground the petition charged that at the time the Hewitt Act was passed the bank had an irrevocable contract arising from section 7 of its charter limiting taxation to the sum there specified, which right the bank had surrendered in consequence of the contract embodied in the Hewitt Act. It was averred that this surrender of its contract right to enjoy the limited taxation, conferred by its charter, was a valid consideration moving between the bank and the State, operating to cause the Hewitt Act to become a contract upon adequate consideration.

A preliminary injunction restraining the collection of the taxes was allowed. The city of Owensboro demurred to the petition and to the various amendments thereof, and, reserving its demurrers, answered traversing the averments of the original petition and the amendments thereto. Motions were made to dissolve the injunction. On these motions testimony was taken and the case was heard on the motions to dissolve, and on the demurrers. The trial court dissolved the injunction, sustained the demurrers, and dismissed the suit. On appeal to

the Court of Appeals of Kentucky the decree of the trial court was affirmed. 39 S. W. Rep. 1030.

The opinion of the Kentucky Court of Appeals contained not only the reasons applicable to the case we are now considering, but also such as were by it considered relevant to several other cases which, it would seem, were either heard by that court at the same time or were deemed by the court to present so many cognate questions as to enable it to embrace the several cases in one opinion. In so far as it related to this cause, the opinion fully examined and disposed of the question of contract and the issues consequent thereon. An application on behalf of the appellant was thereafter filed, styled "Petition for extension of opinion and reversal." This application, whilst declaring that the appellant could not assent to the conclusion of the court on the question of the existence of an irrevocable contract, protected from impairment by the Constitution of the United States, asked no rehearing on that subject. The grounds for rehearing, which were elaborately pressed, related solely to certain questions of law which it was argued the record presented, and which it was claimed depended on the state law and constitution. There was no contention that these issues involved the Constitution or laws of the United States.

All the assignments of error but the eighth and ninth relate to errors charged to have been committed by the court below in holding that there was no contract protected from impairment by the Constitution of the United States. The eighth assignment asserts that there was error in allowing a penalty for the non-payment of the taxes, because such penalty was by the state law imposed only upon corporations and not on other taxpayers, and therefore the state law violated the Fourteenth Amendment to the Constitution of the United States. The ninth assignment charges that there was error in holding the taxes to be valid because the property or franchise of the bank, on which the tax was levied, was assessed at its full value, whilst other taxpayers in the State were assessed at not more than seventy per cent of the value of their property, thus creating an inequality of taxation, equivalent to a denial of

the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

We at the outset dispose of the eighth and ninth assignments just referred to. The questions which they raise are not properly here for consideration. They are not presented by the record nor do they result by necessary intendment therefrom. Indeed they were excluded from the cause, as Federal questions, by the implications resulting from the pleadings. Whilst it was charged that the penalties were unlawful, there was no allegation that their enforcement would violate any Federal right. On the contrary, the petition and the amendments to it clearly placed the objection to the penalties on the ground that their enforcement would violate the state law and the state constitution. The distinction between the state right thus asserted and the Federal right was clearly made when the only Federal issue which was relied on, the impairment of the obligation of the contract, was alleged, for then it was plainly stated to depend upon a violation of the Constitution of the United States. Even after the opinion of the Court of Appeals was announced there was not a suggestion made in the petition for rehearing that a single Federal question was considered by the parties as arising except the one which the court had fully decided, and as to which it was expressly declared a rehearing was not prayed. The assignments of error in question therefore simply attempt to inject into the record a Federal question not lawfully therein found, never called to the attention of the state court by pleading or otherwise, and not necessarily arising for consideration in reviewing the judgment of the state court to which the writ of error is directed. But after a decision by the court of last resort of a State the attempt to raise a Federal question for the first time is too late. *Miller* v. *Texas*, 153 U. S. 535; *Loeber* v. *Schroeder*, 149 U. S. 580. It is also clear that where it is disclosed that an asserted Federal question was not presented to the state court or called in any way to its attention, and where it is not necessarily involved in the decision of the state court, such question will not be considered by this court. *Louisville & Nashville Railroad* v. *Louisville*, 166 U. S. 709; *Oxley Stave Co.* v. *Butler County*,

166 U. S. 648; *Kipley* v. *Illinois*, 170 U. S. 182; *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425. We therefore decline to review the errors alleged in the eighth and ninth assignments, and passing their consideration are brought to the real Federal controversy which arises on the record — that is, the question of irrevocable contract.

The claim is that the Hewitt Act and its acceptance by the banks constituted an irrevocable contract, although at the time that act was passed there was a general statute of Kentucky reserving the right to repeal, alter or amend "all charters or grants of or to corporations or amendments thereof and all statutes" passed subsequent thereto, and although this general statute was expressly made a part of the Hewitt Act by the sixth section thereof. The wording of the sixth section accomplishing this result is: "This act shall be subject to the provisions of section 8, chapter 68, of the general statutes," the provision thus referred to being the general law of 1856, reserving the power to repeal, alter or amend as above. When the proposition relied upon is plainly stated and its import clearly apprehended, no reasoning is required to demonstrate its unsoundness. In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable. In a case like the one now considered, where not only was there a general statute reserving the power, but where such general law was made by unambiguous

language one of the provisions of the contract, of course the legislative power to repeal or amend is more patently obvious to the extent that that which is plainly expressed is always more evident than that which is to be deduced by a legal implication. In *Tomlinson* v. *Jessup*, 15 Wall. 454, in speaking of a contract exemption from taxation arising from a charter, and of the right to repeal the same springing from a general law, reserving the power to alter or amend, which existed at the time the charter was conferred, the court, through Mr. Justice Field, said (p. 459):

"Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

In *Railroad Co.* v. *Maine*, 96 U. S. 499, 510, the question was as to the liability to taxation of a consolidated corporation which came into existence while a general statute was in force, providing that any act of incorporation subsequently passed might be amended, altered or repealed at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there was in the act of incorporation an express limitation or provision to the contrary. The court said: "There was no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company, upon the legislative power of amendment and alteration, and, of course, there was none upon the extent or mode of taxation which might be subsequently adopted. By the reservation in the law of 1831, which is to be considered as if embodied in that act, the State retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. The existence of

the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control."

In *Louisville Water Company* v. *Clark*, 143 U. S. 1, 12, the corporation claimed that it had acquired under an act of the legislature of the State of Kentucky an exemption from taxation which could not be withdrawn by subsequent legislation without its consent. As the act granting the exemption was passed subsequent to the adoption by the general assembly of Kentucky of the act of 1856, (the general law which was in being when the Hewitt Act was adopted, and which was expressly made a part of alleged contract,) it was held that the exemption from taxation could be repealed without impairing the obligation of the contract. The court, through Mr. Justice Harlan, said: "In short, the immunity from taxation granted by the act of 1882 was accompanied with the condition — expressed in the act of 1856 and made part of every subsequent statute, when not otherwise expressly declared — that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation of the act of 1856 would render it inoperative for the purposes for which, manifestly, it was enacted."

Again, in *Covington* v. *Kentucky*, 173 U. S. 231, 238, considering the same subject in a case which involved the application of the power reserved by the State of Kentucky, in the act of 1856, to repeal, alter or amend all grants or contracts made subsequent to that act, the court said, through Mr. Justice Harlan:

"There was in that act [that is, the one making the grant] no 'plainly expressed' intent never to amend or repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they were situated, should be forever exempt from state, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose

at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interest required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute — particularly one relating to taxation — should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

The conclusions stated in these cases are but the expression of many other adjudged causes. *Railroad Company* v. *Georgia*, 98 U. S. 359, 365; *Hoge* v. *Railroad Company*, 99 U. S. 348, 353; *Sinking Fund cases*, 99 U. S. 700, 720; *Greenwood* v. *Freight Company*, 105 U. S. 13, 21; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Louisville Gas Company* v. *Citizens' Gas Company*, 115 U. S. 683, 696; *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, 408; *Sioux City Street Railway* v. *Sioux City*, 138 U. S. 98, 108.

Undoubtedly in the *Bank Tax cases*, 97 Kentucky, 597, the Court of Appeals of Kentucky decided that the Hewitt law created an irrevocable contract, and that the general assembly of that State could not repeal, alter or amend it without impairing the obligations of the contract, despite the existence of the act of 1856, and despite the circumstance that that act was in express terms incorporated in and made part of the Hewitt law. But the reasoning by which the court reached this conclusion is directly in conflict with the settled line of decisions of this court just referred to, and the case has been specifically overruled by the opinion announced by the Kentucky Court of Appeals in the cause now under review. It is not and cannot be asserted that the *Bank Tax cases* were decided before the contract evidenced by the Hewitt law was accepted, hence it cannot be urged that such

decision entered into the consideration of the parties in forming the contract. It is not pretended that the bank, whose rights are here contested, was either a party or privy to the *Bank Tax cases*. And even if such were the case, we must not be understood as intimating that the construction of the Hewitt Act, which was announced in the *Bank Tax cases*, would be binding in controversies as to other taxes between those who were parties or privies to those cases. On this subject we expressly abstain from now intimating an opinion. In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment. As we conclude that the decision in the *Bank Tax cases* above cited, upon the question of contract, was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions.

