UNITED STATES REPORTS

VOLUME 174

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1898

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING CO.
21 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.

[1] 162 Indian cases, involving the same questions, were decided with this case. Their names and numbers will be found in a note on pp. 467–469.

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.

CAPITAL TRACTION COMPANY *v.* HOF.

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

No. 108. Argued January 5, 6, 1899. — Decided April 11, 1899.

This court has jurisdiction to review by writ of error, under the act of February 9, 1893, c. 74, § 8, a judgment of the Court of Appeals of the District of Columbia, maintaining the validity of proceedings for a trial by a jury before a justice of peace, which were sought to be set aside on the ground that the act of Congress authorizing such a trial was unconstitutional.

The provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.

By the Seventh Amendment to the Constitution, either party to an action at law (as distinguished from suits in equity and in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury.

By the Seventh Amendment to the Constitution, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States otherwise than according to the rules of the common law of England, that is to say, upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law.

Opinion of the Court.

"Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the facts, and (except upon acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

A trial of a civil action, before a justice of the peace of the District of Columbia, by a jury of twelve men, as permitted by the acts of Congress, without requiring him to superintend the course of the trial or to instruct the jury in matter of law, or authorizing him to arrest judgment upon their verdict, or to set it aside for any cause whatever, is not a trial by jury, in the sense of the common law and of the Constitution, and does not prevent facts so tried from being tried anew by a common law jury in an appellate court.

Congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount before a justice of the peace, or, in his presence, by a jury of twelve, or of any less number, allowing to either party, where the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace to a court of record, and to have a trial by jury in that court.

The appeal authorized by Congress from judgments of a justice of the peace in the District of Columbia to a court of record, "in all cases where the debt or damage doth exceed the sum of five dollars," includes cases of judgments entered upon the verdict of a jury.

The right of trial by jury, secured by the Seventh Amendment to the Constitution, is not infringed by the act of Congress of February 19, 1895, c. 100, enlarging the jurisdiction of a justice of the peace in the District of Columbia to three hundred dollars, and requiring every appellant from his judgment to enter into an undertaking, with surety, to pay and satisfy the final judgment of the appellate court.

The case is stated in the opinion of the court.

Mr. R. Ross Perry for plaintiff in error.

Mr. Alexander Wolf for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

On September 8, 1896, the Capital Traction Company, a street railway corporation in the District of Columbia, presented to the Supreme Court of the District a petition for a writ of certiorari to a justice of the peace to prevent a civil

action to recover damages in the sum of $300 from being tried by a jury before him.

The petition for a writ of certiorari alleged that Charles Hof, on August 17, 1896, caused a summons to be issued by Lewis I. O'Neal, Esquire, one of the justices of the peace in and for the District of Columbia, summoning the Capital Traction Company to appear before him on August 20, 1896, "to answer unto the complaint of Charles Hof in a plea of damage of $300," and the matter was postponed until September 8, on which day, after the company had put in its plea, and issue had been joined thereon, the attorney for Hof demanded of the justice of the peace that the action should be tried by a jury, and thereupon the justice of the peace issued a *venire* to a constable, commanding him to summon twelve jurors to appear before said justice on September 10; that the petitioner was advised that such a demand for the so-called jury was founded upon sections 1009–1016 of the Revised Statutes of the District of Columbia, and was intended to subject the petitioner, without appeal, to a form of trial before a justice of the peace, unknown to the common law, and, as the petitioner was advised, illegal and unconstitutional; that the petitioner was informed and believed that Hof's claim was for damages sustained by him through its negligence, while he was a passenger on one of its cars; and that it had a good defence on the merits to his claim, and sought a fair opportunity to make such defence before an impartial tribunal, and was ready and willing to give any security that might be required for the prompt payment of any final judgment which might be pronounced against it in due course of law.

The petition further averred that the only method in which Hof's claim against the petitioner could be tried by a jury according to the common law and the Constitution was by removing his suit from the justice of the peace into the Supreme Court of the District of Columbia; that if this was not done, the petitioner would be deprived of its constitutional right to a trial by jury, and would be in danger of being deprived of its property without due process of law, and would

be denied the equal protection of the laws; and that the amount claimed by Hof was within the jurisdiction of that court.

Wherefore the petitioner prayed that a writ of certiorari might be issued to the justice of the peace to remove Hof's claim into that court for trial according to the course of the common law, upon such terms as to security for costs and damages as the court might think proper; and for such other and further relief as the petitioner might be entitled to.

The Supreme Court of the District of Columbia granted a writ of certiorari to the justice of the peace, as prayed for; and the justice of the peace, in his return thereto, set forth the proceedings before him in the action of Hof against the Capital Traction Company, showing the issue and return of the summons to the defendant, its oral plea of not guilty, the plaintiff's joinder of issue and demand of a jury, and the stay of further proceedings by the writ of certiorari.

On October 6, 1896, the Supreme Court of the District of Columbia overruled a motion of Hof to quash the writ of certiorari; and entered an order quashing all proceedings before the justice of the peace after issue joined. 24 Wash. Law Rep. 646. Hof appealed to the Court of Appeals of the District of Columbia, which on February 17, 1897, reversed that order, and remanded the case with directions to quash the writ of certiorari. 10 App. D. C. 205. The Capital Traction Company thereupon sued out a writ of error from this court, under the act of February 9, 1893, c. 74, § 8. 27 Stat. 436.

The petition for a writ of certiorari presents for determination a serious and important question of the validity, as well as the interpretation and effect, of the legislation of Congress conferring upon justices of the peace in the District of Columbia jurisdiction in civil actions in which the matter in dispute exceeds twenty dollars in value, and providing for a trial by a jury before the justice of the peace, an appeal from his judgment to the Supreme Court of the District of Columbia, and a trial by jury, at the request of either party, in the appellate court. This court, therefore, has jurisdiction of the writ of error. *Baltimore & Potomac Railroad* v. *Hopkins*,

130 U. S. 210, 224; *Parsons* v. *District of Columbia*, 170 U. S. 45.

The Court of Appeals was unanimous in maintaining the validity of the proceedings looking to a trial by a jury before the justice of the peace. But there was a difference of opinion between the two associate justices and the chief justice upon the question whether such a trial before the justice of the peace would be a trial by jury, according to the common law and the Constitution; as well as upon the question whether the trial by jury, allowed by Congress in the Supreme Court of the District, upon appeal from the judgment of the justice of the peace, and upon the condition of giving bond to pay the final judgment of the appellate court, satisfied the requirements of the Constitution.

I. The Congress of the United States, being empowered by the Constitution "to exercise exclusive legislation in all cases whatsoever" over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States. *Kendall* v. *United States*, (1838) 12 Pet. 524, 619; *Mattingly* v. *District of Columbia*, (1878) 97 U. S. 687, 690; *Gibbons* v. *District of Columbia*, (1886) 116 U. S. 404, 407.

It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia. *Webster* v. *Reid*, (1850) 11 How. 437, 460; *Callan* v. *Wilson*, (1888) 127 U. S. 540, 550; *Thompson* v. *Utah*, (1898) 170 U. S. 343.

The decision of this case mainly turns upon the scope and effect of the Seventh Amendment of the Constitution of the United States. It may therefore be convenient, before particularly examining the acts of Congress now in question, to

refer to the circumstances preceding and attending the adoption of this Amendment, to the contemporaneous understanding of its terms, and to the subsequent judicial interpretation thereof, as aids in ascertaining its true meaning, and its application to the case at bar.

II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that "the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.

The Ordinance of 1787 declared that the inhabitants of the Northwest Territory should "always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury," "and of judicial proceedings according to the course of the common law." 1 Charters and Constitutions, 431.

The Constitution of the United States, as originally adopted, merely provided in article 3, section 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury." In the Convention which framed the Constitution, a motion to add this clause, "and a trial by jury shall be preserved as usual in civil cases," was opposed by Mr. Gorham of Massachusetts, on the ground that "the constitution of juries is different in different States, and the trial itself is usual in different cases, in different States;" and was unanimously rejected. 5 Elliott's Debates, 550.

Mr. Hamilton, in number 81 of the Federalist, when discussing the clause of the Constitution which confers upon this court "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make," and again, in more detail, in number 83, when answering the objection to the want of any provision securing trial by jury in civil actions, stated the diversity then existing in the laws of the different States regarding appeals and jury trials; and especially pointed out that in the New England States, and in those alone, appeals were allowed, as of course, from one jury to another until there had been two verdicts on one side, and in no other State but Georgia was there any

appeal from one to another jury. The diversity in the laws of the several States, he insisted, "shows the impropriety of a technical definition derived from the jurisprudence of any particular State," and "that no general rule could have been fixed upon by the Convention which would have corresponded with the circumstances of all the States." And he suggested that "the legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no reëxamination of facts where they had been tried in the original causes by juries;" but if this "should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial." 2 Federalist, (ed. 1788) pp. 319–321, 335, 336.

At the first session of the first Congress under the Constitution, Mr. Madison, in the House of Representatives, on June 8, 1789, submitted propositions to amend the Constitution by adding, to the clause concerning the appellate jurisdiction of this court, the words, "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law;" and, to the clause concerning trial by jury, these words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 Annals of Congress, 424, 435. And those propositions, somewhat altered in form, were embodied in a single article, which was proposed by Congress on September 25, 1789, to the legislatures of the several States, and upon being duly ratified by them, became the Seventh Amendment to the Constitution, in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance

of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that "no fact tried by a jury shall be otherwise reëxamined, in any court of the United States, than according to the rules of the common law," had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States.

This conclusion has been established, and "the rules of the common law" in this respect clearly stated and defined, by judicial decisions.

In *United States* v. *Wonson*, (1812) 1 Gallison, 5, a verdict and judgment for the defendant having been rendered in the District Court of the United States for the District of Massachusetts in an action of debt for a penalty, the United States appealed to the Circuit Court, and were held not to be entitled to try by a new jury in that court facts which had been tried and determined by the jury in the court below. "We should search in vain," said Mr. Justice Story, "in the common law, for an instance of an appellate court retrying the cause by a jury, while the former verdict and judgment remained in full force. The practice indeed seems to be a peculiarity of New England, and, if I am not misinformed, does not exist in more than one (if any) other State in the Union." And, after quoting the words of the Seventh Amendment, he observed: "Beyond all question, the common law here alluded to is not the common law of any individual State, (for it probably differs in all,) but it is the common law of England, the grand reservoir of all our jurisprudence." "Now, according to the rules of the common law, the facts once tried by a jury are never reëxamined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* is awarded. This is the invariable usage, settled by the decisions of ages." 1 Gallison, 14, 20.

In *Parsons* v. *Bedford*, (1830) 3 Pet. 433, this court, on writ of error to a lower court of the United States, held that

it had no power to reëxamine facts tried by a jury in the court below, although that court was held in Louisiana, where Congress had enacted that the mode of proceeding should conform to the laws directing the mode of practice in the district courts of the State, and a statute of the State authorized its supreme court to try anew on appeal facts tried by a jury in a district court. Mr. Justice Story, in delivering the judgment of this court, expounding the Seventh Amendment to the Constitution, after showing that, in the first clause, the words "suits at common law" were used in contradistinction to suits in equity and in admiralty, and included "not merely suits which the common law recognized among its old and settled proceedings," but all suits in which legal rights, and not equitable rights, were ascertained and determined, proceeded as follows: "But the other clause of the Amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise reëxamined, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to reëxamine any facts, tried by a jury, in any other manner. The only modes known to the common law to reëxamine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." 3 Pet. 446–448.

This last statement has been often reaffirmed by this court. *Barreda* v. *Silsbee*, (1858) 21 How. 146, 166; *Justices* v. *Murray*, (1869) 9 Wall. 274, 277; *Miller* v. *Life Insurance Co.*, (1870) 12 Wall. 285, 300; *Insurance Co.* v. *Comstock*, (1872) 16 Wall. 258, 269; *Insurance Co.* v. *Folsom*, (1873) 18 Wall. 237, 249; *Railroad Co.* v. *Fraloff*, (1879) 100 U. S. 24, 31; *Lincoln* v. *Power*, (1894) 151 U. S. 436, 438; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, (1897) 166 U. S. 226, 246.

The Judiciary Act of September 24, 1789, c. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed — within six months after the organization of the Government under the Constitution, and on the day before the first ten

Amendments were proposed to the legislatures of the States — by the First Congress, in which were many eminent men who had been members of the Convention which formed the Constitution, has always been considered as a contemporaneous exposition of the highest authority. *Cohens* v. *Virginia*, (1821) 6 Wheat. 264, 420; *Parsons* v. *Bedford*, above cited; *Börs* v. *Preston*, (1884) 111 U. S. 252, 256; *Ames* v. *Kansas*, (1884) 111 U. S. 449, 463, 464; *Wisconsin* v. *Pelican Ins. Co.*, (1888) 127 U. S. 265, 297. That act provided, in §§ 9 and 12, that the trial of issues of fact, in a District or Circuit Court, in all suits, except those of equity or admiralty jurisdiction, should be by jury; in § 13, that the trial of issues of fact in this court, in the exercise of its original jurisdiction, in all actions at law against citizens of the United States, should be by jury; in § 17, that "all the said courts of the United States" should "have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law;" and in §§ 22 and 24, that final judgments of the District Court might be reviewed by the Circuit Court, and final judgments of the Circuit Court be reviewed by this court, upon writ of error, for errors in law, but not for any error in fact. 1 Stat. 77, 80, 81, 83, 84. Those provisions, so far as regards actions at law, have since remained in force, almost uninterruptedly; and they have been reënacted in the Revised Statutes, allowing the parties, however, to waive a jury and have their case tried by the court. Rev. Stat. §§ 566, 633, 648, 689, 691, 726, 1011.

The only instances that have come to our notice, in which Congress has undertaken to authorize a second trial by jury to be had in a court of the United States, while the verdict of a jury upon a former trial in a court of record has not been set aside, are to be found in two temporary acts passed during the last war with Great Britain, and in an act passed during the war of the rebellion and continued in force for a short time afterwards, each of which provided that certain actions brought in a state court against officers or persons acting under the authority of the United States might, after final judgment, be removed by appeal or writ of error to the

Circuit Court of the United States, and that court should "thereupon proceed to try and determine the facts and the law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding." Acts of February 4, 1815, c. 31, §§ 8, 13, and March 3, 1815, c. 94, §§ 6, 8; 3 Stat. 199, 200, 234, 235; Act of March 3, 1863, c. 81, § 5; 12 Stat. 757; Act of May 11, 1866, c. 80, § 3; 14 Stat. 46. But such a provision, so far as it authorized the facts to be tried and determined in the Circuit Court of the United States in a case in which a verdict had been returned in the state court, was held to be inconsistent with the Seventh Amendment of the Constitution of the United States by the Supreme Judicial Court of Massachusetts, in a case arising under the acts of 1815; and by the Supreme Court of New York and by this court, in cases arising under the acts of 1863 and 1866. *Wetherbee* v. *Johnson*, (1817) 14 Mass. 412; *Patrie* v. *Murray*, (1864) 43 Barb. 323; *S. C. nom. Justices* v. *Murray*, (1869) 9 Wall. 274; *McKee* v. *Rains*, (1869) 10 Wall. 22.

In *Justices* v. *Murray*, an action was brought by Patrie against Murray, a United States marshal, and his deputy, in the Supreme Court of the State of New York, and a verdict and judgment for the plaintiff were rendered in that court. The defendant sued out a writ of error from the Circuit Court of the United States, under the act of Congress of March 3, 1863, c. 81, § 5; and moved the state court to stay proceedings. The state court denied the motion, and refused to make a return to the writ of error, upon the ground that the act of Congress, so far as it provided that a case, after verdict and judgment in a state court, might be removed to the Circuit Court of the United States for trial and determination upon both the facts and the law, in the same manner as if the case had been originally commenced in that court, was in violation of the Seventh Amendment of the Constitution of the United States, and for that reason null and void. *Patrie* v. *Murray*, 43 Barb. 323. Thereupon the Circuit Court of the United States, without expressing any opinion upon this point, granted a writ of mandamus to the clerk of the state court.

Murray v. *Patrie*, 1 Blatchford, 343; 9 Wall. 276, note. The judgment of the Circuit Court ordering a mandamus was then brought to this court by writ of error, and reversed. Mr. Justice Nelson, in delivering judgment, after remarking that the case (which had been twice argued by very able counsel) had received the most deliberate consideration of the court, quoting the statements of Mr. Justice Story in *Parsons* v. *Bedford*, above cited, and recognizing that the second clause of the Seventh Amendment could not be invoked in a state court to prohibit it from reëxamining, on a writ of error, facts that had been tried by a jury in a lower court, went on to say: "It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common law cases coming up from an inferior Federal court, and also to the Circuit Court, in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers, in cases of Federal cognizance coming up from a state court? The terms of the Amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court." The *ratio decidendi*, the line of thought pervading and controlling the whole opinion, was that the Seventh Amendment undoubtedly prohibited any court of the United States from reëxamining facts once tried by a jury in a lower court of the United States, and that there was no reason why the prohibition should not equally apply to a case brought into a court of the United States from a state court. "In both instances," it was said, "the cases are to be disposed of by the same system of laws, and by the same judicial tribunal." 9 Wall. 277–279.

In *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 242–244, the same course of reasoning was fol-

lowed, and was applied to a case brought by writ of error from the highest court of a State to this court.

It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of reëxamination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.

The case of enforcing, in a court of the United States, a statute of a State giving one new trial, as of right, in an action of ejectment, is quite exceptional; and such a statute does not enlarge, but restricts, the rules of the common law as to reëxamining facts once tried by a jury, for by the common law a party was not concluded by a single verdict and judgment in ejectment, but might bring as many successive ejectments as he pleased, unless restrained by a court of equity after repeated verdicts against him. Bac. Ab. Ejectment, I; *Equator Co.* v. *Hall*, (1882) 106 U. S. 86; *Smale* v. *Mitchell*, (1892) 143 U. S. 99.

III. "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to

instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.

Lord Hale, in his History of the Common Law, c. 12, "touching trial by jury," says: "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." And again, in summing up the advantages of trial by jury, he says: "It has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury." 2 Hale Hist. Com. Law, (5th ed.) 147, 156. See also 1 Hale P. C. 33.

The Supreme Court of Ohio held that the provision of article 1, section 19, of the constitution of that State, requiring compensation for private property taken for the public use to "be assessed by a jury," was not satisfied without an assessment by a jury of twelve men under the supervision of a court; and, speaking by Chief Justice Thurman, said: "That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." "We agree with Grimke, J., in *Willyard* v. *Hamilton*, 7 Ohio, pt. 2, 111, 118, that a jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, that a presiding law tribunal

is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference, that a mere commission, though composed of twelve men, can never be properly regarded as a jury. Upon the whole, after a careful examination of the subject, we are clearly of the opinion that the word 'jury,' in section 19 of article 1, as well as in other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence and arguments of the parties." *Lamb* v. *Lane*, (1854) 4 Ohio St. 167, 177, 179.

The Justices of the Supreme Judicial Court of New Hampshire, in an opinion given to the House of Representatives of the State, said: "The terms 'jury,' and 'trial by jury,' are, and for ages have been, well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor or against either party, duly empanelled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." *Opinion of Justices*, (1860) 41 N. H. 550, 551.

Judge Sprague, in the District Court of the United States for the District of Massachusetts, said: "The Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This

direction and superintendence was an essential part of the trial." "At the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict." "Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted." *United States* v. *Bags of Merchandise*, (1863) 2 Sprague, 85–88.

This court has expressed the same idea, saying: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts." *Vicksburg &c. Railroad* v. *Putnam*, (1886) 118 U. S. 545, 553. And again: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination." *United States* v. *Philadelphia & Reading Railroad*, (1887) 123 U. S. 113, 114. And see *Sparf* v. *United States*, (1895) 156 U. S. 51, 102, 106; *Thompson* v. *Utah*, (1898) 170 U. S. 343, 350; Miller on the Constitution, 511; Cooley's Principles of Constitutional Law, 239.

IV. By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man. There were in England, however, courts baron, county courts, courts of conscience and other petty courts, which were not courts of record, and whose proceedings varied in many respects from the course of the common law, but which were empowered to hear and determine, in a summary way, without a jury, personal actions in which the debt or damages demanded did not exceed forty

shillings. 3 Bl. Com. 33, 35, 81. The twelve freeholders summoned to the county court of Middlesex, and authorized, when there assembled together with the county clerk, and without any judge being present, to decide by a majority, and in a summary way, causes not exceeding forty shillings, under the statute of 23 Geo. II, c. 33, (1750) commended by Blackstone, were clearly not a common law jury. 3 Bl. Com. 83, and Coleridge's note.

In this country, before the Declaration of Independence, the jurisdiction over small debts, which county courts and similar courts had in England, was generally vested in single justices of the peace. Whenever a trial by jury of any kind was allowed at any stage of an action begun before a justice of the peace, it was done in one of two ways; either by providing for an appeal from the judgment of the justice of the peace to a court of record, upon giving bond, with surety, "to prosecute the said appeal there with effect, and to abide the order of said court," and for a trial in that court by a common jury, as in Massachusetts; 6 Dane Ab. 405, 442; Mass. Prov. Stats. 1697, c. 8, § 1, and 1699, c. 2, § 3, (1 Prov. Laws, State ed. pp. 283, 370,) and Stat. 1783, c. 42; or by providing for a trial by a jury of six before the justice of the peace, as in New York and in New Jersey; 6 Dane Ab. 417; N. Y. Stats. of December 16, 1737, 1 Smith & Livingston's Laws, p. 238, § 4, and of December 24, 1759, 2 Ib. p. 170, § 4; N. J. Stat. February 11, 1775, Allinson's Laws, p. 468; *Wanser* v. *Atkinson*, (1881) 14 Vroom, (43 N. J. Law,) 571, 572.

Justices of the peace in the District of Columbia, in the exercise of the jurisdiction conferred upon them by Congress to try and determine cases, criminal or civil, are doubtless, in some sense, judicial officers. *Wise* v. *Withers*, 3 Cranch, 330, 336. But they are not inferior courts of the United States, for the Constitution requires judges of all such courts to be appointed during good behavior. Nor are they, in any sense, courts of record. They were never considered in Maryland as "courts of law." *Weikel* v. *Cate*, (1882) 58 Maryland, 105, 110. The statutes of Maryland of 1715, c. 12, and of 1763, c. 21, (in Bacon's Laws of Maryland,) and of 1791, c. 68, (in

2 Kilty's Laws,) defining the civil jurisdiction of justices of the peace, were entitled acts "for the speedy recovery of small debts out of court." And Congress has vested in them, "as individual magistrates," the powers and duties which justices of the peace previously had under the laws in force in the District of Columbia. Act of February 27, 1801, c. 15, § 11; 2 Stat. 107; Rev. Stat. D. C. § 995.

A trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, can hardly have been within the contemplation of Congress in proposing, or of the people in ratifying, the Seventh Amendment to the Constitution of the United States.

V. Another question having an important bearing on the validity and the interpretation of the successive acts of Congress, concerning trial by jury in civil actions begun before justices of the peace in the District of Columbia, is whether the right of trial by jury, secured by the Seventh Amendment to the Constitution, is preserved by allowing a common law trial by jury in a court of record, upon appeal from a judgment of a justice of the peace, and upon giving bond with surety to prosecute the appeal and to abide the judgment of the appellate court.

The question considered and decided by this court in *Callan* v. *Wilson*, (1888) 127 U. S. 540, though somewhat analogous, was essentially a different one. That case was a criminal case, not affected by the Seventh Amendment of the Constitution, but depending upon the effect of those other provisions of the original Constitution and of the Fifth and Sixth Amendments, which declare that "the trial of all causes, except in cases of impeachment, shall be by jury," that "no person shall be deprived of life, liberty or property without due process of law," and that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." The point there decided was that a person accused of a conspiracy to prevent another person from pursuing his lawful calling, and by intimidations and molestations to reduce him to beggary, had the right to a trial by

jury in the first instance, and that it was not enough to allow him a trial by jury after having been convicted by a justice of the peace without a jury. The decision proceeded upon the ground that such a conspiracy was an offence of a grave character, affecting the public at large, as well as one the punishment of which might involve the liberty of the citizen; it was conceded that there was a class of minor offences to which the same rule could not apply; and the question of applying a like rule to civil cases did not arise in the case, and was not touched by the court.

All the other cases cited at the bar, in which the constitutional right of trial by jury was held not to be secured by allowing such a trial on appeal from a justice of the peace, or from an inferior court, were criminal cases. *Greene* v. *Briggs*, (1852) 1 Curtis, 311, 325; *Saco* v. *Wentworth*, (1853) 37 Maine, 165; *In re Dana*, (1872) 7 Benedict, 1.

On the other hand, the authority of the legislature, consistently with constitutional provisions securing the right of trial by jury, to provide, in civil proceedings for the recovery of money, that the trial by jury should not be had in the tribunal of first instance, but in an appellate court only, is supported by unanimous judgments of this court in two earlier cases, the one arising in the District of Columbia, and the other in the State of Pennsylvania.

The declaration of rights, prefixed to the constitution of Maryland of 1776, declared, in article 3, that "the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law;" and, in article 21, repeated the words of Magna Charta, "No person ought to be taken or imprisoned," &c., "or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." 1 Charters and Constitutions, 817, 818. The statute of the State of Maryland of 1793, c. 30, incorporating a bank in the District of Columbia, provided that on any bill or note made or indorsed to the bank, and expressly made negotiable at the bank, and not paid when due, or within ten days after demand, the bank, upon filing an affidavit of its president to the sum due, might obtain

from the clerk of a court an execution against the property of the debtor; "and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner." 2 Kilty's Laws. The general court of Maryland, in 1799, held that this statute did not infringe the constitutional right of trial by jury. *Bank of Columbia* v. *Ross*, 4 Har. & McH. 456, 464, 465. The statute was continued in force in the District of Columbia by the acts of Congress of February 27, 1801, c. 15, § 5, and March 3, 1801, c. 24, § 5. 2 Stat. 106, 115; *Bank of Columbia* v. *Okely*, (1819) 4 Wheat. 235, 246.

In *Bank of Columbia* v. *Okely*, an execution so issued was sought to be quashed upon the ground that the statute of Maryland violated the Seventh Amendment of the Constitution of the United States, as well as the constitution of the State of Maryland. But this court held the statute to be consistent with both constitutions, and, speaking by Mr. Justice Johnson, said: "This court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judge, to make such rules and orders 'as that justice may be done;' and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that, in practice, the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the Seventh Amendment of the Constitution is not only deducible from the general intent, but from the express wording of the Article referred to. Had the terms been that 'the *trial* by jury shall be preserved,' it might

have been contended that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words of Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost, he has voluntarily relinquished; and the trial by jury is open to him, either to arrest the progress of the law in the first instance, or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution." 4 Wheat. 243, 244.

The constitution of Pennsylvania of 1776 provided, in article 11 of the declaration of rights, that "in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred," and, in section 25 of the frame of government, that "trials shall be by jury as heretofore;" and the constitution of 1790, in section 6 of the bill of rights, declared that "trial by jury shall be as heretofore, and the right thereof remain inviolate." 2 Charters and Constitutions, 1542, 1546, 1554. The statutes of Pennsylvania, from 1782, required all accounts between the State and its officers to be settled by the comptroller general, and approved by the executive council; and, if a balance was found due to the State, authorized the comptroller general to direct the clerk of the county where the officer resided to issue summary process to collect the amount due. And a statute of February 18, 1785, after reciting "whereas it will be agreeable to the constitution of this State, which has declared that 'trial by jury shall be as heretofore,' that persons conceiving themselves aggrieved by the

proceedings of the said comptroller general should be allowed to have trial of the facts by a jury, and questions of law arising thereupon determined in a court of record," enacted that any such person might appeal from the settlement or award of the comptroller general to the Supreme Court of the State, "provided the said party enter sufficient security" before a judge "to prosecute such appeal with effect, and to pay all costs and charges which the Supreme Court shall award, and also pay any sum of money which shall appear by the judgment of the said court to be due from him" to the State; and might have the whole matter tried by a jury upon the appeal. This statute also provided that the settlement of any account by the comptroller general, and confirmation thereof by the executive council, whereby any sum of money should be found due from any person to the State, should be a lien on all his real estate throughout the State. 2 Dall. Laws Penn. 44, 247, 248, 251.

In *Livingston* v. *Moore*, (1833) 7 Pet. 469, which came to this court from the Circuit Court of the United States for the Eastern District of Pennsylvania, the validity of a lien so acquired by the State was attacked on the ground, among others, that the statutes creating it were contrary to section 6 of the Pennsylvania bill of rights of 1790. But this court upheld the validity of the lien, and in an opinion delivered by Mr. Justice Johnson, after elaborately discussing the other questions in the case, briefly disposed of this one as follows: "As to the sixth section of the Pennsylvania bill of rights, we can see nothing in these laws on which to fasten the imputation of a violation of the right of trial by jury; since, in creating the lien attached to the settled accounts, the right of an appeal to a jury is secured to the debtor." 7 Pet. 552.

While, as has been seen, the Seventh Amendment to the Constitution of the United States requires that "the right of trial by jury shall be preserved" in the courts of the United States in every action at law in which the value in controversy exceeds twenty dollars, and forbids any fact once tried by a jury to "be otherwise reëxamined, in any court of the United States, than according to the rules of the common law," mean-

ing thereby the common law of England, and not the law of any one or more of the States of the Union, yet it is to be remembered that, as observed by Justice Johnson, speaking for this court, in *Bank of Columbia* v. *Okely*, above cited, it is not "trial by jury," but "the right of trial by jury," which the Amendment declares "shall be preserved." It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several States are entitled to great weight, inasmuch as the constitutions of all of them had secured the right of trial by jury in civil actions, by the words "shall be preserved," or "shall be as heretofore," or "shall remain inviolate," or "shall be held sacred," or by some equivalent expression.

A long line of judicial decisions in the several States, beginning early in this century, maintains the position that the constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted, allows a trial by jury for the first time upon appeal from the judgment of the justice of the peace, and requires of the appellant a bond with surety to prosecute the appeal and to pay the judgment of the appellate court. The full extent and weight of those precedents cannot be justly appreciated without referring to the texts of the statutes which they upheld, and which have not always been fully set forth in the reports.

The leading case is *Emerick* v. *Harris*, (1808) 1 Binney, 416, which arose under the statutes of Pennsylvania. The provisions of the constitution of the State are quoted above. The provincial statute of March 1, 1745, gave a justice of the peace jurisdiction of actions to recover the sum of forty shillings and upwards and not exceeding five pounds; and authorized any person aggrieved by his judgment to appeal to the court of common pleas, "first entering into recognizance, with at least one sufficient security, at least in double value of

the debt or damages sued for, and sufficient to answer all costs, to prosecute the said appeal with effect, and to abide the order of the said court, or in default thereof to be sent by *mittimus* to the sheriff of the county, by him to be kept until he shall give such security, or be otherwise legally discharged." 1 Dall. Laws Penn. 304, 307. The statute of April 5, 1785, enlarged the summary jurisdiction of a justice of the peace to sums not exceeding ten pounds; and, for the avowed purpose of conforming to the constitution of the State, gave an appeal to the court of common pleas, upon the like terms as by the statute of 1745. And the statute of March 11, 1789, conferred upon the aldermen of the city of Philadelphia the jurisdiction of justices of the peace. 2 Dall. Laws Penn. 304, 305, 660. The statute of April 19, 1794, extended the jurisdiction of justices of the peace, as well as of the aldermen of Philadelphia, to demands not exceeding twenty pounds, with a right of appeal, after judgment, if the amount exceeded five pounds, to the court of common pleas, "in the same manner, and subject to all other restrictions and provisions," as in the statute of 1745. 3 Dall. Laws Penn. 536–538. In support of a writ of certiorari to quash a judgment for eleven pounds and six shillings, rendered in the alderman's court of Philadelphia upon default of the defendant, it was argued "that the constitution, by directing that trial by jury should be as heretofore, and the right thereof remain inviolate, had interdicted the legislature from abolishing or abridging this right in any case in which it had existed before the constitution; that a prohibition to do this directly was a prohibition to do it indirectly, either by deferring the decision of a jury until one, two or more previous stages of the cause had been passed, or by clogging the resort to that tribunal by penalties of any kind, either forfeiture of costs, security upon appeal, or delay; that the power to obstruct at all implied the power to increase the obstructions until the object became unattainable; and that the instant the enjoyment of the right was to be purchased by sacrifices unknown before the constitution, the right was violated, and ceased to exist as before." But the Supreme Court of Pennsylvania held that the statute of 1794 was a constitu-

tional regulation of judicial proceedings by legislative authority. 1 Binney, 424, 428. See also *McDonald* v. *Schell*, (1820) 6 S. & R. 240; *Biddle* v. *Commonwealth*, (1825) 13 S. & R. 405, 410; *Haines* v. *Levin*, (1866) 51 Penn. St. 412.

Soon after the decision in *Emerick* v. *Harris*, a similar decision was made by the Supreme Court of North Carolina. In the constitution of that State of 1776, it was declared that "in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." 2 Charters and Constitutions, 1410. When that constitution was formed, justices of the peace had jurisdiction over sums of twenty shillings and under. In 1803, the legislature extended their jurisdiction to thirty pounds, "subject nevertheless to the right of appeal, as in similar cases" — a statute of 1794 having provided that, in all cases of appeals from the judgment of a justice, the appellant's subscription and acknowledgment of the security, attested by the justice, "shall be sufficient to bind the security to abide by and perform the judgment of the court; and where judgment shall be against the appellant, the same shall be entered on motion against the security, and execution shall issue against the principal, or against both principal and security, at the option of the plaintiff." 2 Martin's Laws of North Carolina, pp. 60, 207. "The legislature has," said the court, "given to either party the right of appealing to a court, where he will have the benefit of a trial by jury. It cannot, therefore, be said that the right of such trial is taken away. So long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the legislature. The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of right." *Keddie* v. *Moore*, (1811) 2 Murphy, 41, 45; followed in *Wilson* v. *Simonton*, (1821) 1 Hawks, 482.

The constitution of Tennessee of 1796 declared that "the right of trial by jury shall remain inviolate." 2 Charters and

Constitutions, 1674. At the time of the adoption of that constitution, as appears by the territorial statute of 1794, c. 1, §§ 52, 54, justices of the peace had jurisdiction only of actions for twenty dollars and under; and either party might appeal to the county court, "first giving security for prosecuting such appeal with effect, which said appeal shall be tried and determined at the first court, by a jury of good and lawful men, and determination thereon shall be final." The jurisdiction of a justice of the peace was extended by the statute of 1801, c. 7, to fifty dollars, "subject, nevertheless, to appeal by either party, to be tried in the county court by a jury, as in other cases." And the statute of 1809, c. 63, provided that an appeal from the judgment of a justice of the peace should not be granted, unless the appellant "enter into bond with good and sufficient security, with a condition to prosecute said appeal;" and that, if the papers should not be returned to the clerk of the county court at the return term, it should "be lawful for the appellee, on the production of the papers in the cause, to move for judgment against the appellant and his securities, for the amount of the debt and costs, if he should have been the original defendant; if not, for the amount of costs." 1 Scott's Laws of Tennessee, pp. 476, 695, 1166. The statute of 1831, c. 59, further extended the jurisdiction of a justice of the peace to one hundred dollars. Public Acts of Tennessee of 1831, p. 83. In a case arising under the last statute, the Supreme Court of Tennessee, while Chief Justice Catron (afterwards a justice of this court) was a member thereof, declared it to have been settled by a long series of its decisions, beginning under the statute of 1801, that such a statute was constitutional, upon the ground that "inasmuch as the party was in all cases allowed his appeal, when he could have a trial by jury, the right of trial by jury was not taken away; so that the terms of requiring bail or security for the money belonged to the legislature to provide, and though the security required in the cases of appeal differed from those cases where the party was brought into court by original writ, still, as it did not take away the right of trial by jury, the act was not unconstitutional." *Morford* v. *Barnes*, (1835)

8 Yerger, 444, 446; followed in *Pryor* v. *Hays*, (1836) 9 Yerger, 416.

The constitution of Connecticut of 1818, article 1, section 21, likewise declared that "the right of trial by jury shall remain inviolate." 1 Charters and Constitutions, 259. At the time of its adoption, the jurisdiction of justices of the peace, in actions of trespass, was limited to fifteen dollars. In the Revised Laws of 1821, tit. 2, § 23, their jurisdiction was extended to thirty-five dollars; but in demands for more than seven dollars an appeal was allowed to the county court, the appellant to "give sufficient bond, with surety, to the adverse party, to prosecute such appeal to effect, and to answer all damages in case he make not his plea good." The Supreme Court of Connecticut held the statute constitutional; and Chief Justice Hosmer, in delivering judgment, said: "I admit that the trial by jury must continue unimpaired; and shall not now dispute that there can be no enlargement of a justice's jurisdiction, which shall take from any one the legal power of having his cause heard by a jury, precisely as it might have been before the constitution was adopted. It is indisputable that a justice of the peace is empowered to hear all causes personally, and that he cannot try them by a jury. The question, then, is brought to this narrow point: whether the enlargement of a justice's jurisdiction, with the right of appeal, as it existed when the constitution was adopted, is a violation of the above privilege, secured by that instrument. I am clear that it is not; and that a construction of this nature is equally unwarranted by the words, and by the intention, of the constitution. An instrument remains inviolate if it is not infringed; and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character. It never could be the intention of the constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made, and no regulation even of the right of trial by jury could be had. It is sufficient, and within the reason-

able intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration. A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations, as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation, made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited because it increases the burden or expense of the litigating parties." "In conclusion, I am satisfied that the liberty of appeal preserves the right of trial by jury inviolate, within the words and fair intendment of the constitution; and that no such unreasonable hardship is put on the appellant, by the bond required for the prosecution of the appeal, as to justify the assertion that the right of trial by jury is in any manner impaired." *Beers* v. *Beers*, (1823) 4 Conn. 535, 538–540. See also *Colt* v. *Eves*, (1837) 12 Conn. 243, 253; *Curtis* v. *Gill*, (1867) 34 Conn. 49.

Before the adoption of the constitution of the State of Maryland, each of the statutes of the Province "for the speedy recovery of small debts out of court, before a single justice of the peace," would appear to have restricted his civil jurisdiction to claims for thirty-three shillings and four pence, as in the statute of 1715, c. 12, or for fifty shillings, as in the statute of 1763, c. 21. Bacon's Laws.

By the statute of the State of Maryland of 1791, c. 68, "for the speedy recovery of small debts out of court," § 1, any one justice of the peace, of the county wherein the debtor resided, was vested with jurisdiction to try, hear and determine "all cases where the real debt and damages doth not exceed ten pounds current money," (or twenty-six and two thirds dollars,) "and, upon full hearing of the allegations and evidences of both parties, to give judgment, according to the laws of the land, and the equity and right of the matter." By § 6, his jurisdiction was made exclusive to that extent. By § 4, "in all cases where the debt or demand doth exceed twenty

shillings common money," (or two and two thirds dollars,) "and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any magistrate, he or she shall be at liberty to appeal to the next county court, before the justices thereof, who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to the law of the land, and the equity and right of the matter;" and "either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election." And by § 5, the appellant was required to give bond with sufficient sureties, in double the sum to be recovered, to prosecute his appeal, and to pay the appellee, "in case the said judgment shall be affirmed, as well the debt, damage and cost adjudged by the justice from whose judgment such appeal shall be made, as also all cost and damage that shall be awarded by the court before whom such appeal shall be heard, tried and determined." Latrobe's Justices' Practice, (1st ed. 1826) pp. 56, 112, 360, 362; 2 Kilty's Laws.

By the statute of Maryland of 1809, c. 76, §§ 1, 6, (3 Kilty's Laws,) the exclusive original jurisdiction of justices of the peace was extended to all cases where the real debt or damages demanded did not exceed fifty dollars. And by the statute of Maryland of 1852, c. 239, their original jurisdiction was extended to all cases of contract, tort or replevin, where the sum or damage or thing demanded did not exceed one hundred dollars, with a right of appeal to the county court; and was made concurrent with that of the county court where it exceeded fifty dollars.

In *Steuart* v. *Baltimore*, (1855) 7 Maryland, 500, the Court of Appeals of Maryland, speaking by Judge Eccleston, said: "In the third section of the old bill of rights, it was declared 'that the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law.' Notwithstanding this, the legislature passed laws at different times, extending the jurisdiction of justices of the peace in matters of contract, and giving jurisdiction

in matters of tort where they had none previously. These laws, of course, made no provision for trials by jury except on appeal to the county courts, and yet they were constantly acquiesced in, and not considered as being repugnant to the bill of rights." The court then referred to *Morford* v. *Barnes*, *Beers* v. *Beers* and *McDonald* v. *Schell*, above cited, and added: "These cases fully establish the principle that where a law secures a trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground that the party, if he thinks proper, can have his case decided by a jury before it is finally settled." 7 Maryland, 511, 512.

To the like general effect are the following: Kentucky Stat. January 30, 1812, §§ 4–6, 2 Morehead & Brown's Digest, pp. 893, 894; *Pollard* v. *Holeman*, (1816) 4 Bibb, 416; *Head* v. *Hughes*, (1818) 1 A. K. Marshall, 372; *Feemster* v. *Anderson*, (1828) 6 T. B. Monroe, 537; *Flint River Co.* v. *Foster*, (1848) 5 Georgia, 194, 208; *Lincoln* v. *Smith*, (1855) 27 Vermont, 328, 361; *Lamb* v. *Lane*, (1854) 4 Ohio St. 167, 180; *Norton* v. *McLeary*, (1858) 8 Ohio St. 205, 209; *Reckner* v. *Warner*, (1872) 22 Ohio St. 275, 291, 292; Cooley Const. Lim. (6th ed.) 505; 1 Dillon Mun. Corp. (4th ed.) § 439.

VI. When the District of Columbia passed under the exclusive jurisdiction of the United States, the statute of Maryland of 1791, c. 68, above quoted, (having been continued in force by the statute of that State of 1798, c. 71, 2 Kilty,) was one of the laws in force in the District.

The act of Congress of February 27, 1801, c. 15, in § 1, enacted that the laws in force in the State of Maryland, as they then existed, should be and continue in force in that part of the District which had been ceded by that State to the United States — which, since the retrocession of the county of Alexandria to the State of Virginia by the act of Congress of July 9, 1846, c. 35, (9 Stat. 35,) is the whole of the District of Columbia — and, in § 11, provided for the appointment of "such number of discreet persons to be justices of the peace" in the District of Columbia as the President should think expedient,

who should continue in office five years, and who should "in all matters civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws hereinbefore continued in force in those parts of said District for which they shall have been respectively appointed; and they shall have cognizance in personal demands of the value of twenty dollars, exclusive of costs; which sum they shall not exceed, any law to the contrary notwithstanding." 2 Stat. 104, 107.

In quoting the provisions of subsequent acts of Congress, the reënactments of them in the corresponding sections of the Revised Statutes of the District of Columbia will be referred to in brackets.

On March 1, 1823, Congress took up the subject in the act of 1823, c. 24, entitled "An act to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia." 3 Stat. 743.

The first section of that act gave to any one justice of the peace, of the county wherein the defendant resided, jurisdiction to try, hear and determine "all cases where the real debt or damages do not exceed the sum of fifty dollars, exclusive of costs," "and, upon full hearing of the allegations and evidence of both parties, to give judgment, according to the laws existing in the said District of Columbia, and the equity and right of the matter, in the same manner and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of twenty dollars, exclusive of costs." [Rev. Stat. D. C. §§ 997, 1006.] And by section 6, the jurisdiction of justices of the peace up to fifty dollars was made exclusive. [Rev. Stat. D. C. § 769.] The reference in section 1 was evidently to the act of Congress of February 27, 1801, § 11, above quoted; and sections 1 and 6 of the act of 1823 followed, as to jurisdictional amount, the statute of Maryland of 1809, c. 76, §§ 1, 6.