It was earnestly argued that conceding the general rule to be that a reserved power to repeal, alter or amend enters into and forms a part of all subsequent legislative enactments, nevertheless this case should not be controlled thereby, first, because of peculiar conditions which it is asserted existed at the time the Hewitt law was enacted, and, second, because of the terms of the act of 1856 by which the power to repeal, alter or amend was reserved. The conditions relied upon and stated in argument as removing this case from the operation of the general principle are as follows: When the Hewitt law was enacted there existed much uncertainty as to the power of the State of Kentucky to tax banks within its borders. There were banks claiming to be only subject to limited taxation because of charters enacted prior to the act of 1856. Again, there were other banks asserting a like right because of charters adopted since 1856, but which, it was said, were not dominated by that act. In consequence of these pretensions on behalf of state banks which were then undetermined, the national banks, organized in the State, were insisting that they were subject only to the rate of taxation to which the most favored state bank was liable, because it was urged that to tax such banks at a higher rate

would be a discrimination in favor of these banks and against the national banks, which was forbidden by the law of the United States. To add to this complexity, it is said, the varying rate of local taxation was operating inequality among banks, and driving banking capital from the localities where the tax was highest, thus producing a public detriment. To assuage these difficulties and conflicts, to secure as to all banks, state and national, a uniform and higher rate of state taxation than that existing as to other property, it is asserted that the Hewitt law tendered to all banks a contract giving freedom from local burdens if a higher state tax was voluntarily paid. This must have been contemplated to be irrevocable, for otherwise the very object of the law could not have been accomplished. Conceding *arguendo* to the fullest degree the situation to have been as described, the conclusion sought to be deduced from it is wholly unsound, since it disregards the fact that the contract proposed and which was actually entered into contained an express reservation of the right to repeal, alter or amend. Indeed, the contention, when analyzed, amounts to this, that the plain letter of the contract should be disregarded upon the theory that the parties intended to make a different contract from that which they actually entered into. The distinction between the potentiality of a particular state of facts, for the purpose of preventing the implication of the reserved power to alter, amend or repeal, and the impotency of such facts to overcome the express and unambiguous provisions of the contract, at once demonstrate the confusion of thought involved in the contention. It was upon the distinction existing between the implication of the power to amend, alter or repeal, and its express statement in a contract, that the case of *New Jersey* v. *Yard*, 95 U. S. 104, proceeded, and that case is therefore wholly inapposite to the controversy here presented.

The argument predicated on what is said to be the peculiar language of the act of 1856 is this: That act, whilst reserving the right to amend or repeal "all charters and grants of or to corporations, or amendments thereof, and all other statutes," accompanied this reserved right with the restriction that it

should not be exercised where "a contrary intent be therein plainly expressed, (in the act creating the right,) provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." The bank, it is asserted, had under its charter a right to be taxed only to a limited amount; and this, it is claimed, constituted a contract which was surrendered on the theory that the Hewitt law was irrevocable, and if it were not so, then there was no surrender of the right under the charter, and therefore it now exists. This contention, however, but states in another form the claims which we have already disposed of. The charter was conferred on the bank subsequent to the act of 1856, and the limit of taxation stated in the charter was therefore subordinated to that act and subject to the exercise of the power of amendment or repeal. True it is, in *Franklin County Court* v. *Deposit Bank of Frankfort* (June, 1888), 87 Kentucky, 370, 382, the Court of Appeals of Kentucky decided that a grant, after the act of 1856, of an exemption from taxation for a designated time, signified such a plain manifestation of the will of the legislature that the grant should not be subject to alteration or amendment, that the right so conferred was therefore not submitted to the paramount power of repeal or amendment reserved by the act of 1856. This decision, however, was rendered long after the enactment of the charter of the bank, whose rights are now before us, and has been expressly overruled, by the Court of Appeals, in the case which we are reviewing. The doctrine settled by the adjudications of this court is this: That the mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect. The doctrine on which the argument depends is that any grant for a designated time is by implication taken out of the general rule, even although there be no express provision to that end in the act making the grant.

The assertion that wherever it is stated in a legislative grant

or charter that it is to last for a given period of time, therefore such provision is a plain manifestation of the intention of the legislature that the grant or charter shall not be repealed or amended for the time for which it was declared that it should exist, is fallacious, since it overlooks the consideration that the limit of time fixed for the duration of the charter or grant, like every other provision therein, is qualified by the reserved power to alter, amend or repeal. It hence results that where in a charter or grant enacted, when there is a general statute reserving the power to repeal, alter or amend, a time is stated, the granting act must be read just as if it declared that the charter or grant should exist for a designated time, unless sooner repealed, altered or amended. Indeed, reduced to its final analysis, the argument that because in a grant or charter a time is designated for its duration, it cannot, therefore, until the expiration of such time, be repealed, altered or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract. For, if every case of charter or grant where a time is fixed, either expressly or by necessary construction in the charter or grant, is taken out of the reach of the reserved power, it would follow that only those charters or grants which were determinable at will would come under the control of the power reserved. But to say this simply amounts to declaring that the reserved power applies and can be enforced only in those cases where it would be entirely unnecessary or useless to do so.

The source of the reservation, by many of the States in general laws, of the power to amend, alter or repeal, was fully reviewed in *Greenwood* v. *Freight Company*, 105 U. S. 13, where it was shown that such legislation had its origin in the purpose to provide for a case exactly like the one before us. Referring to the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, the court, through Mr. Justice Miller, said (p. 20): "It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power," (the power to repeal or amend,) "without violating the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College*

case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass. 143. It would seem that the States were not slow to avail themselves of this suggestion. . . ." As then the limitation in the charter of the bank was subject to repeal by the legislature, it cannot be claimed that such exemption was vested in the bank, and was therefore subject to be reinstated if the Hewitt Act was not an irrevocable contract, even if the correctness of the claim that this result would legally arise, if the charter had been an irrevocable contract, be *arguendo* conceded.

It is urged that as the act of 1856 provides that other rights previously vested could not be taken away by the repealing act, therefore the exemption from taxation could not be withdrawn; but this is a mere form of restating the arguments already examined, and is tantamount to the reassertion of the proposition that the limited taxation established by the Hewitt Act, or the one conferred by the charter, could not be taken away at all. Referring to this subject, this court in *Greenwood* v. *Freight Company*, (*ubi supra*,) said (p. 17): "Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it or on the soundness of the reasons which prompted it." In

considering what constituted vested rights, the court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act, and such rights obviously came within the power to repeal and amend, and were not within the category of those taken out of the reach of such power.

In the *Greenwood case* the reserved power was, by the general statute, authorized to be exercised "at the pleasure of the legislature." But this qualification was decided in *Hamilton Gas Light Company* v. *Hamilton City*, 146 U. S. 258, 271, to be no more comprehensive than the power which would be implied from a general law simply reserving the right to repeal, alter or amend.

Nor is there force in the claim that before the adoption of the charter in question the courts of the State of Kentucky had settled the law to be that vested rights would include a mere privilege conferred by the granting act, and which was therefore necessarily subjected to the power to repeal or amend if such power is to have any application at all. This claim is based on what is assumed to have been decided in Kentucky in *Commissioners of the Sinking Fund* v. *Green & Barren River Navigation Company*, 79 Kentucky, 73, 75, 83. The case has not the import attributed to it. The scope of the question, in that case adjudged, was considered and commented on by this court in *Louisville Water Company* v. *Clark*, 143 U. S. 1, 16, where it was said:

"But there is nothing in that case inconsistent with the views we have expressed. It was there decided that the legislature could not consistently with the constitution, or with the above statute of 1856, take from the Green and Barren River Navigation Company, without making compensation therefor, the right it acquired under a contract with the State, concluded in 1868, to take, for a term of years, tolls from vessels navigating Green and Barren rivers, in consideration of its agreement, which had been fully performed, to maintain and keep in repair, at its own expense, such line of navigation. The case before us presents no such features. As already indicated, in losing an exemption from taxation the water com-

pany regained its rights to make such charges for water, furnished for fire protection, as it could rightfully have done before the act of 1882 was passed, and whilst its property was subject to taxation."

Finally, it is said that as at the time the Hewitt Act was passed the rate of state taxation was lower than the sum of taxation fixed by that act on the banks giving their assent to it, therefore this increased sum over and above the amount of state taxes paid by other taxpayers, to the State, constituted a consideration received by the State, and created a vested right of such a nature that the State could not repeal the Hewitt Act without providing for the refunding of the sum paid the State in excess of the state taxes paid by other taxpayers. But this disregards the patent fact that whilst the amount of the state taxes, paid by the bank under the Hewitt Act, was larger than the taxes paid by other taxpayers to the State, the bank was by the Hewitt Act relieved from all obligation to pay county and municipal taxes. As the bank had at the time of the Hewitt Act no contract limiting the taxing power of the State which could not have been repealed, it therefore could have been subjected by the State to the same rate of county and municipal taxes resting upon other taxpayers. It is not asserted that if this legislative power had been exerted and the bank been compelled to pay the same amount of taxation, for all governmental purposes, that other property owners were obliged to pay that it would not have contributed more than it was called upon to do under the Hewitt Act. The claim therefore amounts to this: That because the Hewitt Act relieved the bank from a part of the burden of taxation which rested upon the other taxpayers of the State, and this relief from burden was purely the result of the voluntary act of the lawmaker, that the power to remove the privilege cannot be exerted without refunding to the bank a portion of the lesser burden which it has paid. Thus to analyze the proposition is to answer it.

Our conclusion being that there was no irrevocable contract protecting the bank from taxation, and therefore that the taxing law of Kentucky did not violate the contract clause of

the Constitution of the United States, it follows that the decree below must be and it is

Affirmed.

Mr. Justice Brown dissenting.

The cogency with which the opinion of the court is expressed is calculated to awaken a distrust as to the soundness of any conflicting views; but the very fact that the court to which this writ of error was issued, only two years before the decree was pronounced which this court has affirmed, came to a precisely opposite conclusion upon the same state of facts, indicates at least that the question is not free from a reasonable doubt. Indeed the judiciary of Kentucky appears to be about equally divided upon the subject.

The dominant question in the case is whether the written acceptance by the bank of the proposition contained in the act of 1886, known as the Hewitt Act, constituted a contract which neither the legislature nor the bank could repudiate at pleasure. As stated in the opinion of the court, the bank was chartered in 1884, with a provision that its life should continue for thirty years, and that a payment of fifty cents on each one hundred dollars of stock should "be in full of all tax and bonus thereon of every kind." This charter fell under the provisions of the prior act of 1856, declaring that all such charters should be subject to amendment or repeal at the will of the legislature. There seems, however, to have been some dispute as to whether, under the power to amend, it was within the competency of the legislature to increase this tax during the life of the charter, without a violation of the Fourteenth Amendment to the Federal Constitution. To settle this question beyond peradventure, the legislature, in 1886, inaugurated a new policy, and in the Hewitt Act made a distinct proposition that, if the banks and corporations interested, with the consent of the majority in interest of their stockholders, at a regular meeting thereof, should give their consent to the levying of a tax of seventy-five cents on each share equal to one hundred dollars, and agree to pay the same as therein provided, and would agree to waive and release all

right under the act of Congress, or under their charters, to a different mode or smaller rate of taxation, and should evidence such consent by writing under the seal of the bank delivered to the Governor of the Commonwealth, "such bank and its shares of stock should be exempt from all other taxation whatever, so long as said tax shall be paid during the corporate existence of such bank." There was a further provision that, in case of refusal to enter into this compact, the bank should be assessed as directed by a previous section, and such state, county and municipal taxes imposed as were imposed on the assessed taxable property in the hands of individuals.

It is true that this act was made expressly subject to the prior act of 1856, declaring that all charters and grants to corporations should be subject to amendment or repeal at the will of the legislature; but this very act limited the power to repeal and amend to cases where a "contrary intent" was not "therein plainly expressed." In other words, that while such charters or grants were generally subject to amendment or repeal, if language were used by the legislature indicating clearly an intention that the privileges and franchises therein granted should not be subject to amendment or repeal, it was perfectly competent to do so, and the stipulation was binding. There was a further provision that no amendment or repeal should "impair other rights previously vested." How then could such intent to limit its own powers be manifested by the legislature? It will probably be conceded that, if the grant or charter contained a clause to the effect than any particular privilege therein granted should not be subject to amendment or repeal, it would be sufficient; but it seems to me equally clear that if it contained other language plainly evincing an intent that a particular clause should be irrepealable for a certain length of time; or, if it contained a proposition from which the legislature could not withdraw without a breach of faith toward those who had accepted its terms, it could not be intended that such contract, if accepted, should be subject to repudiation. Conceding to its fullest extent the doctrine of the *Dartmouth College case*, that the charter of

a corporation is a contract, it follows that so far as it is a charter it is, under the act of 1856, subject to amendment or repeal; but so far as the legislature departs from the main object of the charter of granting privileges and franchises, and invites its corporations to enter into written contracts with it, requires such contracts to be executed in an unusual form, and to receive the consent, not only of the directors but of a majority of its stockholders, and, further, that they be made under seal and delivered to the Governor of the Commonwealth, that then it evinces an intent as clearly as language can express it that such contract shall be binding, and that, in respect thereto, it yields up its right to amendment or repeal. *New Jersey* v. *Yard*, 95 U. S. 104. To hold that a contract thus solemnly entered into may be repudiated at the next session of the legislature is practically to say that the legislature may set a trap for its corporations, and that after it has enticed them into it by the offer of more favorable terms than they otherwise could obtain, may repudiate its own obligations, without restoring to the corporations what it had previously induced them to give up.

The difficulty with the position of the court is, that it renders it impossible for the Commonwealth to enter into a contract with one of its own corporations, which it may not repudiate at the next session of its legislature. If capital may be enticed into the State under its solemn promise that certain privileges shall be granted, or that it shall be subject to a certain specified rate of taxation, which may be withdrawn at any moment, it can scarcely complain if foreign capital refuses to be tempted by such illusory offers. I see no reason why, under the decision of the court, if the legislature should enter into a compact with one of its own corporations to perform a great public work, it may not, after capital has been largely invested therein, and the work entered upon, under the guise of amending the grant, abrogate its contract and leave the corporation practically defenceless. Indeed it seems to me that it is not creditable to the legislature to impute to it an intent to subject corporations, which had accepted the benefits of the Hewitt Act, to the rate of taxation prescribed by the act of 1892,

providing for wholly different modes of assessment and taxation, and that it is more reasonable to assume that the taxing officers of the city of Owensboro exceeded their authority in attempting to exact the taxes in question.

The cases cited in the opinion of the court are not in conflict with the position here assumed. In *Tomlinson* v. *Jessup*, 15 Wall. 454, it was decided that an act of the legislature of South Carolina, passed in 1851, incorporating the Northeastern Railroad Company, and a subsequent act passed in 1855, providing that its stock should be exempt from taxation during the continuance of the charter, were subservient to a general act passed in 1841, reserving the right to amend, alter or repeal every such charter, unless the act granting such charter should in express terms except it. As the amended charter in question contained no clause excepting it from the provisions of the general act of 1841, it was held that its property might be taxed by subsequent legislation. The case differs from the one under consideration in the fact that the amended charter contained no exception taking it out of the act of 1841, and that there was no express contract in that charter that no tax should be subsequently imposed. There was nothing to indicate that this charter was not intended to fall within the restrictions of the act of 1841.

In *Railroad Company* v. *Maine*, 96 U. S. 499, there was a similar general law, passed in 1831, declaring any act of incorporation liable to be amended, altered or repealed at the pleasure of the legislature, unless there was "an express limitation or provision to the contrary." It was held that an act of the legislature passed in 1856, authorizing corporations to consolidate and form a new corporation, was an act of incorporation of a new company, and, there being in this act no limitation upon the power of amendment, alteration and repeal, the State retained the power to alter it in all particulars, constituting the grant of corporate rights, privileges and immunities to the new company, and that a limitation upon the taxing power of the State prescribed in the charters of the old companies ceased upon their consolidation, though it was said that "rights and interests acquired by the company, not constituting a part of

the contract of incorporation, stand upon a different footing." In its application to this case it is subject to the same criticism as that of *Tomlinson* v. *Jessup*.

The case of the *Louisville Water Company* v. *Clark*, 143 U. S. 1, arose under the same act of Kentucky of 1856. In that case, an immunity from taxation, conferred upon the water company by an act passed in 1882, was withdrawn by a subsequent act passed in 1886, and it was held that as the act of 1882 contained no clause that "plainly expressed" an intention not to exercise the power reserved by the statute of 1856 to amend or repeal, at the will of the legislature, all charters or grants to corporations, the act was subject to that general statute for the very reason that there was no "contrary intent" "plainly expressed." The opinion harmonizes completely with the position here assumed, and contains a clear inference that where a subsequent act plainly evinces an intention on the part of the legislature that the general statute of 1856 should not apply, such intention will be respected and will control the operation of the general statute. If the Hewitt Act does not evince such intention, of course the whole argument falls to the ground; but it seems to me that its language in this particular is too clear to be disregarded.

The recent case of *Covington* v. *Kentucky*, 173 U. S. 231, is of the same tenor. An act passed in 1886, authorizing the city of Covington to build a system of water works, contained a provision that they should "remain forever exempt from state, county and city tax." This was held to be subject to the act of 1856, providing for the amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed. It was very properly held that there was nothing in the act of 1886 plainly expressing an intent that the provision exempting the property from taxation was not subject to repeal; but the whole theory of this dissent is embodied in the proposition that there was in the Hewitt Act a plainly expressed intent that it should not be amended or repealed to the prejudice of banks accepting its terms. There was a plain intimation in that opinion that if the act of 1886 had contained evidence of such intent it would have been held to repeal the

act of 1856 to that extent. "Before a statute," said the court, — "particularly one relating to taxation, — should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

Such intent *was* found by this court in *New Jersey* v. *Yard*, 95 U. S. 104, in the fact that there was in the supplemental charter of the corporation, precisely as in the Hewitt Act, (1) a subject of dispute and fair adjustment of it for a valuable consideration on both sides; (2) the contract assumed, by legislative requirement, the shape of a formal written contract; (3) the terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof," excluded in view of the whole transaction, the right of the State to revoke it at pleasure. There was the same provision as in the Hewitt Act, that the section providing for a commutation of taxes should not go into effect, or be binding upon the company, until it had signified its assent under its corporate seal and filed it in the office of the secretary of State. The language of Mr. Justice Miller is so pertinent that I cannot forbear quoting the following paragraph: "Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the State intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?" I find it difficult to see how that case and the one under consideration can stand together.

So far as the Court of Appeals of Kentucky had spoken

upon this question, prior to the decision which is here affirmed, it was uniformly in favor of the position taken in this dissent. In *Franklin County Court* v. *Deposit Bank of Frankfort*, 87 Kentucky, 370, it was held that an act which continued the life of a charter to a period beyond the time fixed for its expiration, and reserved the corporate organization, privileges, powers, duties and rights, was an extension of an old charter, and not the grant of a new one; that an act passed in 1858, "plainly expressed" an intention that the act of 1856 should not apply to it, and that such intent was evinced by the provision that the appellee bank should establish a branch at Columbus; "that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share of its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension."

I desire only to add that in *Commonwealth* v. *Farmers' Bank of Kentucky*, 97 Kentucky, 590, it was held, by the same majority of the court which subsequently overruled it, that there existed in the Hewitt Act "every element of a contract between the State and the banks and, with such a consideration as will uphold it, no reasonable doubt can be entertained that such was the purpose of the parties to it." "We are satisfied," said the court, "after a careful consideration of this question, that the parties making the contract never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties." The argument is a powerful demonstration of the existence of an irrevocable contract; but the Court of Appeals subsequently overruled this decision, and this court has affirmed its action, and in addition thereto has pronounced an opinion seemingly so inconsistent with *New Jersey* v. *Yard*, as to practically amount to an overruling of that case. These cases, however, are but a reaffirmance of a

principle which the same court had previously laid down in *Commissioners of Sinking Fund* v. *Green & Barren River Navigation Co.*, 79 Kentucky, 73, and *Commonwealth* v. *Owensboro &c. Railroad*, 95 Kentucky, 60, that a distinct contract contained in a charter was not subject to the act of 1856. Indeed, I do not understand upon what other theory a positive acceptance of the taxation imposed by the Hewitt Act was required of these banks.

DEPOSIT BANK OF OWENSBORO *v.* OWENSBORO.

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

No. 149. Argued February 27, 28, 1899. — Decided April 3, 1899.

Citizens' Savings Bank of Owensboro v. *Owensboro*, *ante*, 636, followed.

THIS case was argued with the *Citizens' Savings Bank case.*

Mr. W. T. Ellis for plaintiff in error.

Mr. Chapeze Wathen and *Mr. J. D. Atchison* for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The relief sought by the plaintiff in error was the nullity of certain taxes levied by the city of Owensboro for the years 1893 and 1894. The grounds upon which this relief was prayed are in all material respects like unto those relied on in the two cases against the city of Owensboro, just decided. The charter and an amendment extending the same were both enacted after the act of 1856.