Sections 3 and 4 of the act of Congress of 1823 made it the duty of every justice of the peace to keep a docket con-

taining a record of his proceedings, and subjected him to damages to any person injured by his neglect to keep one. [Rev. Stat. D. C. §§ 1000, 1001.] Those provisions were evidently taken from the statute of Maryland of 1809, c. 76, §§ 4, 5. But they never were considered, either in the State of Maryland or in the District of Columbia, as making a justice of the peace a court of record.

By section 7 of the act of Congress of 1823, "in all cases where the debt or demand doth exceed the sum of five dollars, and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace, he or she shall be at liberty to appeal to the next Circuit Court in the county in which the said judgment shall have been rendered, before the judges thereof, who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to law, and the equity and right of the matter;" "and either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election." [Rev. Stat. D. C. §§ 1027, 775, 776.] These provisions (increasing the requisite sum, however, from twenty shillings, or two and two thirds dollars, to five dollars) were evidently copied from the statute of Maryland of 1791, c. 68, § 4, above cited; and the provision of § 5 of that statute, which required the appellant to give bond with sureties to pay, if the judgment should be affirmed, as well the sum and costs adjudged by the justice of the peace, as also those awarded by the appellate court, was not repealed or modified by the act of Congress of 1823, and appears to have been considered as still in force in the District of Columbia. *Butt* v. *Stinger*, (1832) 4 Cranch C. C. 252.

The same act of 1823, for the first time in the legislation of Congress, provided that actions might be tried by a jury before a justice of the peace, as follows:

"Sec. 15. In every action to be brought by virtue of this act, where the sum demanded shall exceed twenty dollars, it shall be lawful for either of the parties to the suit, after issue joined, and before the justice shall proceed to inquire into the

merits of the cause, to demand of the said justice that such action be tried by a jury; and upon said demand the said justice is hereby required to issue a *venire* under his hand and seal, directed to any constable of the county where said cause is to be tried, commanding him to summon twelve jurors to be and appear before the justice issuing such *venire*, at such time and place as shall be therein expressed; and the jurors thus summoned shall possess the qualifications, and be subject to the exceptions, now existing by law in the District of Columbia.

"Sec. 16. If any of the persons so summoned and returned as jurors shall not appear, or be challenged and set aside, the justice before whom said cause is to be tried shall direct the constable to summon and return forthwith a *tales*, each of whom shall be subject to the same exceptions as the jurors aforesaid, so as to make up the number of twelve, after all causes of challenge are disposed of by the justice; and the said twelve persons shall be the jury who shall try the cause, each of whom shall be sworn by the justice well and truly to try the matter in difference between the parties, and a true verdict to give, according to evidence; and the said jury, being sworn, shall sit together, and hear the proofs and allegations of the parties, in public, and when the same is gone through with, the justice shall administer to the constable the following oath, viz.: 'You do swear, that you will keep this jury together in some private room, without meat or drink, except water; that you will not suffer any person to speak to them, nor will you speak to them yourself, unless by order of the justice, until they have agreed on their verdict.' And when the jurors have agreed on their verdict, they shall deliver the same publicly to the justice, who is hereby required to give judgment forthwith thereon; and the said justice is hereby authorized to issue execution on said judgment, in the manner, and under the limitations, hereinbefore directed." 3 Stat. 746. [Rev. Stat. D. C. §§ 1009–1017.]

These sections, providing for a trial by a jury before the justice of the peace, would appear, from their position in the act, to have been added, by an afterthought, to the scheme of the earlier sections, derived from the legislation of Maryland,

and providing for a trial without any jury before a justice of the peace, and for a trial by jury, if demanded by either party, in an appellate court; and were evidently taken, in great part *verbatim*, from the twelfth section of the statute of New York of 1801, c. 165, (which gave justices of the peace jurisdiction of actions in which the debt or damages did not exceed twenty-five dollars,) as modified by the twenty-second section of the statute of New York of 1818, c. 94, which extended their civil jurisdiction to fifty dollars. The material parts of both those statutes are copied, for convenience of comparison, in the margin.[1]

---

[1] "In every action to be brought by virtue of this act, it shall be lawful for either of the parties to the suit, or the attorney of either of them, after issue joined, and before the court shall proceed to inquire into the merits of the cause, to demand of the said court that such action be tried by a jury; and upon such demand the said justice holding such court is hereby required to issue a *venire*, directed to any constable of the city or town where the said cause is to be tried, commanding him to summon twelve good and lawful men, being freeholders or freemen of such city, or being freeholders of such town, where said cause is to be tried, and who shall be in nowise of kin to the plaintiff or defendant, nor interested in such suit, to be and appear before such justice issuing such *venire*, at such time and place as shall be expressed in such *venire*, to make a jury for trial of the action between the parties mentioned in the said *venire*." [It is then provided that the names of the jurors so summoned shall be written on separate papers and put into a box.] "And on the trial of such cause such justice, or such indifferent person as he shall appoint for that purpose, shall draw out six of the said papers one after another; and if any of the persons whose names shall be so drawn shall not appear, or shall be challenged and set aside, then such further number thereof shall be drawn as shall make up the number of six who do appear, after all legal causes of challenge allowed by the said justice, unless the said parties agree that the said constable shall summon six men at his discretion; and the said six persons so first drawn and appearing and approved by the court as indifferent, shall be the jury who shall try the cause, to each of whom the said justice shall administer the following oath: 'You do swear in the presence of Almighty God, that you will well and truly try the matter in difference between —— plaintiff and —— defendant, and a true verdict will give according to evidence.' And after the said jury have taken the oath aforesaid, they shall sit together, and hear the several proofs and allegations of the parties, which shall be delivered in public in their presence." [Provision is then made for the form of oath to be administered to witnesses.] "And after hearing the proofs and allegations, the jury shall be kept together in some convenient place until they

The provisions of the New York statute of 1801, (copied in the margin,) were reënacted, almost word for word, in the statutes of that State of 1808, c. 204, § 9, and of 1813, c. 53, § 9.

The New York statutes of 1801, 1808 and 1813, indeed, differed from the act of Congress of 1823, in giving a justice of the peace civil jurisdiction up to twenty-five dollars only; in authorizing every action "brought by virtue of this act," without restriction of amount, to be tried by a jury before a justice of the peace; in providing for a jury of six, instead of a jury of twelve men; and in the mode of selecting the jury; but were construed to authorize the justice of the peace (as the act of Congress of 1823 afterwards did in terms) to award a *tales* in case of a default of the jurors summoned on the *venire*. *Zeely* v. *Yansen*, (1807) 2 Johns. 386.

The New York statute of 1818, however, like the act of Congress of 1823, extended the civil jurisdiction of a justice

---

all agree upon a verdict, and for which purpose a constable shall be sworn, and to whom the said justice shall administer the following oath, viz.: 'You do swear in the presence of Almighty God, that you will, to the utmost of your ability, keep every person sworn on this inquest together in some private and convenient place, without meat or drink, except water; you will not suffer any person to speak to them, nor speak to them yourself, unless by order of the justice, unless it be to ask them whether they have agreed on their verdict, until they have agreed on their verdict.' And when the jurors have agreed on their verdict, they shall deliver the same to the justice in the same court, who is hereby required to give judgment thereupon, and to award execution in manner hereafter directed." N. Y. Stat. 1801, c. 165, § 12.

"In every action to be brought by virtue of this act, wherein the sum or balance due, or thing demanded, shall exceed twenty-five dollars, if either of the parties, the agent or attorney of either of them, after issue joined, and before the court shall proceed to inquire into the merits of the cause, shall demand of the court that such action be tried by a jury, and that such jury shall consist of twelve men, the *venire* to be issued shall in every such case require twenty good and lawful men to be summoned as jurors, and the jury for the trial of every such issue shall in such cases consist of twelve men, instead of six, as in other cases of trial before a justice; and the provisions in the ninth and tenth sections of the act above mentioned [of 1813, c. 53, reënacting the statute of 1801, c. 165, §§ 12, 13,] shall be followed, and shall be deemed to apply in every other respect." N. Y. Stat. 1818, c. 94, § 22.

of the peace to fifty dollars, and (in the section copied in the margin) provided for a trial by a jury of twelve men before the justice of the peace, although it differed from the act of Congress in allowing such a trial to be had only when the sum demanded exceeded twenty-five dollars, whereas the act of Congress allowed it whenever the sum demanded exceeded twenty dollars.

The New York statute of 1801 also, in its first section, differed from the act of Congress, by expressly authorizing a justice of the peace to hold a court, and vesting him with all the powers of a court of record; and, in the twelfth section, by not requiring the justice of the peace to give judgment "forthwith" upon the verdict of the jury.

Yet under that statute it was held by the Supreme Court of the State of New York, in *per curiam* opinions, doubtless delivered by Chancellor (then Chief Justice) Kent, and, before the passage of the act of Congress of 1823, was understood to be settled law in that State, that upon a trial by a jury before a justice of the peace, (differing in these respects from a trial by jury in a superior court,) the jury were to decide both the law and the facts, and the justice was bound to render judgment, as a thing of course, upon the verdict of the jury, and had no authority to arrest the judgment or to order a new trial. *Felter* v. *Mulliner*, (1807) 2 Johns. 181; *M'Neil* v. *Scoffield*, (1808) 3 Johns. 436; *Hess* v. *Beekman*, (1814) 11 Johns. 457; Cowen's Justice of the Peace, (1st ed. 1821) 541, 544.

By a familiar canon of interpretation, heretofore applied by this court whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a State provisions which had received in that State a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State. *Metropolitan Railroad* v. *Moore*, (1887) 121 U. S. 558, 572; *Willis* v. *Eastern Trust Co.*, (1898) 169 U. S. 295, 307, 308.

VII. The questions of the validity and the effect of the act of Congress of 1823 then present themselves in this aspect:

The Seventh Amendment to the Constitution of the United States secures to either party to every suit at law, in which the value in controversy exceeds twenty dollars, the right of trial by jury; and forbids any such suit, in which there has once been a trial by jury, within the sense of the common law and of the Constitution, to be tried anew upon the facts in any court of the United States.

Congress, when enlarging, by the act of 1823, the exclusive original jurisdiction of justices of the peace in the District of Columbia from twenty to fifty dollars, manifestly intended that the dictates of the Constitution should be fully carried out, in letter and spirit. With this object in view, Congress first enacted that "in all cases" before a justice of the peace, in which the demand exceeded five dollars, either the plaintiff or the defendant should have a right to appeal from the judgment of the justice of the peace to the Circuit Court of the United States, and either of the parties might elect to have "a trial by jury" in that court. Congress also, by way of additional precaution, further enacted that every case, in which the sum demanded exceeded twenty dollars, should, if either party so requested, "be tried by a jury" of twelve men before the justice of the peace.

In all acts of Congress regulating judicial proceedings, the very word "appeal," unless restricted by the context, indicates that the facts, as well as the law, involved in the judgment below, may be reviewed in the appellate court. *Wiscart* v. *Dauchy*, (1796) 3 Dall. 321, 327; *In re Neagle*, (1890) 135 U. S. 1, 42; *Dower* v. *Richards*, (1894) 151 U. S. 658, 663, 664.

By section 7 of the act of 1823, the right of appeal to a court of record was expressly given "in all cases where the debt or demand doth exceed the sum of five dollars, and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace." The words "in all cases," in their natural meaning, include cases which have been tried by a jury before the justice of the

peace, as well as those tried by him without a jury; and we perceive no necessity and no reason for restricting their application to the latter class of cases, and thereby allowing the fact, that upon the demand of one party the case has been tried by a jury before the justice of the peace, to prevent the other party from appealing to a court of record and obtaining a trial by jury in that court.

Neither the direction of section 1, that the justice of the peace should give judgment "according to the laws existing in the District of Columbia, and the equity and right of the matter," nor the similar direction of section 7, that the case should be determined on appeal "according to law, and the equity and right of the matter," can reasonably be construed as conferring chancery jurisdiction, either upon the justice of the peace, or upon the appellate court, or as substituting the rules of technical equity for the rules of law.

The trial by jury, allowed by the seventh section of the act, in a court of record, in the presence of a judge having the usual powers of superintending the course of the trial, instructing the jury on the law and advising them on the facts, and setting aside their verdict if in his opinion against the law or the evidence, was undoubtedly a trial by jury, in the sense of the common law, and of the Seventh Amendment to the Constitution.

But a trial by a jury before a justice of the peace, pursuant to sections 15 and 16 of the act, was of quite a different character. Congress, in regulating this matter, might doubtless allow cases within the original jurisdiction of a justice of the peace to be tried and decided in the first instance by any specified number of persons in his presence. But such persons, even if required to be twelve in number, and called a jury, were rather in the nature of special commissioners or referees. A justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and defined by, and

rested upon, the acts of Congress only. The act of 1823, in permitting cases before him to be tried by jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution. It was no more a jury, in the constitutional sense, than it would have been, if it had consisted, as has been more usual in statutes authorizing trials by a jury before a justice of the peace, of less than twelve men.

There was nothing, therefore, either in the Constitution of the United States, or in the act of Congress, to prevent facts once tried by such a jury before the justice of the peace from being tried anew by a constitutional jury in the appellate court.

VIII. The majority of the Court of Appeals, in the case at bar, in holding that no appeal lay from a judgment entered by a justice of the peace on a verdict in the District of Columbia, appears to have been much influenced by the practice, which it declared to have prevailed in the District for seventy years, in accordance with decisions made by the Circuit Court of the United States of the District of Columbia soon after the passage of the act of Congress of 1823. But the reasons assigned for those decisions are unsatisfactory and inconclusive.

Such decisions, indeed, were made by the Circuit Court in several early cases. *Davidson* v. *Burr*, (1824) 2 Cranch C. C. 515; *Maddox* v. *Stewart*, (1824) 2 Cranch C. C. 523; *Denny* v. *Queen*, (1827) 3 Cranch C. C. 217; *Smith* v. *Chase*, (1828) 3 Cranch C. C. 348. Yet the appellant in one of those cases, whose appeal had been dismissed as unauthorized by law, was notwithstanding held liable on his bond to prosecute the appeal. *Chase* v. *Smith*, (1830) 4 Cranch C. C. 90.

The decisions in question would appear, by the brief notes

of them in the reports of Chief Justice Cranch, to have proceeded upon the assumption that the trial before a justice of the peace, by a jury empanelled pursuant to the act of 1823, was a trial by jury within the meaning of the Seventh Amendment to the Constitution, and therefore the facts could not be tried anew upon appeal. In *Smith* v. *Chase*, however, that learned judge (declaring that he spoke for himself only) delivered an elaborate opinion, in which he maintained the position that, upon the demand of a trial by a jury, the cause was taken entirely out of the hands of the justice of the peace; that he was obliged to summon and swear the jury, and to render judgment according to their verdict; that no authority was given to him to instruct the jury upon matter of law or of fact, or to set aside their verdict and grant a new trial; and that the jury were not bound by his opinion upon matter of law, but were to decide the law as well as the fact. 3 Cranch C. C. 351, 352. From these premises he inferred (by what train of reasoning does not clearly appear) that such a trial by a jury before the justice of the peace was a trial by jury within the meaning of the Seventh Amendment to the Constitution; that the facts so tried, therefore, could not be tried anew in an appellate court; and that no appeal lay in such a case. Curiously enough, that opinion, purporting to have been delivered at December term, 1828, refers to the opinion of this court in *Parsons* v. *Bedford*, 3 Pet. 446–448, which was not delivered until January term, 1830.

In 1863, all the powers and jurisdiction, previously possessed by the Circuit Court of the District, including the appellate jurisdiction from justices of the peace, were transferred by Congress to the Supreme Court of the District of Columbia. Act of March 3, 1863, c. 91, §§ 1, 3, 12; 12 Stat. 762–764. [Rev. Stat. D. C. §§ 760, 1027.]

The foregoing decisions of the Circuit Court were followed in the Supreme Court of the District at general term in 1873, without much discussion, in *Fitzgerald* v. *Leisman*, 3 McArthur, 6; and at special term in 1896, by Justice Bradley in *Brightwood Railway* v. *O'Neal*, 24 Wash. Law Rep. 406, and by Justice Cox in the present case. *Capital Traction*

Co. v. *Hof*, 24 Wash. Law Rep. 646. But each of these two judges, while holding himself bound by the previous decisions of the courts of the District, expressed a clear and positive opinion that they were erroneous.

Apart from the inconsistencies in the opinions delivered in the courts of the District of Columbia, it is quite clear that the decisions of those courts, especially when they involve questions of the interpretation of the Constitution of the United States, and of the constitutionality and effect of acts of Congress, cannot be considered as establishing the law, or as relieving this court from the responsibility of exercising its own judgment. *Ex parte Wilson*, (1885) 114 U. S. 417, 425; *Andrews* v. *Hovey*, (1888) 124 U. S. 694, 717; *The J. E. Rumbell*, (1893) 148 U. S. 1, 17.

IX. The legislation of Congress since the act of 1823 has not changed the character of the office, or the nature of the powers, of the justices of the peace in the District of Columbia, or of the juries summoned to try cases before those justices. The principal changes have been by enlarging the limits of the civil jurisdiction of the justices of the peace, and by expressly requiring security on appeals from their judgments.

By the act of February 22, 1867, c. 63, § 1, (14 Stat. 401,) Congress enlarged the jurisdiction of justices of the peace in the District of Columbia to "all cases where the amount claimed to be due for debt or damages arising out of contracts, express or implied, or damages for wrongs or injuries to persons or property, does not exceed one hundred dollars, except in cases involving the title to real estate, actions to recover damages for assault, or assault and battery, or for malicious prosecution, or actions against justices of the peace or other officers for misconduct in office, or in actions for slander, verbal or written." [Rev. Stat. D. C. § 997.] And on the same day, Congress, by the act of 1867, c. 64, (14 Stat. 403,) provided that "no appeal shall be allowed from a judgment of a justice of the peace, unless the appellant, with sufficient surety or sureties, approved by the justice, enter into an undertaking to satisfy and pay all intervening damages and costs arising on the appeal;" and that, "when such

undertaking has been entered into, the justice shall immediately file the original papers, including a copy of his docket entries, in the office of the clerk of the Supreme Court of the District of Columbia; and thereupon, as soon as the appellant shall have made the deposit for costs required by law, or obtained leave from one of the justices, or from the court, to prosecute his appeal without a deposit, the clerk shall docket the cause," and it should be proceeded with substantially in the manner prescribed by the act of Congress of 1823. [Rev. Stat. D. C. §§ 1027–1029, 774.]

In 1874, the provisions, above quoted, of the acts of 1823 and 1867, were reënacted (with hardly any change except by subdividing and transposing sections) in the Revised Statutes of the District of Columbia, at the places above referred to in brackets.

By the act of February 19, 1895, c. 100, §§ 1, 2, justices of the peace of the District of Columbia have been granted (with the same exceptions as in the act of February 22, 1867, c. 63, also excepting, however, actions for damages for breaches of promise to marry, and not excepting actions for assault or for assault and battery) exclusive original jurisdiction of "all civil pleas and actions, including attachment and replevin, where the amount claimed to be due or the value of the property sought to be recovered does not exceed" one hundred dollars, and concurrent original jurisdiction with the Supreme Court of the District of Columbia, where it is more than one hundred and not more than three hundred dollars; "and where the sum claimed exceeds twenty dollars, either party shall be entitled to a trial by jury." And by § 3, "no appeal shall be allowed from the judgment of a justice of the peace in any common law action, unless the matter in demand in such action, or pleaded in set-off thereto, shall exceed the sum of five dollars; nor unless the appellant, with sufficient surety approved by the justice, enters into an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court." 28 Stat. 668.

Under the act of 1895, as under the previous acts of Congress, where the matter in controversy exceeds five dollars in value, an appeal lies to a court of record from any judgment

of a justice of the peace, whether rendered upon a verdict or not, and either party may have a trial by a common law jury in the appellate court; and the trial by jury in that court is, and the trial before a justice of the peace is not, a trial by jury within the meaning of the Seventh Amendment to the Constitution.

The only question remaining to be considered is of the constitutionality of the provisions of the act of 1895, by which the civil jurisdiction of justices of the peace is extended to three hundred dollars, and either party, on appealing from the judgment of the justice of the peace to the Supreme Court of the District of Columbia, is required to enter into an undertaking to pay and satisfy whatever judgment may be rendered in that court.

For half a century and more, as has been seen, after the adoption of the earliest constitutions of the several States, their courts uniformly maintained the constitutionality of statutes more than doubling the pecuniary limit of the civil jurisdiction of justices of the peace as it stood before the adoption of constitutions declaring that trial by jury should be preserved inviolate, although those statutes made no provision for a trial by jury, except upon appeal from the judgment of the justice of the peace, and upon giving bond with surety to pay the judgment of the appellate court. And such appears to have been understood to be the law of Maryland and of the District of Columbia before and at the time of the passage of the act of Congress of 1823.

Legislation increasing the civil jurisdiction of justices of the peace to two or three hundred dollars, and requiring each appellant from the judgment of a justice of the peace to a court of record, in which a trial by jury may be had for the first time, to give security for the payment of the judgment of the court appealed to, has not generally been considered as unreasonably obstructing the right of trial by jury, as is shown by the numerous statutes cited in the margin,[1]

[1] Arkansas. Digest 1894, §§ 4317, 4431, 4432.
California. Code of Civil Procedure 1872, §§ 114, 974, 978.

from which it appears that the civil jurisdiction of justices of the peace has been increased to three hundred dollars in Pennsylvania, Ohio, Michigan, Kansas, Arkansas, Colorado and California; to two hundred and fifty dollars in Missouri; and to two hundred dollars in New York, Indiana, Illinois, Wisconsin, Delaware, North Carolina, Mississippi and Texas; and that the appellant is required (at least when the appeal is to operate as a supersedeas) to enter into a bond or recognizance, not only to prosecute his appeal, but to pay the judgment of the appellate court, in all those States, except Pennsylvania; and in that State any corporation, except a municipal corporation, is required to give such a bond, but other appellants are required to give bond for the payment of costs only. And we have not been referred to a single decision in any of those States that holds such a statute to be unconstitutional in any respect.

The legislature, in distributing the judicial power between courts of record, on the one hand, and justices of the peace or other subordinate magistrates, on the other, with a view to prevent unnecessary delay and unreasonable expense, must have a considerable discretion, whenever in its opinion, be-

---

Colorado. Rev. Stat. 1867, c. 50, §§ 1, 38,39; Gen. Laws 1877, §§ 1482, 1519, 1520; Gen. Stat. 1883, §§ 1924, 1979, 1980.

Delaware. Rev. Stat. 1893, c. 99, §§ 1, 25.

Illinois. Rev. Stat. 1874, c. 79, §§ 13, 62; Starr & Curtis's Stat. 1896, c. 79, §§ 16, 115.

Indiana. Rev. Stat. 1881, §§ 1433, 1500.

Kansas. Gen. Stat. 1868, c. 81, §§ 2, 121; Gen. Stat. 1897, c. 103, §§ 20, 188.

Michigan. Rev. Stat. 1872, §§ 5249, 5433; Howell's Stat. 1882, §§ 6814, 7000.

Mississippi. Code 1892, §§ 2394, 82.

Missouri. Rev. Stat. 1889, §§ 6122, 6328.

New York. Stat. 1861, c. 158; Rev. Stat. 1875, (6th ed.) pt. 3, tit. 2, § 56; tit. 4, § 53.

North Carolina. Code 1883, §§ 834, 884.

Ohio. Rev. Stat. 1880, §§ 585, 6584.

Pennsylvania. Stat. July 7, 1879, c. 211; Purdon's Digest, 1885, (11th ed.) Justice of the Peace, §§ 35, 99, 100.

Texas. Rev. Stat. 1879, §§ 1539, 1639; Rev. Stat. 1895, §§ 1568, 1670.

Wisconsin. Rev. Stat. 1878, §§ 3572, 3756; Stat. 1898, §§ 3572, 3760.

cause of general increase in litigation, or other change of circumstances, the interest and convenience of the public require it, to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance to the decision of justices of the peace, provided always the right of trial by jury is not taken away in any case in which it is secured by the Constitution.

Having regard to the principles and to the precedents applicable to this subject, we should not be warranted in declaring that the act of Congress of 1895 so unreasonably obstructs the right of trial by jury, that it must for this reason be held to be unconstitutional and void.

X. Upon the whole matter, our conclusion is, that Congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount by a justice of the peace, or, in his presence, by a jury of twelve, or of any less number, allowing to either party, where the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace to a court of record, and to have a trial by jury in that court; that Congress, in every case where the value in controversy exceeds five dollars, has authorized either party to appeal from the judgment of the justice of the peace, although entered upon the verdict of a jury, to the Supreme Court of the District of Columbia, and to have a trial by jury in that court; that the trial by a jury of twelve, as permitted by Congress to be had before a justice of the peace, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the Seventh Amendment to the Constitution; that therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being reëxamined by a jury in the appellate court; that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of Congress upon the subject is in all respects consistent

Counsel for Parties.

with the Constitution of the United States; and that upon these grounds (which are substantially those taken by Chief Justice Alvey below) the judgment of the Court of Appeals, quashing the writ of certiorari to the justice of the peace, must be affirmed.

The effect of so affirming that judgment will be to leave the claim of Hof against the Capital Traction Company open to be tried by a jury before the justice of the peace, and, after his judgment upon their verdict, to be taken by appeal to the Supreme Court of the District of Columbia, and to be there tried by jury on the demand of either party.

Judgment affirmed.

Mr. Justice Brewer concurred in the judgment of affirmance, but dissented from so much of the opinion as upheld the validity of the provision of the act of Congress requiring every appellant from the judgment of a justice of the peace to give bond with surety for the payment of the judgment of the appellate court.

Mr. Justice Brown did not sit in this case, or take any part in its decision.

In No. 114, Metropolitan Railway Company *v.* Church, and No. 195, Brightwood Railway Company *v.* O'Neal, argued at the same time, the judgments of the Court of Appeals of the District of Columbia, quashing writs of certiorari to set aside proceedings of a justice of the peace under similar circumstances, are likewise

Affirmed.

Mr. D. W. Baker for Metropolitan Railway Co. *Mr. Nathaniel Wilson* was on his brief.

Mr. Ernest L. Schmidt for Church.

Mr. Henry P. Blair and *Mr. Corcoran Thom,* for Brightwood Railway Co., submitted on their brief.

Mr. Raymond A. Heiskell and *Mr. M. J. Colbert* for O'Neal.

KIRBY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 164. Argued January 20, 1899. — Decided April 11, 1899.

On the trial of a person charged with feloniously receiving and having in his possession with intent to convert them to his own use, postage stamps which had been feloniously stolen, taken and carried away from a post office by three persons named, although the person so receiving them well knew that the same had been so feloniously taken, stolen and carried away, the judgment convicting the said three persons of stealing the said stamps was received in evidence against the accused, under the provision in the act of March 3, 1875, c. 144, § 2, that such judgment "shall be conclusive evidence against said receiver, that the property of the United States therein described has been embezzled, stolen or purloined." The accused having been convicted, and the case brought here by writ of error, *Held*, That that provision of the statute violates the clause of the Constitution of the United States, declaring that in all criminal prosecutions, the accused shall be confronted with the witnesses against him; and that the judgment must be reversed.

The contention by the defendant that the indictment is defective in that it does not allege ownership by the United States of the stolen articles of property at the time that they were alleged to have been feloniously received by him, is without merit.

The objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken.

THE case is stated in the opinion of the court.

Mr. A. G. Safford for plaintiff in error. *Mr. C. O. Bailey* and *Mr. Joseph Kirby* were on his brief.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error Kirby was indicted in the District Court of the United States for the Southern Division of the District of South Dakota under the act of Congress of March 3,

1875, c. 144, entitled "An act to punish certain larcenies, and the receivers of stolen goods." 18 Stat. 479.

The first section provides that "any person who shall embezzle, steal or purloin any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records or property of the United States shall be deemed guilty of felony, and on conviction thereof before the District or Circuit Court of the United States in the district wherein said offence may have been committed, or into which he shall carry or have in possession said property so embezzled, stolen or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

By the second section it is provided that "if any person shall receive, conceal or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher or valuable thing whatever, of the moneys, goods, chattels, records or property of the United States, which has theretofore been embezzled, stolen or purloined, such person shall, on conviction before the Circuit or District Court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen or purloined." 18 Stat. 479.

The indictment contained three counts, but the defendant was tried only on the first. In that count it was stated that Thomas J. Wallace, Ed. Baxter and Frank King on the 7th day of June, 1896, at Highmore, within the jurisdiction of the court, feloniously and forcibly broke into a post office of the United States, and feloniously stole, took and carried away

therefrom certain moneys and property of the United States, to wit: 3750 postage stamps of the denomination of two cents and of the value of two cents each, 1266 postage stamps of the denomination of one cent and of the value of one cent each, 140 postage stamps of the denomination of four cents and of value of four cents each, 250 postage stamps of the denomination of five cents and of the value of five cents each, 80 postage stamps of the denomination of eight cents and of the value of eight cents each, and also United States Treasury notes, national bank notes, silver certificates, gold certificates, silver, nickel and copper coins of the United States as well as current money of the United States, a more particular description of which the grand jury were unable to ascertain, of the value of $58.19; and that the persons above named were severally indicted and convicted of that offence, and had been duly sentenced upon such conviction.

It was then alleged that the defendant on the 9th day of June, 1896, at the city of Sioux Falls, the postage stamps "so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away, contrary to the form, force and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States."

At the trial of Kirby the Government offered in evidence a part of the record of the trial of Wallace, Baxter and King, from which it appeared that Wallace and Baxter after severally pleading not guilty withdrew their respective pleas and each pleaded guilty and was sentenced to confinement in the penitentiary at hard labor for the term of four years. It appeared from the same record that King having pleaded not guilty was found guilty and sentenced to the penitentiary at hard labor for the term of five years.

The admission in evidence of the record of the conviction of Wallace, Baxter and King was objected to upon the ground that the above act of March 3, 1875, was unconstitutional so

far as it made that conviction conclusive evidence in the prosecution of the receiver that the property of the United States described in the indictment against him had been embezzled, stolen or purloined. The objection was overruled, and the record offered was admitted in evidence, with exceptions to the accused.

After referring to the provisions of the act of March 3, 1875, and to the indictment against Kirby, the court among other things said, in its charge to the jury: "In order to make out the case of the prosecution and in order that you should be authorized to return a verdict of guilty in this case, you must find beyond a reasonable doubt from the evidence in the case certain propositions to be true. In the first place it must be found by you beyond a reasonable doubt that the property described in the indictment, and which is also described in the indictment against these three men [Wallace, Baxter and King] who it is alleged have been convicted, was actually stolen from the post office at Highmore, was the property of the United States and of a certain value. Second. You must find beyond a reasonable doubt that the defendant Joseph Kirby received or had in his possession a portion of that property which had been stolen from the post office at Highmore. Third. That he received or had it in his possession with intent to convert it to his own use and gain. Now, upon the first proposition — as to whether the property described in the indictment was stolen as alleged in the indictment — the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons — that is, the parties who it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, the record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property

described in the indictment was actually stolen, as alleged, from the post office at Highmore. But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore post office. Upon the further proposition that the court has suggested, after you have found, by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the post office at Highmore. Now, in order to find the defendant guilty of the offence charged in the indictment, you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion or all of the property which was stolen from the post office at Highmore, and that he received that property from the thief or thieves who committed the theft at the Highmore post office or some agent of these thieves. The statute punishes, you will observe, both the receipt of stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession such property, knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the post office at Highmore was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession or received it from the thief or his agent, knowing at the time that it was stolen property. Now, upon the question of whether the defendant knew that it was stolen property, you will, of course, consider all the evidence in the case. You have the right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer

that he did know. Now, if a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen. Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving stolen property. That was the common law. But this statute has added this further ingredient that it must be done with the intent to convert it to the party's own use and gain. It was probably put in for the reason that the statute goes further than the common law, making it punishable to conceal or aid in concealing with intent to convert it to his own use and gain. Now, all these propositions that I have charged must be made out by the prosecution, of course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it will be your duty to acquit the defendant."

In response to a request from the jury to be further instructed, the court after referring to the indictment and to the second section of the act of 1875, said: "This indictment does not contain all the words of the statute. This indictment charges the defendant with having, on the 9th day of June, 1896, received and had in his possession these postage stamps that were stolen from the United States at Highmore. Now, if you should find beyond a reasonable doubt from all the testimony in the case, in the first place, that the postage stamps mentioned in the indictment or any of them were stolen from the post office at Highmore by these parties who it is alleged did steal them, and you further find beyond a reasonable doubt that these postage stamps or any portion of them were on the 9th day of June, 1896, received by the defendant from the thieves or their agent, knowing the same to have

been so stolen from the United States by these parties, with the intent to convert the same to his own use and gain, or if you find beyond a reasonable doubt that they were so stolen at the Highmore post office, as I have stated, and that the defendant, on or about the 9th day of June had them in his possession or any portion of them, knowing the same to have been so stolen, with the intent to convert the same to his own use and gain, and you will find all these facts beyond a reasonable doubt, you would be authorized to return a verdict of guilty as charged."

The jury returned a verdict of guilty against Kirby. The exceptions taken by him at the trial were sufficient to raise the questions that will presently be considered.

As shown by the above statement the charge against Kirby was that on a named day he feloniously received and had in his possession with intent to convert to his own use and gain certain personal property of the United States, theretofore feloniously stolen, taken and carried away by Wallace, Baxter and King, who had been indicted and convicted of the offence alleged to have been committed by them.

Notwithstanding the conviction of Wallace, Baxter and King, it was incumbent upon the Government, in order to sustain its charge against Kirby, to establish beyond reasonable doubt (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession, with intent to convert it to his own use or gain; and (3) that he received or retained it with knowledge that it had been stolen from the United States.

How did the Government attempt to prove the essential fact that the property was stolen from the United States? In no other way than by the production of a record showing the conviction under a separate indictment of Wallace, Baxter and King — the judgments against Wallace and Baxter resting wholly upon their respective pleas of guilty, while the judgment against King rested upon a trial and verdict of guilty. With the record of those convictions out of the present case,

there was no evidence whatever to show that the property alleged to have been received by Kirby was stolen from the United States.

We are of the opinion that the trial court erred in admitting in evidence the record of the convictions of Wallace, Baxter and King, and then in its charge saying that in the absence of proof to the contrary, the fact that the property was stolen from the United States was sufficiently established against Kirby by the mere production of the record showing the conviction of the principal felons. Where the statute makes the conviction of the principal thief a condition precedent to the trial and punishment of a receiver of the stolen property, the record of the trial of the former would be evidence in the prosecution against the receiver to show that the principal felon had been convicted; for a fact of that nature could only be established by a record. The record of the conviction of the principals could not however be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offence charged against them. If he had sought to do either of those things — even upon the ground that the conviction of the principal felons might be taken as establishing *prima facie* a vital fact in the separate prosecution against himself as the receiver of the property — the court would have informed him that he was not being tried and could not be permitted in anywise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment

against them alone was sufficient *prima facie* to show, as against Kirby, indicted for another offence, the existence of the fact that the property was stolen — a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.

One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused — charged with a different offence for which he may be convicted without reference to the principal offender — except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. "This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin* v. *United States*, 156 U. S. 432, 459. But that presumption in *Kirby's case* was in effect held in the court below to be of no consequence; for, as to a vital fact which the Government was bound to establish affirma-

tively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been *said* in another criminal prosecution with which he was not connected and at which he was not entitled to be represented. In other words, the United States having secured the conviction of Wallace, Baxter and King as principal felons, the defendant charged by a separate indictment with a different crime — that of receiving the property in question with knowledge that it was so stolen and with intent to convert it to his own use or gain — was held to be presumptively or *prima facie* guilty so far as the vital fact of the property having been stolen was concerned, as soon as the Government produced the record of such conviction and without its making any proof whatever by witnesses confronting the accused of the existence of such vital fact. We cannot assent to this view. We could not do so without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.

This precise question has never been before this court, and we are not aware of any adjudged case which is in all respects like the present one. But there are adjudications which proceed upon grounds that point to the conclusion reached by us.

A leading case is *Rex* v. *Turner*, 1 Moody's Crown Cases, 347. In that case the prisoner was indicted for feloniously receiving from one Sarah Rich certain goods and chattels theretofore feloniously stolen by her from one Martha Clarke. At the trial before Mr. Justice Patteson it was proposed to prove a confession of Sarah Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner and others as well as herself. The evidence was not admitted, but the court admitted other evidence of what Sarah Rich said

respecting herself only. The prisoner was convicted and sentenced. The report of the case proceeds: "Having since learned that a case occurred before Mr. Baron Wood at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver, the learned judge thought it right to submit to the learned judges the question, Whether he was right in admitting the confession of Sarah Rich in the present case. The learned judge thought it right to add that the prisoner, one Taylor, and Sarah Rich had immediately before been tried upon an indictment for burglary, and stealing other property in the house of Mrs. Clarke on the night of the 22d of August; and that Taylor and Rich had been found guilty, but the prisoner had been acquitted, there being no proof of his presence. The learned judge did not pass sentence upon Sarah Rich immediately; but a new jury was called, and the prisoner was tried as a receiver, so that either party might have called her as a witness. In Easter term, 1832, all the judges (except Lord Lyndhurst, C. B., and Taunton, J.) met, and having considered this case, were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means; and the conviction was held wrong." In a later case, *Keable* v. *Payne*, 8 Ad. & Ell. 555, 560, which was an action involving a question as to the admission of certain evidence, and was heard in the Queen's Bench before Lord Denman, Chief Justice, and Littledale, Patteson and Williams, Justices, Mr. Justice Patteson, referring to *Rex* v. *Turner*, above cited, said: "On an indictment for receiving goods feloniously taken, the felony must be proved; and neither a judgment against a felon, nor his admission, would be evidence against the receiver. In such a case I

once admitted evidence of a plea of guilty by the taker; and it was held that I did wrong." A note in Starkie on Evidence p. 367, is to this effect: "In *R.* v. *Turner*, 1 Moo. C. C. 347; *R.* v. *Ratcliffe*, 1 Lew. C. C. 112; *Keable* v. *Payne*, 8 Ad. & E. 560, (35 E. C. L. R. 454,) it is stated that many of the judges (all the judges except two being assembled) were of opinion that the record of the conviction of the principal would not be evidence of the fact, where the indictment against the accessory alleged not the conviction but the guilt of the principal. And on principle it would seem to be evidence only when the indictment alleges the conviction of the principal, and *simply to support that allegation*."

The leading American case on the question is *Commonwealth* v. *Elisha*, 3 Gray, 460. The indictment was for receiving stolen goods knowing them to have been stolen. The court, speaking by Metcalf, J., said: "This indictment is against the defendant alone, and charges him with having received property stolen by Joseph Elisha and William Gigger, knowing it to have been stolen. It is not averred, nor was it necessary to aver or prove, (Rev. Sts. c. 126, § 24,) that they had been convicted of the theft. But it was necessary to prove their guilt, in order to convict the defendant. Was the record of their conviction on another indictment against them only, upon their several pleas of guilty to a charge of stealing the property, legal evidence, against the defendant, that they did steal it? We think not, either on principle or authority. That conviction was *res inter alios*. The defendant was not a party to the proceedings, and had no opportunity nor right to be heard on the trial. And it is an elementary principle of justice, that one man shall not be affected by another's act or admission, to which he is a stranger. That conviction being also on the confession of the parties, the adjudged cases show that it is not evidence against the defendant. *Rex* v. *Turner*, 1 Mood. C. C. 347, and 1 Lewin's C. C. 119; 1 Greenl. Ev. § 233; Rosc. Crim. Ev. (2d ed.) 50; *The State* v. *Newport*, 4 Harring. (Del.) 567. We express no opinion concerning a case differing in any particular from this, but confine ourselves to the exact

question presented by these exceptions. Our decision is this, and no more: The record of the conviction of a thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of the receiver of that property, upon an indictment against him alone, which does not aver that the thief has been convicted."

To the same general effect are some of the text-writers. Phillips, in his Treatise on the Law of Evidence, referring to the rule as to the admissibility and effect of verdicts or judgments in prosecutions, says: "A record of conviction of a principal in felony has been admitted in some cases, not of modern date, as evidence against the accessory. *R.* v. *Smith*, Leach Cr. C. 288; *R.* v. *Baldwin*, 3 Camp. 265. This has been supported on the ground of convenience, because the witnesses against the principal might be dead or not to be found, and on the presumption that the proceedings must be taken to be regular, and the guilt of the convicted party to be established. Fost. Disc. iii. c. 2, s. 2, p. 364. But this is not strictly in accordance with the principle respecting the admissibility of verdicts as evidence against third persons. From the report of the recent case of *Rex* v. *Turner*, it seems that a record of conviction of a principal in the crime of stealing, who pleads guilty, would not now be received as evidence of the guilt of the principal against the receivers of the stolen property, or the accessory after the fact; and it is said to be doubtful, whether a record of the conviction of the principal on his plea of not guilty, would be admissible against the accessory. As proof of *the fact of conviction*, the record would be admissible and conclusive, but it seems not to be admissible evidence of the *guilt* of the convict, as against another person charged with being connected with him in crime, the record being in this respect *res inter alios acta*. It is evidence that a certain person, named in the record, was convicted by the jury, but not evidence as against a third person, supposed to have been engaged with him in a particular transaction, as to the *ground* on which the conviction proceeded, namely, that the convict committed the criminal act described in the record."

2 Phillips's Ev. 3d ed. pp. 22-3. Taylor in his Treatise on Evidence, after stating that a prisoner is not liable to be affected by the confessions of his accomplices, says: "So strictly has this rule been enforced, that where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held by all the judges to be no evidence of that fact as against the receiver (*R.* v. *Turner*); and the decision, it seems, would be the same, if both parties were indicted together, and the principal were to plead guilty. (*Id.*)" 1 Taylor's Ev. § 826, 6th ed.

The principle to be deduced from these authorities is in harmony with the view that one accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not within the meaning of the Constitution confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel. As heretofore stated the crime charged against Wallace, Baxter and King and the crime charged against Kirby were wholly distinct—none the less so because in each case it was essential that the Government should prove that the property described was actually stolen. The record of the proof of a vital fact in one prosecution could not be taken as proof in the other of the existence of the same fact. The difficulty was not met when the trial court failed as required by the act of 1875 to instruct the jury that the record of the conviction of the principal felons was conclusive evidence of the fact that the property had been actually stolen, but merely said that such record made a *prima facie* case as to such fact. The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felons as competent proof for any purpose. That those persons had been convicted was a fact not necessary to be established in the case against the alleged receiver; for, under the statute, he could be prosecuted even if the principal felons had not been tried or indicted. As already stated, the effect of the charge was

to enable the Government to put the accused, although shielded by the presumption of innocence, upon the defensive as to a vital fact involved in the charge against him by simply producing the record of the conviction of other parties of a wholly different offence with which the accused had no connection.

It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath — "the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth." *Clyde Mattox* v. *United States*, 146 U. S. 140, 151; Cooley's Const. Lim. 318; 1 Phillips on Ev. c. 7, § 6.

For the reasons stated it must be held that so much of the above act of March 3, 1875, as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen or purloined had been embezzled, stolen or purloined, is in violation of the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Upon this ground the judgment must be reversed and a new trial had in accordance with law. But as the case must go back to the Circuit Court for another trial, it is proper to notice other questions presented by the assignments of error.

The accused contends that the indictment is defective in that it does not allege ownership by the United States of the stolen articles of property at the time they were alleged to have been feloniously received by him. This contention is without merit. The indictment alleges that the articles

described were the property of the United States when they were feloniously stolen on the 7th day of June, 1896, and that the defendant only two days thereafter, on the 9th day of June, 1896, "the postage stamps aforesaid so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use or gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away." The stamps alleged to have been feloniously received by the accused on the 9th day of June are thus alleged to have been the same that were stolen from the United States two days previously. The larceny did not change the ownership, and it must be taken that the United States had not regained possession of the stamps before they were received by Kirby, and that the indictment charges that they were out of the possession of the United States and stolen property when they came to the hands of the accused.