Indeed, this case along with the other two were disposed of by the Kentucky Court of Appeals in the same opinion, because of the identity of the questions presented.

For reasons given in the opinion in *Citizens' Savings*

Bank of Owensboro v. *Owensboro*, *ante*, 636, this term, the decree is

Affirmed.

DEPOSIT BANK OF OWENSBORO *v.* DAVIESS COUNTY. No. 150. Argued with No. 669, *ante*, 636, and by the same counsel. Decided April 3, 1899. MR. JUSTICE WHITE: By a written stipulation it is agreed that this cause abide the result of No. 149, *Deposit Bank of Owensboro* v. *Owensboro*. The decree in that case having been affirmed, the same result is therefore necessary in this, and accordingly the decree of the Court of Appeals of Kentucky in this case is also

Affirmed.

FARMERS' AND TRADERS' BANK OF OWENSBORO *v.* OWENSBORO.

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

No. 151. Argued February 27, 28, 1899. — Decided April 3, 1899.

Citizens' Savings Bank v. *Owensboro*, *ante*, 636, followed.

THIS case was argued with the *Citizens' Savings Bank case.*

Mr. W. T. Ellis for plaintiff in error.

Mr. Chapeze Wathen and *Mr. J. D. Atchison* for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error was chartered by the legislature of Kentucky in 1876. The charter limited the taxing power to fifty cents on each one hundred dollars of capital stock, during the life of the corporation, which was fixed at twenty-five years. This suit was commenced by petition asserting the nullity of certain taxes levied by the city of Owensboro for the years 1893 and 1894. The petition was twice amended. The cause of action alleged was, in every material respect,

the same as that relied on in the case of *Citizens' Savings Bank of Owensboro* v. *Owensboro*, No. 669, *ante*, 636. For this reason the opinion in that case disposes of all the issues arising in this, and for the reasons therein given the decree of the Court of Appeals of Kentucky in this case rendered is

Affirmed.

OWENSBORO NATIONAL BANK *v.* OWENSBORO.

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

No. 148. Argued February 27, 28, 1899. — Decided April 3, 1899.

A State is wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except when permitted so to do by the legislation of Congress.

Section 5219 of the Revised Statutes is the measure of the power of States to tax national banks, their property or their franchises, that power being confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank.

The taxing law of the State of Kentucky, under the provisions of which the tax in controversy in this case was imposed, is beyond the authority conferred by Congress on the States, and is void for repugnancy to that act.

The tax here complained of having been assessed on the franchise or intangible property of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal.

This suit was originally instituted in a court of the State of Kentucky by the plaintiff in error, the Owensboro National Bank. The relief prayed was that the city of Owensboro and its tax collector Simmons be perpetually restrained from enforcing the collection of alleged "franchise" taxes for the years 1893 and 1894, claimed by the defendants to have been assessed under authority of a revenue act of the State of Kentucky enacted November 11, 1892, as amended. The taxes in question were laid upon the amount fixed by the state board of valuation and assessment provided for in the act, which valuation equalled the combined sum of the par of the capital stock of the bank, its surplus and undivided

profits. It is admitted on the record that the avails of the bank to the amount of the valuation were invested in non-taxable bonds of the United States. Various reasons why the taxes should be declared illegal were urged in the petition and the amendments thereto. Without going into detail, all the grounds are substantially included in the following summary:

1. That the levy of the taxes in question impaired the obligation of an alleged irrevocable contract entered into in 1886 between the bank and the State, and embodied in a legislative enactment referred to as the Hewitt Act, which contract was protected from impairment by the Constitution of the United States;

2. That the taxes complained of were unlawful, because they were not laid on the shares of stock in the names of the shareholders, but were actually imposed on the property of the bank, contrary to the act of Congress;

3. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States, which the State was, under the law of the United States, without power to tax either directly or indirectly;

4. That even if the taxes were otherwise valid, they were unlawful, because discriminatory, inasmuch as certain state banks which were incorporated prior to the year 1856 were entitled to a low rate of taxation resulting from charter contracts, and it was illegal to tax national banks at a higher rate than that assessed against the most favored state bank;

5. That the law under which the taxes were levied and the modes of procedure adopted in carrying the law into effect operated to produce inequality in taxing the property of the bank, to its disadvantage, as compared with other property within the State, contrary to the state constitution;

6. That the rate of taxation imposed by the city of Owensboro for the year 1893 was in excess of that authorized by the state constitution or laws;

7. That if the taxes complained of were considered laid,

not upon the capital or franchise of the bank, but upon the shares of stock in the names of the shareholders, then they were discriminatory as against shareholders who were the heads of families, as such shareholders were not permitted to deduct from the assessment against their shares an exemption authorized by a statute of the State in favor of the class of individuals referred to;

8. That if the bank could be legally taxed upon its property of any kind it was a foreign corporation as to the State of Kentucky, and could only be taxed to the extent that its property was invested and had been earned in the city of Owensboro.

The petitions and the amendments thereto were demurred to, and an answer filed reserving the demurrers. Motions were made to dissolve a preliminary injunction which had been allowed. On these motions testimony was heard. The court dissolved the injunction and sustained the demurrers, and, the plaintiff failing to plead further, the petition and amended petitions were dismissed. On appeal the Court of Appeals of the State of Kentucky affirmed the judgment of the lower court, and the cause was then brought here for review.

Mr. W. T. Ellis for plaintiff in error. *Mr. Wilfred Carico* and *Mr. George W. Jolly*, each filed a brief for same.

Mr. Chapeze Wathen and *Mr. J. D. Atchison* for defendant in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The claim of contract arising from the Hewitt Act need not be considered, as it is disposed of adversely to the contentions of the plaintiff in error by the opinion expressed in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, just decided. We therefore dismiss that subject and the questions arising from it from further consideration.

The other issues which the cause presents group themselves under two distinct headings: First, a contention that the taxes

levied were illegal, because imposed in violation of the act of Congress regulating the method of taxation which the respective States may exert against national banks or their stockholders as such; second, because the taxes imposed are discriminatory.

This latter question has a twofold aspect, since some of the charged discriminations are asserted to be in violation of the act of Congress, and others are claimed to arise because of an asserted contravention of the state law and constitution. Of course, we are concerned only with the discrimination claimed to constitute a violation of the law of the United States. We need not, however, dissect the discriminations relied upon so as to separate the Federal from the state questions in this regard, at least until we have disposed of the contention that the taxes were levied upon the bank and its property in violation of the laws of the United States, since if error in this regard is found, the taxes will be illegal, and it will become unnecessary to determine whether they were discriminatory even from a Federal aspect.

Were the taxes complained of levied upon the bank, its property or franchise, and if so were they legal? is the question which then arises on the threshold of the case.

Two elements are involved in the determination of this question — that is, the extent of the power of the respective States to tax national banks, and the ascertainment of the scope and purport of the law by which the taxes complained of were levied.

Early in the history of this Government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the Constitution, was not in its capital, franchises and operations subject to the taxing powers of a State. *M'Culloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738.

The principles settled by the cases just referred to and subsequent decisions were thus stated by this court in *Davis* v. *Elmira Savings Bank*, 161 U. S. 283:

"National banks are instrumentalities of the Federal Gov-

ernment, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

It follows then necessarily from these conclusions that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress.

The first act providing for the organization of national banks, passed February 25, 1863, c. 58, 12 Stat. 665, contained no grant of power to the States to tax national banks in any form whatever. Doubtless the far-reaching consequence to arise from depriving the States of the source of revenue which would spring from the taxation of such banks, and the error of not conferring the power to tax, early impressed itself upon Congress; for the following year, act of June 3, 1864, c. 106, 13 Stat. 99, power was granted to the States, not to tax the banks, their franchises or property, but to tax the shares of stock in the names of the shareholders. This provision subsequently was amended and supplemented in various particulars, act of February 4, 1868, c. 6, 15 Stat. 34, and the result of this legislation is embodied in section 5219 of the Revised Statutes, which is as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located

within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void.

So self-evident are these conclusions that the adjudicated cases justify the deduction that they have been accepted from the beginning as axiomatic and unquestioned, since the controversies as to taxation of national banks illustrated in the opinions of this court mainly depend, not upon any attempted exercise of a power to tax the property and franchises of the banks, but involved controversies as to whether, when the shares of the stock in the names of the shareholders had been assessed according to law, the tax could be imposed upon them because of alleged discrimination or other illegalities.

Does then the Kentucky statute tax the shares of stock in the names of the shareholders, or does it impose a tax upon the bank, its property or franchise?

Without undertaking to recapitulate the provisions of the Kentucky statutes, in virtue of which the taxes here in question were imposed, we content ourselves with reiterating, in the margin,[1] the statement of the taxing statutes of Kentucky

[1] Excerpt from *Adams Express Co.* v. *Kentucky*, 166 U. S. 173:

"Chapter 108 of the compilation of 1894 is divided into articles as well as sections, and may be referred to by way of convenience. There are some slight differences from the act of 1892 not material to be noted. The first

made by the court in *Adams Express Company* v. *Kentucky*, 166 U. S. 171, 175, *et seq.*

The effect of the statutory provisions contained in the third

---

article contains the general provisions relating to the assessment and collection of taxes 'upon all property.' Sections 4019 and 4020 are as follows:

'SEC. 4019. An annual tax of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the sinking fund; twenty-two (22) cents for the support of the common schools, and one-half of one cent for the Agricultural and Mechanical College, as now provided by law, by an act entitled "An act for the benefit of the Agricultural and Mechanical College," approved April twenty-ninth, one thousand eight hundred and eighty, including the necessary travelling expenses of all pupils of the State entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

'SEC. 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of the State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale.'

Article two relates to the assessment of property by the assessors, to whom every person in the Commonwealth must give in a list of all his property under oath.