Another contention by the accused is that the indictment was fatally defective in not stating from whom the defendant received the stamps. This contention is apparently supported by some adjudications, as in *State* v. *Ives*, 13 Iredell, 338. But upon a careful reading of the opinion in that case it will be found that the judgment rests upon the ground that the statute of North Carolina, taken from an old English statute, made the receiver of stolen goods strictly an accessory and contemplated the case of the goods being received from the person who stole them. As already stated the act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony, for which he can be tried either before or after the conviction of the principal felon, or whether the latter is tried or not. Under such a statute the person who stole the property might be pardoned, and yet the receiver could be indicted and convicted of the crime committed by him. Bishop in his New Criminal Procedure says that while some American cases have held it to be

necessary in an indictment against the receiver of stolen goods to state from whom he received the goods, "commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received." Vol. 2, § 983. By an English statute, 7 & 8 Geo. IV, June 21, 1827, c. 29, § 54, it was enacted that "if any person shall receive any chattel, money, valuable security or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice," etc. Under that statute a receiver of stolen goods was indicted. It was objected that one of the counts did not state the name of the principal, or that he was unknown. Tindall, C. J., said: "It will do. The offence created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question therefore will be, whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offence." *Rex* v. *Jervis*, 6 C. & P. 156; 2 Russell on Crimes, 6th ed. 436. In *State* v. *Hazard*, 2 R. I. 474, an indictment charging the accused with fraudulently receiving stolen goods, knowing them to have been stolen, was held to be good, although it did not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown to the grand jurors. We therefore think that the objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken. If the stamps were in fact stolen from the United States, and if they were received by the

accused, no matter from whom, with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged even if it were not shown by the evidence from whom he received the stamps. This rule cannot work injustice nor deprive the accused of any substantial right. If it appears at the trial to be essential in the preparation of his defence that he should know the name of the person from whom the Government expected to prove that he received the stolen property, it would be in the power of the court to require the prosecution to give a bill of particulars. *Coffin* v. *United States*, 156 U. S. 432, 452; *Rosen* v. *United States*, 161 U. S. 29, 35; *Commonwealth* v. *Giles*, 1 Gray, 466; Rosc. Crim. Ev. 6th ed. 178, 179, 420.

The judgment is reversed, and the case is remanded with directions for a new trial and for further proceedings consistent with law.

Mr. Justice Brown and Mr. Justice McKenna dissented.

Mr. Justice Brewer did not participate in the decision of this case.

COSGROVE *v.* WINNEY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 172. Submitted January 19, 1899. — Decided April 24, 1899.

The appellant, a Canadian, was extradited from Canada under the extradition treaty between Great Britain and the United States, and, being brought before a police court of Detroit was charged with larceny, gave bail for his appearance at the trial, and returned to Canada. Returning from Canada to Detroit voluntarily before the time fixed for trial, he was arrested on a capias issued from the District Court of the United States for the Eastern District of Michigan before his extradition, charging him with an offence for which he was not extraditable, and was taken into custody by the marshal of that district. He applied to the District Court of the United States for a writ of *habeas corpus* which

Statement of the Case.

was allowed. After hearing and argument his application for a discharge was refused by the District Court. On appeal to this court it is *Held:* That under the circumstances the appellant retained the right to have the offence for which he was extradited disposed of, and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained.

November 7, 1895, Winney, United States marshal for the Eastern District of Michigan, made a complaint before one of the police justices of the city of Detroit within that district against Thomas Cosgrove for the larceny of a boat, named the Aurora, her tackle, etc., whereon a warrant issued for his arrest. Cosgrove was a resident of Sarnia, in the Province of Ontario, Dominion of Canada, and extradition proceedings were had in accordance with the treaty between the United States and Great Britain, which resulted in a requisition on the Canadian Government, which was duly honored, and a surrendering warrant issued May 19, 1896, on which Cosgrove was brought to Detroit to respond to the charge aforesaid; was examined in the police court of Detroit; was bound over to the July term, 1896, of the recorder's court of that city; and was by that court held for trial, and furnished bail. He thereupon went to Canada, but came back to Detroit in December, 1896.

December 3, 1895, a capias issued out of the District Court of the United States for the Eastern District of Michigan, on an indictment against Cosgrove, on the charge of obstructing the United States marshal in the execution of a writ of attachment, which was not served until December 10, 1896, some months after Cosgrove had been admitted to bail in the recorder's court.

Cosgrove having been taken into custody by the marshal applied to the District Court for a writ of *habeas corpus*, which was issued, the marshal made return, and the cause was duly argued.

The court entered a final order denying the application and remanding the petitioner. From this order an appeal was taken to the Circuit Court of Appeals, and there dismissed,

whereupon an appeal to this court was allowed, and Cosgrove discharged on his own recognizance.

The district judge stated in his opinion that it appeared "that the property, for the taking of which he [Cosgrove] is charged with larceny, was the vessel which, under the indictment in this court, he was charged with having unlawfully taken from the custody of the United States marshal, while the same was held under a writ of attachment issued from the District Court in admiralty."

And further: "The only question which arises under this treaty therefore is whether upon the facts stated in the return which was not traversed, the petitioner has had the opportunity secured him by that treaty to return to his own country. If he has had such opportunity, then article 3 has not been violated, either in its letter or spirit, by the arrest and detention of the petitioner. It is conceded that he was delivered to the authorities of the State of Michigan in May, 1896, to stand his trial upon the charge of larceny. He gave bail to appear for trial in the recorder's court when required and immediately returned to Canada. On December 10, 1896, he voluntarily appeared in the State of Michigan, of his own motion, and not upon the order of the recorder's court, or at the instance of his bail, and while in this district was arrested."

Mr. E. H. Sellers and *Mr. Cassius Hollenbeck* for appellant.

Mr. Solicitor General for appellee.

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

Article three of the Extradition Convention between the United States and Great Britain, promulgated March 25, 1890, 26 Stat. 1508, and section 5275 of the Revised Statutes, are as follows:

"Article III. No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence, committed prior to his extradition, other

than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

"SEC. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter, and may employ such portion of the land and naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

Cosgrove was extradited under the treaty, and entitled to all the immunities accorded to a person so situated; and it is admitted that the offence for which he was indicted in the District Court was committed prior to his extradition, and was not extraditable. But it is insisted that although he could not be extradited for one offence and tried for another, without being afforded the opportunity to return to Canada, yet as, after he had given bail, he did so return, his subsequent presence in the United States was voluntary and not enforced, and therefore he had lost the protection of the treaty and rendered himself subject to arrest on the capias and to trial in the District Court for an offence other than that on which he was surrendered; and this although the prosecution in the state court was still pending and undetermined, and Cosgrove had not been released or discharged therefrom.

Conceding that if Cosgrove had remained in the State of Michigan and within reach of his bail, he would have been exempt, the argument is that, as he did not continuously so remain, and, during his absence in Canada, his sureties could not have followed him there and compelled his return, if his appearance happened to be required according to the exigency

of the bond, which the facts stated show that it was not, it follows that when he actually did come back to Michigan he had lost his exemption.

But we cannot concur in this view. The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offence for which he had been extradited, and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the state prosecution in any way. *United States* v. *Rauscher*, 119 U. S. 407, 433.

The mere fact that he went to Canada did not in itself put an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he reëntered Michigan he was as much subject to the compulsion of his sureties as if he had not been absent.

In *Taylor* v. *Taintor*, 16 Wall. 366, 371, Mr. Justice Swayne, speaking for the court, said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern, 231, it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

Opinion of the Court.

We think the conclusion cannot be maintained on this record that, because of Cosgrove's temporary absence, he had waived or lost an exemption which protected him while he was subject to the state authorities to answer for the offence for which he had been extradited.

The case is a peculiar one. The marshal initiated the prosecution in the state courts, and some weeks thereafter the indictment was found in the District Court for the same act on which the charge in the state courts was based. The offences, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he could be arrested on process from the District Court before the prior proceeding had terminated and he had had opportunity to return to the country from which he had been taken. Or, rather, whether the fact of his going to Canada pending the state proceedings deprived him of the immunity he possessed by reason of his extradition so that he could not claim it though the jurisdiction of the state courts had not been exhausted; he had come back to Michigan; and he had had no opportunity to return to Canada after final discharge from the state prosecution.

We are of opinion that, under the circumstances, Cosgrove retained the right to have the offence for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained.

Final order reversed and cause remanded with a direction to discharge petitioner.

AMERICAN REFRIGERATOR TRANSIT COMPANY *v.* HALL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 226. Argued and submitted March 16, 17, 1899. — Decided April 24, 1899.

It having been settled, by previous decisions of this court, that where a corporation of one State brings into another State, to use and employ, a portion of its movable property, it is legitimate for the latter State to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon similar property, used in like way by its own citizens, it is now held that such a tax may be properly assessed and collected when the specific and individual items of property so used (railway cars) were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed; and that the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid.

In March, 1896, the American Refrigerator Transit Company, a corporation organized under the laws of the State of Illinois, filed, in the district court of Arapahoe County, State of Colorado, against Frank Hall, treasurer of said county, a bill of complaint seeking to restrain the defendant from enforcing payment by the said transit company of certain taxes assessed upon refrigerator cars owned by the company, and used for the transportation of perishable freight over various lines of railroad throughout the United States. The bill alleged that the business in which said cars were engaged was exclusively interstate commerce business; that the company has and has had no office or place of business within the State of Colorado, and that all the freight transported in plaintiff's cars was transported either from a point or points in a State outside of the State of Colorado to a point within that State, or from a point in the State of Colorado to a point without said State, or between points wholly outside of said State; that said cars had no taxable situs within said State; that said assessment of taxes upon said cars was without authority of

law and void; and that complainant had no plain or adequate remedy at law.

A demurrer to the complaint was overruled and answer was filed denying some and admitting other allegations of the bill. At the trial the parties agreed to and filed the following stipulation:

"1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers on said railroads may desire to route them in shipping, and furnishes the same for transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff received a mileage of three fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United

States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

"That, owing to the varying and irregular demand for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

"That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats and the like, to have such character of cars wherein they can safely transport such character of freight.

"2d. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation.

"3d. That said company is not doing business in this State, except as shown in this stipulation and by the facts admitted in the pleadings.

"4th. That in case it be found by the court under the undisputed facts set forth in the pleadings and the facts herein stipulated that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the

plaintiff for the relief prayed; otherwise judgment shall be entered for the defendants.

"The following constitutional and statutory provisions are referred to in the opinion:

'All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.' (§ 10, art. 10, state const.)

'Sec. 3765. (M. A. S.) All property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation. . . .'

'Sec. 3804. . . . It shall be the duty of said board (the board of equalization) to assess all the property in this State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies.

'Sec. 3805. The president, vice president, general superintendent, auditor, tax agent or some other officer of such railway, sleeping, general or other palace car, or telegraph or telephone company, or corporation, owning, operating, controlling or having in its possession in this State any property, shall furnish said board on or before the fifteenth day of March, in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the thirty-first day of December preceding.'

"5th. A full list of rolling stock belonging to or operated by such railway company, setting forth the number, class and value of all locomotives, passenger cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars and all other kinds of cars owned or used by said company. The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the State during the year for which the statement is made. The said statement shall also show the actual proportion of rolling stock of said company used upon leased lines and lines operated with others within the

State, the mileage so leased and operated and the location thereof. . . .

"7th. . . . Whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation by which it is owned or to which it belongs. But every such corporation shall, in the statement to said board, set forth what property belonging to or owned by any other corporation is used or controlled by the corporation making the statement."

The cause having come on to be heard, judgment was entered on behalf of the plaintiff, awarding a perpetual injunction as prayed for in the bill of complaint. Thereupon an appeal was taken to the Supreme Court of the State, from whose decision, reversing the judgment of the trial court and directing the dismissal of the bill, an appeal was taken to this court.

Mr. Judson Harman for plaintiff in error. *Mr. Percy Werner* was on his brief.

Mr. Alexander B. McKinley for defendant in error, submitted on his brief.

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

In this record we again meet the problem, so often presented, how to reconcile the rightful power of a State to tax property within its borders with its duty to obey those provisions of the Federal Constitution which forbid the taking of property without due process of law, and the imposition of burdens upon interstate commerce.

The frequency with which the question has arisen is evidence both of its importance and of its difficulty. The vast increase of commerce throughout the country, and the consequent necessary increase of the means whereby such commerce is carried on, have been the occasion of many of the cases in which this court has been called upon to consider the

subject. The expense involved in the manufacture of some of the common articles in daily use and in their transportation is so great as to be beyond the means of individuals, and has rendered necessary the aggregation of capital in the form of corporations. Usually such corporations, though organized under the law of one State, make their profits by doing their business in several or all of the States, and, while so doing, receive the protection of their laws. When the taxpayers of one State perceive that they are subjected to competition by the importation of articles made in another, or that they are contributing continually to the prosperity of foreign corporations, what more natural than that they should demand that some share of the public burdens should be put upon such corporations? The difficult task of the lawmaker is to meet that natural and proper demand without infringing upon the freedom of interstate commerce, or depriving those engaged therein of the equal protection of the laws.

In the case before us we do not need to go far in search of the principles which determine it. We think they may be found in the cases of *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; and *Adams Express Co.* v. *Ohio*, 165 U. S. 194.

In the first of those cases was involved the question of the validity of a law of Massachusetts, which imposed on the Western Union Telegraph Company, a corporation of the State of New York, a tax on account of the property owned and used by it within the State of Massachusetts, the value of which was to be ascertained by comparing the length of its lines in that State with the length of its entire lines. This court held that such a tax is essentially an excise tax, and not forbidden by the commerce clause of the Constitution.

In *Pullman's Palace Car Co.* v. *Pennsylvania* the nature of the case and the conclusion were thus stated by Mr. Justice Gray:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so

employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran its cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

Adams Express Co. v. *Ohio* was a case wherein was drawn in question the validity of a law of the State of Ohio imposing an assessment upon an express company whose business was carried on through several States. The statute required a board of assessors "to proceed to ascertain and assess the value

of the property of express, telegraph and telephone companies in Ohio, and in determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

It was contended, on behalf of the express company, that the law in question was invalid because it sought to impose taxes on property beyond the territorial jurisdiction of Ohio; because the assessments therein provided for were an invasion of the constitutional guaranty of the equal protection of the laws, and because the assessments imposed a burden upon interstate commerce. But this court held otherwise. Portions of the opinion of Mr. Chief Justice Fuller may be appropriately quoted:

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government.

"As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which

their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction.

"The valuation was thus not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on — a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh Railway* v. *Backus*, 154 U. S. 421, or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State. *Western Union Tel. Co.* v. *Taggart*, 163 U. S. 1.

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to

the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicted."

On a petition for a rehearing, the questions were again fully argued, and the conclusions reached on the first hearing were reaffirmed. *Adams Express Co.* v. *Ohio*, 166 U. S. 185. From the opinion denying the rehearing, delivered by Mr. Justice Brewer, a few extracts may be quoted as applicable to the case in hand:

"Where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different States, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the State which gave it its corporate franchise, or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises

and privileges into a single unit of property, and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the States other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those States, but, unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle. . . . In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine spun theories about situs should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation as a fair distribution of the actual value of their property among those States requires."

The constitution of the State of Colorado provides that all corporations in the State or doing business therein shall be subject to taxation on the real and personal property owned or used by them within the territorial limits of the authority levying the tax, and its statutes provide for a board of equalization, whose duty it shall be to assess all the property in the State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies; and that whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation to which it belongs.

The American Refrigerator Transit Company is a corporation of the State of Illinois, engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States, and receives as compensation for the use of its cars a

mileage of three fourths of a cent per mile from each railroad company over whose lines said cars are run.

The receiver of the Union Pacific, Denver and Gulf Company reported to the board of equalization that he had on the line of the railroad which he was operating within the State of Colorado forty-two refrigerator cars belonging to the American Refrigerator Transit Company on December 31, 1894. The board thereupon assessed to the Transit Company said forty-two cars, at a valuation of two hundred and fifty dollars each, and distributed said assessment to the different counties through which the line of said railroad extended.

It was stipulated in the trial court "that it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, to have such character of cars wherein they can safely transport such freight; and that owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it profitable to build or own cars of such character, and therefore rely upon securing such cars when needed from the Transit Company, or corporations doing a like business."

It was further stipulated "that the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such State, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said State for the purposes of taxation."

Applying the reasoning and conclusions of the cases hereinbefore cited to those admitted facts, we have no difficulty in affirming the judgment of the Supreme Court of Colorado sustaining the validity of the taxation in question.

The state statutes impose no burdens on the business of the plaintiff in error, but contemplate only the assessment and

levy of taxes upon the property situated within the State; and the only question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the average number used within the state limits during the period for which the assessment was made.

It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation valid. *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

The judgment of the Supreme Court of the State of Colorado is accordingly

Affirmed.

Mr. Justice Harlan and Mr. Justice White dissented.

HOLMES *v.* HURST.

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

No. 124. Argued March 3, 1899. — Decided April 24, 1899.

The serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, c. 16, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

Statement of the Case.

THIS was a bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Company of Boston, in twelve successive numbers of the Atlantic Monthly, a periodical magazine published by them, and having a large circulation. Each of these twelve numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These twelve parts were published under an agreement between Dr. Holmes and the firm of Phillips, Sampson & Company, whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the twelve numbers so published in the Atlantic Monthly; but on November 2, 1858, after the publication of the last of the twelve numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the District Court of the District of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson & Company in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the District Court. The usual notice, namely, "Entered according to act of Congress, 1858, by Oliver Wendell Holmes, in the Clerk's Office of the District Court of the District of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time; sent a printed copy of the title to the Librarian of Congress, who recorded the same in a book kept for that purpose,

and also caused a copy of this record to be published in the Boston Weekly Advertiser; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the twelve numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said twelve numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts, by the Circuit Court for the Eastern District of New York, and the bill dismissed. 76 Fed. Rep. 757. From this decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, by which the decree of the Circuit Court was affirmed. 51 U. S. App. 271. Whereupon plaintiff took an appeal to this court.

Mr. Rowland Cox for appellant.

Mr. Andrew Gilhooly for appellee.

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

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, c. 16, 4 Stat. 436, as to vitiate a copyright of the whole book, obtained subsequently but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of

this common law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623 and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation and imprisonment without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state — although Parliament made some efforts to restrain the licentiousness of the press — until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from fourteen to twenty-eight years. Notwithstanding this act, however, the chancery courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed so late as 1769 by the Court of King's Bench in the very carefully considered case of *Millar* v. *Taylor*, 4 Burrows, 2303, in which the right of the author of "Thompson's Seasons," to a monopoly of this work, was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldsons* v. *Becket*, 4 Burrows, 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldsons* v. *Becket*, was followed by this court in *Wheaton* v. *Peters*, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act — in other words, that while a right did exist by common law, it has been superseded by statute.

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or, as Lord Mansfield describes it, "an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever." 4 Burrows, 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys* v. *Boosey*, 4 H. L. C. 815, 867: "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

The right of an author to control the publication of his works, at the time the title to the "Autocrat" was deposited, was governed by the act of February 3, 1831, c. 16, 4 Stat. 436, wherein it is enacted:

"SEC. 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, . . . shall have the sole right and liberty of printing, reprinting, publishing and vending such book or books, . . . in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"SEC. 4. That no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book or books . . . in the clerk's office of the District Court of the District wherein the author

or proprietor shall reside, etc. And the author and proprietor of any such book . . . shall, within three months from the publication of said book, . . . deliver or cause to be delivered a copy of the same to the clerk of said District."

The substance of these enactments is that, by section one, the author is only entitled to a copyright of books not printed and published; and by section four, that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is, that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the twelve parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the twelve parts printed as they were printed in the Atlantic Monthly, and that while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the twelve parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title "The Autocrat of the Breakfast Table;" (2) deposit a copy of the book "The Autocrat of the Breakfast Table;" and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manuscript until the book was completed, and then taking the copyright, this copyright is valid. His position briefly is that no one of the twelve copyrights, if each chapter were copyrighted, nor

all of them combined, could be held to be a copyright, in the sense of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section four could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively; but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions or "the order of his words," but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts — a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the monopoly of the

author thus abandoned, we do not see how it could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright act covers the process of aggregation as well as that of intellectual production. The contrary is the fact.

If the patent law furnishes any analogy in this particular — and we see no reason why it may not — then there is nothing better settled than that a mere aggregation of familiar elements, producing no new result, is not a patentable combination. *Hailes* v. *Van Wormer*, 20 Wall. 353; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Pickering* v. *McCullough*, 104 U. S. 310; *Richards* v. *Chase Elevator Co.*, 158 U. S. 299. But if there were anything more than mechanical skill involved in the collocation of the several parts of this work, it would be the exercise of inventive genius and the subject of a patent rather than a copyright. If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public — and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes, and the word "book" as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or *en bloc*.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publica-

tion;" and if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. *Henderson* v. *Maxwell*, L. R. 4 Ch. Div. 163; *Bradbury* v. *Sharp*, W. N. (1891) 143.

We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the Librarian of Congress, with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly, (since those numbers were never copyrighted,) even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below must therefore be

Affirmed.

WHITE *v.* LEOVY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 232. Submitted April 3, 1899. — Decided April 24, 1899.

From the statement of this case made by the Supreme Court of Louisiana in its opinion, quoted in the opinion of this court, it is manifest that no Federal question was passed upon by that court, but that its decision was put upon an independent ground, involving no Federal question, and of itself sufficient to support the judgment below; and this court therefore dismisses the writ of error.

THE case is stated in the opinion.

Mr. E. Howard McCaleb for plaintiff in error.

Mr. Alexander Porter Morse, *Mr. Henry J. Leovy* and *Mr. Victor Leovy* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action of jactitation or slander of title, and is here on error from the Supreme Court of the State of Louisiana. A motion is made to dismiss for want of jurisdiction in this court on the ground that no Federal question was decided. We think the motion should be granted.

Both parties, who were respectively plaintiff and defendants in the court below, derive title from the State of Louisiana by patents which were issued in execution of the grant to it of swamp and overflowed lands. Plaintiff's patent was prior in time to that of defendants, and it is claimed that by the issue of the latter the State "has attempted to impair the obligations of the contract between the State of Louisiana and the said Robert M. White, plaintiff herein, and deprive him of his property without due process of law, in violation of the Constitution and laws of the United States."

The title of the State must be assumed, and the contest is by which patent that title passed. It seems almost inevitable

that the questions hence arising would be state ones, and that the decision of the Supreme Court was confined to such a question is manifest from its opinion. 49 La. Ann. 1660.

After defining the action under the Louisiana laws, and stating upon whom the burden of establishing title devolved, it said:

"The description of the land which was purchased by the plaintiff, which was evidenced by the patent that issued to the plaintiff, is of the following tenor, viz.: 'All the unsurveyed marsh west of lots fronting on the right bank of the Mississippi, except section No. sixteen (16), in township twenty-two (22) south, of range thirty-one (31) east, in the southeastern west of the river land district, containing thirty-eight hundred and forty (3840) acres, according to the official plat of the survey of said lands in the state land office.'

"The number of the patent is 4058, and it states that the purchase was made with certificate No. 2251, N. S. L."

The plaintiff's petition, original and supplemental, contained the same description.

"The answer of the defendant H. J. Leovy," the opinion further says, "is to the effect that the land claimed by the plaintiff and called for by his patent 'was entered according to an official plat or survey made by G. F. Connelly in 1836, [and] . . . was all within a distance of less than two miles of the Mississippi River, and all territory to the west of that was at the date of that survey, and by the plat by which White claims to have bought, West Bay.

'That a few years after Connelly made said survey the Jump Outlet broke through, and the accumulation on the seaward side of said marsh and in said bay gradually raised the bed of said bay until the whole of said West Bay became marsh land, connecting with swamp land to the westward, and at the time of said lands being transferred to the State, in 1849 and 1850, by Congress it was not a navigable bay or part of the sea.'

"The answer then charges that the plaintiff, well knowing all these facts, and endeavoring to perpetrate a fraud upon the State, 'entered the lands originally allotted by Connelly, and

under his patent 4058 is endeavoring to claim over sixteen thousand (16,000) more acres in said township' than he is entitled to claim thereunder, and by 'a malicious suit now seeks to cast a cloud upon the title of others who have entered the western lands in said township . . . honestly and according to law, and who are in the peaceable and undisturbed possession of the same.'"

The answer of the other defendant was similar. And further—

"In *limine litis* plaintiff's counsel filed an exception and motion to strike out a portion of the defendant's answers on the ground that the official plat of survey of G. F. Connelly, United States surveyor, made in 1836, and on which his patent was based, cannot be questioned or impeached by the defendant, and this court is wholly without jurisdiction to determine whether same is or not erroneous. And that the said patent cannot be questioned or impeached by the defendant for fraud or error.

"That the United States Government, as the owner of the sea marsh adjacent to the seashore and to West Bay, 'acquired all the alluvian made by accretion to said lands between the years 1836 and 1850; and when said lands were granted by the United States Government to the State of Louisiana,' same passed to the State by the granting act of Congress, and that same passed to the plaintiff as patentee thereof, and 'that he acquired all of said lands as well as the accretions which were added thereto, as they were at the time they were granted by the United States to the State of Louisiana,' said granting act passing a fee simple title *in præsenti* to the State, not only as the land was at the time of the survey by Connelly in 1836, but as it was at the date of the grant, and that the whole was acquired by the plaintiff as patentee.

"His additional representation is that the plaintiff as patentee 'acquired *all of said lands* in township No. 22 south, range No. 31 east, on the southeastern west of the river land district, *according to the official survey of said lands in the state land office, as they were at the time they were granted by the United States* to the State of Louisiana.'"

The decision of the district court was in favor of the motion, and after comment on the ruling the Supreme Court said:

"Reduced to a last analysis, the pleadings present for our consideration and decision a purely petitory action, in which the defendant holds the affirmative side of the controversy and is bound to succeed on the strength of his own title, and in deciding the question of title we are to determine whether the patents which the State issued to H. J. Leovy, in 1893, reflect a title which is superior and paramount to the patent which the State issued to the plaintiff in 1890, to the extent that they conflict.

"This controversy is not so much with regard to the character or strength of the respective parties as it is with regard to the area or domain which the State actually and really conveyed to the plaintiff; for it is quite true and cannot be denied that the State was wholly without power to convey to the defendant H. J. Leovy any land in 1893 which she had previously sold to the plaintiff in 1890, without trenching upon the issues of error or fraud which were excluded from consideration. In other words, we are to determine from the evidence before us whether the plaintiff's patent covers and includes all the land in township twenty-two south, of range thirty-one east, in the southeastern land district west of the Mississippi River; for if it does, in fact, the patents which were subsequently issued to the defendant H. J. Leovy do not reflect a paramount title thereto."

The court then gave elaborate consideration to the views of the district court, expressing its dissent from them; also at great length reviewed the evidence and the land laws of the State and the descriptions of the respective patents, and concluded as follows:

"As, in our opinion, this controversy is quite similar to the one presented in *Buras* v. *O'Brien* — that is to say, one for the determination of the area of sea marsh which is covered by a state patent — our conclusion is that the plaintiff's patent 4058 does not extend to nor include the land which is called for by the patents which were subsequently issued by

the State to the defendant H. J. Leovy, and that consequently there is no conflict between them.

"Under the jurisprudence and statutes of this State governing the sale and entry of swamp and marsh lands, we think it our duty to consider all the provisions and recitals of patents issued therefor and to give same effect according to their tenor; and thus considering the patent of the plaintiff, we regard it as evidencing a sale by measure and not by estimation of quantity. We consider the words thereof 'containing 3840 acres' as limiting the words preceding, 'all the unsurveyed marsh west of lots fronting on the right bank of the Mississippi,' and that the reference made therein to 'the official plat of the survey of said lands in the state land office' was intended to verify and confirm the statement as to the character and extent of the area of land which was actually conveyed to the patentee.

"We are of the opinion that inasmuch as the plaintiff's patent 4058 calls for 'all the unsurveyed marsh west of lots fronting on the Mississippi, except section sixteen in township twenty-two,' he is not entitled to survey, select and appropriate all the dry land or swamp land above overflow in said township in order to make out the quantity of '3840 acres' he purchased.

"We are of opinion that inasmuch as the patent conveys 'all the unsurveyed marsh west of the lots fronting on the Mississippi,' those lots must be taken as the initial point from which the area is to be computed, same being the only fixed and definite boundary mentioned in the patent.

"Thus considering the law and the evidence, we are of opinion that there should be judgment in favor of the defendant H. J. Leovy maintaining his patents as reflecting the paramount title to the lands which are therein described, and perpetuating his writ of injunction."

It is manifest no Federal question was passed on by the court. Its decision was put upon an independent ground involving no Federal question and of itself sufficient to support the judgment. It merely determined the extent of the grant to the State, and, interpreting the contending patents

Counsel for Plaintiff in Error.

as conveyances, decided that the lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace them. This was but the interpretation of written instruments, and if it were even apparent to us to be wrong, which we cannot say, we should nevertheless be without power to review it.

In *Remington Paper Co.* v. *Watson*, 173 U. S. 443, we had occasion to repeat and affirm the rule 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."

The writ of error is dismissed.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY *v.* MATTHEWS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 147. Submitted January 18, 1899. — Decided April 17, 1899.

The provision in § 2 of c. 155 of the acts of Kansas of 1885, entitled "An act relating to the liability of railroads for damages by fire," that, "in all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment," must, for reasons stated in the opinion of the court, be sustained as legislation authorized by the Constitution of the United States.

THE statement of the case will be found in the opinion of the court.

Mr. Robert Dunlap and *Mr. E. D. Kenna*, for plaintiff in error, submitted on their brief.

No appearance for defendants in error.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

In 1885 the legislature of Kansas passed the following act:

"An act relating to the liability of railroads for damages by fire.

"SECTION 1. *Be it enacted by the legislature of the State of Kansas:* That in all actions against any railway company organized or doing business in this State, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages, (which proof shall be *prima facie* evidence of negligence on the part of said railroad): *Provided*, That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"SEC. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." (Sess. Laws 1885, c. 155, 258.)

Under it an action was brought in the district court of Cloud County which resulted in a judgment against the railroad company, plaintiff in error, for $2094 damages and $225 attorney's fees. This judgment having been affirmed by the Supreme Court of the State, the company brought the case here on error.

All questions of fact are settled by the decision of the state courts, *Hedrick* v. *Atchison, Topeka &c. Railroad*, 167 U. S. 673, 677, and cases cited in the opinion, and the single matter for our consideration is the constitutionality of this statute. It is contended that it is in conflict with the Fourteenth Amendment to the Federal Constitution, and this contention was distinctly ruled upon by the Supreme Court of the State adversely to the railroad company. In support of this contention great reliance is placed upon *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in

amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the Supreme Court of the State, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive.

But while there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is "caused by the operating" of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Missouri Pac. Railway* v. *Humes*, 115 U. S. 512. And yet its purpose is not different. Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather, see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed. It

has been frequently before the Supreme Court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. In *Missouri Pac. Railway* v. *Merrill*, 40 Kansas, 404, 408, it was said:

"The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed and the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised."

And in the opinion filed in the present case, 58 Kansas, 447, 450, that court observed:

"Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. *St. Louis & San Francisco Railway* v. *Snaveley*, 47 Kansas, 637; *Same* v. *Curtis*, 48 Kansas, 179; *Same* v. *McMullen*, Id. 281; *Missouri Pac. R. R. Co.* v. *Henning*, Id. 465."

It is true that the *Ellis case* was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the Supreme Court of Texas, as appears from this extract from our opinion (p. 153): "The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty

upon railroad corporations for a failure to pay certain debts." And again, referring specifically to this matter, (p. 158): "While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State." Indeed, the limit in amount, ($50,) found in that statute, made it clear that no police regulation was intended, for if it were, the more stock found on the track the greater would be the danger and the more imperative the need of regulation and penalty.

So that according to the interpretation placed upon the Texas statute by its Supreme Court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments and upholding one part on a theory inconsistent with the policy of the State; while on the other hand, the purpose of this statute is, as declared by the Supreme Court of Kansas, protection against fire — a matter in the nature of a police regulation.

It may be suggested that this line of argument leads to the conclusion that a statute of one State whose purpose is declared by its Supreme Court to be a matter of police regulation will be upheld by this court as not in conflict with the Federal Constitution, while a statute of another State, precisely similar in its terms, will be adjudged in conflict with that Constitution if the Supreme Court of that State interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the Supreme Court of the State. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366. It forms its own independent judgment as to the scope and purpose of a statute, while of

course leaning to any interpretation which has been placed upon it by the highest court of the State. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment.

That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, (and sometimes in spite of such care,) scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie State like Kansas. It early attracted the attention of its legislature, and in 1860 — long before any railroads were built in the State — this statute was passed, (Laws 1860, c. 70, sec. 2; Comp. Laws, c. 101, sec. 2): "If any person shall set on fire any woods, marshes or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action." As held in *Emerson* v. *Gardiner*, 8 Kansas, 452, its effect was to change the rule of the common law, which gave redress only when the person setting the fire did so wantonly or through negligence, whereas by this statute the mere fact of setting fire to woods, marshes or prairies gave a right to the party injured to recover damages. And in the years after the railroads began to be constructed, and prior to the passage of the act before us, the reports of the Supreme Court of that State show that nearly a score of actions had been brought to that court for consideration, in some of which great damage had been done by fire escaping from moving trains. Fire catching in the dry grass often runs for miles, destroying not merely crops but houses and barns. Indeed, in one case, *Atchison, Topeka &c. Railroad* v. *Stanford*, 12 Kansas, 354, it appeared that the fire escaping had swept across the prairies for over four miles, and one ground of objection to the recovery was that the distance of the property destroyed from the railroad track was so great and the fire had passed over so many intervening farms that it could

not rightfully be held that the proximate cause of the injury was the escape of fire from the locomotive. No other work done, or industry carried on, carries with it so much of danger from escaping fire.

In 1887 the legislature of the State of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S. 1. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire.

While, as heretofore noticed, no special act of precaution was required, no statutory duty imposed upon railroad corporations in respect to protection against escaping fire, and a similar omission in the legislation of Texas was referred to in the opinion in the *Ellis case* as strengthening the argument that no police regulation was intended, yet we are of opinion that such omission is not conclusive upon the question of the validity of the statute. We have no right to consider the wisdom of such legislation. Our inquiry runs only to the matter of legislative power. If, in order to accomplish a given beneficial result — a result which depends on the action of a corporation — the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accomplish the result? As individuals we may think it better that the legislature prescribe the specific duties which the corporations must

perform; we may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire *prima facie* evidence of negligence; but clearly as a court we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts.

Many cases have been before this court, involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the law which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language. *Barbier* v. *Connolly*, 113 U. S. 27. In that case, after in general terms declaring that the Fourteenth Amendment designed to secure the equal protection of the laws, the court added (pp. 31 and 32):

"But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning

streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. It is also clear that the legislature (which has power in advance to determine what rights, privileges and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. *St. Louis &c. Railway Company* v. *Paul*, 173 U. S. 404. It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule.

Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo* v. *Hopkins*, *supra*, forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.

While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. Without attempting to cite all the cases it may not be amiss to notice, in addition to those already cited, the following: *Missouri* v. *Lewis*, 101 U. S. 22; *Hayes* v. *Missouri*, 120 U. S. 68; *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380, 389; *Chicago, Kansas & Western Railroad* v. *Pontius*, 157 U. S. 209; *Lowe* v. *Kansas*, 163 U. S. 81, 88; *Plessy* v. *Ferguson*, 163 U. S. 537; *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 597; *Jones* v. *Brim*, 165 U. S. 180; *W. U. Tel. Co.* v. *Indiana*, 165 U. S. 304; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 257; *Holden* v. *Hardy*, 169 U. S. 366; *Savings Society* v. *Multnomah County*, 169 U. S. 421; *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283, 300; *Tinsley* v. *Anderson*, 171 U. S. 101. In some of them the

court was unanimous. In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line.

It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the Supreme Court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the State, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the Supreme Court of Kansas is

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Brown, Mr. Justice Peckham and Mr. Justice McKenna, dissenting.

Dissenting Opinion: Harlan, Brown, Peckham, McKenna, JJ.

The statute of Kansas, the validity of which is involved in the present case, provides in its first section that in all actions against a railway company to recover damages resulting from fire caused by the operating of its road, it shall only be necessary for the plaintiff to establish the fact that the fire complained of "was caused by the operating of said railroad, and the amount of his damages (which proof shall be *prima facie* evidence of negligence on the part of said railroad): *Provided*, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration." The second and only other section provides that "if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

Manifestly, the statute applies only to suits against railroad companies, and only to causes of action arising from fire caused by operating a railroad. It establishes against a defendant railroad company a rule of evidence as to negligence that does not apply in any other suit for damages arising from the negligence of a defendant, whether a corporate or natural person. It does more. It imposes upon the defendant railroad corporation, if unsuccessful in its defence, a burden not imposed upon any other unsuccessful defendant sued upon a like or upon a different cause of action. That burden is the payment of an attorney's fee as a part of the judgment. Even if it appears that the railway company was not guilty of any negligence whatever or that the plaintiffs were guilty of contributory negligence preventing any recovery in their favor, no such fee nor any sum beyond ordinary costs is taxed against them.

In *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, 165 U. S. 150, we had before us a statute of Texas declaring among other things that any person in that State having "claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railroad corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, veri-

fied by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and *in addition thereto all reasonable attorney's fees*, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

That was an action against the railway company to recover damages for the killing of an animal. Judgment was entered against the company, and it included a special attorney's fee. That judgment was sustained by the state court.

The question to be decided was whether within the meaning of the Fourteenth Amendment and in the cases specified the Texas statute did not deny to a railroad corporation the equal protection of the laws in that it required the corporation, if unsuccessful in the suit, to pay, in addition to the ordinary costs taxable in favor of a successful litigant, a special attorney's fee, but gave it no right if successful to demand a like fee from its adversary.

After observing that only against railway companies and only in certain cases was such exaction made, and considering the statute as a whole, this court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class or debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff;

if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits therefore to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Referring to the previous decisions of this court holding that corporations were persons within the meaning of the Fourteenth Amendment of the Constitution of the United States, this court also said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

In response to the argument made in that case that it was competent for the legislature to make a classification of corporations enjoying special privileges, the court said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties — duties arising out of the particular business in which they are engaged — is a just classification and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512. But this and all

kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged — a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations. While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, 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. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

Dissenting Opinion: Harlan, Brown, Peckham, McKenna, JJ.

If the opinions in the *Ellis case* and in this case be taken together, the state of the law seems to be this:

1. A State *may not* require a railroad company sued for negligently killing an animal to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, if it does not allow the corporation when its defence is sustained to recover a like attorney's fee from the plaintiff.

2. A State *may* require a railroad company sued for and adjudged liable to damages arising from fire caused by the operation of its road, to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, even if it does not allow the corporation when successful in its defence to recover a like attorney's fee from the plaintiff.

The first proposition arises out of a suit brought on account of the killing by the railroad of a colt. The second proposition arises out of a suit brought on account of the destruction of an elevator and the property attached to it by fire caused by operating a railroad.

Having assented in the *Ellis case* to the first proposition, I cannot give my assent to the suggestion that the second proposition is consistent with the principles there laid down. Placing the present case beside the former case, I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute be unconstitutional.

In the former case we held that a railroad corporation, sued for killing an animal, was entitled to enter the courts upon equal terms with the plaintiff, but that that privilege was denied to it when the Texas statute required it to pay a special attorney's fee if wrong, and did not allow it to recover any fee if right in its defence; and yet allowed the plaintiff to recover a special attorney's fee if right, and pay none if wrong. Upon these grounds it was adjudged that the parties did not stand equal before the law, and did not receive its equal protection. In the present case the Kansas statute is held to be constitutional, although the parties in

suits embraced by its provisions are not permitted to enter the courts upon equal terms, and although the defendant railroad corporation is not allowed to recover an attorney's fee if right, but must pay one if found to be wrong in its defence; while the plaintiff is exempt from that burden if found to be wrong.

In the former case it was adjudged that a State had no more power to deny to corporations the equal protection of the law than it has to individual citizens. In the present case it is adjudged that in suits against a railroad corporation to recover damages arising from fire caused by the operation of the railroad, a rule of evidence may be applied against the corporation which is not applied in like actions against other corporations or against individuals for the negligent destruction of property by fire.

In the former case it was held that as the killing of the colt was not attributable to a failure upon the part of the railroad to perform any duty imposed upon it by statute, there could be no penalty for non-performance. In the present case it is adjudged that the statute may impose a penalty upon the defendant corporation for non-performance, although the negligence imputed to it was not in violation of any statutory duty.

Suppose the statute in question had been so framed as to give the railroad corporation a special attorney's fee if successful in its defence, but did not allow such a fee to an individual plaintiff when successful. I cannot believe that any court, Federal or state, would hesitate a moment in declaring such an enactment void as denying to the plaintiff the equal protection of the laws. If this be true, it would seem to follow that a statute that accords to the plaintiff rights in courts that are denied to his adversary should not be sustained as consistent with the doctrine of the equal protection of the laws. This conclusion, it seems to me, is inevitable unless the court proceeds upon the theory that a corporate person in a court of justice may be denied the equal protection of the laws when such protection could not be denied under like circumstances to natural persons. But we said in the *Ellis*

case that "a State has no more power to deny to corporations the equal protection of the laws than it has to individual citizens," and that corporations are denied a right secured to them by the Fourteenth Amendment if "they cannot appeal to the courts as other litigants under like conditions and with like protection."

There is another aspect in which the Kansas statute may be viewed. Taken in connection with the principles of general law recognized in that State, that statute, although not imposing any special duties upon railroad companies, in effect says to the plaintiffs Matthews and Trudell, the owners of the elevator property — indeed it says in effect to every individual citizen, and for that matter to every corporation in the State: "If you are sued by a railroad corporation for damage done to its property by fire caused by *your* negligence or in the use of *your* property, the recovery against you shall not exceed the damages proved and the ordinary costs of suit. But if your property is destroyed by fire caused by the operation of the railroad belonging to the same corporation, and you succeed in an action brought to recover damages, you may recover, in addition to the damages proved and the ordinary costs of suit, a reasonable attorney's fee; and if you fail in the action no such attorney's fee shall be taxed against you." In my judgment, such discrimination against a litigant is not consistent with the equal protection of the laws secured by the Fourteenth Amendment.

I submit that any other conclusion is inconsistent with *Gulf, Colorado & Santa Fé Railway* v. *Ellis*, as well as with many other well-considered decisions. A reference to a few adjudged cases will suffice.

The principles which in my judgment should control the determination of cases like the present one are well stated by the Supreme Court of Michigan in *Wilder* v. *Chicago & W. Michigan Railway*, 70 Michigan, 382. That case involved the validity of a provision in a statute of that State authorizing an attorney's fee of $25 to be taxed against a railroad company against which judgment should be rendered in an action for injuries to stock. The court said: "But the imposing of the

attorney's fee of $25 as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25 if it fails to successfully maintain its defence. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. 'The genius, the nature and the spirit of our state government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them.' *Durkee* v. *Janesville*, 28 Wisconsin, 464, 468; *Calder* v. *Bull*, 3 Dall. 386, 388. Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties in the disguise of costs upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defence in the courts

when suits are brought against them." These principles were reaffirmed in *Lafferty* v. *Chicago & W. Michigan Railway*, 71 Michigan, 35, and *Grand Rapids Chair Co.* v. *Runnells*, 77 Michigan, 104, 111.

The validity of a statute of Alabama requiring a reasonable attorney's fee, not exceeding a named amount, to be taxed as part of the costs in certain actions, was involved in *South & North Alabama Railroad* v. *Morris*, 65 Alabama, 193, 199. The Supreme Court of Alabama, referring to the Fourteenth Amendment as well as to the state constitution, said: "The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defence of their rights in courts of justice in this State, except so far as may be otherwise provided in the Constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions. . . . The section of the code under consideration (§ 1715) prescribes a regulation of a peculiar and discriminative character, in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but it is confined to such as own or control railroads only; and it varies from the general law of the land, by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee, not to exceed twenty dollars. A law

which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants or ministers of the gospel, would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every state constitution of the various Commonwealths of the American Government. We think this section of the code is antagonistic to these provisions of the state constitution, and is void. *Durkee* v. *Janesville*, 28 Wisconsin, 464; *Gordon* v. *Winchester Association*, 12 Bush, 110; *Greene* v. *Briggs*, 1 Curtis, 327; Cooley's Const. Lim. (3d ed.) § 393. The section in question is also violative of that clause in section 1, Article XIV of the Constitution of the United States, which declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' This guaranty was said by Justice Bradley in *Missouri* v. *Lewis*, 101 U. S. 22, 30, to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person or class of persons should be denied the same protection which is enjoyed by other persons, or other classes, in the same places and under like circumstances.' The same court, in *United States* v. *Cruikshank*, 92 U. S. 542, 555, per Waite, C. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there.' *Ward* v. *Flood*, 48 California, 36."

Coal Company v. *Rosser*, 53 Ohio St. 12, 22–24, involved the validity of a section of the Revised Statutes of Ohio providing that "if the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but

not in excess of $5, for his attorney; but no such attorney fee shall be taxed in the costs unless said wages shall have been demanded in writing, and not paid within three days after such demand; if the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of $15 for his attorney as the court may allow." The Supreme Court of Ohio said: "Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds which he wilfully or arbitrarily or even carelessly refused to apply to pay his debt, nor that a vexatious or dilatory defence had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him. Whether the debtor interposes or shows a vexatious defence, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case the statute denounces against him a penalty called an attorney fee if an action is brought on the claim and judgment recovered for the sum demanded. . . . The right to protect property is declared as well as that justice shall not be denied and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property." Again: "Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will, while the other party or another class of citizens does so at the peril of being mulcted in an attorney fee if an honest but unsuccessful defence should be interposed? A statute that imposes this restriction upon

one citizen or class of citizens only denies to him or them the equal protection of the law."

In *Chicago, St. Louis &c. Railroad* v. *Moss*, 60 Mississippi, 641, 646–647, 650–652, which involved the validity of a statute authorizing an attorney's fee to be taxed against the appellant, "whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this State against any corporation," the Supreme Court of Mississippi said: "All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances. There may be different rules for appeals and their incidents in different classes of cases, determined by their nature and subjects, but not with respect to the persons by or against whom they are instituted. The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions, will be equally free from objection on the ground of its discriminating character; but to say that where certain persons are plaintiffs and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally, is to deny the equal protection of the law to the party thus discriminated against. It is to debar certain persons from prosecuting a civil cause before the appellate tribunals of this State. It is an unwarrantable interference with the 'due course of law' prescribed for litigants generally. . . . It is doubtless true that the act was designed for the relief of citizens who became litigants in actions against corporations, because it applies only when a citizen is plaintiff, and it was assumed that the corporation would be appellant, and to avoid discrimination between parties to the same action it was made to operate on either party as appellant, but it sometimes occurs, and may very

often, that the citizen plaintiff is an appellant, and in such cases the discrimination may operate oppressively on him. The Supreme Court of Alabama declared its act violative of the constitution of that State and of the United States, because of its unjust discrimination in establishing peculiar rules for a particular occupation, *i.e.*, 'such as own or control railroads.' Our objection to the act under consideration is broader, as shown above, embracing in its scope the right of the citizen who sues a corporation, for whom we assert the right to appeal on the same terms granted to the plaintiffs in like cases, *i.e.*, actions for damages against whomsoever brought. The act was intended to deter from the appellate court corporations against whom judgments should be rendered for damages, or citizens of this State suing them for damages. It was conceived in hostility to citizens as plaintiffs or corporations as defendants in such actions. In either view it is partial and discriminating against classes of litigants, denying them access to the appellate courts on the same terms and with the same incidents as other litigants who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it. . . . An act 'which is partial in its operations, intended to affect particular individuals alone or to deprive them of the benefit of the general laws, is unwarranted by the Constitution and is void.' 'A partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general laws of the land, is unconstitutional and void.'"

Cases almost without number could be cited to the same general effect. I refer to the following as bearing more or less upon the general inquiry as to the scope and meaning of the clause in the Fourteenth Amendment prohibiting any State from denying to any person within its jurisdiction the equal protection of the laws. *Jolliffe* v. *Brown*, 14 Washington, 155; *Randolph* v. *Builders and Painters' Supply Co.*, 106 Alabama, 501; *New York Life Ins. Co.* v. *Smith*, (Texas) 41 S. W. Rep. 680; *St. Louis &c. Railway* v. *Williams*, 49 Arkansas, 492; *Denver & Rio Grande Railway Co.* v. *Outcalt*, 2 Colo. App. 395; *Atchison & Neb. Railroad* v. *Baty*, 6 Nebraska, 37; *O'Con-*

nell v. *Menominee Bay Shore Lumber Co.*, (Michigan) 71 N. W. Rep. 449; *San Antonio & A. P. Railway* v. *Wilson*, (Texas) 19 S. W. Rep. 910; *Jacksonville* v. *Carpenter*, 77 Wisconsin, 288; *Pearson* v. *Portland*, 69 Maine, 278; *Burrows* v. *Brooks*, (Michigan) 71 N. W. Rep. 460; *Middleton* v. *Middleton*, 54 N. J. Eq. 692; *State* v. *Goodwill*, 33 W. Va. 179. These adjudications rest substantially upon the grounds indicated by this court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, where it was said that "the equal protection of the laws is a pledge of the protection of equal laws."

I do not think that the adjudged cases in this court, to which reference has been made, sustain the validity of the statute of Kansas.

In *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 522, this court sustained a statute of Missouri requiring every railroad corporation to erect and maintain fences and cattle guards on the sides of its roads, and for failure to do so subjecting it to liability in double the amount of damages occasioned thereby. The court said: "The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. . . . The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that in-

crease in many cases double, in some cases treble, and even quadruple the actual damages. . . . The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates and cattle guards, is exacted, when its road passes through, along or adjoining enclosed or cultivated fields or unenclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances."

In *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205, 209, this court held not to be unconstitutional a statute of Kansas making every railroad company liable for all damages done to one of its employés in consequence of any negligence of its agents or by any mismanagement of its engineers or other employé, to any person sustaining such damage. This court said: "Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

In *Minneapolis & St. Louis Railway* v. *Emmons*, 149 U. S. 364, 367, the court held to be valid a statute of Minnesota requiring railroad companies within a named time to build or cause to be built good and sufficient cattle guards at all wagon crossings and good and substantial fences on each side of their respective roads, and that failure by any company to perform that duty should be deemed an act of negligence, for which it should be liable in treble the amount of damage sustained. This court said: "The extent of the obligations and duties

required of railroad corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employés, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police power of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect."

In *St. Louis & San Francisco Railway* v. *Mathews*, 165 U. S. 1, 26, this court upheld a statute of Missouri providing that every railroad corporation owning and operating a railroad in that State should be responsible in damages to the owner of any property injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon its railroad — the railroad company being however authorized to procure insurance on the property upon the route of its railroad. It was there said: "The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any

particular property." Observe, that the Missouri statute gave the railroad company for its protection against the new liability imposed upon it the right to insure the property likely to be destroyed by fire.

I do not perceive that the judgment now rendered finds support in any adjudication by this court. The above cases proceed upon the general ground that in the exercise of its police power a State may by statute impose additional duties upon railroad corporations, with penalties for the non-performance of such duties, and that such legislation is not, because of its special character, a denial of the equal protection of the laws. It is said to be of the essence of classification that "upon the class are cast duties and burdens different from those resting upon the general public." But here the State does not prescribe any additional duties upon railroad companies in respect of the destruction of property by fire arising from the operating of their roads. It simply imposes a penalty which it does not impose upon other litigants under like circumstances. It only prescribes a punishment for assuming to contest a claim of a particular kind made against it for damages. The railroad company can escape the punishment only by failing to exercise its privilege of resisting in a court of justice a demand which it deems unjust. Undoubtedly, the State may prescribe new duties for a railroad corporation and impose penalties for their non-performance. But, under the guise of exerting its police powers, the State may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the court in the *Ellis case*, "arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency." Arbitrary selection cannot, we said in the same case, "be justified by calling it classification." There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the *Ellis case* was exactly in point, namely, "as no duty is imposed there can be no penalty for non-performance." Instead of prescribing some penalty for the

neglect by the railroad company of duties specifically enjoined upon it, the State attempts — and by the decision just rendered is enabled — to take from the company the right which we declared in the *Ellis case* was secured by the Constitution, namely, the right to "appeal to the courts as other litigants, under like conditions and with like protection."

Some stress is laid upon the fact that the statute under consideration was passed by a State in which fires caused by the operating of railroads may often cause and are likely to cause widespread injury to grass, crops, houses and barns. What, in the light of the authorities, the State may constitutionally do in order to protect its people against dangers of that character I need not stop to consider. The only question here is whether, in the absence of any statutory regulation prescribing what a railroad corporation shall or shall not do in order to guard property against destruction by fire arising from the operating of its road, the State can deny to such a corporation, when defending a suit brought against it to recover damages on the ground of negligent destruction of property, a privilege which it accords to its adversary in the trial of the issues joined. May the State meet the railroad corporation at the doors of its courts of justice and say to it, "If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?" Nothing has ever heretofore fallen from this court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind accorded to its opponent. If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice — a principle which I had supposed was as old as Magna Charta.

In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general princi-

ples of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws. I dissent from the opinion and judgment.

AUTEN *v.* UNITED STATES NATIONAL BANK OF NEW YORK.

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

No. 206. Argued March 9, 1899. — Decided April 24, 1899.

In June, 1892, the United States National Bank of New York, by letter, solicited the business of the First National Bank of Little Rock, Arkansas. The latter, through its president, accepted the proposition, and opened business, by enclosing for discount, notes to a large amount. This business continued for some months, the discounted notes being taken up as maturing, until the Arkansas bank suspended payment, and went into the hands of a receiver. At that time the New York bank held notes to a large amount, which it had acquired by discounting them from the Arkansas bank. These notes have been duly protested for non-payment, and the payment of the fees of protest, made by the New York bank, have been charged to the Arkansas bank in account. The receiver refused to pay or allow them. At the time of the failure of the Arkansas bank there was a slight balance due it from the New York bank, which the latter credited to it on account of the sum which was claimed to be due on the notes after the refusal of the receiver to allow them. The New York bank commenced this suit against the receiver, to recover the balance which it claimed was due to it. The receiver denied all liability and asked judgment in his favor for the small balance in the hands of the New York bank. It was also set up that the notes discounted by the New York bank were not for the benefit of the Arkansas bank, but for the benefit of its president, and that the New York bank was charged with notice of this. The judgment of the trial court, which was affirmed by the Circuit Court of Appeals, was for the full amount of the notes, less the set-off. In this court motion was made to dismiss the writ of error on the ground that jurisdiction below depended on diversity of citizenship, and hence was final. *Held:*

(1) That the receiver, being an officer of the United States, the action against him was one arising under the laws of the United States, and this court had jurisdiction;

Statement of the Case.

(2) That it was competent for the directors of the Arkansas bank to empower the president, or cashier, or both to indorse the paper of the bank, and that, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized, and were executed as authorized;
(3) That the set-off having been allowed by the New York bank in account, the receiver was entitled to no other relief.

Two of the parties to this action in the court below were national banks, one located at New York, the other located at Little Rock, Arkansas. Sterling R. Cockrill, as receiver of the latter bank, was also a party. He resigned and plaintiff in error was appointed. The banks will be denominated respectively the New York bank and the Little Rock bank.

The complaint contained the necessary jurisdictional allegations, and that on December 7, 1892, the City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the State of Missouri, its three promissory notes, each for five thousand dollars, payable four months after date, with interest at the rate of ten per cent per annum from maturity until paid: that said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff: that on December 7, 1892, the McCarthy & Joyce Company, a corporation resident in the city of Little Rock, Pulaski County, Arkansas, and organized and doing business under the laws of Arkansas, executed and delivered to James Joyce, a citizen of the State of Missouri, its two promissory notes, each for five thousand dollars, payable to his order at four and five months respectively after date, with interest from maturity at the rate of ten per cent per annum until paid: that said Joyce afterwards indorsed said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff: that said notes were each at maturity presented at the First National Bank in Little Rock, Arkansas,

for payment, and payment being refused, they were each duly protested for non-payment, the fees for which, amounting to twenty-five dollars, were paid by plaintiff. Copies of said notes, with the indorsements thereon, were thereto attached, marked 1 to 5 inclusive, and made part thereof. No part of said notes has been paid, and the same have been presented to the receiver of said bank for allowance, which he has refused to do.

Judgment was prayed for the debt and other relief.

Three of said notes are in the following form:

"$5000. 34131. LITTLE ROCK, ARK., *Dec.* 7, 1892.

Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

CITY ELECTRIC ST. R'Y CO.

W. H. SUTTON, *Sec'y.* H. G. BRADFORD, *P't.*

No. A, 73485. Due Apr. 7–10, '93."

The following indorsement appears on each: "Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Arkansas; H. G. Allis, P't.

Two of the notes were in the following form:

"$5000. 34128. LITTLE ROCK, ARK., *Dec.* 7, 1892.

Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

McCARTHY & JOYCE CO.

GEO. MANDLEBAUM, *Sec'y & Treas.*

A, 73477. No. 2. Due Ap'l 7–10, '93."

They were indorsed as follows: "James Joyce, H. G. Allis, First National Bank, Little Rock, Ar.; H. G. Allis, P't."

Statement of the Case.

The receiver only answered, and his answer as finally amended denied that either of the notes described in the plaintiff's complaint was ever indorsed and delivered to the First National Bank; he denied that either of said notes was ever the property of or in the possession of said bank; and denied that the said bank ever indorsed or delivered either of said notes to the plaintiff; he denied that said bank ever received any consideration from said plaintiff for any indorsement or delivery of said notes to it; and averred that the name of the defendant bank was indorsed on said notes by H. G. Allis for his personal benefit without authority from said bank; that the said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money, which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; that if said transaction created an indebtedness against the defendant bank, then the total liability of said defendant bank to the plaintiff by virtue thereof exceeded one tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business which either the plaintiff or the defendant bank was authorized to carry on; that the plaintiff was not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank. Also that at the date of the suspension of the First National Bank the United States National Bank was indebted to it in the sum of $467.86, that sum then being on deposit in the said United States National Bank to the credit of the First National Bank of Little Rock; and that the same has never been paid.

The receiver prayed that "he be discharged from all liability upon the notes sued on herein, and that he have judg-

ment against the plaintiff for the said sum of $467.86, and interest from the 1st day of February, 1893."

The plaintiff bank denied the indebtedness of $467.86, and averred "that at the time said First National Bank failed it was indebted to plaintiff in a large amount, to wit, the notes sued upon herein, and plaintiff applied said $467.86 as a credit upon said indebtedness."

The issues thus made up were brought to trial before a jury. Upon the conclusion of the testimony the court, at the request of the plaintiff bank, instructed the jury to find a verdict for it, which the court did, and denied certain instructions requested by the defendant. The jury found for the plaintiff, as instructed, for the full amount of the notes sued, less the amount of the set-off, and judgment was entered in accordance therewith.

A writ of error was sued out to the Circuit Court of Appeals, which affirmed the judgment, and the case was brought here.

There had been two other trials, the rulings in which and the action of the Circuit Court of Appeals, are reported in 27 U. S. App. 605, and 49 U. S. App. 67.

The defendant assigned as error the action of the Circuit Court in instructing the jury to find for the plaintiff bank and in refusing the instructions requested by the defendant. The latter were nineteen in number, and presented every aspect of the defendant's defence and contentions. They are necessarily involved in the consideration of the peremptory instruction of the court, and their explicit statement is therefore not necessary.

The evidence shows that the New York bank solicited the business of the Little Rock bank by a letter written by its second assistant cashier, directed to the cashier of the Little Rock bank, and dated June 21, 1892.

Among other things the letter stated "If you will send on $50,000 of your good, short-time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent."

The reply from the Little Rock bank came not from its cashier, but from its president, H. G. Allis, who accepted the offer and enclosed notes amounting to $50,728, among which

were three of the City Electric Railway Company, the maker of three of the notes in controversy. When first forwarded they were not indorsed, and had to be returned for indorsement. They were indorsed, and the letter returning them was signed by Allis. To the letter forwarding them the New York bank replied as follows:

"NEW YORK, *June* 27, 1892.

H. G. Allis, Esq., President, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in favor of the 24th inst., and proceeds of same placed to your credit."

The notes were enumerated, their amounts calculated and footed up and discount at 4 per cent deducted, and the proceeds, amounting to $50,216.48, placed to the credit of the Little Rock bank.

On July 6, 1892, the following telegrams were exchanged:

"New York, *July* 6, 1892.

First National Bank, Little Rock, Ark.:

Will give you additional fifty thousand on short-time, well-rated bills discounted at five per cent. Money rates are little firmer. Answer if wanted.

U. S. NAT. BANK."

"LITTLE ROCK, ARK., *July* 6, 1892.

United States Nat. Bank, N.Y.:

We can use fifty thousand dollars additional at five per cent; will send bills to-morrow.

FIRST NAT. BANK."

In accordance with the proposition thus made and accepted, H. G. Allis, as president, wrote on the 9th of July, 1892, to the New York bank a letter, enclosing what he denominated "prime paper, amounting to $50,301.88," and requested proceeds to be placed "to our credit and advise." These notes were discounted and acknowledged. Their proceeds, less discount, amounted to $49,641.68.

On July 26, 1892, the New York bank telegraphed:

Statement of the Case.

"New York, *July* 26, 1892.

First National Bank, Little Rock, Ark.:

Can take fifty thousand more of your well-rated bills discounted at five per cent. U. S. Nat. Bank."

To this H. G. Allis, as president, answered as follows:

"Little Rock, Ark., *July* 29, 1892.

United States National Bank, New York city.

Gentlemen: Your telegram of the 26th, saying you could take $50,000 more short-time, well-rated paper, I placed before our board to-day.

While it is two weeks earlier than we need it, on account of the rate we will take it now, and I enclose herein paper as listed below; amount, $50,089.93.

Yours very truly, H. G. Allis, *President.*

We hold collaterals subject to your order; see (pencil) notations on paper for rating. H. G. Allis, *Pr.*"

In the list of notes were two by the City Electric Street Railway Company and two by the McCarthy & Joyce Co., who were the makers of two of the notes in controversy. There was one by N. Kupferle for $5000, "due Nov. 8, 1892." The significance of this will be stated hereafter.

These notes were discounted and the fact communicated to H. G. Allis, Esq., president, Little Rock, Ark.

The next letter contains notes for discount from the Little Rock bank, sent by its cashier, W. C. Denney. The proceeds amounted to $24,413.05, acknowledgment of which was made.

The next communication was about the notes in controversy. It was dated November 25, 1892, and was signed by W. C. Denney, cashier. The letter, however, enclosing the notes was sent by H. G. Allis, as president. The correspondence is as follows:

"The First National Bank of Little Rock, Ark.

Nov. 25, 1892.

United States National Bank, New York city.

Gentlemen: Kindly advise us if you can give us $25,000

more in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

Yours very truly, W. C. Denney, *Cashier.*"

"New York, *Nov.* 28, 1892.

Mr. W. C. Denney, Cashier, Little Rock, Ark.

Dear Sir: Yours of the 25th is to hand.

We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6 %.

Yours very truly, H. C. Hopkins, *Cashier.*"

"Little Rock, Ark., *Dec.* 13, 1892.

United States Nat. Bank, New York city.

Gentlemen: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying $175,000 in demand loans on cotton, which we may have to carry two or three months longer.

We enclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

Yours, very truly, H. G. Allis, *President.*

Dickenson Hardware Co., due March 3.....	$2,500 00
Dickenson Hardware Co., due April 6.....	5,000 00
City Electric St. R'y Co., due April 10.....	5,000 00
Carried forward,	$12,500 00

Statement of the Case.

Brought forward,	$12,500 00
City Electric St. R'y Co., due April 10	5,000 00
City Electric St. R'y Co., due April 10	5,000 00
McCarthy & Joyce Co., due May 10	5,000 00
McCarthy & Joyce Co., due April 10	5,000 00
	$32,500 00

We hold all collaterals recited subjected to your order and for your account."

"NEW YORK, *Dec.* 16, 1892.

H. G. Allis, Esq., Pres't, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of the 13th inst., and proceeds of same placed to your credit:

Dickenson H'ware Co.,	due	M'ch 3, '93.	$2,500	disc't	$32	08
Do. do.	"	Ap'l 6, '93.	5,000	"	92	50
City Electric St. R'y Co.	"	" 10, .	5,000	"	95	83
" "		" 10, .	5,000	"	95	83
Do. do.		" 10, .	5,000	"	95	83
McCarthy & Joyce Co.		" 10, .	5,000	"	95	83
Do. do.		May 10, .	5,000	"	120	83
Amount of notes			$32,500			
Less discount at 6%			628 73			
Proceeds			$31,871 27			

We enclose herewith note of Dickenson Hardware Co. $5000 due Ap'l 6th for insertion of amount in body and return to us.

Yours truly, JNO. J. MCAULIFFE,
Ass't Cashier."

"NEW YORK, *December* 17, 1892.

First National Bank, Little Rock, Arkansas:

Letter thirteen received notes discounted proceeds credited account.

UNITED STATES NATIONAL BANK."

"The First National Bank of Little Rock, Ark.

Dec. 20, 1892.

United States National Bank, New York city.

GENTLEMEN: We have your favor of the 16th inst., enclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with $31,871.27, proceeds of $32,500.00 of discounts.

Yours very truly, W. C. DENNEY, *Cashier.*"

In the subsequent correspondence Allis takes part but once, and sent the following telegram December 21, 1892:

"LITTLE ROCK, ARK., *Dec.* 21, 1892.

U. S. Nat'l Bank, N.Y.:

Can you discount thirty thousand country banks' paper secured by cotton thirty days no renewal desire to carry over holidays answer day message?

H. G. ALLIS, *President.*"

Henry C. Hopkins, cashier of the New York bank, was called as a witness in its behalf, and after explaining the letters and telegrams which were sent by the banks, and the transactions which they detailed, testified that the dealings between the banks were such as take place between banks carrying on legitimate banking business, in the usual course of business, and that the notes were not discounted in any other way, and that the bank had no notice or intimation that the notes had not been regularly received by the First National Bank or offered by it in the regular course of business or for the benefit of any person other than the bank or interested in the proceeds, and that the United States National Bank in its correspondence and dealings did not recognize H. G. Allis, W. C. Denney or S. S. Smith personally or in any capacity than as representing the First National Bank; and that the transactions were solely with the First National Bank; and that the correspondence and transactions were usual for the president and cashier of a United States

national bank to carry on; and that the proceeds of the various discounted notes were withdrawn by the Little Rock bank in the regular course of business by its officers.

There was a detailed statement of the transactions between the banks attached to Hopkins' deposition which is not in the record, but instead thereof there appears the following:

"The account current here referred to began June 27, 1892, and continued until the suspension of business of the First National Bank. It shows almost daily entries of debit and credit. It shows that the several notes discounted by the United States National Bank and referred to in the depositions of the officers of that bank, being forty-nine in number, were charged against the account of the First National Bank by the United States National Bank at the several dates of their maturity. In two thirds of the instances where such charges were made the balance to the credit of the First National Bank on the books of the United States National Bank was sufficient to cover the charge. In other instances the balance to the credit of the First National Bank was insufficient to meet the charge at the time of the entry, and in the other instances the account of the First National Bank was in overdraft as shown by the books of the United States National Bank at the time the charge was made.

"The account shows that at the time of the suspension of the First National Bank the latter bank had a credit of $467.86 upon the books of the United States National Bank. Against this balance the notes in suit with protest fees were charged on the account April 17 and May 15, 1893, making the account show a balance in favor of the United States National Bank of $24,558.03.

"This is the paper marked '77' referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman and John J. McAuliffe, hereto annexed."

The record also shows that "J. H. Parker, president, Joseph W. Harriman, second assistant cashier, and John J. McAuliffe, assistant cashier, each testified to identically the same facts in the identical language as Henry C. Hopkins, and it is agreed that the depositions of Hopkins shall be treated as the deposi-

tion of each of the said witnesses without the necessity of copying the deposition of each witness."

There was proof made of the protest of the notes.

There was testimony on the part of the plaintiff showing that it was the custom of the banks at Little Rock to rediscount through their presidents and cashiers until after a decision in the *National Bank case* of Cincinnati in January, 1893; after that it was done by resolution of the board of directors, and the banks of New York and other commercial cities commonly require that now.

By a witness who was cashier of the Little Rock bank from November, 1890, to October, 1891, Allis then being president, it was shown that it was the custom of the bank as to rediscounting notes for the cashier or assistant cashier to refer them to the president, and the president generally directed what amount and where to send them. Whether they were referred to the board of directors, the witness was unable to say.

On cross-examination the witness testified that when the discounts were determined on, the cashier or assistant cashier transacted the business. He, however, only remembered sending off one lot of discounts, Mr. Denney, the assistant cashier, usually carrying on the correspondence. He did not remember that the president ever did anything of that kind. "Either Mr Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send to."

There were introduced in evidence "the reports or statements by the bank to the Comptroller of the Currency, showing the rediscounts and business of the bank, of date May 17, 1892, and July 12, 1892, as follows: The report of May 17 was sworn to by W. C. Denney, cashier, and attested by James Joyce, E. J. Butler and H. G. Allis, directors, and showed 'notes and bills rediscounted, $16,132.40.' The report of July 12 was sworn to by H. G. Allis, president, and attested by Charles T. Abeles, E. J. Butler and John W. Goodwin, directors, and showed notes and bills rediscounted, $81,748.80."

The testimony on the part of the plaintiff in error showed

(we quote from brief of defendant in error) that "the notes never belonged to the First National Bank; that the three notes of the Electric Street Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the company to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted; that neither of the notes was ever passed upon by the discount board of the bank or appeared on the books of the bank; that after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes ($25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of $10,679.44; that Allis was at that time indebted to the Little Rock bank on individual notes for at least $50,000, and was continuously thereafter indebted to the bank until its failure."

As to the power of the president to direct rediscounts or to indorse the notes of the bank, E. J. Butler, N. Kupferle and C. T. Abeles, who were directors of the bank at the time of the transactions between it and the New York bank, testified respectively as follows:

"(Butler): Was a pretty regular attendant at the board meetings during the year — at nearly all the meetings.

"Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

"A. Never that I knew of. I knew that when Colonel Roots was president he asked and received authority from the board to make rediscounts, but I do not know that Mr. Allis ever asked, and the board, when I was present — he never was given any authority to make rediscounts for the bank.

"Q. Did he have authority from the bank to indorse its papers for rediscount?

"A. No, sir; never that I was aware of."

On cross-examination he testified that he did not recollect of Allis asking for authority; that the question never came before the board as to discounts. He knew that there were dis-

counts made, but did not recollect any particular ones, but in case there were he would suppose they were on the authority of the board, given in his absence, but did not remember that the question was brought up at all.

"Q. There are a couple of statements made by the bank (being the statements heretofore introduced by the plaintiff) of May 17, 1892, and July 12, 1892, to which you as a director certify, which show, one of May 17 shows rediscounts, $16,172.40, and the one of July 12, 1892, shows rediscounts, $81,748.88. Did you sign these?

"A. I couldn't say without referring to the original reports.

"Q. These are the published reports, are they not?

"A. They purport to be the published report, but I do not know anything about it. I was one of the directors at that time.

"Q. That is one of the usual forms of the reports published in the papers, isn't it?

"A. Yes, sir.

"Q. You now tell the jury that you do not know anything about the extent of rediscounts made by it?

"A. No, sir; I cannot remember."

Mr. Denney was cashier in 1892, and he supposed that Denney transacted the business as to indorsements and rediscounting, but did not know and did not recollect that Allis did. Did not hear of him indorsing the notes in suit until after the bank failed.

"(Kupferle): Mr. Allis did not have the power from the board of directors of the bank to indorse its papers for rediscount.

"Cross-examination: There was nothing said in the board about such power. The question was not brought before the board. The bank during that time rediscounted paper. The cashier generally attended to that. I knew that the bank was discounting paper. I recall once where the president requested of the board that the bank should borrow some money. That was in the fall of 1892. I knew that the bank had been discounting paper long before that and borrowing money before

that, and no authority had been asked of the board to do it. I knew that they were borrowing money and rediscounting paper continually.

"Redirect: We had eleven or thirteen members of the board of directors; I forget which. Never less than eight or nine. There was seldom a meeting when all were present — a majority present.

"Q. Did they at any time rediscount, or authorize the rediscounting of paper? Did they have that authority?

"A. No, sir; that was not their business.

"Q. Theirs was to discount paper for customers of the banks?

"A. The daily offerings, yes, sir."

Did not know of Mr. Allis indorsing the name of the bank upon the paper for the purpose of rediscounting it.

"Q. Did you, as a member of the board of directors, or otherwise, have any information that Mr. Allis was using the name of the bank upon his or other people's paper, for accommodation?

"A. No, sir; I never did.

"Cross-examination:

"Q. You didn't know he was using the name of the bank on the bank's paper?

"A. No, sir.

"Q. You knew he was discounting paper?

"A. No, sir; it was not his place.

"Q. Didn't the correspondence there show he was sending the paper for discount all over the country?

"A. No, sir; I don't know anything about that.

"Q. Wasn't it your business to know it?

"A. I do not know.

"Q. You was vice president and one of the directors?

"A. Yes, sir. I never knew anything about it until the failure of the bank — that he ever used the bank's name."

"(Abeles): Not while I was there (at the meetings of the board) was authority given to Allis as president to indorse or rediscount the notes of the bank. I do not think it was ever mentioned. I knew of the bank rediscounting paper, and

somebody was transacting that part of the business. I think I inquired of some of the directors who it was, and was told that the authority vested in the cashier. I do not recollect that I inquired of Allis or Denney."

"[Cohn] was not a director in 1892 — was for ten years prior to that time, and Allis was president in 1891, but did not recollect that he had authority from the board to indorse its paper or to rediscount it.

"Cross-examination: Knew that rediscounting was being done, but supposed it was being done by the cashier — didn't stop to inquire.

"Redirect:

"Q. Who was authorized in the bank to perform that duty?

"A. I understood the cashier.

"Cross-examination:

"Q. How was he authorized?

"A. By law.

"Q. You are simply giving your legal opinion?

"A. Well, I understood that was his authority."

Other facts are stated in the opinion of the court.

Upon filing the record the defendant in error made a motion to dismiss, which was postponed to the consideration of the merits.

Mr. Sterling R. Cockrill for plaintiff in error.

Mr. John Fletcher for defendant in error. *Mr. W. C. Ratcliffe* was on his brief.

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

1. To sustain the motion to dismiss, it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of Appeals is final. But one of the defendants (plaintiff in error), though a citizen of a different State from the plaintiff in the action

(defendant in error), is also a receiver of a national bank appointed by the Comptroller of the Currency and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy* v. *Gibson*, 8 Wall. 498; *In re Chetwood*, 165 U. S. 443; *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401. It is, however, urged that such appointment was not shown. It was not explicitly alleged, but we think that it sufficiently appeared, and the motion to dismiss is denied.

2. Against the correctness of the action of the Circuit Court in instructing a verdict for the New York bank, it is urged that the discounting of the notes in controversy was for the personal benefit of Allis, and that the New York bank was charged with notice of it because of the nature of the transaction, the form of the notes and the order of the indorsements, and also because notice was a question of fact to be decided by the jury on the evidence.

It is also contended that the receiver was entitled to a judgment on the set-off. We will examine each of the propositions.

1. The argument to sustain this is that the facts detailed constitute borrowing money, and that borrowing is out of the usual course of legitimate banking business; and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so. But is borrowing out of the usual course of legitimate banking business?

Banking in much, if not in the greater part of its practice, is in strict sense borrowing, and we may well hesitate to condemn it as illegitimate, or regard it as out of the course of regular business, and hence suspicious and questionable. "A bank," says Morse, (sec. 2, Banks and Banking,) "is an institution usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit to form a joint fund that shall be used by the institution *for its own benefit*, for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign and domestic

bills of exchange, coin, bullion, credits and the remission of money; or with both these powers, and with the privileges in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business."

This defines the functions: what relations are created by them? Manifestly those of debtor and creditor — the bank being as often the one as the other.

A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit — exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. "The first business of a banker is not to lend money *to* others but to collect money *from* others." (Macleod on Banking, vol. 1, 2d ed. pp. 109, 110.) And Gilbart defines a banker to be "a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another." (Gilbart on Banking, vol. 1, p. 2.)

The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons "to borrow, owe or take up any sum or sums of money on their bills or notes payable at demand." And it had effect until 1772, (about thirty years,) when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created — the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (cheques) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned.

But it may be said these views are elementary and do not

help to a solution of the question presented by the record, which is not what relation a bank has or what power its officers may be considered as having in its transactions with the general public, but what is its relation and what power its officers may be considered as having in its transactions with other banks. Indeed, the question may be even narrower — not one of power, but one of evidence. If so, the views expressed are pertinent. They show the basis of credit upon which banks rest, and the necessity of having power to support it; it may be to extend it. Borrowing is borrowing, no matter from whom. Discounting bills and notes may require rediscounting them; buying bills and notes may require selling them again. Money may not be equally distributed. It is a bank's function to correct the inequality. The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis* v. *Leavitt*, 15 N. Y. 1; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122; *Cooper* v. *Curtis*, 30 Maine, 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities.

It is claimed, however, that *Western National Bank* v. *Armstrong*, 152 U. S. 346, establishes the contrary, and decides the proposition contended for by the plaintiff in error. We do not think it does. Some of its language may seem to do so, but it was used in suggestion of a question which might be raised on the facts of the case, without intending to authoritatively decide it. The facts of that case are different from the facts of the pending one, and in response to its citation we might rest on the difference. But plaintiff in error urges the case so earnestly and confidently that we have considered

it better to answer the argument on which it is asserted to be based and remove misapprehension of the extent of the decision.

2. Did the form of the notes or the order of indorsements charge the New York bank with inquiry of Allis' authority or with knowledge of his use of them for his personal benefit?

It may be conceded that an individual negotiating for the purchase of a bill or note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself. These principles are established by *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S. 557; *Central Bank of Brooklyn* v. *Hammett et al.*, 50 N. Y. 158; *New York Iron Mine* v. *Negaunee Bank*, 39 Michigan, 644; *Lee* v. *Smith*, 84 Missouri, 304; *Park Hotel Co.* v. *Fourth National Bank*, 86 Fed. Rep. 742; *Claflin* v. *Farmers' & Citizens' Bank*, 25 N. Y. 293.

But it is not meant that circumstances may not explain the notes or may not relieve the taker from the obligation of inquiry. If the order of indorsements and Allis' official position and his relation to the notes were circumstances to be considered, they were not necessarily controlling against all other circumstances, and compelled inquiry as a peremptory requirement of law.

3. In judging of the conduct and rights of the New York bank the question is not what actual authority Allis had, but what appearance of authority he had, or, rather, what appearance of authority he was given or permitted by the directors.

In the inquiry there is involved the two preceding propositions as questions of fact, or of mixed law and fact. The first — the power of a bank to rediscount its paper — as to what the course of dealing of the contending banks was; the second — the form of the notes and their order of indorsements as notice — whether relieved by the circumstances which attended them and the transactions which preceded them.

The evidence shows that it was not only the custom of the defendant bank to rediscount its paper, but that it was

the custom of the other banks at Little Rock to do so, and the officers of the New York bank testified as follows:

"Q. Were there any of the dealings between said banks (the parties to this action) other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

"A. No.

"Q. Were the correspondence and transactions carried on by H. G. Allis and W. C. Denney, as you have disclosed, such as are usual for the president and cashier of a United States national bank to carry on and exercise?

"A. Yes."

This testimony certainly has very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks rediscounting paper was in the usual course of their business, and that besides it was the usual course of business in their respective localities. Therefore the discounting of the notes in controversy carried the sanction of such business.

It is contended that the notes gave notice of the want of authority to rediscount them because the indorsement of the bank followed that of Allis, and hence showed that the bank was an accommodation indorser, and because the indorsement of the bank was by its president and not by its cashier.

The order of indorsements did not necessarily import that the Little Rock bank was an accommodation indorser. The order was a natural one if the notes had been discounted in the regular course of business. It is not contended that a want of power precluded the bank from discounting the notes of its officers. It had been done for one of the directors, and his note was rediscounted by the New York bank. It had an example therefore in the dealings of the parties, and, besides, was neither wrong nor unnatural of itself. But it was further relieved from question, and any challenge in the indorsements was satisfied by the circumstances.

It is to be remembered that the discounting the notes in controversy was not the only transaction between the banks. It was one of many transactions of the same kind. They

justified confidence, and it was confirmed by the manner in which the notes were presented. It is conceded that the cashier had the power to rediscount the bank's paper, and it was he who solicited the accommodation on account of which the notes were sent to the New York bank. The notes themselves, it is true, were sent by Allis, but expressly on the part of the bank, and subsequent correspondence about them was conducted with the cashier, as we have seen. And there could have been no misunderstanding. The letter of the New York bank which the cashier of the Little Rock bank answered was specific in the designation of the notes, their sum and the proceeds of the discount, and returned one of the notes not in controversy to be corrected. To this the cashier replied:

"*Dec.* 20, 1892.

United States National Bank, New York city.

GENTLEMEN: We have your favor of the 10th inst., enclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with $31,871.27 proceeds of $32,500.00 of discounts.

Yours very truly, W. C. DENNEY, *Cashier.*"

Notice was therefore brought to him and to the bank of the transaction and almost inevitably of its items. Was he deceived as to the notes which had been sent? It is not shown nor is it suggested how such deception was possible, and a presumption of ignorance cannot be entertained. Therefore, if the discounts he wrote about in his letter of the 20th of December were not in pursuance of those he had requested in his letter of November 25, he ought to have known and ought to have so said. If he had so said, the New York bank could have withdrawn the credit it had given, and Allis' wrong could not have been committed.

The strength of these circumstances cannot be resisted. Against them it would be extreme to say that the New York bank was put to further inquiry. Of whom would it have inquired? Not of Allis, the president of the Little Rock

bank, because his authority would have been the subject of inquiry. Then necessarily of the cashier; but from the cashier it had already heard. He began the transaction; he acknowledged its close, accepting the credit which had been created for the bank of which he, according to the argument, was the executive officer. We can discover no negligence on the part of the New York bank. The dealing with the notes in controversy came to it with the sanction of prior dealings with other notes. It was conducted with the same officers. It was no more questionable. The relation of Allis to it, we have seen, was not unnatural, and if the indorsement of other notes was not shown to be by him, it was not shown not to have been by him. The testimony of the officers of the New York bank was that the notes were received and discounted in the regular course of business, and in no way different from the other notes discounted by it for the Little Rock bank, and that they knew the notes were properly indorsed by one of the duly authorized officers of the First National Bank; but as the notes were not in their possession, they were unable to state the name of the officer. The testimony opposed to this, if it may be said to be opposed, is negative and of no value. Some of the directors testified that Allis did not have the power nor did they know of his having indorsed the bank's paper for rediscount. They knew, however, that the bank's paper was rediscounting in large amounts, and that money was borrowing continually, but they scarcely made an inquiry, and one of them testified that only in a single instance did Allis request the board for power to borrow money. The instance is not identified, except to say that it was in the fall of 1892. Of whom, in what amount, whether the request was granted or denied, what inquiry was made, what review of the business of the bank was made, there was absolute silence about. They surrendered the business absolutely to the president and cashier, and intrusted the manner of the execution to them. This court said by Mr. Justice Harlan, in *Martin* v. *Webb*, 110 U. S. 7, 15: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on

around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declaration of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Under section 5136, Revised Statutes, it was competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank, and, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and executed as authorized. *Briggs* v. *Spaulding*, 141 U. S. 132; *People's Bank* v. *National Bank*, 101 U. S. 181; *Davenport et al.* v. *Stone*, 104 Michigan, 521; *First National Bank of Kalamazoo* v. *Stone*, 106 Michigan, 367; *Houghton* v. *The First National Bank of Elkhorn*, 26 Wisconsin, 663; *Thomas* v. *City National Bank of Hastings*, 40 Nebraska, 501.

4. Set-off is the discharge or reduction of one demand by an opposite one. That of plaintiff in error was so applied and the amount due on the notes reduced. He was entitled to no other relief.

Scott v. *Armstrong*, 146 U. S. 499, does not apply. In that case it was held that a debtor of an insolvent national bank could set off against his indebtedness to the bank, which became payable after the bank's suspension, a claim payable to him before the suspension. And it was further held that the set-off was equitable, and therefore not available in a common law action.

But in this case the plaintiff in error pleaded the set-off. His right to do so was derived from the law of Arkansas, and that law provided: "If the amount set off be equal to the plaintiff's demand, the plaintiff shall recover nothing by his action; if it be less than the plaintiff's demand, he shall have

judgment for the residue only." Gould's Arkansas Digest of Statutes, c. 159, § 5, p. 1020. The law was complied with.

It follows that the Circuit Court did not err in instructing the jury to find for the plaintiff (defendant in error), and judgment is

Affirmed.

UNITED STATES *v.* ONE DISTILLERY *et al.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 190. Argued April 6, 1899. — Decided April 24, 1899.

There was no proof in this case to overcome the denials in the original answer, and to show that the property seized by the Collector of Internal Revenue had been forfeited to the United States.

THE statement of the case will be found in the opinion of the court.

Mr. Assistant Attorney General Boyd for plaintiffs in error.

Mr. Samuel G. Hilborn for defendants in error. *Mr. Frederic W. Hall* filed a brief for same.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an information filed November 13, 1888, in the District Court of the United States for the Southern District of California to obtain a decree declaring that certain real and personal property which had been seized by a Collector of Internal Revenue was forfeited to the United States.

The information was based upon sections 3257, 3281, 3305, 3453 and 3456 of the Revised Statutes.

The property in question once belonged to the Fruitvale Wine and Fruit Company, a corporation of California. The acts that were set forth as constituting the grounds of forfeit-

ure were committed, if at all, while that corporation owned the property. Subsequently, June 9, 1888, the property was purchased by Wolters, Helm, Austin and Coffman at a public sale thereof by the assignee of the company — the consideration, $7700, being paid in cash to the assignee. They appeared and filed a demurrer to the original information. The demurrer was confessed, and an amended information was filed January 11, 1889.

Wolters, Helm, Austin and Coffman on the 19th day of April, 1889, filed an answer to the amended information, controverting its material allegations. The answer contained these among other averments: "That they [the claimants] have not sufficient information in regard to the several wrongful acts alleged to have been perpetrated by said corporation on which to found a belief; they therefore, on behalf of said corporation, deny all and singular the alleged fraudulent acts charged in said information as having been done and performed by said corporation."

On the 21st day of August, 1890, the claimants filed an amendment of their original answer, in which they averred that in December, 1888, W. Moore Young, who was secretary of the Fruitvale Wine and Fruit Company, and one of the owners of the property in question when the acts complained of in the original and amended information were committed, was indicted in the same court, and was convicted and sentenced to imprisonment for one year in the county jail. The claimants further averred that the acts complained of in this case were the same as those relied on by the Government in its prosecution against Young, and that because of the proceedings and judgment against Young the United States ought not to maintain its present action. The amended answer concluded: "These claimants aver the foregoing in addition to their answer already on file herein, and expressly rely not only upon this, but upon all of the allegations and denials contained in said original answer. And having fully answered, they pray as they have heretofore prayed in said original answer."