Section 4058 provides for schedules with interrogatories to be propounded to each person, 'with affidavit thereto attached, to be signed and sworn to by the person whose property is assessed.' The schedules contain a long list of items, including all forms of tangible and intangible, real, personal and mixed property; the enumeration being exceedingly minute. The first eleven items relate to bonds, notes secured by mortgage, other notes, accounts, cash on hand, cash on deposit in bank, cash on deposit with other corporations, cash on deposit with individuals, all other credits or money at interest, stock in joint stock companies or associations, stock in foreign corporations.

The third article covers the assessment of corporations, corporations generally, banks and trust companies, building and loan associations, turnpikes.

Sections 4077, 4078, 4079, 4080, 4081, 4082 and 4091 are as follows:

'SEC. 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company,

article, sections 4077, *et seq.*, as construed and interpreted by the Court of Appeals of the State of Kentucky, were considered in *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150,

---

express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchises may be exercised. The auditor, treasurer and secretary of State are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

'SEC. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed or liable to assessment in this State, and the

and *Adams Express Company* v. *Kentucky*, 166 U. S. 171. In the *Bridge Company case*, referring to the "franchise" tax there in controversy, it was said (p. 154):

---

fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

'SEC. 4079. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government, or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

'SEC. 4080. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts in this State, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

'SEC. 4081. If the corporation organized under the laws of this State or of some other State or government be a railroad, telegraph, telephone,

"The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals, as consistent

---

express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such lines pass or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the State, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district.

'SEC. 4082. Whenever any person or association of persons, not being a corporation nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

'SEC. 4091. All taxes assessed against any corporation, company or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company or association by the auditor; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum ; any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.'

The fourth article relates to the assessment and payment of taxes by railroads; the fifth to distilled spirits; the sixth, seventh, eighth and ninth articles to the board of supervisors and the collection of taxes and the revenue.

Articles 10 to 12 relate to license taxes, special taxes, privilege taxes and the like; and articles 13, 14 and 15 prescribe certain duties for designated officers touching the collection of the revenue. Article 15 provides for a

with the provisions of the constitution of Kentucky in reference to taxation."

In the *Express Company case* the court said (pp. 180, 181):

"Taking the whole act together, and in view of the provisions of sections 4078 to 4081, we agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State. . . . There is nothing in the statute which exempts any intangible property owned by any corporation, company or individual taxpayer from taxation, or discriminates between them. . . . The tax mentioned in section 4077 is not an additional tax upon the same property, but on intangible property which has not been taxed as tangible property."

True it is, since the decision referred to, the Court of Appeals of the State of Kentucky has, it is asserted in the case of *Louisville Tobacco Warehouse Company* v. *Commonwealth*, on a rehearing, 49 S. W. Rep., examined the terms of section 4077, and is stated to have said:

"The latter clause, 'also every other corporation, company or association having or exercising any special or exclusive

---

state board of equalization to equalize the assessments returned to them from each county."

By section 4092, banks and trust companies are required to file the report referred to in section 4078 by a date named. The section also prescribed when taxes are payable, and that upon failure to file the reports "or to pay said taxes, said banks and trust companies shall be subjected to the same fines and penalties as prescribed in section fifteen (4091) of this article."

privilege or franchise not allowed by law to natural persons, or performing any public service,' seems to us to have been added for the purpose of including such corporations as were not strictly *ejusdem generis* with the companies previously enumerated, but which might possess exclusive privileges; and, as a provision for the future, to impose the intangible property tax upon corporations to be thereafter created, which might have exclusive privileges, or perform public services.

"The only authority relied upon in support of the contention that this language includes all corporations is the case of *Western Union Telegraph Company* v. *Norman*, 77 Fed. Rep. 27. But that case was in relation to a company specifically named in the statute under consideration. The question here presented did not arise in that, and was, presumably, not argued; and the suggestion made by the learned judge who delivered that opinion was made in argument in reaching a conclusion, to reach which the dictum cited was not necessary."

In deciding that the conviction of the corporation for wilfully failing to file with the state auditor the statement required by the Kentucky Statutes, sections 4077 and 4078, was erroneous, the court in that case, it is also stated, has, moreover, further observed:

"Nor can the appellant corporation be said to have any intangible property subject to taxation under this statute. Its tangible property — its warehouse, drays and personal property — is of no greater value in the hands of the corporation than it would be if owned and managed by the natural persons who are its stockholders. This is also true of its choses in action, etc. The value of its capital stock must necessarily be the value of its tangible property, choses in action, etc. It had no intangible property subject to taxation under the statute, and, as matter of law, could have none. . . . The revenue law of the State is not unconstitutional because it does not require natural persons, possessing no special franchise or privilege, to make report of special privileges and franchises for taxation; nor is it unconstitutional in failing to require a report from all classes of corporations which can

possess the intangible property sought to be taxed by this statute. The tax upon tangible property of all corporations is elsewhere provided for."

The opinion, however, from which the foregoing extracts are made, has not as yet been reported. But, if the Court of Appeals of Kentucky has given to the state statute the construction indicated, the ruling does not affect the present case, as banks are specifically mentioned in the statute.

The tax then, as defined in the law, as interpreted by the Court of Appeals of Kentucky and by this court in the opinions from which we have excerpted, is a tax nominally on the franchise of the corporation, but in reality a tax on all the intangible property of the corporation. The proposition then comes to this: Nothing but the shares of stock in the hands of the shareholders of a national bank can be taxed, except the real estate of the bank. The taxes which are here resisted are not taxes levied upon the shares of stock in the names of the shareholders, but are taxes levied on the franchise or intangible property of the corporation. Thus, bringing the two conclusions together, there would seem to be no escape in reason from the proposition that the taxing law of the State of Kentucky is beyond the authority conferred by the act of Congress, and is therefore void for repugnancy to such act.

It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements — equivalency in law and equivalency in fact. Does it contain either? is the question.

To be equivalent in law, involves the proposition that a tax on the franchise and property of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the States to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear.

The earliest case in the reports of this court is *Van Allen* v. *The Assessors*, (1865) 3 Wall. 573. The tax was on the shares of stock in the names of the shareholders, pursuant to the act of Congress. Two issues were presented, one, the assertion that the state banks were assessed on their capital and surplus, and therefore that stockholders in national banks were substantially discriminated against. This was held to be well taken; clearly, therefore, deciding that there was no equivalency between taxing the capital and surplus in the hands of the bank and taxing shares in the names of the shareholders, for if the two had been equivalent the decision would necessarily have been otherwise. The other question in the case was thus stated by the court, through Mr. Justice Nelson, page 581:

"The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States."

This question was examined, and it was decided that, as the shares of stock in the hands of the shareholders were distinct and different subjects-matter of taxation from the property or

rights of the bank, that therefore the power conferred by Congress could be exercised so as to tax the shareholders even although the property of the bank was invested in non-taxable bonds of the United States, because the two were distinct and different things.

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid, despite the authority to tax the stock given by the act of Congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the Government which were not subject to taxation. It follows then that not only did this decision refute the claim of equivalency between the tax on the bank or its property or franchises and the tax on the stock in the names of the stockholders, but by a negative affirmative it demonstrates that if the two are equivalent the tax in this case would be illegal, since the record here admits that a sum, at least the equivalent of the capital, surplus and undivided profits of the bank, was invested in bonds of the United States. The contention of equivalency then destroys itself, and if it were conceded would bring about the illegality of the tax, in support of the legality of which the argument is advanced.

Following this came the decision in *People* v. *Tax Commissioners*, (1866) 4 Wall. 244, in which, reiterating the decision in *Van Allen* v. *The Assessors*, it was held, because the property of the bank was distinct and separate from the shares of stock in the names of the shareholders, therefore the latter were not entitled to deduct exempt property belonging to the bank from the assessment on their shares. The court said, again through Mr. Justice Nelson, and in part quoting from the opinion in the *Van Allen case*, (p. 258):

"'The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as

a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him;' and, we add, of course, is subject to like taxation."

The next case in order of time is *Bradley* v. *The People*, (1866) 4 Wall. 459. The question which the case presented was whether a tax on the property or rights of the bank was the legal equivalent of a tax on the shares of stock in the names of the shareholders. The argument of counsel was that in determining this question the method was immaterial, but the substance would be considered. The argument urged (p. 460): "Neither the National Government, the creator of the species of property now taxed, nor the shareholders can be interested in the *methods* which may be adopted by the State for the imposition of the tax." The court, through Mr. Justice Nelson, after referring to the decision in *Van Allen* v. *The Assessors*, and the tax there imposed, said (p. 462):

"It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which were exempt from state taxation, it was not easy to see that the tax on the capital was an equivalent to a tax on the shares."

In *National Bank* v. *Commonwealth*, (1870) 9 Wall. 353, a statute of the State of Kentucky which imposed a tax of fifty cents a share on bank stock, or stock in any moneyed corporation, of loan or discounts, owned by individuals, corporations or societies, was held to authorize a tax on the shares of the stockholders, as distinguished from the capital of the bank invested in Federal securities, and this, although the tax

was collected from the bank instead of the individual stockholders. In the opinion of the court, delivered by Mr. Justice Miller, a summary statement was made of the doctrine enunciated in the prior decisions recognizing the distinction between the property owned by an incorporated bank as a corporate entity and the property or interest of the stockholders in such bank, commonly called a share.

These cases, interpreting the act of Congress, have never been questioned, and indeed form the basis upon which the taxation of the shares of stock in the names of the shareholders allowed by the act of Congress has been made efficacious for the purpose of bringing a vast amount of property within the taxing power of the States, which would have been excluded had not the principles which the cases announced been established. If the postulate upon which they necessarily rest be overthrown by saying that there is an equivalency between the taxation of the property of the bank and the shares of stock in the names of the stockholders, it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed. It would then necessarily follow that the grant by Congress of authority to tax the shares of stock in the names of the shareholders could not be exercised where the bank held bonds of the United States exempt from taxation; that the two things being the same, the shareholders would be entitled to deduct the property of the bank from the sum of the taxation of the shares; in other words, that the right to tax the shareholders would be a vain thing.

It has been suggested that other cases decided since the cases referred to, whilst not questioning the latter, in effect admit a doctrine which tends to a contrary result. We do not stop to review in detail the cases from which this result is claimed to arise. They are: *Palmer* v. *McMahon*, 133 U. S. 660; *Bank of Redemption* v. *Boston*, 125 U. S. 60; *Davenport National Bank* v. *Davenport Board of Equalization*, 123 U. S. 83; *Mercantile Bank* v. *City of New York*, 121 U. S. 138. It suffices to say that the claim is devoid of founda-

tion. In all the cases referred to the taxation was specifically imposed on the shares of stock in the name of the shareholders, and the question presented, in various forms, was whether the provisions of state taxing laws, created a discrimination in favor of other moneyed capital and against the shareholders in national banks, contrary to the act of Congress. On these questions, interpreting the act of Congress with the liberality of construction resorted to in the *Van Allen case* and those which followed it, the court in most of the instances rejected the charge of discrimination. The result of the cases in question tended to give efficient vitality to the grant of Congress to tax the shares of stock in the names of the shareholders. The argument now relied on would, if it were adopted, operate to destroy the power to tax, which the act of Congress sanctions.

It cannot be doubted that, as a general principle, it is settled that the taxation of the property, franchises and rights of a corporation is one thing and the taxation of the shares of stock in the names of the shareholders is another and different one. This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As the result of its application, it is unquestioned that much property has been brought within the range of the taxing power which otherwise would have escaped taxation. It is unnecessary to multiply citations on this subject, as the question has been in recent cases reviewed and restated fully by the court. Thus, in *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146, it was said, through Mr. Justice Peckham:

"The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. (*Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 244, cited in *Farrington* v. *Tennessee*, 95 U. S. 687.)

"This statement has been reiterated many times in various decisions by this court, and is not now disputed by any one. In the case last cited Mr. Justice Swayne, in delivering the

opinion of the court, enumerated many objects liable to be taxed other than the capital stock of a corporation, and among them he instanced, (1) the franchise to be a corporation; (2) the accumulated earnings; (3) profits and dividends; (4) real estate belonging to the corporation and necessary for its business; and he adds that 'this enumeration shows the searching and comprehensive taxation to which such institutions are subjected where there is no protection by previous compact.' And in *Tennessee* v. *Whitworth*, 117 U. S. 129, at page 136, Mr. Chief Justice Waite, in delivering the opinion of the court, says: 'That in corporations four elements of taxable value are sometimes found: First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders.'

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one half of one per cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax."

And, in the case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, although it was held that the capital of the bank was exempt from taxation by a charter contract, and that, owing to the peculiar provisions of the charter, it would violate the contract to compel the bank to pay a tax levied on its shareholders, nevertheless the exemption did not preclude the levy of a tax upon the stock in the names of the stockholders, the court said (p. 402):

"The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned."

There being then no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property

of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal.

Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us, there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company* v. *Kentucky*, *supra*, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.

The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation have been evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing, without reason, a principle inconsistent with the law and destructive of the safeguards which it imposes.

Syllabus.

From the foregoing conclusions, it results that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void, and

The decree below must be and the same is hereby reversed and the cause be remanded for further proceedings not inconsistent with this opinion.

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* SMITH.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 227. Argued March 14, 15, 1899. — Decided April 17, 1899.

The provision in the act of the legislature of Michigan, No. 90, of the year 1891, amending the general railroad law, that one thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula; that such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company; that each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used, is a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws.

In so holding the court is not thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public; but it only says that the particular legislation in review in this

case does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated.

May 21, 1891, by act No. 90 of that year, the general railroad law of the State of Michigan was amended by the legislature, a portion of the ninth section of which amendment reads as follows:

". . . *Provided, further*, That one thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State or carrying on business partly within and partly without the limits of the State, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company. Each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

On April 19, 1893, and again on October 17, 1893, the defendant in error demanded of the ticket agent of the plaintiff in error, in the city of Adrian, Michigan, a thousand-mile ticket, pursuant to the provisions of the above section, in the names of himself and his wife Emma Watts Smith, which demand was refused. The defendant in error then applied for a mandamus to the circuit court to compel the railway company to issue such ticket upon the payment of the amount of $20, and after a hearing the motion was granted. Upon certiorari the Supreme Court of Michigan affirmed that order

and held that the statute applied only to the railway lines of the plaintiff in error operated within the State of Michigan.

The defence set up by the railway company was that under the charter from the State to one of the predecessors of the company to whose rights it had succeeded, it had the right to charge three cents a mile for the transportation of all passengers, and that such charter constituted a contract between the State and the company, which the former had no right to impair by any legislative action, and that the statute compelling the company to sell thousand-mile tickets at the rate of two cents a mile was an impairment of the contract, and was therefore void as in violation of the Constitution of the United States. It also alleged that the act was in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprived the company of its property and liberty of contract without due process of law, and also deprived it of the equal protection of the laws. The act was also alleged to be in violation of the constitution of the State of Michigan on several grounds.

The Supreme Court of the State decided that there was no contract in relation to the rates which the company might charge for the transportation of passengers, and that the statute violated no provision either of the Federal or the state constitution, but was a valid enactment of the legislature, and therefore the court affirmed the order for mandamus, the ticket to be good upon and limited to the railway lines of the defendant railroad company within the State of Michigan. 72 N. W. Rep. 328. The company sued out a writ of error from this court.

Mr. George C. Greene for plaintiff in error.

Mr. Fred A. Maynard and *Mr. Henry C. Smith* for the defendant in error.

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

The only subject of inquiry for us in this case is whether the act of the legislature of the State of Michigan violates any provision of the Federal Constitution. It is not within our province to review the decision of the Supreme Court upon the question whether the act violates the constitution of the State.

The two questions of a Federal nature that are raised in the record are, (1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the State and the railroad company; and (2) if not, does it nevertheless violate the Fourteenth Amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws. If we should decide that this act violates any provision of the Fourteenth Amendment it would be unnecessary to examine the question whether there was any contract between the State and the company as claimed by it. We will therefore first come to an investigation of the legislative authority with reference to that Amendment.

If unhampered by contract there is no doubt of the power of the State to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339, 344; *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 399; *St. Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466, 523.

The extent of the power of the State to legislate regarding the affairs of railroad companies has within the past few years been several times before this court. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U. S. 557; *Illinois Central*

Railroad v. *Illinois*, 163 U. S. 142; *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S. 285, and cases cited. These cases arose under the commerce clause of the Federal Constitution, the inquiry being whether the legislation in question violated that provision. In the cases in which the legislation was upheld it was on the ground that the State was but exercising its proper authority under its general power to legislate regarding persons and things within its jurisdiction, sometimes described as its police power, and that in exercising that power in the particular cases it did not violate the commerce clause of the Federal Constitution by improperly regulating or interfering with interstate commerce. The extent of the right of the State to legislate was examined in these various cases — so far at least as it was affected by the commerce clause of the Constitution of the United States.

In *Illinois Central Railroad* v. *Illinois*, the state statute imposed the duty upon the company of stopping its fast mail train at the station at Cairo, to do which the train had to leave the through route at a point three miles from that station and then return to the same point in order to resume its journey. This statute was held to be an unconstitutional interference with interstate commerce, and therefore void.

In *Lake Shore & Michigan Southern Railway* v. *Ohio*, a statute of the State of Ohio required the company to stop certain of its trains at stations containing 3000 inhabitants for a time sufficient to receive and let off passengers, and the statute was held to be a valid exercise of legislative power and not an improper interference with interstate commerce. In the course of the opinion of the court, which was delivered by Mr. Justice Harlan, it was said that "the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes

reach subjects over which national legislation can be constitutionally extended." And again, speaking of cases involving state regulations more or less affecting interstate or foreign commerce, it was said that these cases "were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce and valid until superseded by legislation of Congress on the same subject."

The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by Mr. Chief Justice Taney, in the course of his opinion in the *License cases*, 5 How. 504, 583, in describing the powers of a State: "they are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void.

The validity of this act is rested by the counsel for the defendant in error upon the proposition that the state legislature has the power of regulation over the corporation created by it, and in cases of railroad corporations, the same power of regulation and also full control over the subject of rates to be charged by them as carriers for the transportation of persons

and property. Assuming that the State is not controlled by contract between itself and the railroad company, the question is how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons. *Greenwood* v. *Freight Company*, 105 U. S. 13, 17; *Commonwealth* v. *Essex County*, 13 Gray, 239; *People* v. *O'Brien*, 111 N. Y. 1, 52; *Detroit* v. *Detroit & Howland Plankroad*, 43 Michigan, 140.

A railroad company, although a *quasi* public corporation, and although it operates a public highway, *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Lake Shore &c. Railway* v. *Ohio*, 173 U. S. 285, 301, has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth* v. *Ames*, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Smyth* v. *Ames*, 169 U. S. 466, 522, 526. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.

The question is presented in this case whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to

lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates — a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the legislature in the exercise of its power to

provide for the safety, the health and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company.

It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word "convenience," it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience.

The power of the legislature to enact general laws regard-

ing a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

The act also compels the company to carry not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would and five years would not be reasonable, why not? And if five years would be reasonable, why would not ten? If the power exist at all, what are the

factors which make it unreasonable to say that the tickets shall be valid for five or for ten years? It may be said that circumstances can change within that time. That is true, but circumstances may change within two just as well as within five or ten years. There is no particular time in regard to which it may be said in advance and as a legal conclusion that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the legislature has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company.

If this power exist it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law;

but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial

reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates.

True it is that the railroad company exercises a public franchise and that its occupation is of a public nature, and the public therefore has a certain interest in and rights connected with the property, as was held in *Munn* v. *Illinois*, 94 U. S. 113, 125, and the other kindred cases. The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are

in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not, is not a matter of policy to be decided by the legislature. It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction.

This case differs from that which has just been decided, *Lake Shore &c. Company* v. *Ohio*, 173 U. S. 285. In that case the convenience of the public in the State was the basis of the decision, regard being also had to the convenience of the public outside of and beyond the State. It included all the public who desired to ride from the stations provided for in the act, and the convenience to the people in taking a train at these stations was held by this court to be so substantial as to justify the enactment in question.

But in this case it is not a question of convenience at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it. It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

To say that the legislature has power to absolutely repeal

the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts.