The demurrer to the amended answer was overruled by an order entered October 20, 1890, and an exception was taken

by the United States to the action of the court. 43 Fed. Rep. 846. On the next day the following decree was entered: "This cause came on regularly for trial before the court, sitting without a jury, a jury trial having been expressly waived in writing, the United States being represented by Willoughby Cole, Esq., United States attorney, and the claimants by Messrs. Brousseau and Hatch, and Henry C. McPike, Esq. Whereupon the United States attorney announced to the court that the facts set forth in the amended and supplemental answer heretofore filed by the claimants in this action, and to which a demurrer had been interposed by the United States and overruled by the court, might be considered by the court and taken as true for the purposes of this trial, as if the said facts had been proved by competent witnesses, but that they were insufficient in law to constitute a defence to this action. Thereupon the United States, by their said attorney, and the claimants by their attorneys aforesaid, submitted the cause to the court for its decision upon the pleadings in said cause and the said amended and supplemental answer, the facts as to the matter, as already stated, being taken as true, the court, after considering the same, orders and decrees that the libel herein be, and the same is hereby, dismissed."

The case was carried to the Circuit Court, and was pending there at its January term, 1891. On the 23d day of February, 1897, the judgment of the District Court was affirmed.

It is contended on behalf of the Government that the amended and supplemental answer did not present a valid defence, and therefore that the Circuit Court erred in affirming the judgment of the District Court. But if, independently of the particular question raised by the amended and supplemental answer, the judgment of the District Court dismissing the information was right upon any ground disclosed upon the record, the judgment of the Circuit Court affirming the judgment of the District Court should not be held to have been erroneous.

It cannot be doubted that by the information and the original answer the distinct issue was presented, whether the prop-

erty in question was forfeited to the United States by reason of the wrongful and fraudulent acts specified in the information. The answer put the Government upon proof of those acts. No proof was however made by the Government to establish the alleged grounds of forfeiture. Nevertheless, *the cause* was submitted for *decision* not only upon the facts set forth in the amended and supplemental answer, taking them to be true, but *upon the pleadings*. So that even if the District Court had been of opinion that the amended and supplemental answers were insufficient in law, it still remained for it to determine the rights of the parties upon the information and the original answer. As the original answer controverted the material allegations of the information, and as the cause was submitted for decision upon the pleadings, without any proof to sustain the allegations of fraudulent acts forfeiting the property, the final order dismissing the information was proper. If the claimants had withdrawn their denials of such allegations of the information as set forth the grounds upon which the Government asserted the forfeiture of the property in question, it would then be necessary to consider whether the conviction of Young precluded the United States from proceeding by information against the property. But the claimants did not take that course. They were careful in the amended and supplemental answer to say not only that the facts therein alleged were in addition to those set forth in their original answer, but that they relied upon the denials contained in the original answer.

Without considering the merits of the question raised by the amendment of the answer, we affirm the judgment of the Circuit Court upon the ground that there was no proof in the case to overcome the denials in the original answer of the averments of the information, and to show, as against the claimants, that the property had been forfeited.

Affirmed.

MORAN *v.* DILLINGHAM.

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

No. 243. Submitted April 17, 1899.—Decided May 1, 1899.

The provision of the act of 1891, c. 517, § 3, that no judge before whom "a cause or question may have been heard or tried" in a District or Circuit Court shall sit "on the trial or hearing of such cause or question" in the Circuit Court of Appeals, disqualifies a judge, who has once heard a cause upon its merits in the Circuit Court, from sitting in the Circuit Court of Appeals on the hearing and decision of any question, in the same cause, which involves in any degree matter on which he had occasion to pass in the Circuit Court.

THE case is stated in the opinion of the court.

Mr. L. W. Campbell for Moran.

Mr. George Clark and *Mr. D. C. Bolinger* for Dillingham.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a writ of certiorari heretofore granted by this court, under the act of March 3, 1891, c. 517, § 6, to review a decree made by Judge Pardee and Judge Newman in the Circuit Court of Appeals for the Fifth Circuit upon an appeal to that court from the Circuit Court of the United States for the Northern District of Texas.

The leading question presented by the writ of certiorari is whether Judge Pardee was disqualified to sit at the hearing of that appeal by the provision of § 3 of that act, "that no justice or judge before whom a cause or question may have been tried or heard in a District Court or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." 26 Stat. 827.

If Judge Pardee was so disqualified, the decree in which he took part, even if not absolutely void, must certainly be set aside and quashed, without regard to its merits. *American*

Construction Co. v. *Jacksonville Railway*, 148 U. S. 372, 387.

The material facts bearing upon the question of his disqualification, as appearing by the record now before this court, are as follows:

Upon a bill in equity, filed April 2, 1885, in the aforesaid Circuit Court of the United States, by the Morgan's Louisiana and Texas Railroad and Steamship Company against the Texas Central Railway Company, to foreclose a mortgage of its railroad and other property, Judge Pardee, on April 4, 1885, made an order, appointing Benjamin G. Clark and Charles Dillingham joint receivers of the property, and appointing John G. Winter special master as to all matters referred or to be referred to him in the cause.

Upon a petition filed in that cause by Dillingham, representing that he had been the active receiver for seventeen months, and praying for an allowance for his services as such, Judge Pardee, on December 4, 1886, made an order "that the receivers be authorized and directed to place Charles Dillingham upon the pay roll of the receivers for the sum of one hundred and fifty dollars per month, as an allowance upon his compensation as receiver in this cause; this allowance to date from the possession of the receivers, and to continue while Mr. Dillingham gives his personal attention to the business of the company or until the further order of the court."

On April 12, 1887, Judge Pardee made a final decree in the cause, for the foreclosure of the mortgage; for the sale of the mortgaged property by auction; and for the payment by the purchasers of "all the indebtedness of the receivers incurred by them in this cause, including all the expenses and costs of the receivers' administration of the property," "and also the compensation of the receivers and their solicitors;" appointing Dillingham and Winter special master commissioners to make the sale, and to execute and deliver a deed to the purchasers; and reserving the right to any party to the cause, as well as to the receivers and master commissioners, to apply to the court for orders necessary to carry that decree into execution. Appeals from that decree were taken by the Morgan's

Louisiana and Texas Railway and Steamship Company and by the Texas Central Railway Company to this court, which on November 24, 1890, affirmed that decree. 137 U. S. 171.

Pursuant to that decree, on April 22, 1891, all the property mortgaged, except some not immediately connected with the railroad, was sold to Moran, Gold and McHarg, trustees for bondholders. On their petition filed in the cause, Judge Pardee, on August 28, 1891, made a decree directing Dillingham and Clark, receivers, to execute and deliver a deed, and to deliver possession, to the purchasers, of all the property, real and personal, of the Texas Central Railway Company, in the State of Texas, used for and pertaining to the operation of its railway; and providing "that nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties; such litigation shall continue to determination in the name of said receivers, with the right reserved to said purchasers, should they be so advised, to appear and join in any such litigation; and nothing in this decree contained is intended to affect, or shall be construed as affecting, the receivership of any of the property of the defendant railway company other than the property so transferred to said purchasers, possession of which said property other than that so transferred is retained for further administration, subject to the orders of this court;" and "that said purchasers or said receivers may apply at the foot of this decree for such other and further relief as may be just." The property was accordingly delivered to the purchasers in September, 1891. On November 6, 1891, on like petition of the purchasers, Judge Pardee made a similar decree, except in directing the deed to the purchasers to be executed and delivered by Dillingham and Winter, special master commissioners, and in other particulars not material to be mentioned.

Dillingham afterwards, and until April, 1895, continued to draw and pay to himself the sum of $150 a month, and returned quarterly accounts to the master crediting himself with those sums. On August 25, 1891, he presented a petition, entitled in the cause, to the master, praying him to

"make to him such an allowance for his services as receiver in the above entitled cause, from the date of his appointment until his discharge, as to said master may seem just and proper." About the same time, a compromise was made between him and the purchasers, pursuant to which he was paid, in addition to the allowance of $150 a month for the past, the sum of $20,000 for services as receiver; and he signed a paper, entitled in the cause, acknowledging that he had received from them the sum of $20,000 "in full of my fees and charges as receiver of the Texas Central Railway Company, as per agreement." At the hearings before the master upon Dillingham's accounts, it was contested between him and the purchasers whether he was entitled to $150 monthly since the compromise. The master reported that he was; and exceptions by the purchasers to his report were referred on April 8, 1895, by order of Judge McCormick, to Abner S. Lathrop, as special master, who by his report, filed September 26, 1896, found that Dillingham was entitled to the monthly allowance of $150 until April, 1893, but was not entitled to it from April, 1893, to April, 1895. That report, on exceptions taken by the purchasers and by Dillingham, was confirmed by decree of Judge Swayne on December 5, 1896; and from that decree Dillingham took an appeal to the Circuit Court of Appeals.

All the proceedings above stated were filed in and entitled of the cause of *Morgan's Louisiana and Texas Railroad and Steamship Company* v. *Texas Central Railway Company.*

The appeal of Dillingham was heard in the Circuit Court of Appeals by Judge Pardee and Judge Newman, who, for reasons stated in their opinion, delivered by Judge Newman, sustained Dillingham's exceptions to the master's report, reversed the decree of Judge Swayne, and remanded the cause to the Circuit Court "with instructions to overrule and discharge the motions attacking the receiver's accounts." 52 U. S. App. 425, 432. Moran, Gold and McHarg, the purchasing trustees, thereupon applied for and obtained this writ of certiorari. 169 U. S. 737.

The intention of Congress, in enacting that no judge before

whom "a cause or question may have been tried or heard," in a District or Circuit Court, "shall sit on the trial or hearing of such cause or question," in the Circuit Court of Appeals, manifestly was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of the first instance. Whatever may be thought of the policy of this enactment, it is not for the judiciary to disregard or to fritter away the positive prohibition of the legislature.

The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the Circuit Court of Appeals at the hearing of the whole cause at the same or at any later stage. And, as "a cause," in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part, in the Circuit Court of Appeals, at the hearing and decision of the cause or of any question arising therein. But, however that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the Circuit Court of Appeals on the hearing and decision of any question, in the same cause, which involves in any degree matter upon which he had occasion to pass in the lower court.

In the present case, all the decrees and orders of Judge Pardee in the Circuit Court, as well as the decree of Judge Swayne from which the appeal in question was taken, were made in and entitled of the original cause of the bill in equity to foreclose the mortgage of the Texas Central Railway Company. The order appointing Dillingham and Clark receivers upon the filing of the bill, the order allowing Dillingham for his services as receiver the sum of $150 a month from his taking possession and "while he gives his personal attention to the business of the company or until the further order of the

Counsel for Plaintiff in Error.

court," the final decree of foreclosure and sale, and the decrees for delivery of possession to the purchasers, were all made by Judge Pardee; and the appeal, in the hearing and decision of which he took part, from the decree of another judge concerning the compensation of Dillingham as receiver, involved a consideration of the scope and effect of his own order allowing that receiver a certain sum monthly.

The necessary conclusion is that Judge Pardee was incompetent to sit on the appeal in question, and the decree in which he participated was not made by a court constituted as required by law; and therefore this court, without considering whether that decree was or was not erroneous in other respects, orders the

Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.

KIMBALL *v.* KIMBALL.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS, STATE OF NEW YORK.

No. 248. Argued April 19, 1899. — Decided May 1, 1899.

If the petition of a woman, claiming to be the widow of a man supposed to have died intestate, for the revocation of letters of administration previously granted to his next of kin, and for the grant of such letters to her, is dismissed by the surrogate's court upon the ground that a decree of divorce obtained by her in another State from a former husband is void; and she appeals from the judgment of dismissal to the highest court of the State, which affirms that judgment; and, pending a writ of error from this court, it is shown that a will of the deceased was proved in the surrogate's court after its judgment dismissing her petition, and before her appeal from that judgment; the writ of error must be dismissed.

THE statement of the case is in the opinion of the court.

Mr. George Bell for plaintiff in error. *Mr. Waldegrave Harlock* was on his brief.

Opinion of the Court.

Mr. Lemuel H. Arnold for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

This action was begun December 18, 1896, by a petition of Maude E. Kimball, claiming to be the widow of Edward C. Kimball, (who resided in Brooklyn, and died there, without issue, on November 9, 1896,) to the surrogate's court of the county of Kings in the State of New York, praying that letters of administration granted by that court on November 10, 1896, to his mother and his brother in law, upon a petition representing that he died intestate and unmarried, be revoked, and that this petitioner be appointed administratrix.

The administrators previously appointed, being cited to show cause why the prayer of her petition should not be granted, filed an answer, denying that she was the widow of the deceased.

At the hearing in the surrogate's court, it was proved and admitted that Edward C. Kimball and the petitioner went through the ceremony of marriage at Brooklyn on June 29, 1895; that she had been married on May 12, 1885, to James L. Semon in the city of New York; that on September 25, 1890, she commenced a suit against Semon in a court of the State of North Dakota for a divorce on the ground of his desertion; that the summons in that suit was not served upon him in North Dakota, but was served upon him in the State of New York on October 15, 1890; that on January 26, 1891, that court rendered a decree of divorce against him as upon his default; that she was living in North Dakota from June 5, 1890, to February 5, 1891; that when she brought her suit for divorce, and ever since, Semon was a resident of the State of New York; and that on December 16, 1896, that court, upon his application and after notice to her, amended the decree of divorce by striking out the statement of his default, and by stating, in lieu thereof, that he had appeared and answered in the suit. Copies of the record of the proceedings for divorce were produced; and the principal matter contested in the surrogate's court was the validity of the divorce.

The surrogate's court held that the decree of divorce and the marriage of the petitioner to the intestate were absolutely void at the time of his death, and were not rendered valid by the subsequent amendment of the decree of divorce; and by a decree dated March 8, 1897, adjudged that the petitioner was not the widow of Edward C. Kimball, nor entitled as such to letters of administration of his estate; and further adjudged that her petition be dismissed. On April 5, 1897, the petitioner appealed from that decree to the Appellate Division of the Supreme Court of the State of New York, which on June 22, 1897, affirmed the decree. *In re Kimball*, 18 N. Y. App. Div. 320. From the decree of affirmance, the petitioner on August 19, 1897, appealed to the Court of Appeals of the State of New York; and that court, on February 4, 1898, affirmed the decree, and ordered the case to be remitted to the surrogate's court. 155 N. Y. 62.

The petitioner sued out this writ of error, and assigned for error that the courts of New York had not given due faith and credit to the decree of the court of North Dakota.

The writ of error was entered in this court on February 21, 1898. On March 22, 1898, the defendants in error moved to dismiss the writ of error, because of the following facts, proved by them, and admitted by the plaintiff in error, namely: On March 25, 1897, on a petition of the mother and sister of Edward C. Kimball, representing that his last will and testament, dated July 7, 1890, devising and bequeathing to them all his property, real and personal, and appointing them executrices thereof, had just been found, the surrogate's court, upon due proof of its execution and attestation, entered a decree admitting the will to probate, ordering letters testamentary to be issued to the executrices, and revoking the letters of administration which had been granted to the mother and the brother in law on November 10, 1896. The entry of the decree of March 25, 1897, was notified by the counsel of the present defendants in error to the counsel of the plaintiff in error on the day on which it took place.

The motion to dismiss was opposed by the plaintiff in error, upon the grounds that the judgment below involved a Federal

question within the jurisdiction of this court; that a dismissal of the writ of error would leave the plaintiff in error bound by the adjudication below that she was not the widow of the deceased; that the admission of the will to probate had no bearing on the question before this court; and that the defendants in error had been guilty of laches in not sooner making a motion to dismiss.

The consideration of the motion to dismiss the writ of error was postponed until the hearing upon the merits, and now presents itself at the threshold.

The rule which must govern the disposition of this motion has been often stated and acted on by this court.

In a comparatively recent case, pending a writ of error to reverse a judgment for a railroad corporation in an action against it by a State to recover sums of money for taxes, it was shown that the defendant had made a tender of those sums to the State, and a deposit of them in a bank to its credit, which by statute had the same effect as actual payment and receipt of the money. Stipulations had been made in other similar cases that they should abide the judgment of this court in this case; and the Attorney General of the State contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the State. But this court dismissed the writ of error, saying: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard." *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308, 314.

Again, in a still more recent case, this court, upon a review of the previous decisions, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills* v. *Green*, 159 U. S. 651, 653.

From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden*, 113 U. S. 222, 225, 226; *Mills* v. *Green*, above cited.

The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a Circuit Court of the United States, on which the jurisdiction of this court extends to the whole case. The rule was applied to a writ of error to the Court of Errors and Appeals of the State of New Jersey in *Little* v. *Bowers*, 134 U. S. 547.

In the present case, the subject matter of the petition to the surrogate's court, and the only relief which could be granted upon that petition, were the revocation of the letters of administration previously issued to the mother and the brother in law of the deceased, and the grant of new letters of administration to the petitioner. The decree admitting the will to probate, in terms, revoked the former letters of administration, and, by its legal effect, superseded the necessity and the possibility of granting any letters of administration as of an intestate estate to the petitioner or to any one

else. New York Code of Civil Procedure, §§ 2476, 2626, 2684. The whole subject matter of the writ of error is thus withdrawn, and the writ of error must be dismissed for want of anything upon which it can operate. *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 84; *San Mateo County* v. *Southern Pacific Railroad*, 116 U. S. 138; *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62.

The question whether the petitioner was or was not the widow of the deceased, whatever importance it may have in the determination of other controversies in which she may be interested, is a moot question in this case in the present condition of things; for, however that question should be decided, the petitioner cannot obtain letters of administration, and the letters of administration granted to other persons have been revoked.

The objection of laches is of no weight. No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief. *Little* v. *Bowers*, 134 U. S. 558, 559; *California* v. *San Pablo & Tulare Railroad*, above cited. The probate of the will was granted, and was known to both parties to this suit, ten days before the petitioner appealed from the decree of the surrogate's court. Yet neither party appears to have requested the surrogate to modify the form of his decree against the petitioner. Had the probate of the will been brought to the notice of either of the appellate courts of the State of New York, that court might probably have dismissed the case, for the reason that its decision could not be made effectual by a judgment. *People* v. *Clark*, 70 N. Y. 518, 520. The neglect of both parties to bring that fact to the notice of those courts affords no reason for this court's assuming to decide a question, the decision of which cannot affect the relief to be ultimately granted in this case.

Writ of error dismissed.

NELSON *v.* MOLONEY.

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

No. 767. Submitted April 17, 1899. — Decided May 1, 1899.

O'Brien being arrested in the State of New York for larceny, Nelson induced Moloney to join him in becoming O'Brien's bondsman, and gave Moloney a mortgage on his (Nelson's) real estate in New York to the amount of $10,000, to indemnify him. O'Brien having defaulted in his appearance for trial, Moloney was sued upon the bond, and a judgment was recovered against him, which was wholly paid by him. Before paying it he brought suit against Nelson to recover the amount for which he was so liable, and obtained a judgment in his favor in the trial court, which was reversed in the courts above on the ground that, as, at that time he had paid nothing on the forfeiture, no recovery could be had. In appealing from the trial court in that case he entered into the usual stipulation that, if the judgment appealed from should be affirmed, judgment absolute might be rendered against him. He then brought this suit to foreclose the mortgage. Meanwhile Nelson had transferred the property mortgaged to one Adams. The defendant contended that the stipulation given by the plaintiff on the appeal to that court in the prior action was a bar to the recovery in this action; and that the bond and mortgage having been given to indemnify bail in a criminal case, they were void because contrary to public policy. But the Court of Appeals held: (1) That the contention that the stipulation operated to prevent a recovery was without support in authority or reason; and (2) That it was not a part of the public policy of the State of New York to insist upon personal liability of sureties, and forbid bail to become indemnified. *Held:*

(1) That these conclusions involved no Federal question;

(2) That under the circumstances described in the opinion of the court, the proceedings in relation to the removal of the cause afforded no ground for the issue of the writ of error;

(3) That, following *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, the state court having proceeded to final judgment in this case, its action is not reviewable on writ of error to such judgment.

This was a suit brought by Dennis Moloney against Samuel Nelson, Albert J. Adams and others, in the Supreme Court of New York, city and county of New York, to foreclose a mortgage on real estate given Moloney by Nelson to secure a bond for ten thousand dollars in indemnification of Moloney against

loss by reason of becoming bail for one O'Brien. The judge before whom the case was tried found the facts as follows:

"I do find that in the month of October, 1891, one Thomas O'Brien was under arrest and confined in Albany County jail, charged with the crime of grand larceny in the first degree, and that on the 16th day of October, 1891, he was discharged from custody on giving a certain bail bond or recognizance in the sum of ten thousand dollars executed by himself, the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, conditioned that the said Thomas O'Brien should appear and answer the said charge in whatever court it may be prosecuted.

"That the defendant, Samuel Nelson, in order to induce the plaintiff to enter into said recognizance, agreed to indemnify him against liability thereunder, and the plaintiff relying upon said agreement and not otherwise entered into and executed the same as aforesaid and the said defendant, Samuel Nelson, immediately thereafter and in fulfilment of said agreement did execute and deliver to the plaintiff, Dennis Moloney, the bond and mortgage set up in the complaint in this action, which said mortgage was thereafter and on the 17th day of October, 1891, duly recorded in the office of the register of the city and county of New York.

"That thereafter and on the 2d day of November, 1891, the said Thomas O'Brien was called upon in the county court of Albany County to appear and answer the indictment above referred to, but did not appear and the bail bond or recognizance executed by said O'Brien, the plaintiff Dennis Moloney, and the defendant Samuel Nelson, was, on said 2d day of November, 1891, declared forfeited.

"That thereafter and before the commencement of this action, an action was brought by the people of the State of New York against the plaintiff, Dennis Moloney, and the defendant, Samuel Nelson, to recover upon said forfeited bail bond or recognizance, and on the 8th day of December, 1891, judgment in said action was duly entered in favor of the people of the State of New York against the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, for the sum of ten thousand and twenty-seven $\frac{13}{100}$ ($10,027.13) dollars, and the judgment roll

Counsel for the Motions.

duly filed in the office of the clerk of Albany County on said date.

"That thereafter executions upon said last-mentioned judgment were duly issued to the sheriff of Albany County, and the plaintiff's property was sold under said execution, and the entire amount of said judgment paid wholly by the plaintiff.

"That no part of the sum of ten thousand dollars secured by said bond and mortgage has been paid to the plaintiff and defendants agreed and consented on the trial of this action that interest upon said sum of ten thousand dollars should be computed from the 5th day of June, 1893."

And thereupon judgment of foreclosure and sale for the amount due and for payment of any deficiency, was entered.

Before this suit was commenced Moloney had brought a similar suit against Nelson and recovered judgment, which was reversed by the general term of the Supreme Court on the ground that it had been prematurely brought, because Moloney had not then paid anything on account of the judgment entered on the forfeiture of the criminal recognizance. *Moloney* v. *Nelson*, 70 Hun, 202. From that judgment Moloney prosecuted an appeal to the Court of Appeals, entering into the usual stipulation that if the judgment appealed from was affirmed, judgment absolute might be rendered against him. The judgment was affirmed and judgment absolute entered. *Moloney* v. *Nelson*, 144 N. Y. 182. After that this action was commenced, but in the meantime Nelson had transferred the property mortgaged to defendant Adams.

From the judgment of the trial court in this suit Nelson alone appealed to the Appellate Division of the Supreme Court in the First Department, by which it was affirmed. Nelson then carried the cause to the Court of Appeals, and the judgment of affirmance was affirmed. *Moloney* v. *Nelson*, 158 N. Y. 351. The record having been remitted to the Supreme Court, this writ of error was allowed, and motions to dismiss or affirm submitted.

Mr. Abram J. Rose for the motions.

Mr. William H. Newman and *Mr. Albert J. Adams, Jr.*, opposing.

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

It is stated in the opinion of the Court of Appeals, by Chief Judge Parker, that the defences interposed by Nelson "upon the trial, and relied upon here, are: (1) The stipulation given by the plaintiff on the appeal to this court in a prior action brought to foreclose the mortgage is a bar to the recovery in this action. (2) The bond and mortgage having been given to indemnify bail in a criminal case, they are void, because contrary to public policy."

The Court of Appeals ruled that the contention that the stipulation given on appeal to that court operated to prevent a recovery, was "without support in authority or reason;" and as to the second ground relied upon to defeat the action, that it was not a part of the public policy of the State of New York to insist upon personal liability of sureties and forbid bail to become indemnified. These conclusions involved no Federal question, nor can we find on this record that any title, right, privilege or immunity under the Constitution or the laws of the United States was specially set up or claimed in the state courts, and that the decision of the highest court of the State in which a decision could be had was against any title, right, privilege or immunity so set up or claimed. But it is said that Nelson filed his petition and bond for the removal of the cause from the Supreme Court of the State of New York to the United States Circuit Court for the Southern District of New York on the ground that, at the time of the commencement of the action, he was a citizen of New Jersey and Moloney was a citizen of the State of New York, and that the action taken thereon raised a Federal question. It appeared that Moloney, and Adams, the holder of the record title to the property mortgaged, were both citizens of the State of New York, and it is not claimed that the state court denied the petition, but, on the contrary, conceded that

the record was transmitted to the Circuit Court, and that that court, on motion, remanded the cause to the state court because there was no separable controversy wholly between citizens of different States. This being so, the proceedings in relation to the removal of the cause afforded no ground for the issue of the writ of error.

In *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, 582, we held that: "If the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a Federal right, when it is the Circuit Court, and not the state court, which has denied its possession. . . . As under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of a Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709 in respect of such an order where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the Circuit Court."

Writ of error dismissed.

McCAIN *v.* DES MOINES.

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

No. 238. Submitted April 5, 1899. — Decided May 1, 1899.

It appearing on the face of the bill in this case that all the parties to this suit are citizens of Iowa, and the court being of opinion that the allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States is not only not supported by the facts appearing in the bill, but is so palpably unfounded

Statement of the Case.

that it constitutes not even a color for the jurisdiction of the Circuit Court, the decree below, dismissing the bill for want of jurisdiction, is affirmed.

THE bill in this case is filed against the city of Des Moines, its board of public works, the Des Moines Brick Manufacturing Company, and the incorporated town of Greenwood Park, to obtain an injunction restraining, among other things, the city of Des Moines and its officers and agents from exercising over the territory of the incorporated town of Greenwood Park any function of municipal government for the purpose of taxation or for works of internal improvements or otherwise, and for other relief.

The bill makes the following allegations: The complainants own in severalty lands within the incorporated town of Greenwood Park, and the lands so owned by each of the complainants are worth more than $2000; adjoining the town is the city of Des Moines, a municipal corporation created under the laws of the State of Iowa. In 1890 the legislature passed an act purporting to extend the limits of the city of Des Moines so as to include therein the town above named. The constitution of the State prohibits the passing of special acts for the incorporation of cities; the act of 1890 was a special act incorporating a city and therefore prohibited by the constitution, and as a consequence entirely void. The incorporated town has never been dissolved and is entitled to exercise all the functions of government and taxation, but it has ceased to exercise them over the territory; that notwithstanding the act of 1890 is wholly void and of no effect, the defendant, the city of Des Moines, pretended and undertook to exercise the functions of government and the power of taxation over the territory of Greenwood Park; that the only warrant for the city to act in the premises is the void act of the legislature of 1890, and the city is assuming to levy assessments and to exercise the power of taxation and to perform all the other functions of municipal government under that act; that the suit herein is one of a civil nature arising under the laws and Constitution of the United States; and the sum in controversy

exceeds $2000. It appears on the face of the bill that all the parties are citizens of the State of Iowa.

The bill further alleges that the city made a contract with the defendant, the Des Moines Brick Manufacturing Company, to pave a public highway in the town, the expense of which was to be assessed upon the property abutting thereon, including the lands of the complainants, and the work was all done under color of the act mentioned, and that it was all illegal for want of authority; that at the time of the passage of the act and the taking of jurisdiction by the city, the town was exclusively an agricultural community, and there was no advantage in or necessity for the annexation of the town to the city of Des Moines, and none of the land in the town had been plotted into lots by laying out streets or alleys therein, and the highways within it were under the control and jurisdiction of the officers of Polk County, and that to subject the lands of complainants or the other lands within the town to the taxes and assessments threatened by the city of Des Moines is to take their property under color of authority from the void act of 1890, and contrary to the amendment of the Constitution of the United States, section 1, article 14.

Further allegations were made, not material to be stated.

In addition to asking for an injunction to restrain the city of Des Moines from exercising jurisdiction over the town of Greenwood Park, the complainants ask that the town "be enjoined to exercise for its own future benefit under the statutes of Iowa all functions of municipal government and taxation and works of internal improvement in the same manner and to the same extent as the said functions have been exercised by said defendant prior to March 3, 1890." The bill further prayed that the city and the board of public works should be enjoined from making any levy upon the property of the complainants to pay the expense of paving the highway, and that the city be restrained from issuing to the Des Moines Brick Manufacturing Company any assessment certificates on account of paving, and for other relief.

The defendant, the Des Moines Brick Manufacturing

Company, demurred to the bill on the ground, among others, that it appeared on the face of complainants' bill that all the parties to the suit were citizens of the State of Iowa, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore the Circuit Court had no jurisdiction in the case.

The Circuit Court sustained the demurrer on the ground of want of jurisdiction, and pursuant to section 5 of the act of March 3, 1891, organizing the Circuit Courts of Appeals, 26 Stat. 826, it has certified the question of jurisdiction alone for decision by this court.

The opinion of the District Judge, in dismissing the bill, is reported in 84 Fed. Rep. 726.

Mr. William E. Mason and *Mr. William G. Clark* for appellants.

Mr. N. T. Guernsey, *Mr. H. T. Granger* and *Mr. Arthur C. Graves* for appellee.

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

The jurisdiction of the Circuit Court depends upon the act approved August 13, 1888, 25 Stat. 433, a part of which reads as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States. . . ."

As it appears upon the face of the bill that all the parties are citizens of Iowa, the Circuit Court had no jurisdiction on the ground of diverse citizenship.

Is the suit one arising under the Constitution or laws of the United States? As was said in the court below, the material question is whether the exercise of jurisdiction by the city of Des Moines over the territory purporting to be annexed by the act of 1890 is lawful? To answer that question it is

necessary only to refer to the constitution and law of the State of Iowa.

The Supreme Court of the State decided in *Iowa* v. *Des Moines*, 96 Iowa, 521, that the act of 1890 was void because it violated the constitutional provision in regard to special legislation. That was an action of *quo warranto* brought to test the right of the defendant city to exercise corporate authority over the added territory under the act of 1890. From the report of the facts in that case it appears that the city was by that act extended two and a half miles in each direction from its then present boundary, and it was provided by the same act that the corporate character of any annexed territory within the extended boundaries should cease and determine upon the passage of the act. Other sections of the act provided for the payment of the indebtedness of the city so enlarged and of the indebtedness of the cities within the annexed territory, and for the exemption from taxation for any city purpose of lands included within the extended limits which had not been laid off into lots of ten acres or less, or which should not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys or otherwise, and also of lands occupied and used in good faith for agricultural or horticultural purposes; for the reorganization of the wards of the cities and for elections therein. It appeared from the census of 1885 that only the city of Des Moines was affected by the act of 1890, and that in the added territory were one city and seven incorporated towns. The provisions of the act by which the municipal governments, other than the city of Des Moines, were to become extinct, and the entire territory to become one corporation and municipality were observed, so that in April, 1890, the change was complete, since which time the city of Des Moines has been thus constituted and has exercised throughout the territory the rights and functions of a city government, including the levy and collection of taxes, establishing, opening, vacating, changing and improving streets, the making of contracts and the creating and payment of debts.

These details, while appearing in the report in 96 Iowa, are

not set up in the complainants' bill, but their substance is shown in the allegations therein made, that the town has ceased to exercise all the functions of government and taxation, and the city of Des Moines and the board of public works are themselves exercising the functions of government over the town territory.

After the court in the *quo warranto* case had determined that the act was local legislation, and of that class prohibited by the Constitution, and therefore void, the opinion therein continues as follows:

"It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, make it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed, after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which before the annexation were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the city and towns annexed, and the delivery of all public records and property to the officers chosen for the city so enlarged. For four years taxes have been levied, collected and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from

a judgment dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case."

The court then cited several cases in which the doctrine of laches had been applied to sustain a municipal government where the organization, as attempted, was illegal. See *State* v. *Leatherman*, 38 Arkansas, 81; *Jameson* v. *People*, 16 Illinois, 257; *People* v. *Maynard*, 15 Michigan, 463; and also the following from Cooley on Constitutional Limitations, (page 312, 4th ed.):

"In proceedings where the question of whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. . . . And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State, and private parties could not enter any question of regularity. And the State itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition."

Continuing with its own opinion, the court stated:

"This, it is true, is a direct proceeding by the State. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the State directly. The learned writer sustains this text by a reference to *People* v. *Maynard*, (*supra*,) *Rumsey* v. *People*, 19 N. Y. 41, and *Lanning* v. *Carpenter*, 20 N. Y. 447. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color

of law. 'Color of law' does not mean actual law. 'Color,' as a modifier, in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.' Kin. Law Dict. & Gloss. In some of the cases the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term 'irregularity' is oftener applied to forms or rules of procedure in practice than to a non-observance of the law in other ways, but it has application to both. It is defined as a 'violation or non-observance of established rules and practices.' The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or non-observance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited."

And again on page 536, in speaking of the invalidity of the act of 1890, the court said:

"Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have served as a color of law inducing the proceedings for annexation."

And lastly, in speaking of the consequences to be apprehended from a judgment of ouster, the learned court said (p. 538):

"Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void."

It will thus be seen that while the Supreme Court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional pro-

vision in regard to special and local legislation, yet the court also held, for the reasons stated, that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality of the present city organization was for those reasons sustained. It is this same organization that the complainants now ask to have enjoined in this suit from exercising any function of government in the annexed district, and the former organization in the annexed district which the complainants allege has ceased to exercise those functions, they now ask the court in this suit to enjoin it "to exercise for its own future benefits under the statutes of Iowa."

To grant the relief demanded would quite effectually overrule the decision of the state court upon a question relating purely to the local law of the State.

The claim of the complainants is based solely and wholly upon the allegation that the act of 1890 was void as in violation of the constitution of Iowa. Their counsel lay that down in so many words in their brief. They say that their claim is "that under a law declared to be void and unconstitutional by the Supreme Court of the State of Iowa, the city of Des Moines is still exercising municipal control and jurisdiction over the complainants' property." There is an allegation in the bill that the land of the town was agricultural, but it is not asserted that the act was a violation of the Federal Constitution because it included such lands. No such question is made by the bill.

In their brief counsel urge that the act was void because among other things it was a violation of the constitution of Iowa in bringing agricultural lands, under the circumstances and to the extent mentioned, into the control and limits of the city. The act itself in the third section exempts such lands from taxation for any city purpose, when they shall in good faith be occupied and used for agricultural or horticultural purposes.

It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be

taken from them by the city authorities without due process of law and in violation of the Constitution of the United States, because the act of 1890 violates the constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is the Federal courts are bound in such a case as this by the decision of the state tribunal. There is no construction of the Federal Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said upon such facts that any question arises under the Constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other. *Starin* v. *New York*, 115 U. S. 248. There is no dispute about construction in any way whatever; the only question is as to the validity of the city organization, which, as stated, is a matter of state law.

The case is, however, made still stronger by the fact that the validity of the present organization of the city government and the lawfulness of its exercise of jurisdiction over the territory mentioned has been already decided by the state court, and had been so decided when this suit was commenced. It is not important upon what ground the state court proceeded in arriving at its judgment, whether it was because the act of 1890 was valid, or that being invalid, the lawfulness of the organization could not be inquired into for the reasons stated in the opinion of the court above quoted. The complainants however argue that the state Supreme Court in the *quo warranto* case did not decide upon the validity of the city organization, but only that the relator, being a non-resident of the city and paying taxes in the town in the nominal sum of a dollar a year, would not be heard upon a question which might disturb the peaceful relations that existed in the territory, and which might also overturn the municipal authority of the city of Des Moines therein. Counsel allege that these complainants do not attempt to test the corporate existence

of the city of Des Moines, but simply to test the right of that corporation to levy taxes for certain purposes upon the property of the complainants.

The last assertion, so far as concerns the testing of the corporate existence of the city in the territory mentioned, is clearly an error, because the bill asks relief in the way of a perpetual injunction to restrain the city of Des Moines, its officers and agents, from the exercise of any function of municipal government or authority or jurisdiction for the purpose of taxation or for works of internal improvement in the town of Greenwood Park, and it asks that the city officers be perpetually restrained from interfering with the officers of the town or from obstructing them in the administration of the municipal affairs of the town; and that the town "be authorized and enjoined to exercise for its own future benefits under the statutes of the State of Iowa all functions of municipal government, taxation and works of internal improvement, in the same manner and to the same extent as the said functions have been exercised by defendant prior to the 3d day of March, 1890." This prayer for relief seeks to test pretty substantially the corporate existence of the city of Des Moines in the territory in question. It does, of course, also seek to test the right of the corporation to levy taxes for the purposes named in the bill and upon the property of the complainants; but the right to levy these taxes depends entirely upon the legality of the city organization, so that if the organization is not lawful, the taxation is equally invalid.

The commencement of this suit is plainly an attempt to overturn the decision of the state court in the *quo warranto* case. In our opinion the complainants take much too narrow a view of the decision of the state court in that case. The facts of the non-residence of the relator and the smallness of his interest were spoken of, but they formed only an insignificant part of other and more important facts upon which the reasoning of the court was based. Those other facts were of a public nature, and the court, in its opinion, gave great weight to the public interests that were involved and the great injury that would fall upon all public as well as private

interests by overturning an authority that had lasted four years, and which had been initiated under color and by reason of an act of the legislature. The court in truth decided that the legality of the city organization could not be inquired into, even in a direct proceeding brought by the State to test the validity of the act, or, in other words, the validity must be sustained for the following, among other, stated reasons: The lapse of time; the actions of the authorities of both city and town in taking and yielding possession and jurisdiction; the delivery of all public records and the closing of all public offices by the officers in all the abandoned municipal governments; the levying, collection and expenditure of taxes; the public improvements made after the passage of the act; the bonds that had been recalled by the city and others issued in their place; the general recognition of the validity of the municipal government by all classes of the community; the color of law under which the organization of the city government had been practically effected in the territory; and the inextricable confusion into which the whole affairs of the city and town would be thrown as the necessary result of holding that the city government did not extend over the territory mentioned. For these public considerations the court refused to permit the inquiry to be made, even by the State, into the validity of the municipal government of the city as enlarged under color of the act of 1890. That no collateral inquiry would be permitted the opinion takes as unquestionably plain.

For the purpose probably of meeting the argument arising from acquiescence, as set forth in the *quo warranto* case, the complainants allege in the bill herein that they and the citizens of Greenwood Park have not assented to or acquiesced in or agreed to the acts of the city of Des Moines, and that jurisdiction has been exercised over them without their consent, and without permitting the citizens by election or otherwise to determine whether the pretended acts of annexation should be operative or not. These allegations would seem to refer to the state of mind which the complainants and citizens were in during these many years, and the allegation of an absence of

acquiescence would also seem to have been founded upon the fact that there had been no election by which to determine whether the act should be accepted or not. Neither fact alters the effect to be properly given the opinion in the case mentioned, in the face of the facts actually existing. From the time of the passage of the annexation act up to the commencement of this suit, a period of seven years, there is no allegation of any act on the part of the complainants or any other citizen in the way of an attempt to test the validity of this legislation with the exception of the suit brought by the State upon the relation of a non-resident property owner who paid taxes in the amount of one dollar a year. Otherwise than as above stated there is no allegation tending to show dissatisfaction with the legislation prior to September, 1897, when the brick company defendant entered upon the work which led to the assessment in dispute in this suit. During these years the city authorities have, as the bill alleges, performed all the functions of government in the territory, and taxes have been imposed and collected (presumably from complainants among others), improvements commenced and continued, interest on bonds paid, and no action taken by any one to prevent these measures or to test their validity. What may have been the secret thoughts of the complainants or other citizens during all this time must be matter wholly immaterial, so long as there was such acquiescence on the part of the public authorities as has been stated in the opinion of the court in the *quo warranto* case, and such as substantially appears by the allegations of the bill in this suit. The particular allegations of non-acquiescence by the complainants do not detract from the strength of the principles laid down by the state court, nor do they in any degree affect the full applicability of those principles to the facts set up in the bill in this suit. The action of the State against the city of Des Moines has been the only thing done towards making any attempt to test the question of the validity of the legislation prior to the commencement of this suit. In this suit we are bound to take the law of Iowa as it has been decided to be in the *quo warranto* case. In that case it has been deliberately decided that the validity of the organi-

zation of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by any one at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States, is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport* v. *Cole*, 129 U. S. 36; *New Orleans* v. *Benjamin*, 153 U. S. 411.

Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a shadow of a Federal question in this suit, for if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretence that the collection of the assessment would be without due process of law.

The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the Circuit Court. That court was therefore right in dismissing the bill, and its decree must be

Affirmed.

BOSWORTH *v.* ST. LOUIS TERMINAL RAILROAD ASSOCIATION.

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

No. 211. Submitted January 25, 1899. — Decided May 1, 1899.

A claim was presented against the estate of the Peoria and St. Louis Railway Company in the hands of a receiver, which the receiver disputed. After reference to a master, and his report, stating the facts, an order was entered directing the receiver to pay the claim. He appealed from this decision to the Court of Appeals. The record on appeal contained the order of reference, the findings of fact, the report of the master, and the exceptions of the receiver. The Court of Appeals directed the appeal to be dismissed. *Held*, That the proper entry should have been an affirmance of the decree rather than a dismissal.

A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit.

He may likewise defend the estate against all claims which are antagonistic to the rights of both parties to the suit, subject to the limitation that he may not in such defence question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him.

He cannot question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit.

He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court.

His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver.

THE facts in this case are briefly these: On September 21, 1893, the Mercantile Trust Company, of New York, filed its bill of complaint in the Circuit Court of the United States for the Southern District of Illinois against the Chicago, Peoria and St. Louis Railway Company, praying foreclosure of a mortgage and the appointment of a receiver. On the same day an order was entered appointing the present appellant receiver of that road. Among other things the order of ap-

pointment directed the receiver to pay "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage traffic balances due from said railroad." The plaintiff, the Mercantile Trust Company objected to this part of the order, but after argument the objection was overruled. On May 27, 1895, the Terminal Railroad Association of St. Louis filed an intervening petition, claiming that it had performed labor and furnished materials for the defendant railroad company within the six months named in the order of appointment. The receiver answered, denying the claim. The matter was referred to a master, who found in favor of the petitioner, and on July 30, 1896, the following decree was entered:

"It is therefore ordered, adjudged and decreed by the court that the receiver herein pay to the intervenor, the Terminal Railroad Association of St. Louis, the said sum of eight thousand one hundred and sixty-two dollars and eleven cents ($8162.11) out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgage estate superior to the lien of the mortgage herein."

The receiver appealed from this decree to the Court of Appeals, but on June 8, 1897, that court dismissed the appeal. 53 U. S. App. 302. Thereafter a certiorari was issued, and under that writ the case was brought to this court.

Mr. Bluford Wilson and *Mr. Philip Barton Warren* for appellant.

Mr. M. F. Watts, *Mr. J. E. McKeighan*, *Mr. Shepard Barclay* and *Mr. Samuel P. Wheeler* for appellee.