In *Attorney General* v. *Old Colony Railroad*, 160 Mass. 62, the statute required every railroad corporation in the Commonwealth to have on sale certain tickets which should be received for fare on all railroad lines in the Commonwealth, etc., and the statute was held invalid. The precise question involved in this case was not there presented, and the court said it was not necessary or practicable to attempt to determine in that case just how far the legislature could go by way of regulating the business of railroad companies or just where were the limits of its power.

The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest.

In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the

safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason. Whether the legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time, is not a question which is now before us, and we need not express any opinion in regard to it.

In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated.

The judgment of the Supreme Court of the State of Michigan should be reversed and the case remanded for further proceedings not inconsistent with the opinion of this court, and it is so ordered.

The Chief Justice and Mr. Justice Gray and Mr. Justice McKenna dissented.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 342. Milburn Gin and Machine Company *v.* German Bank. Error to the Supreme Court of the State of Tennessee. Motions to dismiss or affirm. Submitted January 30, 1899. Decided February 27, 1899. *Per Curiam.* Dismissed on the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556; *Egan* v. *Hart*, 165 U. S. 188, and other cases. *Mr. C. W. Metcalf* for motions. *Mr. William M. Randolph* opposing.

No. 121. Northern Pacific Railroad Company *v.* Lynch. Error to the United States Circuit Court of Appeals for the Ninth Circuit. Submitted January 11, 1899. Decided February 27, 1899. Judgment affirmed with costs and cause remanded to the Circuit Court of the United States for the District of Montana. *Mr. William Wallace, Jr.*, for plaintiff in error. *Mr. John B. Clayberg* for defendant in error.

No. 90. Gilbert, Receiver, *v.* Washington Beneficial Endowment Association. Appeal from the Court of Appeals of the District of Columbia. Argued January 24 and 25, 1899. Decided March 6, 1899. *Per Curiam.* Dismissed on the authority of *Lodge* v. *Twell*, 135 U. S. 232; *McGourkey* v. *Toledo and Ohio Central Railway Company*, 146 U. S. 536, and cases cited. *Mr. Thomas M. Fields* and *Mr. Henry D. Hotchkiss* for appellant. *Mr. A. A. Lipscomb*, *Mr. S. F. Phillips*, *Mr. Frederic D. McKenney*, *Mr. James E. Padgett* and *Mr. Edwin Forrest* for appellees.

Decisions announced without Opinions.

No. 159. GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, *v.* FIRST NATIONAL BANK OF BOONVILLE, NEW YORK. Error to the Supreme Court of the State of Kansas. Submitted January 18, 1899. Decided March 6, 1899. *Per Curiam.* Dismissed on the authority of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648; *Louisville and Nashville Railroad Company* v. *Louisville*, 166 U. S. 709, and other cases. *Mr. A. P. Jetmore* for plaintiff in error. *Mr. W. H. Rossington* and *Mr. Charles Blood Smith* for defendant in error.

No. 23. KEOKUK AND HAMILTON BRIDGE COMPANY *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. Argued and submitted January 20, 1899. Decided March 13, 1899. *Per Curiam.* Dismissed on the authority of *Ross* v. *King*, 172 U. S. 641, and cases cited. *Mr. Felix T. Hughes* for plaintiff in error. *Mr. Edward C. Akin* for defendants in error.

No. 228. ROGERS, AS MAYOR, AND CITY OF DENVER *v.* MORGAN. Error to the United States Circuit Court of Appeals for the Eighth Circuit. Submitted March 10, 1899. Decided March 13, 1899. *Per Curiam.* Dismissed on the authority of *Clark* v. *Kansas City*, 172 U. S. 334; *Kinnear* v. *Bausman*, 172 U. S. 644, and cases cited. *Mr. Platt Rogers* and *Mr. George Q. Richmond* for plaintiffs in error. *Mr. Willard Teller* and *Mr. H. M. Orahood* for defendants in error.

No. 231. CONSOLIDATED WATER COMPANY *v.* BABCOCK. Appeal from the Circuit Court of the United States for the Southern District of California. Submitted March 15, 1899. Decided March 20, 1899. *Per Curiam.* Dismissed on the authority of *Maynard* v. *Hecht*, 151 U. S. 324; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Davis* v. *Geissler*, 162 U. S. 290; *Cornell* v. *Green*, 163 U. S. 75, and cases cited. *Mr. Horace S. Oakley*, *Mr. C. K. Davis*, *Mr. Frank B. Kellogg* and *Mr.*

C. A. Severance for appellants. *Mr. H. E. Doolittle*, *Mr. Wm. J. Hunsaker*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for appellees.

Decisions on Petitions for Writs of Certiorari.

No. 671. EAGLE *v.* PILLSBURY-WASHBURN FLOUR MILLS COMPANY (LIMITED). Seventh Circuit. Denied February 27, 1899. *Mr. Edward O. Brown* for petitioner. *Mr. Frank F. Reed* opposing.

No. 673. HILLER *v.* LADD. Ninth Circuit. Denied February 27, 1899. *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. P. G. Galpin* for petitioners. *Mr. C. E. S. Wood* opposing.

No. 676. RHODES *v.* MASON. Sixth Circuit. Denied February 27, 1899. *Mr. Harvey D. Goulder* and *Mr. F. H. Canfield* for petitioners. *Mr. C. E. Kremer* opposing.

No. 693. INTERLAKE TRANSPORTATION COMPANY *v.* MASON. Sixth Circuit. Denied February 27, 1899. *Mr. James H. Hoyt* for petitioners. *Mr. C. E. Kremer* opposing.

No. 690. PELZER *v.* HORN AND BRANNEN MANUFACTURING COMPANY. Third Circuit. Granted February 27, 1899. *Mr. Richard N. Dyer* for petitioner. *Mr. Hector T. Fenton* opposing.

No. 694. HIBBERD *v.* BALTIMORE BUILDING AND LOAN ASSOCIATION. Fourth Circuit. Denied February 27, 1899. *Mr. Henry M. Russell* for petitioners. *Mr. Fielder C. Slingluff* opposing.

No. 699. CARNEGIE STEEL COMPANY (LIMITED) *v.* CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY. Sixth

Circuit. Denied February 27, 1899. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for petitioner. *Mr. Edmund F. Trabue* opposing.

No. 684. VENNER *v.* FARMERS' LOAN AND TRUST COMPANY. Sixth Circuit. Denied February 27, 1899. *Mr. Alfred Russell* for petitioner. *Mr. Frederick B. Van Vorst* opposing.

No. 685. ADRIAN WATER WORKS COMPANY *v.* FARMERS' LOAN AND TRUST COMPANY. Sixth Circuit. Denied February 27, 1899. *Mr. Andrew Howell* for petitioner. *Mr. Frederick B. Van Vorst* opposing.

No. 711. GREAT SOUTHERN FIRE PROOF HOTEL COMPANY *v.* JONES. Sixth Circuit. Granted February 27, 1899. *Mr. J. K. Richards* and *Mr. D. F. Pugh* for petitioner. *Mr. Talfourd P. Linn*, *Mr. George K. Nash* and *Mr. J. H. Outhwaite* opposing.

No. 720. MOFFETT, HODGKINS & CLARKE COMPANY *v.* CITY OF ROCHESTER. Second Circuit. Granted February 27, 1899. *Mr. Thomas H. Carter* and *Mr. Louis Marshall* for petitioner. *Mr. John F. Kinney* opposing.

No. 627. ADRIAANS *v.* ALVEY. Court of Appeals of the District of Columbia. Denied March 6, 1899. *Mr. William A. Cook* and *Mr. William A. Meloy* for petitioner. *Mr. Solicitor General* opposing.

No. 712. SAXLEHNER *v.* EISNER & MENDELSON COMPANY No. 713, SAXLEHNER *v.* SIEGEL-COOPER COMPANY; No. 714, SAXLEHNER *v.* GIES; No. 715, SAXLEHNER *v.* MARQUET; and No. 716, SAXLEHNER *v.* NIELSEN. Second Circuit. Granted

March 6, 1899. *Mr. Joseph H. Choate*, *Mr. Arthur v. Briesen* and *Mr. Antonio Knauth* for petitioner. *Mr. Edmund Wetmore* and *Mr. Charles G. Coe* opposing.

No. 719. STATE BANK OF AMBIA *v.* CHICAGO TITLE AND TRUST COMPANY. Seventh Circuit. Denied March 13, 1899. *Mr. Daniel Fraser* and *Mr. Otto Gresham* for petitioner. *Mr. Samuel O. Pickens* and *Mr. Smiley N. Chambers* opposing.

No. 270. GRATZ *v.* LAND AND RIVER IMPROVEMENT COMPANY. Seventh Circuit. Denied April 11, 1899. *Mr. Henry S. Wilcox* for petitioner. *Mr. John C. Spooner*, *Mr. A. L. Sanborn* and *Mr. Maxwell Evarts* opposing.

No. 730. MEXICAN CENTRAL RAILWAY COMPANY *v.* MARSHALL. Fifth Circuit. Denied April 11, 1899. *Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioner.

No. 754. CHAPMAN *v.* YELLOW POPLAR LUMBER COMPANY. Fourth Circuit. Denied April 17, 1899. *Mr. J. F. Bullitt* and *Mr. R. A. Ayers* for petitioner. *Mr. John N. Baldwin* opposing.

No. 717. GLAW *v.* PENNSYLVANIA COMPANY. Sixth Circuit. Denied April 17, 1899. *Mr. Charles Dick* and *Mr. Frederick C. Bryan* for petitioner. *Mr. William B. Sanders* opposing.

No. 748. SCAIFE *v.* WESTERN NORTH CAROLINA LAND COMPANY. Fourth Circuit. Denied April 17, 1899. *Mr. A. C. Avery* for petitioner.

In Memoriam.

BARON HERSCHELL, D.C.L., LL.D.

On the coming in of the court on March 1, 1899, the Chief Justice said:

It is with sincere sorrow that I announce to the members of the bar the sudden death of Baron Herschell, former Lord Chancellor of England, information of which has just been received by the court with deep sensibility.

Lord Herschell had been some months in this country in a public and international capacity, and but a few days have elapsed since he sat with us here, a compliment which has been extended only once previously in the instance of the then Lord Chief Justice of England.

In view of the cordial relations between Lord Herschell and the members of this court, his great distinction in our common profession and on the bench, and his unexpected death while absent from home in the discharge of high public duty, we feel called upon to take notice of this sad event, and as a mark of respect to his memory the court will adjourn until to-morrow at the usual hour.

In Memoriam.

STEPHEN JOHNSON FIELD, LL.D.

Mr. Justice Field was born on the 4th of November, 1816. On the 10th of March, 1863, he was commissioned as a Justice of this court. Having resigned, he ceased to be a member of the court on the first day of December, 1897. He died on Sunday the 9th of April, 1899. On the coming in of the court on Monday morning, the 10th, the Chief Justice said:

It becomes my sad duty to inform the gentlemen of the bar that Mr. Justice Field on yesterday (Sunday) evening passed peacefully from this life. He died full of years and of honors, and attended by all that should accompany old age.

The judicial career of Mr. Justice Field was unexampled in length and distinction, and he occupied a seat upon this bench for a longer period than any of its members from the beginning. His labors left no region of jurisprudence unexplored, and now that he rests from them, his works will follow him. His retirement when he saw port approaching was so recent that he hardly seems to have been absent, and his death comes home to us the more keenly.

As a mark of respect to his memory, the court will adjourn until to-morrow.

On the morning of Thursday, the 13th of April, the funeral services took place at the church of the Epiphany in Washington, at half-past ten o'clock.

INDEX.

ABATEMENT.

ADMIRALTY.

ATTACHMENT.

entitled to the possession of the cattle, and asked that they should be returned to him with damages. With the consent of both sides Pierce was appointed receiver of the cattle, and then service was made upon the Missouri corporation by publication, had in compliance with requirements of law. Stoddard then filed an interplea, setting up rights of other parties. This was demurred to, but no action was had on the demurrer. The receiver sold the cattle, paid himself in full and reported to the court that he had a balance in his hands, subject to its order. Then the Missouri company filed pleas to the jurisdiction of the court, and other pleas were filed, setting up claims to the balance in the receiver's hands. The Missouri company also set up that Pierce, by becoming receiver, had abandoned his claim to the ownership of the cattle. The trial court held that the territorial act, authorizing the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge, was unconstitutional and void, and ordered the action dismissed. The Supreme Court of the Territory held that the court below was wrong in this respect, but affirmed its judgment on the ground that an actual levy was necessary in order to give the court jurisdiction, and there had been none. The case being brought here, the Missouri corporation set up that this court was without jurisdiction, because the intervenors in the trial court had not been made parties to the appeal. *Held:* (1) That it was not necessary to make the intervenors parties; (2) That property of the Missouri company had been levied on under the writ of attachment, and that the decision of the Supreme Court of the Territory to the contrary was wrong; (3) That the Oklahoma statute, requiring an affidavit in its support, as a prerequisite to the issuance of a writ of attachment, does not involve the discharge of a judicial function, but is the performance of a ministerial duty; (4) That the court acquired jurisdiction of the defendant corporation by constructive service, by foreign attachment, without its consent; (5) That the territorial statute, authorizing the issue of a writ of attachment against the property of a non-resident defendant, is not repugnant to the Fourteenth Amendment to the Constitution. *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 84.

CASES AFFIRMED OR FOLLOWED.

See CLAIMS AGAINST THE UNITED STATES, 3; HABEAS CORPUS, 1; JURISDICTION, A, 4; C, 2; MUNICIPAL BONDS, 2; PUBLIC LAND, 8; STATUTE A, 1.

CLAIMS AGAINST THE UNITED STATES.

1. Claims for depredations on the Pottawatomie Indians committed by Indians were properly allowed by the Secretary of the Interior under

COMMON CARRIER.

CONSTITUTIONAL LAW.

CONTRACT.

EVIDENCE.

See VOLUNTARY GIFT, 1, 2.

EXCEPTION.

Although the bill of exceptions in this case does not state, in so many words, that it contains all the evidence, it sufficiently appears that it does contain all, and this court can inquire on this record whether the Circuit Court erred in giving a peremptory instruction for the defendant. *Gunnison County Commissioners* v. *Rollins*, 255.

FEES.

1. In proceedings taken by a District Attorney of the United States, by order of the Attorney General at the request of the Secretary of War, and conducted under directions of the latter, to secure the condemnation of private lands within the limits of his district for the purpose of erecting fortifications thereon for the use of the United States, he is performing his official duties as District Attorney of the United States, and is not entitled to any extra or special compensation for them. *United States* v. *Johnson*, 363.
2. The authority conferred upon the Attorney General by the act of March 3, 1891, c. 542, 26 Stat. 985, to offer rewards for the detection and prosecution of crimes against the United States, preliminary to the indictment, empowered him to authorize the Marshal of the Northern District of Florida to offer a reward for the arrest and delivery of a person accused of the committal of a crime against the United States in that district, the reward to be paid upon conviction; and a deputy marshal, who had complied with all the conditions of the offer and of the statute, was entitled to receive the amount of the reward offered. *United States* v. *Matthews*, 381.

FOX RIVER WATER POWER.

See CONSTITUTIONAL LAW, 2, 3.

FRAUD.

The facts in this case, as detailed in the statement of the case and the opinion of the court, show that a gross fraud was committed by the plaintiffs in error against the defendants, to dispossess them of the property in question; and in view of the peculiar circumstances of the case, the fraud, so glaring, the original and persistent intention of McIntire through so many years to make himself the owner of the property, the utter disregard shown of the rights of the plaintiff as well as of the mortgagee, the false personation of Emma Taylor, and the

HABEAS CORPUS.

INDIANS.

INSOLVENCY.

B. JURISDICTION OF CIRCUIT COURTS OF APPEAL.

A Circuit Court of Appeals is without jurisdiction to review a decree of a Circuit Court when that decree, as in this case, was not a final one. *Guarantee Co.* v. *Mechanics' Savings Bank & Trust Co.*, 582.

See JURISDICTION, C, 10, 11.

C. JURISDICTION OF CIRCUIT COURTS.

1. The Circuit Court of the United States for the Eastern District of Louisiana has jurisdiction of a suit brought in it by a citizen of New York to recover from the city of New Orleans on a number of certificates, payable to bearer, made by the city, although the petition contains no averment that the suit could have been maintained by the assignors of the claims or certificates sued upon. *New Orleans* v. *Quinlan*, 191.
2. *Newgass* v. *New Orleans*, 33 Fed. Rep. 196, approved in holding that "A Circuit Court shall have no jurisdiction for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over, (1) suits upon foreign bills of exchange; (2) suits that might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made; (3) suits upon choses in action payable to bearer, and made by a corporation." *Ib.*
3. The instruments sued on in this case being payable to bearer, and having been made by a corporation, are expressly excepted by the Judiciary Act of August 13, 1888, c. 866, from the general rule prescribed in it that an assignee or subsequent holder of a promissory note or chose in action could not sue in a Circuit or District Court of

him, and was ignorant of the whole proceeding. In 1890, upon the matter coming to his knowledge, he brought this action in the Circuit Court of the United States for the Eastern District of Texas against persons occupying and claiming part of the land, setting up the above facts, and asking a decree that the judgment of 1850 was null and void, and not binding upon him. He died before trial could be had, and the action proceeded to trial and judgment in the name of his executors. The jury found a verdict in favor of the executors, judgment was rendered accordingly, and an appeal was taken to the Court of Appeals. In answer to a question certified to this court by the Court of Appeals, it is *Held*, that the said judgment of the district court of Brazoria, Texas, which was a court of general jurisdiction, was, under the circumstances stated, subject to collateral attack in the United States Circuit Court for the Eastern District of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the State of New York and a citizen of the State of Texas by evidence *aliunde* the record of the state court. *Cooper* v. *Newell*, 555.

See CONSTITUTIONAL LAW, 2, 3.

LACHES.

Less than two years having elapsed from the payment of the first dividend to the filing of this bill, and the other creditors of the bank not having been harmed by the delay, no presumption of laches is raised, nor can an estoppel properly be held to have arisen. *Merrill* v. *National Bank of Jacksonville*, 131.

MUNICIPAL BONDS.

1. The recitals in the bonds of Gunnison County, the coupons of which are in suit in this case, that they were "issued by the Board of County Commissioners of said Gunnison County in exchange, at par, for valid floating indebtedness of the said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the State of Colorado, entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21, 1881; 'that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;' that the total amount of the issue does not exceed the limit prescribed by the constitution of the State of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison, voting on the question at a general election duly held in said county on the seventh day of November, A.D. 1882," estop the county from asserting, against a

PUBLIC LAND.

C. STATUTES OF STATES AND TERRITORIES.

SUGAR BOUNTY.

The manufacturer of the sugar, and not the producer of the sugar cane, is the person entitled to the "bounty on sugar" granted by the act of March 2, 1895, c. 189, to "producers and manufacturers of sugar in the United States." *Allen* v. *Smith*, 389.

TAX AND TAXATION.

1. The system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against owners of shares in national banks, and, in its practical operation it does not materially do so; and there is nothing upon the face of these statutes which shows such discrimination. *First National Bank of Wellington* v. *Chapman*, 205.
2. The term "moneyed capital" in the act of Congress fixing limits to state taxation on investments in national banks, Rev. Stat. § 5219, does not include capital which does not come into competition with the business of national banks, and exemptions from taxation, made for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by those statutes. *Ib.*
3. This court is bound by the construction put by the highest court of the State of Kentucky upon the provisions in the Constitution of that State, relating to exemptions from taxation of property used for "public purposes," however much it may doubt the soundness of the interpretation. *Covington* v. *Kentucky*, 231.
4. The provision in the act of the legislature of Kentucky of May 1, 1886, c. 897, that "the said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land on which they are situated," which the city of Covington was, by that act authorized to acquire and construct, "shall be and remain forever exempt from state, county and city tax," did not, in view of the provision in the act of February 14, 1856, that "all charters and grants of or to corporations, or amend-

VOLUNTARY GIFT.