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

Upon the record as it was filed in the Court of Appeals, and independently of other considerations, its decision was manifestly erroneous. A claim was presented against the estate in the hands of the receiver, which he disputed. A part of his contention, as appears from the exceptions, was, specifically, that the debt, whatever its amount, was due from the Jacksonville Southeastern line and not from the mortgagor, the Chicago, Peoria and St. Louis Railway Company. After reference to a master, and his report stating the facts, an order was entered directing the receiver to pay the claim. The reference, the findings, the report of the master, the exceptions of the receiver, were all set forth. So that in the record, as it came to the Court of Appeals, there was a denial on the part of the receiver of any liability of the estate in his possession to the petitioner, and a decree adversely thereto. That alleged liability he was the proper person to contest, and to contest both in the court which had appointed him receiver, and on appeal in the appellate court. But the Court of Appeals, in its opinion directing the dismissal, makes this statement of facts, page 305:

"The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, or as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of his claim.' He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right; that within our ruling in *Mather Humane Stock Transportation Company* v. *Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; that within the doctrine declared in *Turner* v. *The Indianapolis, Bloomington and Western Railway Com-*

pany, 8 Bissell, 315; *Fosdick* v. *Schall*, 99 U. S. 235; *Union Trust Company* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U. S. 434; *Wood* v. *Guarantee Trust and Safe Deposit Company*, 128 U. S. 416; *Kneeland* v. *American Loan and Trust Company*, 138 U. S. 509; *Thomas* v. *Western Car Company*, 149 U. S. 111; *Farmers' Loan and Trust Company* v. *Green Bay, W. & St. P. Railway Company*, 45 Fed. Rep. 664, before a claim can be deemed to be preferential to the mortgage debt there must be first established a diversion of income from the payment of operating expenses to the payment of interest; and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide out of the income or the corpus of the road, for the payment of operating expenses incurred within a limited time prior to the suit unless there has been diversion of income, and then only to the extent of such diversion."

And again, page 307:

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

Even with the change made in the condition of the case by these admissions, we are of opinion that the proper entry should have been an affirmance of the decree rather than a dismissal. A dismissal implies that the receiver had no right to appeal; whereas we are of opinion that he was the proper party to take such appeal, was entitled to a hearing in the Court of Appeals, and also bound the estate in his possession as receiver by any admission of facts. Such admission in this case went so far as to relieve the appellate court from any

necessity of inquiry as to the merits of the claim, but it was made after the case had been taken to the appellate court, and did not affect the rightfulness of the appeal.

It becomes important to consider what are the rights and duties of a receiver in respect to claims made against the estate in his possession. It is often said that he is merely the hand of the court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that court, but he is also a custodian of property, and has by virtue of such custody certain obligations to the parties owning or interested therein.

First. A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes, because if valid they are superior to the rights of both parties; in a case like the present, superior to the rights of mortgagor and mortgagee.

Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defence question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. As this is a matter specially pertinent to the present controversy it may be well to consider briefly the scope of this proposition: A suit is brought by a mortgagee to foreclose his mortgage, and a receiver is appointed to take possession of the mortgaged property. The right to have a decree of foreclosure and sale is an absolute right on the part of the mortgagee, flowing from a breach of the conditions in the mortgage. But the appointment of a receiver is a matter resting largely in the discretion of the court — not, of course, an arbitrary but a legal discretion — and depending not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property out of the

possession of the mortgagor and placing it in the hands of a receiver. In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. A receivership is not essential to a foreclosure and sale, and the court is charged, when an application therefor is made, with the duty of inquiring whether, under all the circumstances, considering the interests of the parties and the public, it is wise and proper to take possession of the property. It may in its judgment be necessary to appoint a receiver without prescribing any terms. It may be that the interests of the parties or the public require that the appointment shall be made subject to certain conditions. Now, these conditions, whatever they may be, are beyond the challenge of the receiver. He may not say directly or indirectly, "I accept the appointment; I take charge of the property, but I repudiate the terms and conditions imposed on the receivership." Whether under the present state of the statutory law in reference to appeals any review can be had of the terms of such an order, it is clear that a receiver, whose rights spring from the appointment, cannot be heard to question them.

Third. Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervenor, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver, who represents, so far as the property is concerned, the interests of the parties, may rightfully challenge his claim; provided that in such challenge he does not question any or-

ders of the court heretofore referred to. Let us take some illustrations: A suit is brought to foreclose a mortgage, a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession, the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property, against which a claim is made, can defend; and defend not only in the court appointing him, but also by appeal. In that defence he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession.

Take another case: An intervenor presents a claim against the mortgaged property which the mortgagor admits. There is, therefore, no defence to be interposed in behalf of the defendant mortgagor, no protection to be sought for the property, and the only question is whether such claim, admitted by the mortgagor, is to be satisfied out of the mortgaged property prior to the claim of the mortgagee. The latter is the only party who has an antagonistic relation to the intervenor. Now, the receiver, who represents both mortgagee and mortgagor, both plaintiff and defendant, so far as the custody of the property is concerned, is entitled to defend against this claim of priority made by the intervenor, and may defend both in the court appointing him, and also by appeal. It is true in such defence he may not be heard to say that the terms and conditions imposed in the order of his appointment were improper, but he may defend on the proposition that the claim presented does not come within those terms and conditions. Whatever right, if any, the mortgagee plaintiff may have to question, in resisting such claim, the validity of the terms of the appointment, the receiver cannot do so; and the only defence he can make is that the claimed priority has no foundation in the terms of the order; or, if it be a matter entirely outside of those terms, that it has no foundation in any recognized legal or equitable principle.

Opinion of the Court.

In the case at bar one defence, as shown by the exceptions taken to the report of the master, was that the claim of the intervenor was not against the estate, but against some third party. That defence the receiver had a right to make. We do not mean that he alone can act; we do not stop to inquire what rights either party to the suit may have in this respect. All we now decide is that the receiver is a proper party to make the defence. And when he alone makes it, when he carries on the litigation in his own name as receiver, then as the representative and custodian of the estate he can, subject to the supervision of the court, bind it by admissions made in good faith in the progress of the litigation. And as in the appellate court, after the appeal had been perfected, he being the only party to the appeal, admitted that it was a just claim against the mortgagor and within the priority over the mortgage prescribed in the order of appointment, his admission showed that the allowance was right, and that the decree ought to be affirmed. But still, until that admission was made, there was a pending dispute, and he was a proper person to appeal from the allowance.

Fourth. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as for instance to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial court. He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.

Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at

the same time to leave to the receiver the further defence of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial court allowed the appeal must in the appellate court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property.

It seems unnecessary to say more. We have indicated, so far as it can safely be done by general propositions, the powers of a receiver in respect to appellate proceedings. We are of opinion that the decree of the Court of Appeals should have been one of affirmance, and to that extent it is modified. Under the admissions of the receiver the cost of the appellate proceedings should be paid by him, and this notwithstanding, in our judgment, the formal order of the Court of Appeals dismissing the case was incorrect.

The judgment of the Circuit Court is affirmed at the cost of the appellant.

HUMPHRIES *v.* DISTRICT OF COLUMBIA.

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

No. 230. Argued April 4, 1899. — Decided May 1, 1899.

In this case a jury was empanelled, trial had, and the case submitted on the 30th of November, 1896, with the following written instructions: "When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it." On the 1st of December the jury returned the following verdict in writing signed by all. The official record of the proceedings is as follows: "Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and

Statement of the Case.

confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name "John T. Wright," signed thereto, is in his handwriting; "thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7000)." The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assesses her damages by reason of the premises at $7000.00. Judgment was entered on this verdict against the District. It was contended by the District, which contention was sustained by the Court of Appeals, that this judgment was a nullity. *Held*, That the defect complained of was merely a matter of error, which did not render the verdict a nullity.

This case is before the court on error to the Court of Appeals of the District of Columbia. The facts are these: On May 22, 1896, the plaintiff in error filed an amended declaration in the Supreme Court of the District, claiming damages from the defendant, now defendant in error, on account of injuries caused by a defective condition of the bridge between Washington and Anacostia — a condition resulting from the negligence of the defendant. A jury was empanelled, trial had, and the case submitted to it on November 30, with instructions to return a sealed verdict. The instructions and the verdict were returned on the morning of December 1, and were in the following form:

"When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it.

Elizabeth M. Humphries
v.
The District of Columbia. } No. 38281. At Law.

Dated *November* 30, 1896.

"We, the jurors sworn to try the issue joined in the above-

entitled cause, find said issue in favor of the plaintiff, and that the money payable to him by the defendant is the sum of seven thousand dollars and — cents ($7000.00).

All sign:

Michael Keegan.	Lester G. Thompson.
W. H. St. John.	Wm. J. Tubman.
Geo. W. Rearden.	John T. Wright.
James D. Avery.	Jos. I. Farrell.
Bernard F. Locraft.	Isaac N. Rollins.
Geo. W. Amiss.	Thos. J. Giles."

The proceedings on December 1 are thus stated in the record:

"Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name 'John T. Wright,' signed thereto, is in his handwriting; 'thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7000).'

"The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assesses her damages by reason of the premises at $7000."

Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of

Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. 12 App. D. C. 122. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term.

Mr. Arthur A. Birney for plaintiff in error.

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

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

The single question presented by the record, the right to review which is sustained by *Phillips* v. *Negley*, 117 U. S. 665, is whether the verdict, returned under the circumstances described, was an absolute nullity, or, at least, so far defective that no valid judgment could be entered upon it. Such is the contention of the defendant. On the contrary, the plaintiff insists that whatever irregularities may have occurred, or be apparent in the proceedings, they are simply matters of error, to be corrected on direct proceedings within the ordinary time, and in the customary manner for correcting errors occurring on a trial. Is the defect or irregularity disclosed a mere matter of error or one which affects the jurisdiction? The opinion of the Court of Appeals, announced by Mr. Justice Morris, is an exhaustive and able discussion of the question, arriving at the conclusion that the verdict was an absolute nullity, and therefore the judgment, based upon it, one that could be set aside, not merely at the term at which it was rendered, but at any subsequent term.

While appreciating fully the strength of the argument made by the learned judge, we are unable to concur in the conclusions reached. That the verdict returned expressed at the time it was signed the deliberate judgment of the twelve jurors, cannot be questioned. That it remained the judgment of the eleven at the time it was opened and read is shown by the poll that was taken, and that it was still the judgment of the absent juror at the time he forwarded it to the court is evident from the testimony. So the objection runs to the fact that at the time the verdict was opened and read each of the twelve jurors was not polled, and each did not then and there assent to the verdict as declared. That generally the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. It is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict. Take the case suggested on argument. Supposing the twelve jurors are present, and the defeated party insists upon a poll of the jury and that right is denied, can it be that a verdict returned in the presence of the twelve by the foreman, without dissent, is by reason of such denial an absolute nullity? Is not the denial mere error, and not that which goes to the question of jurisdiction? There are many rights belonging to litigants — rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction or render the proceedings absolutely null and void.

The line of demarcation between those rulings which are simply erroneous and those which vitiate the result may not always be perfectly clear, and yet that such demarcation exists is conceded. This ruling of the trial court, conceding it to be error, is on the hither side of this line, and could only be taken advantage of by proceedings in error. It is not so vital as to make the verdict a nullity or the judgment entered thereon void. Suppose, after the jury, at the end of a protracted trial, have agreed upon the verdict and come into

court to announce it, and after it has been read in open court but before a poll can be had one of the jurors is suddenly stricken dead, can it be that the whole proceeding theretofore had become thereby a nullity? Can it be that after each of the jurors has signed the verdict and after it has been returned and each is present ready to respond to a poll, the mere inability to complete the poll and make a personal appeal to each renders the entire proceedings of the trial void? We are unable to assent to such a conclusion. The right to poll a jury is certainly no more sacred than the right to have a jury, and under many statutes a trial of a case, in which a jury is a matter of right, without a waiver thereof, has again and again been held to be erroneous and subject to correction by proceedings in error. But it is also held that an omission from the record of any such waiver is not fatal to the judgment.

"The fourth alleged error is to the effect that the judgment in the Kansas court was void because the cause was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error, and cannot be taken advantage of collaterally." *Maxwell* v. *Stewart*, 21 Wall. 71. "A trial by the court, without the waiver of a jury, is at most only error." *Same case*, 22 Wall. 77.

If a trial without a jury, when a jury is a matter of right and no waiver appears of record, is not fatal to the judgment, *a fortiori* the minor matter of failing to poll the jury when it is clear that the verdict has received the assent of all the jurors, cannot be adjudged a nullity, but must be regarded as simply an error, to be corrected solely by direct proceedings in review. See in reference to the distinction between matters of error and those which go to the jurisdiction, the following cases: *Ex parte Bigelow*, 113 U. S. 328; *In re Coy*, 127 U. S. 731; *In re Belt*, 159 U. S. 95; *In re Eckart*, 166 U. S. 481.

We are of opinion that the defect complained of was merely

a matter of error, and does not render the verdict a nullity.

The judgment of the Court of Appeals will therefore be reversed and the case remanded with instructions to affirm the judgment of the Supreme Court of the District of Columbia.

MORRIS *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 49. Argued October 26, 27, 28, 31, November 1, 2, 3, 4, 7, 1898. — Decided May 1, 1899.

The grant by Charles I to Lord Baltimore on the 20th of June, 1632, included in unmistakable terms the Potomac River, and the premises in question in this suit, and declared that thereafter the province of Maryland, its freeholders and inhabitants, should not be held or reputed a member or part of the land of Virginia; and the territory and title thus granted were never divested, and upon the Revolution the State of Maryland became possessed of the navigable waters of the State, including the Potomac River, and of the soils thereunder, and, by the act of cession to the United States, that portion of the Potomac River with the subjacent soil, which was appurtenant to and part of the territory granted, became vested in the United States; and the court, in consequence, affirms the judgment of the court below in respect of the Marshall heirs, denying their claims.

It was not the intention of Congress by the resolution of February 16, 1839, to subject lands lying beneath the waters of the Potomac, and within the limits of the District of Columbia, to sale by the methods therein provided; and the recent decisions of the courts of Maryland to the contrary, made since the cession to the United States, and at variance with those which prevailed at the time of the cession, cannot control the decision of this court on this question; but as the invalidity of the patent in the present case was not apparent on its face, but was proved by extrinsic evidence, and as the controversy respecting the patent was not abandoned by the defendants, they are not entitled to a decree for the return of the purchase money or for costs.

It was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac River, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in

commerce free access to the navigable water, and such intention has never been departed from.

As to land above high-water mark in Washington, the title of the United States must be found in the transactions between the private proprietors and the United States.

The proprietors of such land, by their conveyances, completely divested themselves of all title to the tracts conveyed, and the lands were granted to the trustees.

The Dermott map was the one intended by President Washington to be annexed to his act of March 2, 1797; but the several maps are to be taken together as representing the intentions of the founders of the city; and, so far as possible, are to be reconciled as parts of one scheme or plan.

From the first conception of the Federal City, the establishment of a public street, bounding the city on the south, and to be known as Water street, was intended, and such intention has never been departed from; and it follows that the holders of lots and squares, abutting on the line of Water street, are not entitled to riparian rights, nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river, unless they can show valid grants to the same from Congress, or from the city on the authority of Congress, or such a long protracted and notorious possession and enjoyment of defined parcels of land, as to justify a court, under the doctrine of prescription, in inferring grants.

The Chesapeake and Ohio Canal Company, having entered Washington long after the adoption of the maps and plans, cannot validly claim riparian rights as appurtenant to the lots or parts of lots which it purchased in Water street; as it was the persistent purpose of the founders of the city to maintain a public street along the river front; and Congress and the city only intended to permit that company to construct and maintain its canal within the limits of the city, and to approve its selection of the route and terminus.

No riparian rights belonged to the lots between Seventh street west and Twenty-seventh street west.

There is no merit in the claim of the descendants of Robert Peter.

It is impossible to reconcile the succession of acts of Congress and of the city council with the theory that the wharves of South Water street were erected by individuals in the exercise of private rights of property.

The failure of the city to open Water street created no title in Willis to the land and water south of the territory appropriated for that street.

The court does not understand that it is the intention of Congress, in exercising its jurisdiction over this territory, to take for public use, without compensation, the private property of individuals, and therefore, while affirming the decree of the court below as to the claims of the Marshall heirs, and as to the Kidwell patent and as to the claims for riparian rights, it remands the case to the court below for further proceedings.

Statement of the Case.

THE act of Maryland, entitled "An act to cede to Congress a district of ten miles square in this State for the seat of the Government of the United States," 1788, c. 46, was in the following terms: "Be it enacted by the General Assembly of Maryland, that the representatives of this State in the House of Representatives of the Congress of the United States, appointed to assemble at New York, on the first Wednesday of March next, be and they are hereby authorized and required, on behalf of this State, to cede to the Congress of the United States any district in this State, not exceeding ten miles square, which the Congress may fix upon and accept for the seat of Government of the United States." (Kilty's Laws of Maryland.)

On December 3, 1789, 13 Hening, c. 32, by an act entitled "An act for the cession of ten miles square, or any lesser quantity of territory within this State, to the United States, in Congress assembled, for the permanent seat of the General Government," Virginia ceded to the Congress and Government of the United States a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the State, and in any part thereof as Congress may by law direct, in full and absolute right, and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon; providing that nothing therein contained should be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States; and providing that the jurisdiction of the laws of the Commonwealth, over the persons and property of individuals residing within the limits of the said concession, should not cease or determine until Congress should accept the cession, and should by law provide for the government thereof under their jurisdiction.

Congress, by an act entitled "An act for establishing the temporary and permanent seat of the Government of the United States," approved July 16, 1790, c. 28, accepted a district of territory, not exceeding ten miles square, to be located on the river Potomac; and authorized the President

of the United States to appoint Commissioners, who should, under the direction of the President, survey, and by proper metes and bounds, define and limit the district, which, when so defined, limited and located, should be deemed the district so accepted for the permanent seat of the Government of the United States. It was further thereby enacted that the said Commissioners should have power to purchase or accept such quantity of land on the eastern side of said river, within the said district, as the President should deem proper for the use of the United States, and according to such plans as the President should approve, and that the Commissioners should, prior to the first Monday in December in the year 1800, provide suitable buildings for the accommodation of Congress, and of the President, and for the public offices of the Government; and that on the said first Monday in December, in the year 1800, the seat of the Government of the United States should be transferred to the district and place aforesaid, and that all offices attached to the Government should be removed thereto and cease to be exercised elsewhere. The act contained the following proviso: "That the operation of the laws of the State within said district shall not be affected by this acceptance until the time fixed for the removal of the Government thereto, and until Congress shall otherwise by law provide." 1 Stat. 130.

On January 22, A.D. 1791, Thomas Johnson and Daniel Carroll, of Maryland, and Daniel Stuart, of Virginia, were appointed by President Washington commissioners to carry the foregoing legislation into effect.

On March 3, 1791, Congress passed an amendatory act, by which, after reciting that the previous act had required that the whole of the district of territory, not exceeding ten miles square, to be located on the river Potomac, should be located above the mouth of the Eastern Branch, the President was authorized to make any part of the territory below said limit, and above the mouth of Hunting Creek, a part of the said district, so as to include a convenient part of the Eastern Branch and of the lands lying on the lower side thereof, and also the town of Alexandria, and that the territory so to be

included should form a part of the district not exceeding ten miles square for the seat of the government, but providing that nothing contained in the act should authorize the erection of the public buildings otherwise than on the Maryland side of the river Potomac.

On March 30, A.D. 1791, President Washington issued a proclamation, describing the territory selected by him for the location of the seat of government, as follows:

"Beginning at Jones' Point, being the upper cape of Hunting Creek in Virginia, and at an angle, in the outset, of forty-five degrees west of the north, and running in a direct line ten miles for the first line; then beginning again at the same Jones' Point and running another direct line at a right angle with the first across the Potomac ten miles for the second line; then from the terminations of the said first and second lines, running two other direct lines of ten miles each, the one crossing the Eastern Branch aforesaid and the other the Potomac, and meeting each other in a point."

The Commissioners were accordingly instructed by the President to have the said four lines run, and to report their action.

In the meantime intercourse was had between the Commissioners and the principal owners of property within the district, looking to the sale and conveyance by the latter of land on which a Federal City was to be erected. And the following agreement was signed by the proprietors:

"We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal City laid off upon our lands, do hereby agree and bind ourselves, heirs, executors and administrators, to convey in trust, to the President of the United States, or commissioners, or such person or persons as he shall appoint, by good and sufficient deed in fee simple, the whole of our respective lands which he may think proper to include within the lines of the Federal City, for the purposes and on the conditions following:

"The President shall have the sole power of directing the Federal City to be laid off in what manner he pleases. He may retain any number of squares he may think proper for public improvements, or other public uses, and the lots only

which shall be laid off shall be a joint property between the trustees on behalf of the public and each present proprietor, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be, after the city shall be laid out.

"For the streets the proprietors shall receive no compensation, but for the squares or lands in any form which shall be taken for public buildings or any kind of public improvements or uses, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public. The whole wood on the land shall be the property of the proprietors, but should any be desired by the President to be reserved or left standing, the same shall be paid for by the public at a just and reasonable valuation exclusive of the twenty-five pounds per acre, to be paid for the land on which the same shall remain.

"Each proprietor shall retain the full possession and use of his land, until the same shall be sold and occupied by the purchasers of the lots laid out thereupon, and in all cases where the public arrangements as to streets, lots, etc., will admit of it, each proprietor shall possess his buildings and other improvements and graveyards, paying to the public only one half the present estimated value of the lands, on which the same shall be, or twelve pounds ten shillings per acre. But in cases where the arrangements of the streets, lots and squares will not admit of this, and it shall become necessary to remove such buildings, improvements, etc., the proprietors of the same shall be paid the reasonable value thereof by the public.

"Nothing herein contained shall affect the lots which any of the parties to this agreement may hold in the towns of Carrollsburgh or Hamburgh.

"In witness whereof we have hereto set our hands and seals, this thirteenth day of March, 1791."

Among the signers of this agreement were Robert Peter, David Burns, Notley Young and Daniel Carroll.

Subsequently, in pursuance of the agreement, the several proprietors executed deeds of conveyance to Thomas Beall and John Mackall Gantt as trustees.

It will be found convenient, in view of the questions that arise in the case, to have the deeds of David Burns and Notley Young transcribed in full:

"This Indenture, made this twenty-eighth day of June, in the year of our Lord one thousand seven hundred and ninety-one, between David Burns of the State of Maryland, of the one part, and Thomas Beall (son of George) and John Mackall Gantt of the State of Maryland, of the other part, Witnesseth: That the said David Burns, for and in consideration of the sum of five shillings to him in hand paid by the said Thomas Beall and John Mackall Gantt, before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge and thereof doth acquit the said Thomas Beall and John Mackall Gantt, their executors and administrators, and also for and in consideration of the uses and trusts hereinafter mentioned to be performed by the said Thomas Beall and John Mackall Gantt and the survivor of them, and the heirs of such survivor, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, released and confirmed, and by these presents doth grant, bargain, sell, alien, release and confirm unto the said Thomas Beall and John Mackall Gantt and the survivor of them, and the heirs of such survivor, all the lands of him the said David Burns, lying and being within the following limits, boundaries and lines, to wit: Beginning on the east side of Rock Creek at a stone standing in the middle of the road leading from Georgetown to Bladensburgh, thence along the middle of the said road to a stone standing on the east side of the Reedy Branch of Goose Creek, thence southeasterly making an angle of sixty-one degrees and twenty minutes, with the meridian to a stone standing in the road leading from Bladensburgh to the Eastern Branch Ferry, thence south to a stone eighty poles north of the east and west line already drawn from the mouth of Goose Creek to the Eastern Branch, thence east parallel to the said east and west line to the Eastern Branch, Potomack River and Rock Creek, to the beginning, with their appurtenances, except all and every lot and lots of which the said David Burns is seized or to which he is entitled lying in

Carrollsburgh or Hamburgh. To have and to hold the hereby bargained and sold lands, with their appurtenances, to the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heirs of such survivor, forever, to and for the special trusts following, and no other, that is to say, that all the said lands hereby bargained and sold, or such parts thereof as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a Federal City, with such streets, squares, parcels and lots as the President of the United States for the time being shall approve, and that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the Commissioners for the time being appointed by virtue of an act of Congress, entitled 'An act for establishing the temporary and permanent seat of the Government of the United States,' and their successors, for the use of the United States forever all the said streets and such of the said squares, parcels and lots, as the President shall deem proper, for the use of the United States, and that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid off and divided, that a fair and equal division of them shall be made, and if no other mode of division shall be agreed on by the said David Burns and the Commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate to the said David Burns, and it shall in that event be determined by lot whether the said David Burns shall begin with the lot of the lowest number laid out on his said lands or the following number, and all the said lots which may in any manner be divided or assigned to the said David Burns shall thereupon together with any part of the said bargained and sold lands, if any which shall not have been laid out in the said city, be conveyed by the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor to him, the said David Burns, his heirs and assigns, and that the said other lots shall and may be sold at any time or times in such manner and on such terms and conditions as the President of the United States for the time being shall direct, and that the said Thomas

Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor will, on the order and direction of the President, convey all the said lots so sold and ordered to be conveyed to the respective purchasers in fee simple, according to the terms and conditions of such purchasers, and the produce of the sales of the said lots when sold as aforesaid shall, in the first place, be applied to the payment in money to the said David Burns, his executors, administrators or assigns, for all the part of the lands hereby bargained and sold, which shall have been in lots, squares or parcels, and appropriated as aforesaid, to the use of the United States, at the rate of twenty-five pounds per acre, not accounting the said streets as part thereof, and the said twenty-five pounds per acre being so paid, or in any other manner satisfied, that the produce of the same sales or what thereof may remain as aforesaid in money or securities of any kind shall be paid, assigned, transferred and delivered over to the President for the time being, as a grant of money, and to be applied for the purposes and according to the act of Congress aforesaid, but the said conveyances to the said David Burns, his heirs or assigns, as well as the conveyances to the purchasers, shall be on and subject to such terms and conditions as shall be thought reasonable by the President for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally in the said city, or in particular streets or parts thereof for common convenience, safety and order; provided such terms and conditions be declared before the sales of any of the said lots under the direction of the President and in trust farther, and on the agreement that he, the said David Burns, his heirs and assigns, shall and may continue his possession and occupation of the said land hereby bargained and sold, at his and their will and pleasure until the same shall be occupied under the said appropriations for the use of the United States as aforesaid, or by purchasers, and when any lots or parcels shall be occupied under purchase or appropriations as aforesaid, then, and not till then, shall the said David Burns relinquish his occupation thereon. And in trust also as to the trees, timber and woods on the premises that he,

the said David Burns, his heirs or assigns, may freely cut down, take and use the same as his and their property, except such of the trees and wood growing as the President or Commissioners aforesaid may judge proper and give notice, shall be left for ornament, for which the just and reasonable value shall be paid to the said David Burns, his executors, administrators or assigns, exclusive of the twenty-five pounds per acre for the land, and in case the arrangements of the streets, lots and like will conveniently admit of it, he, the said David Burns, his heirs and assigns, shall, if he so desire it, possess and retain his buildings and graveyard, if any, on the hereby bargained and sold lands, paying to the President at the rate of twelve pounds ten shillings per acre, of the lands so retained, because of such buildings and graveyards to be applied as aforesaid, and the same shall be thereupon conveyed to the said David Burns, his heirs and assigns, with the lots, but if the arrangements of the streets, lots and the like will not conveniently admit of such retention and it shall become necessary to remove such buildings then the said David Burns, his executors, administrators or assigns, shall be paid the reasonable value thereof in the same manner as squares or other ground appropriated for the use of the United States are to be paid for. And because it may so happen that by deaths and removals of the said Thomas Beall and John Mackall Gantt, and from other causes difficulties may occur in fully perfecting the said trust by executing all the said conveyances, if no eventual provision is made, it is therefore agreed and covenanted, between all the said parties, that the said Thomas Beall and John M. Gantt, or either of them, or the heirs of either of them, lawfully may, and they at any time, at the request of the President of the United States for the time being, will convey all or any of the said lands hereby bargained and sold which shall not then have been conveyed in execution of the trusts aforesaid to such person or persons as he shall appoint in fee simple, subject to the trusts then remaining to be executed, and to the end that the same may be perfected. And it is further agreed and granted between all the said parties, and each of the said parties doth for himself respectively and

for his heirs covenant and grant to and with the others of them that he and they shall, and will, if required by the President of the United States for the time being, join in and execute any further deed or deeds for carrying into effect the trusts, purposes and true intent of this present deed.

"In witness whereof, the parties to these presents have hereunto interchangeably set their hands and affixed their seals the day and year first above written."

The deed of Notley Young is in substantially similar terms.

On December 19, 1791, an additional act was passed by Maryland, ratifying the previous act of cession, and reciting that Notley Young, Daniel Carroll of Duddington, and many other proprietors of the part of the land thereinafter mentioned to have been laid out in a city, had come into an agreement, and had conveyed their lands in trust to Thomas Beall and John Mackall Gantt, whereby they subjected their lands to be laid out as a city, given up part to the United States, and subjected other parts to be sold to raise money, as a donation, to be employed according to the act of Congress for establishing the temporary and permanent seat of the Government of the United States, under and upon the terms and conditions contained in each of said deeds; that the President had thereafter directed to be laid out upon such lands a city, which has been called the city of Washington, comprehending all the lands beginning on the east side of Rock Creek, at a stone standing in the middle of the road leading from Georgetown to Bladensburgh, thence along the middle of said road to a stone standing on the east side of the Reedy Branch of Goose Creek, thence southeasterly, making an angle of sixty-one degrees and twenty minutes with the meridian, to a stone standing in the road leading from Bladensburgh to the Eastern Branch Ferry, thence south to a stone eighty poles north of the east and west line already drawn from the mouth of Goose Creek to the Eastern Branch, then east parallel to the said east and west line to the Eastern Branch, then with the waters of the Eastern Branch, Potomac River and Rock Creek, to the beginning.

By section 2, that portion of the "territory called Colum-

bia," lying within the limits of the State, there was ceded and relinquished to the Congress and the Government "full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," but providing that nothing therein contained should be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein otherwise than the same shall or may be transferred by such individuals to the United States, and that the jurisdiction of the laws of the State over the persons and property of individuals residing within the limits of the cession should not cease or determine until Congress should by law provide for the government thereof.

By section 3, it was provided that "all persons to whom allotments and assignments of land shall be made by the Commissioners, or any two of them, on consent and agreement, or, pursuant to this act, without consent, shall hold the same in their former estate and interest, and as if the same had been actually reconveyed pursuant to the said deed in trust."

By section 5, it was enacted that "all the lots and parcels which have been or shall be sold to raise money shall remain and be to the purchasers, according to the terms and conditions of their respective purchase;" and that a purchase, when made from one claiming title and, for five years previous to the statute, in possession, either actually or constructively, through those under whom he claimed, was rendered unassailable, and that the true owner must pursue the purchase money in the hands of the vendor.

Section 7 enacted that the Commissioners might appoint a clerk of recording deeds of land within the said territory, who shall provide a proper book for the purpose, and therein record, in a strong, legible hand, all deeds, duly acknowledged, of lands in the said territory delivered to him to be recorded, and in the same book make due entries of all divisions and allotments of lands and lots made by the Commissioners in pursuance of this act, and certificates granted by them of sales, and the purchase money having been paid, with a proper alphabet in the same book of the deeds and entries aforesaid.

By section 9, it was enacted that the Commissioners "shall direct an entry to be made in the said record book of every allotment and assignment to the respective proprietors in pursuance of this act."

By section 12, it was declared that until the assumption of legislative power by Congress the Commissioners should have power to "license the building of wharves in the waters of the Potowmack and the Eastern Branch, adjoining the said city, of the materials, in the manner and of the extent they may judge durable, convenient and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without a license as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance; they may also, from time to time, make regulations for the discharge and laying of ballast from ships or vessels lying in the Potowmack River above the lower line of the said territory and Georgetown, and from ships and vessels lying in the Eastern Branch." 2 Kilty Laws of Maryland, c. 45.

While the transactions were taking place between the Commissioners and the several proprietors, which culminated in the deeds of conveyance by the latter to Beall and Gantt, negotiations were going on between the President and the Commissioners on the one hand, and the owners of the lots in Carrollsburgh and Hamburgh on the other. Without following these negotiations in detail, it seems sufficient to say that an agreement, substantially similar to the one of March 13, 1791, was reached with those lot owners, and that the territory of those adjacent villages was embraced in the President's proclamation of March 30, 1791.

By a letter, contained in the record, dated March 31, 1791, from President Washington to Thomas Jefferson, Secretary of State, it appears that Major L'Enfant was, after the aforesaid agreements had been reached, directed by the President to survey and lay off the city; and the President further stated in that letter that "the enlarged plan of this agreement having done away the necessity, and indeed postponed

the propriety, of designating the particular spot on which the public buildings should be placed until an accurate survey and subdivision of the whole ground is made," he has left out of the proclamation the paragraph designating the sites for the public buildings.

On August 19, 1791, Major L'Enfant presented to the President his plan of the city, accompanied with a letter, describing the plan as still incomplete, and making several suggestions, particularly one to the effect that sales should not be made till the completion of his scheme for the city and the public buildings should be completed.

On December 13, 1791, the President sent to Congress a communication in the following terms: "I place before you the plan of the city that has been laid out within the district of ten miles square, which was fixed upon for the permanent seat of the Government of the United States."

Afterwards, on February 20, 1797, on the occasion of a complaint by Mr. Davidson of certain deviations from this plan by Major Ellicott, who succeeded Major L'Enfant as surveyor, President Washington, in a letter to the Commissioners, said: "Mr. Davidson is mistaken if he supposed that the transmission of Major L'Enfant's plan of the city to Congress was the completion thereof. So far from it, it will appear by the message which accompanied the same that it was given as matter of information to show what state the business was in, and the return of it requested. That neither house of Congress passed any act consequent thereupon. That it remained, as before, under the control of the executive. That afterwards several errors were discovered and corrected, many alterations made, and the appropriations, except as to the Capitol and the President's House, struck out under that authority, before it was sent to the engraver, intending that work and the promulgation thereof were to give it the final and regulating stamp."

Subsequently dissensions arose between the Commissioners and L'Enfant, which resulted in the dismissal of the latter, and the employment of Andrew Ellicott, who, on February 23, 1792, completed a plan of the city and delivered it to the

President, who, in a letter to the Commissioners dated March 6, 1792, said : "It is impossible to say with any certainty when the plan of the city will be engraved. Upon Major L'Enfant's arrival here, in the latter part of December, I pressed him in the most earnest manner to get the plan ready for engraving as soon as possible. Finding there was no prospect of obtaining it through him, at least not in any definite time, the matter was put into Mr. Ellicott's hands to prepare about three weeks ago. He has prepared it, but the engravers who have undertaken to execute it say it cannot certainly be done in less than two — perhaps not under three months. There shall, however, be every effort made to have the thing effected with all possible dispatch."

This so-called Ellicott's plan was engraved at Boston and at Philadelphia — the engraved plans differing in that the latter did and the former did not show the soundings of the creek and river.

Subsequently, James R. Dermott was employed to make a plan of the city, which he completed prior to March 2, 1797, and on that day President Washington, by his act, requested and directed Thomas Beall and John M. Gantt, the trustees, to convey all the streets in the city of Washington, as they were laid and delineated in the plan of the city thereto attached, and also the several squares, parcels and lots of ground appropriated to the use of the United States, and particularly described, to Gustavus Scott, William Thornton and Alexander White, commissioners appointed under the act of Congress.

On July 23, 1798, President Adams, in an instrument alleging that the plan referred to in said request and instruction by President Washington as having been annexed thereto had been omitted, declared that he had caused said plan to be annexed to said writing, and requested the said Thomas Beall and John M. Gantt to convey the streets, squares, parcels and lots of ground, described in the act of the late President of the United States as public appropriations, to the said Scott, Thornton and White, and their successors in office as commissioners, to the use of the United States forever.

Statement of the Case.

Lots and parcels of ground were sold to private purchasers, from time to time, under all three of these plans, and controversies have arisen as to the comparative authenticity of these plans. The particulars wherein those plans differ are stated and considered in the opinion of the court.

On February 27, 1801, Congress passed the act concerning the District of Columbia and its government, and providing "That the laws of the State of Maryland as they now exist shall be continued in force in that part of the said district which was ceded by that State."

By the act of August 2, 1882, c. 375, 22 Stat. 198, Congress made an appropriation for "improving the Potomac River in the vicinity of Washington with reference to the improvement of navigation, the establishment of harbor lines, and the raising of the flats, under the direction of the Secretary of War, and in accordance with the plan and report made in compliance with the River and Harbor Act approved March 3, 1881, and the reports of the Board of Engineers made in compliance with the resolution of the Senate of December 13, 1881."

This act made it the duty of the Attorney General to examine all claims of title to the premises to be improved under this appropriation, and to institute a suit or suits at law or in equity "against any and all claimants of title under any patent which, in his opinion, was by mistake or was improperly or illegally issued for any part of the marshes or flats within the limits of the proposed improvement."

By subsequent acts of Congress further appropriations were made for continuing the improvement, amounting to between two and three million of dollars, and in the prosecution of the work channels have been dredged, sea walls constructed, and a large area reclaimed from the river.

It appearing that claims to the lands embraced within the limits of the improvement, or to parts of them, were made by the Chesapeake and Ohio Canal Company, and by several other corporations and persons, besides those claiming under the patent referred to in the act of 1882, Congress passed the act approved August 5, 1886, c. 930, 24 Stat. 335, entitled "An

act to provide for protecting the interests of the United States in the Potomac River Flats, in the District of Columbia."

By the first section of this act it was made the duty of the Attorney General "to institute, as soon as may be, in the Supreme Court of the District of Columbia, a suit against all persons and corporations who may have or pretend to have any right, title, claim or interest in any part of the land or water in the District of Columbia within the limits of the city of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac River, and composing any part of the land and water affected by the improvements of the Potomac River or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto."

By the second section, it was provided that the suit "shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations known to set up or assert any claim or right to or in the land or water in said first section mentioned, and against all other persons and corporations who may claim to have any such right, title or interest. On the filing of said bill process shall issue and be served, according to the ordinary course of said court, upon all persons and corporations within the jurisdictions of said court; and public notice shall be given, by advertisement in two newspapers published in the city of Washington for three weeks successively of the pendency of said suit, and citing all persons and corporations interested in the subject-matter of said suit, or in the land or water in this act mentioned, to appear, at a day named in such notice, in said court, to answer the said bill, and set forth and maintain any right, title, interest or claim that any person or corporation may have in the premises; and the court may order such further notice as it shall think fit to any party in interest."

The third section gives the court "full power and jurisdiction by its decree to determine every question of right, title, interest or claim arising in the premises, and to vacate, annul, set aside or confirm any claim of any character arising or set forth in the premises; and its decree shall be final and con-

clusive upon all persons and corporations parties to the suit, and who shall fail, after public notice as hereinbefore in this act provided, to appear in said court and litigate his, her or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest or claim in the premises."

As to all the defendants, except those claiming under a certain patent issued through the General Land Office to John L. Kidwell in 1869, the bill states that "the complainant is not sufficiently informed as to the nature and extent of said claims, or any of them, to set them out with particularity; and the complainant leaves them to present their claims in their answer hereto as they may be advised."

As to the claims under said patent, the bill avers the patent to be void upon several grounds, and the claims, therefore, unfounded, and prays that the patent may be cancelled and annulled.

The bill further states, that "the complainant disclaims in this suit seeking to establish its title to any of the wharves included in the area described in paragraph 3 of this bill, and claims title only to the land and water upon and in which said wharves are built, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, to be decided in any other appropriate proceeding."

The limits of the "land and water" affected by the improvements are specifically set forth in the third paragraph of the bill of complaint. The beginning of said limits is at the southeast corner of square south of square 12, and they proceed thence along the east line of said square and the west line of Twenty-sixth street to the line of the Chesapeake and Ohio Canal bank; thence, by several courses and distances, "along the canal bank, parallel to and about ten feet southwest of a row of sycamore trees," and following the shore line of the river to the southwest line of Virginia avenue between Seventeenth and Eighteenth streets west; thence southeasterly along the southeast line of said avenue to the east line of Seventeenth street west, being the west line of Reservation 3 (known as the Monument Grounds); thence to the crest

of the bank forming the southwestern boundary of Reservation 3, and along said crest to the southwestern corner of square 233, at the intersection of Fifteenth street west and Water street; thence across Fourteenth street west and Maryland avenue to a point in the middle of E street south; thence to the nearest point in the shore line of the river; thence with said shore line to Greenleaf's Point at the southern extremity of the Arsenal Grounds; the line proceeds thence along the east side of the Washington channel of the Potomac River and across the mouth of the Eastern Branch in a southerly direction to the wharf at Giesboro Point; thence across the main or Virginia channel of the Potomac River in a westerly direction to the west side of that channel; thence along the west side of that channel in a northwesterly direction and following the meanders of the channel to a point opposite the wharf known as Easby's wharf; thence across the channel to the southwest corner of said wharf, and thence along the south side of said wharf to the southwest line of square south of square 12; and thence along said southwest line to the place of beginning at the southeast corner of said square.

The area of actual reclamation of land from the bed of the river within said limits under the above-mentioned legislation amounted to nearly seven hundred and fifty acres.

Claims and pretensions of various kinds to the land and water within said limits, or to portions of the same, are set up in the answers of the parties who were originally made defendants to the bill and of those who have appeared in response to the public notice of the pendency of the suit given in accordance with the terms of the act.

These claims, with respect to the nature of the several issues involved in them, admit of convenient division into classes, viz.:

I. The claim made by the heirs of James (M.) Marshall and those of his brother, Chief Justice John Marshall, to the ownership of the entire bed of the river from shore to shore (including therein the reclaimed land) under grants from the crown of England to Lord Culpeper and others, for what is known as the Northern Neck of Virginia, and the deed from Denny Martin Fairfax, as said Culpeper's successor in title, to said

James (M.) Marshall; and the claim made by the said heirs of James (M.) Marshall to such ownership under the patent to Lord Baltimore for the Province of Maryland, and the deed to them from Frederick Paul Harford as Lord Baltimore's successor in title.

II. The claims of ownership made to part of the reclaimed land by certain defendants, who assert title under a patent issued by the United States through the General Land Office to John L. Kidwell in the year 1869 for forty-seven and seventy-one one-hundreths ($47\frac{71}{100}$) acres and to one hundred and fifty (150) acres of alleged accretion thereto; and to another tract, the area of which is not stated, adjoining the Long Bridge and extending therefrom southwardly between the Washington and Georgetown channels, of which latter tract they claim to be the equitable owners under an application for a patent made by said Kidwell in 1871.

III. The claims made by the Chesapeake and Ohio Canal Company and its lessee, Henry H. Dodge, to riparian rights from Easby's Point to Seventeenth street west.

IV. The claims to riparian rights, right of access to the channel of the river, and to accretions, natural and artificial, made by the owners of lots in squares along the river west of Seventeenth street west, namely, squares 148, 129, 89, 63, 22, and square south of square 12.

V. The claim made by certain of the descendants of Robert Peter, an original proprietor of lands in the city of Washington, to certain land near the public reservation known as the Observatory Grounds.

VI. The claims to riparian privileges and wharfing rights made by owners of lots in squares beginning with square 233 and extending to the line of the Arsenal Grounds.

VII. The claims made by certain persons occupying wharves below the Long Bridge.

The main determination by the court "of rights drawn in question" in the suit was by a decree passed October 17, 1895. The decree adjudicated nearly all the points in controversy in favor of the United States.

Certain lots and parts of lots in squares 63, 89, 129 and

148, north of their boundaries on Water street and A street, which were subject to the ebb and flow of the tide, were included in the work of reclamation, and as to them the decree held the owners to be entitled to compensation for the taking and inclusion of the same in the improvements.

By the first paragraph of the decree, the claims under class 2, that is, those set forth in the answers of certain defendants founded upon a patent issued to John L. Kidwell in 1869, for a tract of forty-seven and seventy-one one-hundredths ($47\frac{71}{100}$) acres in the Potomac River, and alleged accretion thereto, and also to a tract adjoining the Long Bridge, founded upon an application for a patent therefor made by said Kidwell in 1871, are held and declared to be "invalid, void and of none effect;" and the said patent is "vacated, annulled and set aside."

By the second paragraph, "the claims of each and all of the other parties defendants, set forth in their respective answers, to any rights, titles and interests, riparian or otherwise, in the said lands or water," are held and declared "to be invalid, void and of none effect," except as to the parties owning said lots and parts of lots in the squares last mentioned.

By the third paragraph, it is held and declared "that there does not exist (except as aforesaid) any right, title or interest in any person or corporation, being a party to this cause, to or in any part of the said land or water," and "that the right and title of the said United States (except as aforesaid) to all the land and water included within the limits of the said improvements of the Potomac River and its flats, as the said limits are described in the said bill of complaint," is absolute "as against all the defendants to this cause, and as against all persons whomsoever claiming any rights, titles or interests therein who have failed to appear and set forth and maintain their said rights, titles or interests as required by said act of Congress."

By the fourth paragraph, it is held that the defendants who are owners of the lots or parts of lots in squares 63, 89, 129 and 148, "which are included between the north line or

lines of the said improvements of the Potomac River and its flats, and the north line or lines of Water street and A street, are entitled to be indemnified for whatever impairment or injury may have been caused to their respective rights, titles or interests in said lots or parts of lots by the taking of the same by the United States; the value of such rights, titles, interests or claims to be ascertained by this court, exclusive of the value of any improvement of the said lots or parts of lots made by or under the authority of the said United States."

By the fifth and last paragraph of the decree, the taking of further testimony was authorized, on behalf of the owners and on behalf of the United States, as to the respective areas of the said lots and parts of lots, and of and concerning the true ownership and value of the said lots and parts of lots.

Such testimony as to ownership, areas and values having been taken and returned, the court upon consideration thereof, and on March 2, 1896, passed a further and supplementary decree, adjudging the values of the said lots and parts of lots so taken to be ten cents per square foot, and payment was directed to be made to sundry persons whom the court found to be the owners of certain of the parcels; the ownership of the remaining parcels not being, in the opinion of the court, sufficiently established, the taking of further testimony with respect thereto was ordered. The total amount of said values found by the court is $26,684.09.

The court having made a report of its action in the premises to Congress, agreeably to the requirements of the act of August 5, 1886, an appropriation was made for the payment of the sums so found to be due to the owners of the said lots and parts of lots in said squares; and with two exceptions, namely, Richard J. Beall and the trustees of the estate of William Easby, deceased, the several owners of the property applied, under said appropriation act, to the court for the payment to them of the respective sums found to be due to them, and the fund has been very largely disbursed under orders of the court passed on said applications.

From the main decree of October 17, 1895, appeals were taken as follows:

Statement of the Case.

1. By all the defendants embraced in class one (1), namely, the heirs of James (M.) Marshall and the heirs of his brother, Chief Justice Marshall.

2. By all the defendants embraced in class two (2), claiming under the Kidwell patent, etc., namely, Martin F. Morris, Henry Wells, Edward H. Wilson, Catherine A. Kidwell, Emma McCahill, John W. Kidwell, Francis L. Kidwell, Ida Hyde and George A. Hyde.

3. By one of the defendants embraced in class three (3), namely, the Chesapeake and Ohio Canal Company and its trustees.

4. By two of the defendants embraced in class four (4), namely, the trustees of the estate of William Easby, deceased, and Richard J. Beall.

5. By all of the defendants embraced in class five (5), namely, certain descendants of Robert Peter.

6. By certain of the defendants embraced in class six (6), namely: (*a*) Charles Chauncy Savage et al.; (*b*) The Washington Steamboat Company, limited; (*c*) Avarilla Lambert et al.; (*d*) William W. Rapley; (*e*) Mary A. S. Kimmell Gray; (*f*) James F. Barber et al.; (*g*) William G. Johnson, assignee of the American Ice Company; (*h*) Thomas W. Riley; (*i*) Edward M. Willis; (*j*) Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, et al.; (*k*) Elizabeth K. Riley, in her own right and as trustee and executrix of William R. Riley, deceased; (*l*) The Great Falls Ice Company; (*m*) Daniel S. Evans; (*n*) Margaret J. Stone; and (*o*) Charles B. Church et al.

7. By certain of the defendants embraced in class seven (7), namely, Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, et al.; Charles B. Church et al.; Daniel S. Evans, and William W. Rapley.

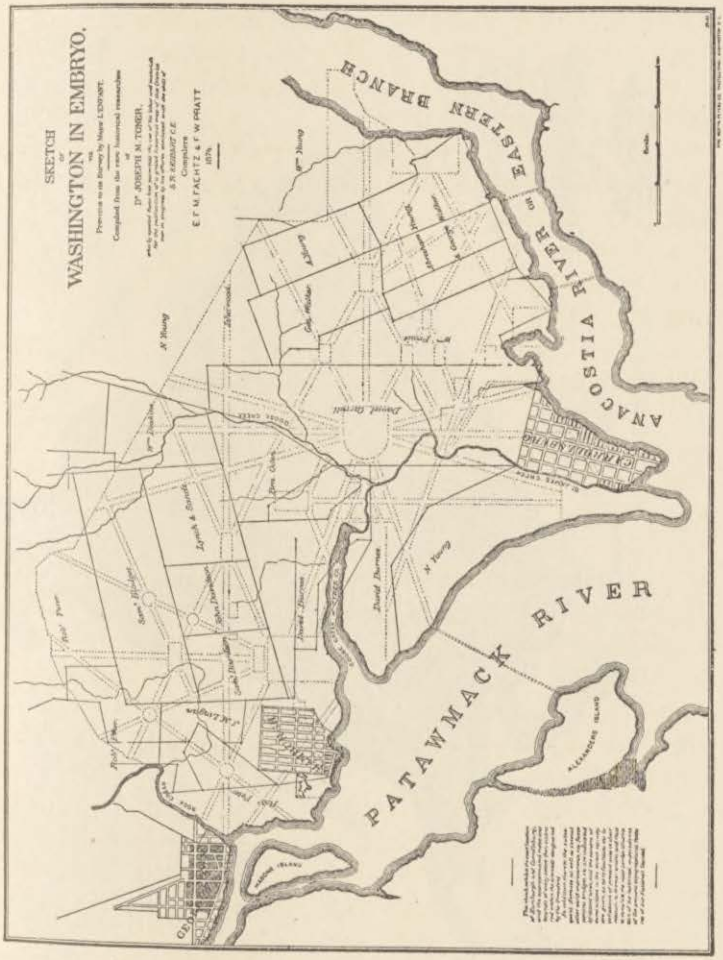
The following reduced copies of the plans will assist in applying the reasoning of the opinion:

No. 1 is the city before the conveyances.

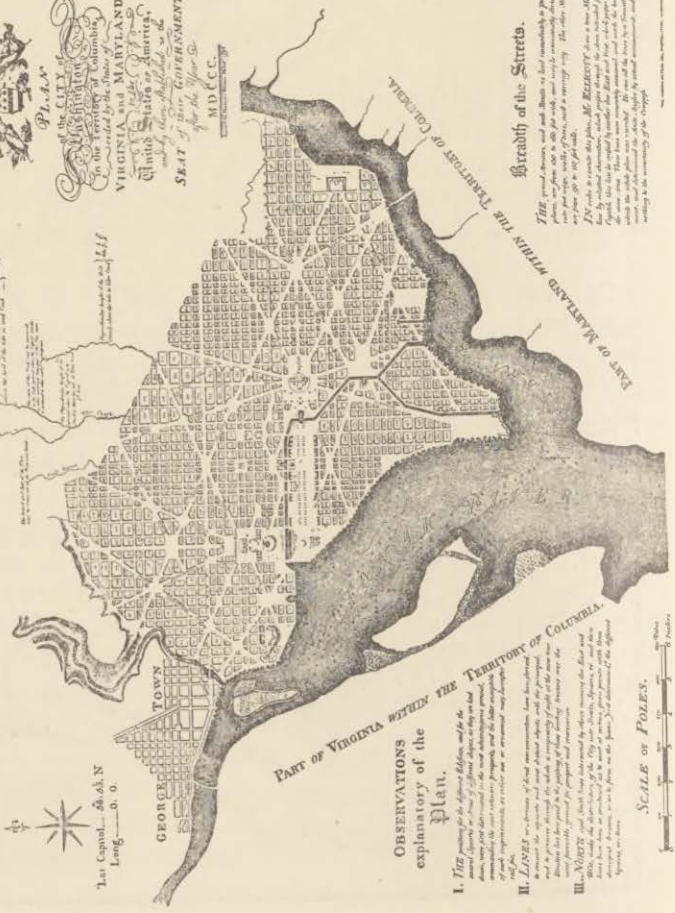
No. 2 is the Ellicott plan.

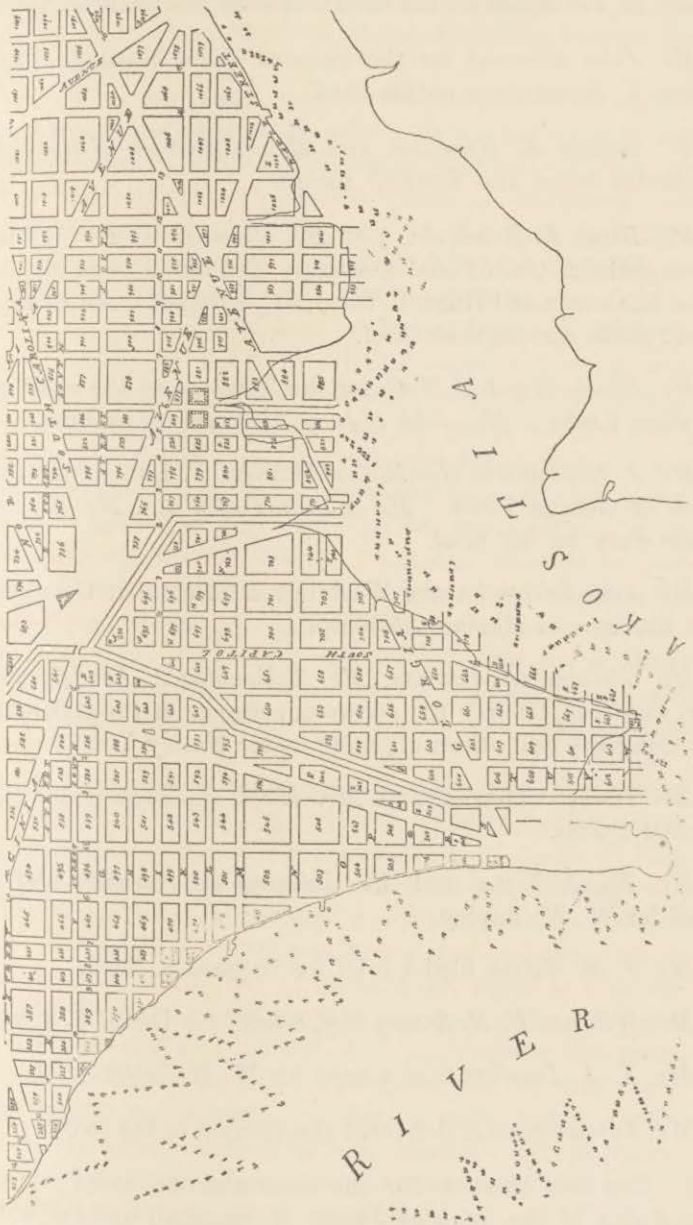
No. 3 is a portion of the Dermott map, sufficient to indicate the river front in part.

No. 1.


SKETCH
OF
WASHINGTON IN EMBRYO.
EASTERN BRANCH
ANACOSTIA RIVER
PATAWMACK RIVER

No. 2.


PLAN
of the CITY
of
WASHINGTON
in the
TERRITORY of Columbia,
on the east side of the River Potowmack
between
VIRGINIA and MARYLAND
the
United States of America.
SEAT of the GOVERNMENT.
MDCCC.
Breadth of the Streets.
PART OF MARYLAND WITHIN THE TERRITORY OF COLUMBIA.
PART OF VIRGINIA WITHIN THE TERRITORY OF COLUMBIA.
OBSERVATIONS
explanatory of the
Plan.
I.
II. LINES
III. NORTH
SCALE OF POLES.
GEORGE TOWN
Lat. Capitol 38 53 N
Long. 0. 0.



No. 3. Portion of the Dermott Map, 1797.

Mr. A. Leo Knott for the heirs of James Markham Marshall.

Mr. John Howard for the heirs of John Marshall. *Mr. James V. Brooke* was on his brief.

Mr. George E. Hamilton and *Mr. Nathaniel Wilson* for claimants under the Kidwell patent.

Mr. Hugh L. Bond, Jr., and *Mr. John K. Cowen* for the Chesapeake & Ohio Canal Company, and for Joseph Bryan, John K. Cowen and Hugh L. Bond, Jr., Trustees. *Mr. Charles F. T. Beale* was on their brief.

Mr. Henry Randall Webb for the Trustees of the estate of William Easby. *Mr. John Sidney Webb* was on his brief.

Mr. J. Holdsworth Gordon for William F. Dunlap and the heirs of George Peter. *Mr. Enoch Totten* and *Mr. Arthur Peter* were on his brief.

Mr. John Selden for the Washington Steamboat Company and the heirs of Moncure Robinson.

Mr. William G. Johnson, *Mr. Tallmadge A. Lambert* and *Mr. Calderon Carlisle* for Johnson, assignee of the American Ice Company and others claiming under Notley Young.

Mr. Holmes Conrad and *Mr. Hugh T. Taggart* for the United States.

Mr. Enoch Totten and *Mr. Edward A. Newman* filed a brief for W. W. Rapley.

Mr. J. M. Wilson filed a brief for Richard J. Beall.

Mr. William F. Mattingly filed a brief for Daniel S. Evans.

Mr. T. A. Lambert filed a brief for W. M. Easby-Smith.

Mr. Justice Shiras delivered the opinion of the court.

1. The first question for our determination arises out of the claims of the heirs of James M. Marshall and the heirs

of John Marshall to the ownership of the entire bed of the Potomac River, from shore to shore, including therein the reclaimed lands.

Their claims are based upon two distinct lines or sources of title, inconsistent with each other: One originating in the charter granted by Charles I, King of England, on June 20, 1632, to Cecilius Calvert, second Baron of Baltimore and first Lord Proprietary of the Province of Maryland; the other, in the charter granted by James II, King of England, on September 27, 1688, to Thomas, Lord Culpeper.

We do not think it necessary to enter at length or minutely into the history of the long dispute between Virginia and Maryland in respect to the boundary line. It is sufficient, for our present purpose, to say that the grant to Lord Baltimore, in unmistakable terms, included the Potomac River and the premises in question in this suit, and declared that thereafter the Province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, "from which we do separate both the said province and inhabitants thereof."

On September, 1688, King James II, by his royal patent of that date, granted to Thomas, Lord Culpeper, what was called the Northern Neck of Virginia, and described as follows:

"All that entire tract, territory or parcel of land situate, lying and being in Virginia in America, and bounded by and within the first heads or springs of the rivers of Tappahannock al^{s} Rappahannock and Quiriough al^{s} Patawonuck Rivers, the courses of said rivers from their said first heads or springs as they are commonly called and known by the inhabitants and descriptions of those parts and the Bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwoods, timber and trees, wayes, mountains, swamps, marshes, waters, rivers, ponds, pools, lakes, water courses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons and other royal fish. . . . To have,

hold and enjoy all the said entire tract, territory or portion of land, and every part and parcel thereof, . . . to the said Thomas, Lord Culpeper, his heirs and assigns forever."

Owing to the conflicting descriptions, as respected the Potomac River, contained in these royal grants, a controversy early arose between Virginia and Maryland. A compact was entered into in 1785 between the two States, whereby, through commissioners, a jurisdictional line, for the purpose of enforcing the criminal laws and regulating the rights of navigation in the Potomac River, was agreed upon.

Finally, the controversy as to the true boundary still continuing, in 1874 the legislatures of the two States agreed in the selection of arbitrators, by whose award, dated January 16, A.D. 1877, the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore. This award was accepted by the two States, and, by an act approved March 3, 1879, c. 196, 20 Stat. 481, Congress gave its consent to the agreement and award; but provided that nothing therein contained should be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which formed the subject of the said agreement or award.

It was a mutual feature of the legislation by which this conclusion was reached that the landholders on either side of the line of boundary between the said States, as the same might be ascertained and determined by the said award, should in no manner be disturbed thereby in their title to and possession of their lands, as they should be at the date of said award, but should in any case hold and possess the same as if their said titles and possession had been derived under the laws of the State in which by the fixing of the said line by the terms of said award they should be ascertained to be. (Act of Virginia, February 10, 1876, chap. 48; act of Maryland, April 3, 1876, chap. 198.)

Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac River, or as establishing

a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I, in 1632, of the territory known as the Province of Maryland, embraced the Potomac River and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.

The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac River or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction.

Without pursuing further this branch of the subject, and assuming that the heirs of John Marshall have become lawfully vested with the Fairfax title, we are of opinion that they have failed to show any right or title to the lands and premises involved in this litigation, and that the decree of the court below, so far as it affects them, is free from error.

There remains to consider the claim of the heirs of James M. Marshall as alleged successors to the title of Lord Baltimore to the river Potomac and the soil thereunder, as part and parcel of the grant to him by the patent of Charles I, in 1632.

We adopt, as sufficient for our purposes, the statement of that claim made in the printed brief filed on behalf of the heirs of James M. Marshall:

1st. That Charles I, in his charter of June, 1632, conveyed to the Lord Proprietary of Maryland, *inter alia*, full title to the lands under the navigable waters and rivers subject to tidal overflow, within the limits of that charter, with the right to grant such lands to others.

2d. That the King in said charter granted to the Proprietary of the Province of Maryland the whole bed and soil of the

Potomac River, from bank to bank, and from its source to its mouth, the *locus in quo* of the lands here in controversy.

3d. That the said Proprietary held such lands, as he held his other lands, in absolute ownership and propriety, but subject to the public servitudes in and of the waters over them, so long as those waters covered the lands.

4th. But that when the waters ceased to be or flow over them, these lands were relieved of those servitudes, and his right of seizin or possession attached and perfected his title, and of this his heirs or assigns could take the benefit and advantage, if holding title at that time.

5th. That by the action of the Government of the United States, in reclaiming these lands for public purposes, and converting them into firm and fast lands, and passing the act of August 5, 1886, and bringing suit against these appellants and others, the first opportunity was given to these appellants to make or assert their title.

6th. That title was legally derived to them by the devises and deeds set out in the record.

Briefly expressed, the appellants' contention is that the property in the soil under the river Potomac passed to Lord Baltimore and his grantees, and that it passed, not as one of the regalia of the Crown, or as a concomitant of government, but as an absolute proprietary interest, subject to every lawful public use, but not the less, on that account, a hereditament, and the subject of lawful ownership, and of the right of full and unqualified possession when that public use shall have ceased.

We need not enter into a discussion of this proposition, because the doctrine on which it is based has been heretofore adversely decided by this court in several leading and well-considered cases. *Martin* v. *Waddell*, 16 Pet. 367; *Den* v. *Jersey Company*, 15 How. 426; *Shively* v. *Bowlby*, 152 U. S. 1.

The conclusions reached were that the various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under

tide waters; that by those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community about to be established, as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property, to be parcelled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States; that when the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

If these principles are applicable to the present case, it follows that, upon the Revolution, the State of Maryland became possessed of the navigable waters of the State, including the Potomac River, and of the soils thereunder, for the common use and benefit of its inhabitants; and that, by the act of cession, that portion of the Potomac River, with the subjacent soil which was appurtenant to and part of the territory granted, became vested in the United States.

We do not understand the learned counsel for the appellees to controvert the principles established by the cited cases as applicable to the royal grants and territories considered therein. But their contention is that a different doctrine has prevailed in the courts of the State of Maryland, to the effect that lands beneath the tide waters of the Potomac were grantable in fee to private persons, subject only to the public servitudes, and that when, as in the present case, by the action of the Government, these lands have ceased to be submerged, the owner of the title, however long that title has been in abeyance, becomes entitled to possession and to compensation if the land be taken for public purposes.

The soundness of this contention depends upon two propositions: First, that the Federal decisions cited do not establish general principles applicable to each and all of the royal charters to the founders of the Atlantic colonies, but are restricted in their scope to the particular grant in question in those cases; and, second, that the law of Maryland, if the sole rule of decision, is to the effect claimed.

In the argument in *Martin* v. *Waddell*, the decision of the Supreme Court of New Jersey, in the case of *Arnold* v. *Mundy*, 1 Halsted, 1, in which that court had laid down the rule as contended for by the appellants, was cited as conclusive, and as establishing a rule of property binding on the Federal courts.

In respect to this contention Mr. Chief Justice Taney said:

"The effect of this decision by the state court has been a good deal discussed at the bar. It is insisted by the plaintiffs in error that, as the matter in dispute is local in its character, and the controversy concerns only fixed property, within the limits of New Jersey, the decision of her tribunals ought to settle the construction of the charter; and that the courts of the United States are bound to follow it. It may, however, be doubted, whether this case falls within the rule, in relation to the judgments of state courts when expounding their own constitution and laws. The question here depends, not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British crown, under which certain rights are claimed by the State, on the one hand, and by private individuals on the other. And if this court had been of opinion that upon the face of these letters patent the question was clearly against the State, and that the proprietors had been deprived of their just rights by the erroneous judgment of the state court, it would perhaps be difficult to maintain that this decision of itself bound the conscience of this court. . . . Independently, however, of this decision of the Supreme Court of New Jersey, we are of opinion that the proprietors are not entitled to the rights in question."

The subject is barely adverted to in *Shively* v. *Bowlby*, where, referring to the case of *Martin* v. *Waddell*, it was

said by Mr. Justice Gray: "This court, following, though not resting wholly upon, the decision of the Supreme Court of New Jersey in *Arnold* v. *Mundy*, 1 Halsted, 1, gave judgment for the defendants." Whether, in the controversy between the United States, in the capacity of grantees of the State of Maryland, and the heirs of James M. Marshall, as successors to the property title of Lord Baltimore, involving a construction of the grant of Charles I, the final decision belongs to the Federal or to the state court, we do not find it necessary to decide. For, in our opinion, there is no conflict between the views announced by this court in the cases cited, and those that prevailed in Maryland, as they appear in the public conduct, and in cases decided prior to and about the time of the act of cession.

It does not appear that, in the administration of his affairs as land proprietor, Lord Baltimore, or his successors, ever made a sale, or executed a patent which, upon its face and in terms, granted the bed or shores of any tide water in the province, or ever claimed the right to do so.

The argument to the contrary, as respects the decisions of the courts of Maryland, depends on the case of *Browne* v. *Kennedy*, 5 H. & J. 195, decided in 1821, and following cases. The legal import of that case, and the effect to which it is entitled in the present case, we shall consider in a subsequent part of this opinion.

The case of *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603, is authority for the propositions that Lord Fairfax's title to the waste and unappropriated lands, which he devised to Denny Fairfax, was that of an absolute property in the soil in controversy in that case, that the acts of ownership shown to have been exercised by him over the whole waste and unappropriated lands, vested in him a complete seizin and possession thereof; and that, even if there had been no acts of ownership proved, as there was no adverse possession, and the land was waste and unappropriated, the legal seizin must be considered as passing with the title. But neither Maryland nor any grantee of Maryland was a party to that suit. Nor, even as between the parties, was any actual question

made or evidence offered as to the boundary between Maryland and Virginia. The questions adjudicated were, what was the *nature*, not the extent of territory involved, of Lord Fairfax's title, and what was the character of the title which Denny Fairfax took by the will of Lord Fairfax, he being, at the time of Lord Fairfax's death in 1781, an alien enemy.

Therefore the questions now before us are not affected by that case. Nor do we think it necessary, in view of the conclusion we have reached on other grounds, to consider the legal effect and import of an alleged compromise between the State of Virginia and the devisees of Denny Fairfax and those claiming under them, and which is referred to in the act of December 10, 1796. Revised Code, c. 92.

However, even if it be conceded — which we do not do — that the river Potomac and the soil under it were, by virtue of the grant of Charles I the private property of Lord Baltimore, and that the same lawfully descended to and became vested in Henry Harford, the last Proprietary of Maryland, still, by the acts of confiscation passed by the general assembly of Maryland in 1780, (c. 45 and 49,) all the property and estate of the then Lord Proprietary of Maryland, within that State, were confiscated and seized to the use of the State, and, as public property belonging to the State at the time of the cession of 1791, passed into the ownership of the United States.

As against this proposition, it is argued on behalf of the Marshall heirs that the confiscation acts of Maryland were ineffectual in the present case, because the title to these lands under water is of such character that they could not be forfeited or confiscated, the owner thereof not having right of possession or right of entry thereon. If, as is elsewhere claimed by the appellants, the soil under the river was the subject of sale and devise, it is not easy to see why it may not be subjected to forfeiture and confiscation. Indeed, it was held in *Martin* v. *Waddell* that lands under navigable waters were subject to an action of ejectment. And in the case of *Lowndes* v. *Huntington*, 153 U. S. 1, an action of ejectment, asserting title to land submerged under the waters of Huntington Bay, was sustained.

It is further claimed, that these acts of Maryland were in derogation of the common law and of the express provisions and inhibitions of the constitution and bill of rights of that State adopted four years before the passage of these acts of confiscation; and that the effect of the sixth article of the treaty of 1783 and the ninth article of the treaty of 1794 and of the act of Maryland of 1787 making the treaty of 1783 the law of the State, operated to relieve these lands from forfeiture and restored them to Henry Harford, and that the power to pass acts of confiscation did not inhere as a war power in Maryland.

For an answer to the reasoning advanced by the learned counsel for the appellants in support of these contentions, it is sufficient to refer to the case of *Smith* v. *Maryland*, 6 Cranch, 286, where it was held, affirming the Court of Appeals of the State of Maryland, that by the confiscating acts of Maryland the equitable interests of British subjects were confiscated, without office or entry or other act done, and although such equitable interests were not discovered until long after the peace.

It is finally urged that, even conceding the validity of the confiscation acts, and that they were effectual to divest the title of Henry Harford and put it in the State of Maryland, and even though it was transferred by the act of cession to the United States, yet the latter took the property under a trust or equity created by the treaties with Great Britan, whereby they are in equity bound to restore it to the Harford heirs or to their assigns, or to make just compensation for subjecting it to public purposes. It is said that, when now the United States find themselves in control or possession of a part of the estate of a subject of Great Britain, they should do what they "earnestly recommended" should be done by the States, namely, make a restitution of the confiscated estates.

Whatever force, if any, there may be in such suggestions, it is quite evident that they are political in their nature, and appeal to Congress, and not to the courts. It cannot be maintained, with any show of plausibility, that Congress intended, by the act under which these proceedings are had, that the

Supreme Court of the District of Columbia, or that this court on appeal, should have the right to overturn, after the lapse of a century, rights originating in statutes of Maryland and of the United States, sustained as valid by their courts.

We affirm, therefore, the decree of the court below, in respect to the Marshall heirs, that, in the words of the act of 1886, they have no "right, title or interest in any part of the land or water composing any part of the Potomac River, or its flats, in charge of the Secretary of War."

2. The next claim for consideration is that founded upon a patent issued, on December 6, 1869, from the General Land Office to John L. Kidwell, for "a tract of vacant land containing fifty-seven acres and seventy-one one-hundredths of an acre, called 'Kidwell's Meadows,' and lying in the Potomac River, above the Long Bridge, according to the official certificate and plat of survey thereof bearing date the tenth and twelfth of October, 1867, made and returned by the surveyor of Washington County, pursuant to a special warrant of survey unto the said surveyor directed on the 26th day of June, 1867, by the Commissioner of the General Land Office aforesaid, in virtue of the authority of Congress, under a resolution 'directing the manner in which certain laws of the District of Columbia shall be executed,' approved on the 16th day of February, 1839."

The resolution of Congress referred to was in the following words: "That the acts of the State of Maryland for securing titles to vacant land which were continued in force by the act of Congress of the twenty-seventh of February, 1821, in that part of the District of Columbia which was ceded to the United States by that State, and which have been heretofore inoperative for want of proper officers or authority in the said District for their due execution, shall hereafter be executed, as regards lands in the county of Washington and without the limits of the city of Washington, by the Secretary of the Treasury, through the General Land Office, where applications shall be made for warrants, which warrants shall be directed to the surveyor for the county of Washington, who shall make return to the Commissioner of the General Land Office; and payment for said land, according to the said laws of Maryland, shall be

made to the Treasurer of the United States, whose certificate of such payment shall be presented to the Commissioner of the General Land Office, who shall thereupon issue, in the usual form of patents for lands by the United States, a patent for such land to the person entitled thereto; and the Secretary of the Treasury shall make such regulations as he may deem necessary, and shall designate the officers who shall carry the said acts into effect: Provided, that any land which may have been ceded to or acquired by the United States for public purposes shall not be affected by such acts." 5 Stat. 364.

The space claimed to be comprehended within the courses and distances of the survey, set forth in the patent, is now included within the lines of the raised land known as the reclaimed flats; and the claimants under the patent contend that this occupation by the United States is an appropriation of their property, for which they are entitled to compensation under the proceedings in this suit.

It is alleged in the bill that the patent to Kidwell was issued without authority of law, and was and is null and void, and several grounds are set forth for each allegation. The main contentions on behalf of the Government are that the land covered by the patent was, when it issued, within the limits of the city of Washington, and was therefore excepted from the operations of the resolution of 1839; that the land was, at the time of the cession, a part of the bed of the Potomac River and subject to tidal overflow, and was therefore reserved to the United States for such public uses as ordinarily pertain to the river front of a large city; that said land, as part of the bed of the Potomac River and subject to overflow by the tides, was not the subject of a patent under the resolution of 1839, and the General Land Office and its functionaries were without authority to grant a patent therefor; and that the patent was obtained by fraud, and was ineffectual by reason of certain specified irregularities.

By their answers the claimants under the patent denied these several allegations, and under the issues of law and of fact thus raised a large amount of evidence was taken.

In the opinion of the court below the questions involved

were elaborately considered; and they have been fully discussed before us in the oral and printed arguments of the respective counsel.

Our examination of the subject has brought us to conclusions which render it unnecessary for us to express an opinion on several of the questions that have been so fully treated.

In our consideration of the questions now before us we shall, of course, assume that the river Potomac with its subjacent soil was included in the grant to Lord Baltimore and became vested, by the methods hereinbefore considered, in the State of Maryland, and that, by the act of cession, that part of the river and its bed which is concerned in this litigation passed into the control and ownership of the United States.

Without questioning the power of Congress to have made a special sale or grant to Kidwell in 1869 of the lands embraced in this patent, in the condition that they then were, or even to have provided by a general law for the sale of such lands by the land office, we are of opinion that it was not the intention of Congress, by the general resolution of 1839, to subject lands lying beneath the waters of the Potomac and within the limits of the District of Columbia to sale by the methods therein provided.

The lands which Congress had in view in passing the resolution were stated to be the vacant lands, for securing title to which the laws of Maryland which were in force in 1801 had made provisions, but which laws had remained inoperative, after the cession, for the want of appropriate officers or authority in the District of Columbia for their execution.

The only acts of Maryland which have been brought to our attention as having been in force in 1801, under which a disposition of the lands of the State could be made, are the acts of November session, 1781, c. 20, and of November session, 1788, c. 44. The act of 1781, c. 20, is entitled "An act to appropriate certain lands to the use of the officers and soldiers of this State, and for the sale of vacant lands." The preamble recites that there are large tracts of land within the State "reserved by the late proprietors which may be applied to

the discharge of the engagement of lands made to the officers and soldiers of this State, and that the granting the other vacant lands in this State would promote population and create a fund towards defraying the public burthen." Sections 3 and 4 provide for a land office, and for issuing "common or special warrants of vacant cultivation, and for the surveying of any vacant lands, cultivated or uncultivated."

By the act of November session, 1788, c. 44, all other vacant lands in the State were made liable to be taken up in the usual manner by warrant.

It would seem evident that the lands whose disposition was contemplated by these acts were vacant lands which had been cultivated, or which were susceptible of cultivation.

By such terms of description it would not appear that the disposition of lands covered by tide water was contemplated, because such lands are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce.

In the case of *State* v. *Pacific Guano Co.*, 22 S. Car. 50, the Supreme Court of South Carolina, in discussing a somewhat similar question, said:

"The absolute rule, limiting land owners bounded by such streams to high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the State simply as vacant lands, subject to grant to settlers in the usual way through the land office.

"There seems to be no doubt, however, that the State, as such trustee, has the power to dispose of these beds as she may think best for her citizens, but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow that in order to give effect to an alienation which the State might undertake to make, it would be necessary to have a special act of the legislature expressing in terms and formally such intention."

In the case of *Allegheny City* v. *Reed*, 24 Penn. St. 39, 43,

it was held by the Supreme Court of Pennsylvania that the provisions of the general acts in respect to patents for lands did not relate to the foundation of an island whose soil had been swept away by floods. "The title of the Commonwealth to what remained was not gone, but was no longer grantable under the acts of assembly for selling islands. The foundation of the island belongs to the Commonwealth still, but she holds it, as she does the bed of the river and all sand bars, in trust for all her citizens as a public highway. The act of 1806 was not a grant of the State's title, but only a mode prescribed in which titles might thereafter be granted. . . . The jurisdiction is a special one, and if the subject-matter, to which the act of 1806 relates, were gone — had ceased to be — the board of property had no jurisdiction ; no more than they would have over any other subject not intrusted to their discretion."

In *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce.

In *Shively* v. *Bowlby*, 152 U. S. 1, the discussion was so thorough as to leave no room for further debate. The conclusions there reached, so far as they are applicable to the present case, were as follows :

"It is equally well settled that a grant from the sovereign of land bounded by the sea or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention." 152 U. S. 13.

"We cannot doubt, therefore, that Congress has the power to make grants of land below high-water mark of navigable

waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the territory. But Congress has never undertaken by general laws to dispose of such lands." 152 U. S. 48.

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government." 152 U. S. 49.

"Upon the acquisition of a territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people and in trust for the several States to be ultimately created out of the territory." 152 U. S. 57.

In *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, it was again held that the general legislation of Congress in respect to public lands does not extend to tide lands; that the scrip issued by the United States authorities to be located on the unoccupied and unappropriated public lands could not be located on tide lands; and that the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

As against these principles and these decisions, the claimants under the patent cite and rely on the case of *Browne* v. *Kennedy*, 5 H. & J. 195, to the alleged effect "that the bed

of any of the navigable waters of the State may be granted, and will pass if distinctly comprehended by the terms of any ordinary patent, issuing from the land office, subject only to the existing public uses of navigation, fishery, etc., which cannot be hindered or impaired by the patentee."

Our examination of this case has not satisfied us that the decision therein went as far as is now claimed. As we read it, the gist of the decision was that, by the common law and the law of Maryland, proprietors of land bounded by unnavigable rivers have a property in the soil covered by such rivers *ad filum mediam aquæ*, and that where one holding land on both sides of such a stream had made separate conveyances, bounding on the stream, and the stream had afterwards been diverted or ceased to exist, the two original grantees took each to the middle of the land where the stream had formerly existed, and that a subsequent grantee of the territory formerly occupied by the stream took no title. Such a decision would have no necessary application here.

But we are bound to concede that the Court of Appeals, in the subsequent case of *Wilson* v. *Inloes*, 11 G. & J. 351, has interpreted *Browne* v. *Kennedy* as establishing the principle that the State has the right to grant the soil covered by navigable water, subject to the public or common right of navigation and fishery, and inferentially that a title, originating in a patent issued under general law from the land office, attached to the land, and gave a right of possession when the waters ceased to exist.

The decision in *Browne* v. *Kennedy* was not made till a quarter of a century after the cession by Maryland to the United States, and seems to have been a departure from the law as previously understood and applied, both during the colonial times and under the State prior to the cession.

Thus in *Proprietary* v. *Jennings*, 1 H. & McH. 92, an information was filed by the attorney general of the Lord Proprietor, in 1733, to vacate a patent on the ground that it had been illegally obtained, and the case clearly indicates that land under tide water was not patentable. *Smith and Purviance* v. *State*, 2 H. &. McH. 244, was the case of an

appeal from a decree of the chancellor, dated April 27, 1786, vacating and annulling, on the ground of fraud and misrepresentation, a patent granted to Nathaniel Smith, June 2, 1783, for a tract of land called Bond's Marsh. It was disclosed in the case that Smith was the owner of a tract of land called Bond's Marsh, which had been granted to one John Bond, September 16, 1766, for four acres; and that, on April 20, 1782, Smith, who had become the owner of the tract, petitioned for a warrant of resurvey, stating that he had discovered some vacant land contiguous thereto, and that he was desirous of adding the same to the tract already held by him. Thereupon the surveyor of the county was directed "to lay out and carefully survey, in the name of him, the said Smith, the said tract of land called Bond's Marsh, according to its ancient metes and bounds, adding any vacant lands contiguous thereto," etc. On May 8, 1782, the surveyor certified to the land office that he had resurveyed the said original tract called Bond's Marsh, and that it contained exactly four acres, and that there were seventeen and one half acres of vacant land added. Upon this Smith obtained from the State a grant on the said certificate for twenty-one and a half acres under the name of Bond's Marsh resurveyed, and, July 8, 1784, Smith conveyed for a consideration two undivided third parts of said tract to Samuel Purviance. The bill averred that "although the said Smith by his aforesaid petition did allege and set forth that he had discovered vacant land adjoining the said tract called Bond's Marsh, there was not any vacant land adjoining or contiguous to the same, but that the whole which by the said grant is granted to the said Smith as vacant land added to the original tract aforesaid, now is and at the time of obtaining the said warrant and grant was part of the waters of the northwest branch of Patapsco River." The bill also averred that Purviance was not an innocent purchaser, but knew that the pretended vacancy included in the patent "was not land, but part of the waters of the northwest branch of Patapsco River." The decree vacating the patent was affirmed.

In the foot notes to *Baltimore* v. *McKim*, 3 Bland, 468, the

cases of *Fowler* v. *Goodwin* and *Ritchie* v. *Sample* are referred to. In *Fowler* v. *Goodwin*, the chancellor, on May 19, 1809, refused to direct a patent to issue because a large part of the land lay in the waters of Bell's Cove. In *Ritchie* v. *Sample*, the certificate of survey showed that the tract applied for was a parcel of the Susquehanna River, comprehending a number of small islands, and the chancellor held, July 10, 1816, "that the land covered by the water cannot be called grantable land, though possibly islands may have been taken up together, between which the water sometimes flows."

Of course, the recent decisions of the courts of Maryland, giving to the statutes of that State a construction at variance with that which prevailed at the time of the cession, cannot control our decision as to the effect of those statutes on the territory within the limits of the District of Columbia since the legislative power has become vested in the United States. *Ould* v. *Washington Hospital*, 95 U. S. 303; *Russell* v. *Allen*, 107 U. S. 163, 171; *De Vaughn* v. *Hutchinson*, 165 U. S. 566.

At the utmost, such decisions can only be considered as affecting private rights and controversies between individuals. They cannot be given effect to control the policy of the United States in dealing with property held by it under public trusts.

This aspect of the question was considered by Mr. Justice Cox of the Supreme Court of the District of Columbia, in a case arising out of the legislation of Congress establishing the Rock Creek Park; and wherein the effect of a patent granted by the State of Maryland, in 1803, for a piece of land afterwards included in the park, was in question. It was said in the opinion:

"There is a still more important question, and that is whether the State of Maryland at that period could convey any interest, legal or equitable, in the property. In the act of 1791, ceding this property to the United States, there is this proviso: 'That the jurisdiction of the laws of this State over the persons and property of individuals residing within the limits of the cession aforesaid shall not cease or determine until Congress shall by law provide for the government thereof, under their jurisdiction in manner provided by the article of

the Constitution before recited.' Now this continues in force the jurisdiction of the laws of the State of Maryland over the persons and property of individuals residing therein. To make that applicable to the present case it would be necessary to have extended it to the property held by the State; but it seems to me that that extended no further than to say that the laws which affected private rights should continue in force until proper provision was made by Congress. See what the consequences would be if another construction had been given to it. The State of Maryland extended to the Virginia shore, and suppose that after this cession and before 1801 the State of Maryland had undertaken to cede to the State of Virginia the whole bed or bottom of the Potomac River, from its source to its mouth, including that part in the District of Columbia, doubtless Congress could have had something to say about it after the cession had been made. We are satisfied, therefore, that the proviso does not continue in operation the land laws of the State of Maryland, and consequently no title could be derived at the dates of this survey and patent or at the date when the warrant on which it was based was taken out. We are satisfied that the proviso does not continue in operation the land laws of the State of Maryland as to the public lands owned by the State within the said District, and that consequently no title to such lands could be obtained by patent from the State after the act of 1791."

This decision was adopted and the opinion approved by this court in the case of *Shoemaker* v. *United States*, 147 U. S. 282, 307.

If any doubt is left as to whether Congress intended by the resolution of 1839 to subject the river and its subjacent soil to the ordinary land laws as administered by the land office, that doubt must, as we think, be removed by a consideration of the express language of the proviso therein contained, withholding lands held by the United States for public purposes from the operation of the acts of Maryland. The language of the proviso is as follows: "*Provided, that any lands which may have been ceded to, or acquired by, the United States, for public purposes, shall not be affected by such acts.*"

Placed, as this proviso is, at the end of the enactment, the natural implication is that Congress did not intend to include the lands which the United States held for public purposes within the scope of the resolution, but added the proviso out of abundant caution. However this may be, the intention expressed is clear that, in the administration of the land laws by the Secretary of the Treasury through the general land office, the lands that had been ceded to or acquired by the United States for public purposes should not be affected.

What were the lands so held by the United States? Undoubtedly, the squares and lots selected by the President as sites for the President's House, the Capitol, and other public buildings, and which had been, in legal effect, dedicated to public use by the grantors, were not meant, because the resolution in terms provides that the lands to be affected were such as were within the county of Washington and *without the limits of the city of Washington.*

There may have been other land held by the United States for public purposes outside of the limits of the city of Washington, but surely the Potomac River and its bed, so far as they were embraced in the county of Washington, were included in the terms of the proviso. Indeed, it is not too much to say that they constituted the very land which Congress was solicitous to withhold from sale under proceedings in the land office.

It cannot, we think, be successfully claimed that even if, in 1839, the lands embraced within the Kidwell patent were exempted from the jurisdiction of the land office, yet they were brought within that jurisdiction by the fact that the waters had so far receded in 1869 as to permit some sort of possession and occupancy. Not having been within the meaning of the resolution of 1839, they would not be brought within it by a subsequent change of physical condition, but a further declaration by Congress of a desire to open them to private ownership would be necessary.

Besides, the facts of the case show that Congress is asserting title and dominion over these lands for public purposes. Whether Congress should exercise its power over these re-

served lands by dredging, and thus restoring navigation and fishery, or by reclaiming them from the waters for wharfing purposes, or to convert them into public parks, or by subjecting them to sale, could only be determined by Congress, and not by the functionaries of the land office.

If, then, there was an entire want of authority in the land office to grant these lands held for public purposes, a patent so inadvertently issued, under a mistaken notion of the law, would plainly be void, and afford no defence to those claiming under it as against the demands of the Government.

As was said by this court in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

Similar views were expressed in *Doolan* v. *Carr*, 125 U. S. 618, 624, where it was said:

"There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject,

however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void — void for want of power in them to act on the subject-matter of the patent — not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and therefore should be avoided. . . . It is nevertheless a clear distinction, established by law, and it has often been asserted in this court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue."

The further contention on the part of the United States, that the lands embraced within the Kidwell patent lie within the limits of the city of Washington, and that therefore they were, for that reason, not grantable by the land office, we have not found it necessary to determine, and we refrain from expressing any opinion upon it.

Nor do we need to enter at any length into the question of fraud attending the issue of the patent. We deem it not improper to say, however, that the allegations imputing fraud to the government officials concerned in the issuance of the patent, or to those who were active in procuring it, or in asserting rights under it, do not appear to us to have been sustained by the evidence.

We, therefore, conclude this branch of the case by affirming the decision of the court below, "that the proceedings of Kidwell, under the resolution of 1839, to obtain a patent for the 'Kidwell Meadows,' and the issue of that patent, are inoperative to confer upon the patentee or his assigns any title or interest in the property within its limits, adverse to the complete and paramount right therein of the United States."

It is urged on behalf of those claiming under the Kidwell

patent that a court of equity will not set aside the patent at the suit of the United States, unless on an offer by the latter to return the purchase money; that, in granting the relief, the court will impose such terms and qualifications as shall meet the just equities of the opposing party.

As the invalidity of the patent in the present case was not apparent on its face, but was proved by extrinsic evidence, and as the controversy respecting the title was not abandoned by the defendants, they were not, we think, entitled to a decree for a return of the purchase money, or for costs. *Piersoll* v. *Elliott*, 6 Pet. 95.

3. Before considering the remaining claims it will be necessary to dispose of the question of the river boundary of the city of Washington.

What place should be selected for the permanent seat of Government was, as shown by the histories of the times, a matter of long and bitter debate, occupying a large part of the second session of the second Congress. After the claims of Philadelphia and Baltimore had been adversely disposed of, the question was reduced to a choice between a site on the Susquehanna River in Pennsylvania and one on the Potomac River. And we learn from the recently published journal of William Maclay, Senator from Pennsylvania, 1780–91, and who was an earnest advocate for the former, that the allegation that a large expenditure would be required to render the Susquehanna navigable was used as a decisive argument in favor of the site on the Potomac. Maclay's Journal.

The result was the act of July 16, 1790, c. 28, 1 Stat. 130, whereby the President was authorized to appoint three commissioners to survey and, by proper metes and bounds, to define and limit, under his direction, a district of territory, to be located on the river Potomac. By the same act, the commissioners were empowered "to purchase or accept such quantity of land on the eastern side of the said river, within the said district," as the President might deem proper for the use of the United States, and *according to such plans as he might approve*, and were required, prior to the first Monday of December, 1800, to provide suitable buildings for the ac-

commodation of Congress and of the President and for the public offices of the Government.

It has been the practice in this country, in laying out towns, to have the plat surveyed, and a plan made in accordance with the survey, designating the streets, public squares and open spaces left for commons, wharves or any other public purpose. Those streets, squares and open spaces are thus dedicated to the public by the proprietors of the soil, whether they be the State or private individuals. When a town is situated on a navigable river, it is generally the custom to leave an open space between the line of the lots next the river and the river itself. This was done by William Penn in 1682 in the original plan of the city of Philadelphia on the Delaware River front, and he called it a top common; and in 1784 his descendants, the former proprietors, in their plan of Pittsburgh, adopted a similar measure of leaving such an open space, and they called it Water street. *Birmingham* v. *Anderson*, 48 Penn. St. 258.

In 1789 the proprietors of the land on which the city of Cincinnati is built pursued the same policy, and in their plan the ground lying between Front street and the Ohio River was set apart as a common for the use and benefit of the town forever. *Cincinnati* v. *White*, 6 Pet. 431; *Barclay* v. *Howell's Lessee*, 6 Pet. 498; *New Orleans* v. *United States*, 10 Pet. 662; *Barney* v. *Keokuk*, 94 U. S. 324; *Rowan's Executors* v. *Portland*, 8 B. Monroe, 232.

Our examination of the evidence has led us to the conclusion that it was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac River, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in commerce free access to the navigable water, and that such intention has never been departed from.

While, as we have already seen, the United States became vested with the control and ownership of the Potomac River and its subjacent soil, within the limits of the District, by virtue of the act of cession by the State of Maryland, it must yet be conceded that, as to the land above high-water

mark, the title of the United States must be found in the transactions between the private proprietors and the United States, consisting of the mutual agreements entered into by the proprietors, their deeds of conveyance to the trustees, their concurrence in the action of the commissioners in laying out plats and giving certificates, and their recognition of the several plans of the city made under the direction of the President.

As we have already said, our inquiry is as to the intention of the parties to be affected, but that intention need not be expressed by any particular form or ceremony, but may be a matter of necessary implication and inference from the nature and circumstances of the case.

We cannot undertake to comment upon each and every step of the transactions, but shall briefly refer to those of the most significance.

And, first, in the agreement of March 13, 1791, signed by the principal proprietors, including Robert Peter, David Burns, Notley Young and Daniel Carroll, are the following recitals:

"We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal City laid off upon our lands, do hereby agree and bind ourselves, our heirs, executors and administrators, to convey in trust to the President of the United States, or Commissioners, or such person or persons as he shall appoint, by good and sufficient deeds in fee simple, the whole of our respective lands which he may think proper to include within the lines of the Federal City, for the purposes and on the conditions following:

"The President shall have the sole power of directing the Federal City to be laid off in what manner he pleases. He may retain any number of squares he may think proper for public improvements, or other public uses, and the lots only which shall be laid off shall be a joint property between the trustees on behalf of the public and each present proprietor, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be after the city shall be laid out.

"For the streets the proprietors shall receive no compensa-

tion, but for the squares or lands in any form which shall be taken for public buildings or any kind of public improvements or uses, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public," etc.

And by an agreement of March 30, 1791, the proprietors of lots in Carrollsburgh, including Daniel Carroll and Notley Young, it was provided as follows:

"We, the subscribers holding or entitled to lots in Carrollsburgh, agree with each other and with the President of the United States that the lots and land we hold or are entitled to in Carrollsburgh shall be subject to be laid out at the pleasure of the President as part of the Federal City, and that we will receive one half the quantity of our respective lots as near their present situation as may agree with the new plan, and where we may be entitled now to only one lot or otherwise not entitled on the new plan to one entire lot, or do not agree with the President, Commissioners or other person or persons acting on behalf of the public on an adjustment of our interest, we agree that there shall be a sale of the lots in which we may be interested respectively, and the produce thereof in money or securities shall be equally divided, one half as a donation for the use of the United States under the act of Congress, the other half to ourselves respectively. And we engage to make conveyances of our respective lots and lands aforesaid to trustees or otherwise whereby to relinquish our rights to the said lots and lands, as the President or such Commissioners or persons acting as aforesaid shall direct, to secure to the United States the donation intended by this agreement."

A similar agreement was entered into by the owners of the lots in the town of Hamburgh.

Following these agreements came the conveyances by the several proprietors to Beall and Gantt, trustees. Without quoting from them at length, and referring to those of David Burns and Notley Young, copied in full in the Statement of the Case, it is sufficient here to say that the proprietors, by said conveyances, completely divested themselves of all title to the tracts conveyed, and that the lands were granted to the

said trustees, "To have and to hold the hereby bargained and sold lands with their appurtenances to the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heirs of such survivor, forever, to and for the special trust following, and no other, that is to say, that all the said lands hereby bargained and sold, or such part thereof as may be thought necessary or proper, be laid out together with the lands for a Federal City, with such streets, squares, parcels and lots as the President of the United States for the time being shall approve; and that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the Commissioners for the time being appointed by virtue of an act of Congress entitled 'An act for establishing the temporary and permanent seat of the Government of the United States,' and their successors, for the use of the United States forever, all the said streets, and such of the said squares, parcels and lots as the President shall deem proper for the use of the United States. And that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid out and divided, that a fair and equal division of them shall be made," etc.

In a suit between the heirs of David Burns and the city of Washington and the United States this court had occasion to pass upon the nature of these grants, and used the following language:

"It is not very material, in our opinion, to decide what was the technical character of the grants made to the Government; whether they are to be deemed mere donations or purchases. The grants were made for the foundation of a Federal City; and the public faith was necessarily pledged, when the grants were accepted, to found such a city. The very agreement to found a city was itself a most valuable consideration for these grants. It changed the nature and value of the property of the proprietors to an almost incalculable extent. The land was no longer to be devoted to agricultural purposes, but acquired the extraordinary value of city lots. In proportion to the success of the city would be the enhancement of this value; and it required scarcely any

aid from the imagination to foresee that this act of the Government would soon convert the narrow income of farmers into solid opulence. The proprietors so considered it. In this very agreement they state the motive of their proceedings in a plain and intelligible manner. It is not a mere gratuitous donation from motives of generosity or public spirit; but in consideration of the great benefits they expect to derive from having the Federal City laid off upon their lands. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity, and never was so treated in the negotiations of the parties. But, as has been already said, it is not in our view material whether it be considered as a donation or a purchase, for in each case it was for the foundation of a city." *Van Ness* v. *Washington*, 4 Pet. 232, 280.

In *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 686, after an elaborate consideration of the agreements and conveyances, it was said:

"Undoubtedly Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world besides. It can hardly be possible that the establishment of the city upon the plan adopted, including the highway on the river bank, could have left the right of establishing public wharves, so essential to a great centre of population and wealth, a matter of altogether private ownership."

Thomas Johnson, Daniel Carroll and David Stuart were, on January 22, 1791, appointed by President Washington such Commissioners; and on March 30, 1791, by his proclamation of that date, the President finally established the boundary lines of the District; directed the Commissioners to proceed to have the said lines run, and, by proper metes and bounds, defined and limited; and declared the territory, so to be located, defined and limited, to be the district for the permanent seat of the Government of the United States.

With the lines of the District thus established, the next important question that presented itself was the location of the

Federal City, in which were to be erected the buildings for the accommodation of Congress, the President's House, and the public offices.

We are here met with a serious controversy as to the place and nature of the river boundary of the city. The record contains a large amount of evidence, consisting chiefly of maps and plans, of correspondence between the President and the Commissioners, the deeds of conveyance by the original proprietors, and the testimony of old residents, some of whom had acted as surveyors and engineers during the early history of the city.

We cannot complain of having been left unassisted to examine and analyze this mass of evidence, for we have had the aid of the painstaking opinion of the court below and of a number of able briefs on all sides of the controversy.

As a national city was to be founded, which was to be the permanent seat of the Government of the United States, where foreign nations would be expected to be represented, and as the site selected was on a navigable, tide-water river, inviting foreign and domestic commerce, we should naturally expect to find the city located in immediate proximity to the river, with public wharves and landings, and with a municipal ownership and control of the streets and avenues leading to and bounding on the stream.

As we have seen, the agreement of the proprietors provided that "the President shall have the sole power of directing the Federal City to be laid off in what manner he pleases."

In the exercise of that power the President, at different times, caused several maps or plans of the city to be prepared, the authenticity and effect of which constitute a large part of the controversy in the present case.

The earliest of these plans was that prepared in 1791, by Major L'Enfant, and was by him submitted to the President on August 19 of that year. On October 17, 1791, after advertisement, and under direction by the President, the Commissioners sold a few lots. On December 13, 1791, by a communication of that date, the President placed before Congress this L'Enfant plan. On this plan the squares were unnumbered and the streets unnamed.

Afterwards differences arose between L'Enfant and the Commissioners, which resulted in the removal of L'Enfant by the President early in March, 1792. Thereupon Andrew Ellicott was directed by the President to prepare this plan so that it might be engraved, but Major L'Enfant refused to permit Ellicott to use his original plan, and Ellicott proceeded to prepare a plan from materials in his possession and from such information as he had acquired while acting as surveyor under L'Enfant.

It may be well to mention, though out of chronological order, that in a letter of February, 1797, President Washington, in a letter to the Commissioners, referring to L'Enfant's plan and to certain alterations that had been made, stated that Mr. Davidson, a purchaser of lots, "is mistaken if he supposed that the transmission of Major L'Enfant's plan of the city to Congress was the completion thereof; so far from it, it would appear from the message which accompanied the same that it was given as a matter of information only to show what state the business was in; that the return of it was requested; that neither house of Congress passed any act consequent thereupon; that it remained as before under the control of the Executive."

Ellicott completed his plan and laid it before the President on February 20, 1792. This plan was engraved at Boston and at Philadelphia — the engraved plans differing in the circumstance that the latter did and the former did not exhibit the soundings on the river front and on the Eastern Branch.

On October 8, 1792, the Commissioners, who had been notified that "about 100 squares were prepared and ready for division," had a second public sale of lots — a copy of Ellicott's engraved plan being exhibited at the sale. Under the general authority conferred upon them by the President, on September 29, 1792, to make private sales at such prices and on such terms as they might think proper, the Commissioners, before November 6, 1792, had effected private sales of fifteen lots.

Between 1792 and 1797, this plan of Ellicott's, known as the "engraved plan," was circulated by the Commissioners in

the United States, and forwarded to European countries from the Office of State, as the plan of the city, and was referred to as such by the Commissioners in their negotiations for loans for the purpose of carrying on the public buildings.

On February 27, 1797, the Commissioners addressed a letter to the President, in which, among other things, they said:

"What Mr. Davidson alludes to in his memorial, when he says deviations have been made since the publication of the engraved plan, we know not; that plan required the doing of many acts to carry it into effect — such as the laying out and bounding a water street on the waters which surround the city, and laying out squares where vacant spaces unappropriated were left in several parts of the city. Acts of this kind have no doubt from time to time been done, and with the full consent of all interested."

It appears that the Ellicott plan was, in some respects, incomplete, as it did not show all the squares or correctly delineate the public reservations, and was made before the completion of the surveys.

The first appearance of the Dermott map, that we find in this record, was on June 15, 1795, when, as appears in the proceedings of the Commissioners of that date, "Dermott is directed to prepare a plat of the city with every public appropriation plainly and distinctly delineated, together with the appropriation now made by the board for the National University and Mint."

On March 2, 1797, by an instrument under his hand and seal, President Washington requested Thomas Beall and John M. Gantt, the trustees, to convey to the Commissioners all the streets in the city of Washington, as they are laid out and delineated in the plan of the city thereto annexed; and also the several squares, parcels and lots of ground therein described. Though in this communication President Washington mentioned a plan of the city as annexed thereto, yet it seems that a plan was not so actually annexed. And on June 21, 1798, the Commissioners wrote a letter to President Adams in the following terms:

"At the close of the late President's administration he exe-

cuted an act directing the trustees of the city of Washington to convey to the Commissioners the streets of said city and the grounds which were appropriated to public use. In the press of business the plan referred to was not annexed. We now send it by Mr. Nourse, with the original act and the draft of another act, which appears to us proper to be executed by the present President, in order to remove any objection to a compliance with the late President's request arising from the omission above mentioned. As these acts are the authentic documents of the title of the public to the lands appropriated, we shall write to Mr. Craik, or some other gentleman, to take charge of their return rather than trust them to the mail."

Accordingly, on July 23, 1798, President Adams, by an instrument reciting the act executed by his predecessor on March 2, 1797, and the non-annexation to that act of the plan of the city therein mentioned, makes known to Beall and Gantt, trustees, that he has caused the said plan to be annexed to the said act, and requests them to convey to the Commissioners for the use of the United States forever, according to the tenor of the act of Congress of July 16, 1790, "all the streets in the said city of Washington, as they are laid out and delineated in the plan of the said city hereto annexed, and all the squares, parcels and lots of ground described in the said act as public appropriations."

The following entry, as of the date of August 31, 1798, appears in the proceedings of the Commissioners: "Mr. William Craik delivered into the office the plan of the city of Washington, with the acts of the late and present Presidents."

Some dispute subsequently arose as to whether the plan which President Washington intended to have annexed to his act was the plan of Ellicott or that of Dermott. Thus, in an opinion delivered on December 16, 1820, by Attorney General Wirt to President Monroe, it was said that "if President Washington has, as Mr. Breckinridge states, previously ratified Ellicott's engraved plan, this must be considered as the plan he intended to annex, and it was not competent for President

Adams to give the instrument of writing a different direction by annexing to it a different plan."

But this opinion was evidently given in ignorance of the proceedings of the Commissioners on June 21, 1798, already referred to, and in which it appears that, in their letter to President Adams, they mention that the plan sent was "the last plan of the city, made by Mr. Dermott, and referred to in said instrument of writing" — the said instrument of writing being President Washington's act of March 2, 1797.

We also find in the record that, on January 7, 1799, Attorney General Lee, in an opinion given to President Adams, said:

"Already a plan of the city has been approved and ratified by the President of the United States, who has signed the plan itself, or an instrument referring to the plan, which I presume is a sufficient authentication. If this plan, under the President's signature, varies from the L'Enfant's or Ellicott's essays, they must yield to it, as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President. It is not supposed that this is incomplete in any respect, except in relation to the rights appurtenant to the water lots, and to the street which is to be next to the water courses."

The record also contains a copy of a report of a committee of the House of Representatives, of April 8, 1802, in which it is said, referring to the Dermott plan:

"This plan has been signed by Mr. Adams, in conformity with which the trustees were directed by him to convey the public grounds to the United States, and is considered by the Commissioners the true plan of the city. The plan has never been engraved or published. . . . Your committee are of the opinion that suffering the engraved plan, which is no longer the true plan of the city, to continue to pass as such, may be productive of great deception to purchasers; and that measures ought to be taken for its suppression."

On July 14, 1804, President Jefferson, in a communication to Mr. Thomas Monroe, Superintendent of Public Buildings, said:

"The plan and declaration of 1797 were final so far as they

went, but even they left many things unfinished, some of which still remain to be declared."

What would seem to be decisive of the dispute is the fact that in the act or instrument signed by President Washington on March 2, 1797, is contained, by metes and bounds, a specification of the reservations, seventeen in number, and those metes and bounds do not coincide with the reservations indicated upon the Ellicott plan, but do accurately coincide with the reservations as indicated in the Dermott plan.

We, therefore, cannot doubt that the Dermott map was the one intended by President Washington to be annexed to his act of March 2, 1797.

But while we regard the Dermott map as sufficiently authenticated, we do not accept the contention that it is to be considered as the completed and final map of the city, and that it alone determines the questions before us.

On the contrary, we think it plain, upon the facts shown by this record, that the President, the Commissioners and the surveyors proceeded, step by step, in evolving a plan of the city. Under each of the plans mentioned lots were sold and private rights acquired. Changes were, from time to time, made to suit the demands of interested parties, and additions were made as the surveys were perfected. Even the last map approved by President Washington, as was said by President Jefferson in 1804, left many things unfinished, some of which still remained to be declared.

In short, we think that these several maps are to be taken together as representing the intentions of the founders of the city, and, so far as possible, are to be reconciled as parts of one scheme or plan.

Pursuing such a method of investigation, we perceive that, in the first map submitted to Congress by President Washington on December 13, 1791, as "the plan of the city," there is between the lots fronting on the Potomac and the river itself an open space, undoubtedly intended as a thoroughfare and for public purposes. It is true that this open space is not named as a street. But none of the other streets and avenues on this map are named. And we read in a letter of

the Commissioners to Major L'Enfant, dated September 9, 1791, as follows:

"We have agreed that the Federal District shall be called 'The Territory of Columbia,' and the Federal City 'The City of Washington;' the title of the map will therefore be 'A map of the City of Washington in the Territory of Columbia.' We have also agreed the streets be named alphabetically one way, and numerically the other; the former divided into north and south letters, the latter into east and west numbers from the capitol. Major Ellicott, with proper assistants, will immediately take and soon furnish you with soundings of the Eastern Branch to be inserted in the map."

This L'Enfant plan contains all the essential features of the city of Washington as they exist to-day.

Owing to the disputes between L'Enfant and the Commissioners, as already stated, the former withdrew, and Andrew Ellicott, who had been acting as an assistant to L'Enfant, proceeded with the work, with the result that about October, 1792, the engraved or Ellicott map was completed and in the hands of the Commissioners. This map shows the squares numbered, the avenues named, and the lettered and numbered streets all designated. It also shows on the front on the Potomac River and on the Eastern Branch, between the ends of the lots and the squares and the water, an open, continuous space or street, extending through the entire front of the city.

But it must be said of this map that it did not show all the squares or correctly place the public reservations, and, indeed, it was made before the completion of the surveys. As was said by the Commissioners in their letter of February, 1797, "that plan required the doing of many acts to carry it into effect, such as the laying out and bounding a water street on the waters which surround the city."

Then came, in March, 1797, the Dermott map, which indicated the location and extent of the public reservations or appropriations, and also certain new squares, not shown on the engraved plan, and which were laid out on the open spaces at the intersection of streets appearing on the engraved plan; and also exhibited the progress that had been made since

1792, in laying down the city upon the ground in accordance with the scheme of the previous plans. But, as was said by President Jefferson on July 14, 1804, in a passage previously quoted, "The plan and declaration of 1797 were final so far as they went; but even they left many things unfinished, some of which still remain to be declared."

President Jefferson was probably led to form this opinion by his personal knowledge of the situation, which was intimate. And here may well be quoted a portion of a long communication addressed to him by Nicholas King, surveyor of the city of Washington, dated September 25, 1806, in which the writer, adverting to the several plans and to certain regulations published by the Commissioners on July 20, 1795, said:

"Perfecting this part of the plan, so as to leave nothing for conjecture, litigation or doubt, in the manner which shall most accord with the published plans, secure the health of the city, and afford the most convenience to the merchants, requires immediate attention. . . . The principle adopted in the engraved plan, if carried into effect and *finally established in the plan now laid out upon the ground*, when aided by proper regulations as to the materials and mode of constructing wharves for vessels to lay at and discharge their cargoes on, seems well calculated to preserve the purity of the air. The other streets will here terminate in a street or key, open to the water, and admitting a free current of air. It will form a general communication between the wharves and warehouses of different merchants, and, by facilitating intercourse, render a greater service to them than they would derive from a permission to wharf as they pleased. The position of this Water Street being determined, it will ascertain the extent and situation of the building squares and streets on the made ground, from the bank of the river and bring the present as near to the published plan as now can be done. It will define the extent and privileges of water lots, and enable the owners to improve without fear of infringing on the rights of others. . . . Along the water side of the street, the free current or stream of the river should be permitted to flow and carry with it whatever may have been brought from the city along

the streets or sewers. The wharves permitted beyond this street to the channel may be stages or bridges with piers and sufficient waterways under them. And on the wharves so erected, it would seem proper to prohibit the erection of houses or anything obstructing a free circulation of air. . . . The surveying is now so far completed that it can be done with the utmost precision, and every foot of ground within the limits of the Federal City, with its appurtenant privileges, may be so defined as to prevent litigation or doubt on the subject. If it is not done at this time the evils will increase and every year add to our difficulties. Even now, from the various decisions or neglects, alterations or amendments which have heretofore taken place, some time an investigation may be necessary in the arrangement of a system which shall combine justice with convenience. If this decision is left to a future period and our courts of law, they can only have a partial view of the subject, and any general rule they may adopt may be attended with serious disadvantages."

Nicholas King himself prepared a plan or serial map of sixteen sheets in 1803. There is evidence tending to show that this was done in pursuance of an order of the Commissioners; and in reference to it the record contains the testimony, in the present case, of William Forsythe, who had been connected for many years with the office of surveyor of the city, in subordinate capacities and as the head of it, and who was in 1876 the surveyor of the District of Columbia. He says:

"I can only say that it is the best in point of execution of the early maps of the city; and that it has been acted upon ever since it has been prepared in connection with the affairs of the surveyor's office, and that the lines of wharfing indicated upon the map from Rock Creek to Easby's Point have been followed; in other words, that all the improvements, such as reclamation of land, and the wharves that have been built in that section of the city, were made and built in accordance with the plan of wharfing, etc., indicated on this map. . . . The map of 1803 has always, in my recollection going back forty years in connection with the surveying

department of the city, been considered and acted upon as an official map, and from conversation with those who have preceded me in the surveyor's office, I know that it was always considered by them as an authentic official map of the city. It has in fact been the standard map."

While it is true that this map of 1803 was never officially approved or authenticated by any President of the United States, as were the earlier maps, and is not therefore of conclusive effect, it is, in our opinion, a legitimate and important piece of evidence.

In connection with the later map of 1803, prepared by King, ought also to be considered a series of plans drawn by him and laid before the Commissioners on March 8, 1797, in a communication, as follows:

"I send you herewith a series of plans exhibiting that part of the city which lies in the vicinity of the water, and includes what is called the water property, from the confluence of Rock Creek with the Potomac to the public appropriation for the Marine Hospital on the Eastern Branch. What appears to me the most eligible course for Water street, with the necessary alterations in the squares already laid out, or the new ones which will be introduced thereby, are distinguishable by the red lines which circumscribe them, while those already established are designated by two black lines."

Without pausing to examine the King map and plans in their particulars, to some of which we may have occasion to recur at a subsequent stage of our investigation, it is enough to here state that the existence of a water street in front of the city, and comporting, in the main, with its course as laid down on the engraved plan of the Ellicott plan, is distinctively recognized.

The record also contains a map proposed by William Elliott, surveyor of the city of Washington, in 1835, and adopted in 1839 by the city councils and approved by President Van Buren, entitled "Plan of part of the City of Washington, exhibiting the water lots and Water street, and the wharves and docks thereon, along the Potomac, from E to T streets south." This map exhibits Water street as extending in front

of that part of the city embraced in the map, and it also shows that what are styled "water lots" front on the north side of Water street.

We have not overlooked the fact disclosed by the evidence in the record that, even during the presidency of General Washington, there were complaints made, from time to time, of alleged changes or departures from the L'Enfant and Ellicott plans, and that also efforts were made, sometimes successfully, to get changes allowed. And on November 10, 1798, a memorial was addressed to President Adams by some of the proprietors of lands within the city, complaining of changes made by the Dermott plan in some of the features of the previous plans, and calling attention to the incompleteness of that plan in omitting a delineation of Water street.

But these complaints appear to have been ineffectual. Nor are we disposed to understand them as meaning more than a call for a perfect delineation of Water street — not as asserting that the Dermott plan was an abandonment of such a street.

In connection with the various maps and plans must be read the regulations issued by the Commissioners while they were acting, and their contract and agreements with the proprietors and purchasers.

In July, 1795, certain wharfing regulations were published, containing, among other things, the following: "That all the proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the Eastern Branch as they may think convenient and proper, not injuring or interrupting the channels or navigation of the said waters; leaving a space, wherever the general plan of the streets of the city requires it, of equal breadth with those streets; which, if made by an individual holding the adjacent property, shall be subject to his separate occupation and use, until the public shall reimburse the expense of making such street; and where no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground." This was certainly an assertion of the control by the public, then represented by the Commissioners, over the

fast land adjoining the shores and extending to the navigable channels.

Another fact of much weight is that, in the division of squares between the Commissioners and Notley Young, the plats of which were signed by the Commissioners and by Notley Young, in March, 1797, the southern boundary is given as Water street.

It is, doubtless, true, as argued in the brief filed for those who succeeded to Young's title, that such a division would not, of itself, have the effect of vesting title in fee to the land in the United States. Nor, perhaps, would such a transaction operate as a donation by Young to the city of the territory covered by the street, although it might be deemed a dedication thereof to public use as a street.

But the importance of the fact consists in the recognition by Young of the existence of Water street, as an existing or projected southern boundary of the squares.

Stress is laid, in the arguments for the appellants, on the use of the term "water lots," in the agreement of December 24, 1793, between the Commissioners for the Federal buildings, of the one part, and Robert Morris and James Greenleaf, of the other part, and also on the statement made, in that agreement, that Morris and Greenleaf were entitled to the lots in Notley Young's land, and, of course, to the privileges of wharfing annexed thereto.

It should, however, be observed that the term "water lots," as used in that agreement, and elsewhere in the proceedings of the Commissioners, does not necessarily mean that such lots were bounded by the Potomac River. The lots fronting on Water street were spoken of as "water lots" because next to that street and nearer to the river than the lots lying behind — a fact which gave them additional value. That this was the usage in speaking of "water lots" appears in Elliott's map made in 1835, and approved by President Van Buren in 1839, where the lots abutting on Water street on the south are termed "water lots."

As to the statement in the agreement that Morris and Greenleaf, as purchasers from the Commissioners of lots in

Notley Young's land, would be entitled to the privilege of wharfing annexed thereto, it must be remembered that that language was used in 1793, before the division of squares between Notley Young and the Commissioners was made.

It is true that in the return made by the surveyors, on June 15, 1793, of squares 472, 473, 505, 506, south of 506, and south of south 506, they bounded said lots by the Potomac River. But in a further and subsequent return, made on December 14, 1793, these squares are given, in each instance, a boundary by Water street. And on June 22, 1794, the Commissioners adopted the later survey, as shown by an entry on their minutes, as follows:

"The Commissioners direct that the surveys and returns made of the part of the city in Mr. Young's land, adjoining the Potomak, leaving Water street according to the design of the plan of the city, be acted on instead of the returns made by Major Ellicott in some instances bounded with and in others near the water."

And we learn, from the evidence in the record, that on July 12, 1794, by a letter of that date, Thomas Freeman, a surveyor in the employ of the Commissioners, informed them that "Water street on Potomak River is adjusted and bounded."

So that Morris and Nicholson, who succeeded to the interest of Greenleaf, took under their contract squares laid off in Notley Young's land with a boundary in every instance on Water street.

By various ordinances, from time to time passed, the city, from its organization in 1802, exercised jurisdiction over the portions of the Potomac River and the Eastern Branch adjoining the city and within its limits. So, too, Congress, by the act of May 15, 1820, c. 104, 3 Stat. 583, enacted that "the city should have power to preserve the navigation of the Potomac and Anacostia Rivers, adjoining the city, to erect, repair and regulate public wharves, and to deepen creeks, docks and basins; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the anchorage, stationing and mooring of vessels."

Controversies arose, involving the meaning of the agree-

ments between the original proprietors and the United States and the city of Washington, and as to the effect of subsequent acts of Congress and ordinances of the city authorities, and these questions found their way into the courts.

Van Ness and Wife v. *Washington*, 4 Pet. 232, grew out of an act of Congress of May 7, 1822, authorizing the corporation of Washington, in order to improve certain parts of the public reservations and to drain the low grounds adjoining the river, to lay off in building lots certain parts of the public reservations and squares, and also a part of B street, as laid out and designated in the original plan of the city, which lots they might sell at auction, and apply the proceeds to those objects, and afterwards to enclosing, planting and improving other reservations, the surplus, if any, to be paid into the Treasury of the United States. The act also authorized the heirs or vendees of the former proprietors of the land on which the city was laid out, who might consider themselves injured by the purposes of the act, to institute in the Circuit Court of the District of Columbia a bill in equity against the United States, setting forth the grounds of any claim they might consider themselves entitled to make; the court to hear and determine upon the claim of the plaintiffs, and what portion, if any, of the money arising from the sale of the lots they might be entitled to, with a right of appeal to this court. The plaintiffs, Van Ness and wife, filed their bill against the United States and the city of Washington, claiming title to the lots which had been thus sold, under David Burns, the original proprietor of that part of the city, on the ground that by the agreement between the United States and the original proprietors, upon the laying out of the city, those reservations and streets were forever to remain for public use, and without the consent of the proprietors could not be otherwise appropriated or sold for private use; that by such sale and appropriation for private use the right of the United States thereto was determined, or that the original proprietors reacquired a right to have the reservations laid out in building lots for their joint and equal benefit with the United States, or that they were in equity entitled to the whole or a moiety of the

proceeds of the sales of the lots. This court held that the United States possessed an unqualified fee in the streets and squares, and that no rights or claims existed in the former proprietors or their heirs.

This decision is criticised by the learned counsel of the appellants as founded on an erroneous assumption by the court, that Beall and Gantt, the trustees, had made a conveyance, on November 30, 1791, of all the premises contained in the previous agreements, including the squares or lots for public buildings and the land for the streets. And, indeed, it does appear, by the evidence in the present case, that although both President Washington and President Adams did formally request the trustees to convey to the Commissioners all the streets in the city of Washington, and also the several squares, parcels and lots of ground appropriated for public purposes, yet that the trustees, owing to disputes and objections on the part of several of the original proprietors, failed to ever actually execute such a deed of conveyance. Yet even if such an alleged state of facts had been made to appear to the court, namely, that no conveyance of the land in the streets had been actually made by the trustees, we think the conclusion reached by the court in that case could not have been different.

In the act of Maryland, ratifying the cession, and entitled "An act concerning the Territory of Columbia and the City of Washington," passed December 19, 1791, c. 45, was contained the following (§ 5):

"*And be it enacted*, That all the squares, lots, pieces and parcels of land within the said city, which have been or shall be appropriated for the use of the United States, *and also the streets*, shall remain and be for the use of the United States; and all the lots and parcels, which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchase . . ."

In August, 1855, Attorney General Cushing rendered to the Secretary of the Interior an opinion upon the question of the authority of the Commissioner of Public Buildings, as

successor of the early Commissioners, to sell and convey lots in the city of Washington. Adverting to the act of the legislature of Maryland of December 19, 1791, and citing the section above quoted, he said:

"This provision seems to have been designed to have the legal effect to vest in the United States the fee of all the lots, conveyed for their use, and also to perfect the titles of purchasers to whom sales had been or should be made according to the terms of the act of Congress." 7 Opinions of Attys. Genl. 355.

And even if the act of Maryland did not avail, of itself, to convey unto the United States a legal statutory title, the facts show that the United States were entitled to a conveyance from the trustees, and a court of equity will consider that as having been done which ought to have been done.

In point of fact the trustees did, by their deed of November 30, 1796, on the request of President Washington, convey to the Commissioners in fee simple all that part of the land which had been laid off into squares, parcels or lots for buildings and remaining so laid off in the city of Washington, subject to the trusts remaining unexecuted.

In the case of *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, it was held, following *Van Ness* v. *Washington*, that the fee of the streets was in the city, and further that the strip between the squares and lots and the Potomac River was such a street, and that there were no private riparian rights in Notley Young and those who succeeded to his title.

In the discussion of the evidence that led to such a conclusion Mr. Justice Matthews said:

"It has been observed that both squares No. 472 and No. 504 are bounded on the southwest by Water street. This street was designated on the adopted plan of the city as occupying the whole line of the river front, and separating the line of the squares from the river for the entire distance from Fourteenth street to the Arsenal grounds. It is alleged in the bill in respect to this street that there was traced on the map of the city 'but a single line denoting its general course

and direction; that the dimensions of said Water street, until the adoption, on the 22d of February, 1839, of the certain plan of one William Elliott, as hereinafter more particularly mentioned, were never defined by law; and that the said Water street was never, in fact, laid out and made in the said city until some time after the close of the recent civil war; that before the commencement of the said civil war one high bluff or cliff extended along the bank of said river in the city of Washington, from Sixth street west to Fourteenth street west; that to the edge thereof the said bluff or cliff, between the points aforesaid, was in the actual use and enjoyment of the owners of the land which it bounded towards the river; that public travel between the two streets last above mentioned, along the said river, could only be accomplished by passing over a sandy beach, and then only when the tide was low; and that what is now the path of Water street, between the two streets aforesaid, was and has been made and fashioned by cutting down the said cliff or bluff and filling in the said stream adjacent thereto.'

"These allegations, in substance, are admitted in the answer to be true, with the qualification that the width of the street was left undefined because it constituted the whole space between the line of the squares and the river, whatever that might be determined to be from time to time; but that the Commissioners, on March 22, 1796, made an order directing it to be laid out eighty feet in width from square 1079 to square east of square 1025, and to 'run out the squares next to the water and prepare them for division;' and that it was so designated on the maps of the city in 1803. If not, the inference is all the stronger that the whole space south of the line of the lots was intended to be the property and for the use of the public. *Barclay* v. *Howell's Lessees*, 6 Pet. 498. In *Rowan's Exrs.* v. *Portland*, 8 B. Monroe, 232, 239, that inference was declared to be the legal result of such a state of facts.

"It is quite certain that such a space was designated on the official map of the city as originally adopted, the division and sale of the squares and lots being made in reference to it.

What the legal effect of that fact is we shall hereafter inquire, and while we do not consider it to be qualified by the circumstance set forth as to the actual history of the street as made and used, they perhaps sufficiently account for the doubt and confusion in which the questions of right brought to issue in this litigation seem for so long a period to have been involved.

"The transaction between Notley Young and the public authorities, as evidenced by the documents and circumstances thus far set forth, was equivalent in its result to a conveyance by him to the United States in fee simple of all his land described, with its appurtenances, and a conveyance back to him by the United States of square No. 472, and to Greenleaf of square No. 504, bounded and described as above set forth, leaving in the United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water street, intervening between the line of the squares as laid out and the Potomac River."

It is earnestly urged in the present case that the court in that case did not have before it the Dermott map, and was not aware that said map was the one approved by President Washington on March 2, 1797. From this it is reasoned that, if the court had been informed that the Dermott map was the real and only official plan, and had seen that Water street was not laid out or designated upon it, a different conclusion as to the ownership of Water street would have resulted.

It is by no means clear that the Dermott plan was not before the court. If it was, as is now contended, the only plan which was approved by President Washington as the official map, it would seem very singular that the able and well-informed counsel who represented the respective parties in that case did not think fit to put it in evidence, and make it the subject of comment.

We are inclined to infer that the Dermott plan was the very one referred to in the bill and answer in that case. Thus, in the bill, in the portion above quoted, it was alleged, in respect to Water street, that there was traced on the map of the city "but a single line, denoting its general course and direction;" and in the answer it is stated that the width of

the street was left undefined, because it constituted the whole space between the line of the squares and the river.

An inspection of the Dermott plan discloses such a single line, extending along the entire river front on both the Potomac and the Eastern Branch, and outside of the line of the squares and lots.

But the Ellicott plan, as engraved in Philadelphia, discloses a well-defined space, of varying width, between the river and the line of the lots and squares, extending along the entire front of the city.

There are expressions used in the opinion of the court, in that case, that show that the attention and consideration of the court were not restricted to a single map. Thus, on page 679, after adverting to the order of the Commissioners on March 22, 1796, directing that Water street should be laid out eighty feet in width, the court adds "that it was so designated on the maps of the city in 1803" — evidently referring to the King plan.

Even if so unlikely a fact did exist, namely, that in the case in 109 U. S. the Dermott map was not considered, we think that the conclusion of the court would not have been changed by its inspection. It was not understood to set aside or dispense with the important features of the previous maps. It, no doubt, having been made after most of the surveys had been returned, more accurately comported with the lots, squares and streets as laid out, than the previous plans. But, as we have seen, it was not itself complete. The contention that it omitted Water street, with the intention of thereby renouncing the city's claim to a street on the river, does not impress us as sustained by the evidence. The preceding plans exhibited a space for such a street, and the succeeding plans, both that of King in 1803, and that of Elliott, adopted by the city councils and approved by President Van Buren in 1839, recognize and, in part, define Water street. The Dermott plan itself exhibits the line of a space outside of the line of the squares and lots, and that portion of such space that lies on the Eastern Branch is marked on the Dermott plan as Water street.

The latest reference to the maps that we are pointed to in the reports of this court is in *Patch* v. *White*, 117 U. S. 210, 221,

where Mr. Justice Woods said: "The devise clearly and without uncertainty designates a lot on Ninth street, between I and K streets, well known on the map of the city of Washington, whose metes, bounds and area are definitely fixed, platted and recorded. The map referred to was approved by President Washington in 1792 and recorded in 1794. Thousands of copies of it have been engraved and printed. All conveyances of real estate in the city made since it was put on the record refer to it; it is one of the muniments of title to all the public and private real estate in the city of Washington, and it is probably better known than any document on record in the District of Columbia. The accuracy of the description of the lot devised is, therefore, matter of common knowledge, of which the court might even take judicial notice."

It is true that in that case there was no controversy respecting the authenticity of the city maps, and that the expressions quoted are found in a dissenting opinion. Still, such statements made in a closely contested case, where the parties were represented by leading counsel, residents of the city of Washington, may fairly be referred to as a contribution to the history of the city maps.

Without protracting the discussion, we think, considering the reasonable probability that a public street or thoroughfare would be interposed between the lots and squares and the navigable river; the language and history of the acts of Maryland referred to; the agreements between the original proprietors; the deeds to the trustees; the subsequent transactions between the property holders and the Commissioners; the regulations affecting the use of wharves and docks, published by the Commissioners; the several acts of Congress conferring jurisdiction upon the city over the adjacent waters; the several city maps and plans, beginning with that of L'Enfant, sent by President Washington to Congress in 1791, and ending with that of Elliott, approved by President Van Buren in 1839; and the views expressed on the subject in previous decisions of this court, that the conclusion is warranted, that, from the first conception of the Federal City, the establishment of a public street, bounding the city on the south, and to be

known as Water street, was intended, and that such intention has never been departed from.

With this conclusion reached, it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights; nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river, unless they can show valid grants to the same from Congress, or from the city under authority from Congress, or such a long protracted and notorious possession and enjoyment of defined parcels of land as to justify a court, under the doctrine of prescription, in inferring grants.

4. With these results in view, we shall now proceed to examine the remaining claims.

The Chesapeake and Ohio Canal Company was incorporated in 1824 by concurrent acts of the legislatures of Virginia and Maryland. The object of the company was the construction of a navigable canal from the tide water of the Potomac to the Ohio River.

By an act approved March 3, 1825, c. 52, 4 Stat. 101, Congress enacted "that the act of the legislature of the State of Virginia, entitled 'An act incorporating the Chesapeake and Ohio Canal Company,' be, and the same is hereby, ratified and confirmed, so far as may be necessary for the purpose of enabling any company that may hereafter be formed, by the authority of said act of incorporation, to carry into effect the provisions thereof in the District of Columbia, within the exclusive jurisdiction of the United States, and no further."

That portion of the canal which lies within the boundaries of the city of Washington extends from Twenty-seventh street in a southeasterly direction to Seventeenth street, and appears to have been open for navigation in the latter part of 1835. This part of the canal was wholly constructed north of the street designed to run between the squares nearest to the river front and the river itself. The land occupied by the canal company within the city belonged in part to individual owners and in part to the United States.

Entering the city so long after the adoption of the several

maps and plans, the canal company must be deemed to have been aware of their contents, and to have been subjected thereto, except in particulars in which the company may have been released or exempted therefrom by the acts of Congress, or by the authorities of the city. Consequently the company cannot validly claim riparian rights as appurtenant to those lots or parts of lots which the company purchased from individual owners who held lots north of Water street. Having themselves, as we have seen, no riparian rights, such owners could not convey or impart them to the canal company.

But it is contended, on behalf of the canal company, that riparian rights attached at least to those portions of their land which they acquired by virtue of the legislation of Congress, and which were located on the margin of the Potomac River.

If it was, indeed, the persistent purpose of the founders of the city to erect and maintain a public street or thoroughfare along the river front, it would be surprising to find so reasonable a policy subverted by legislation on the part of Congress in favor of this canal company. To justify such a contention we should expect to be pointed to clear and unmistakable enactments to that effect. But the acts of Congress relied on are of a quite different character. Let us briefly examine them.

There was, in the first place, the act of March 3, 1825, heretofore quoted, wherein the act of Virginia incorporating the Chesapeake and Ohio Canal Company is ratified and confirmed so far as may be necessary for the purpose of enabling any company that might thereafter be formed under the authority of that act to carry into effect the provisions thereof in the District of Columbia within the exclusive jurisdiction of the United States, and no further. Then followed the act of May 23, 1828, c. 85, 4 Stat. 292, authorizing the connection of lateral canals, constructed under authority of Maryland and Virginia, with the main stem of the canal within the District. By the act of May 24, 1828, c. 86, 4 Stat. 293, Congress authorized a subscription by the United States for ten thousand shares of the capital stock of the

company, and made provision for the elevation and width of the section below the Little Falls, so as to provide a supply of water for lateral canals or the extension of the Chesapeake and Ohio Canal by the United States.

It may be conceded that it is clear from these enactments that Congress contemplated the location of the Chesapeake and Ohio Canal along the bank of the Potomac River within the District of Columbia; and it may be further conceded that Congress acquiesced in the route and terminus of the canal selected by the company. But it does not follow from such concessions, or from anything contained in the legislation referred to, that Congress was withdrawing from the city of Washington its rights in Water street, or was granting to the canal company a fee simple in the river margin with appurtenant riparian rights.

It is further urged, that by the act of March 3, 1837, c. 51, Congress adopted and enacted as a law of the United States the provision of the Virginia act of February 27, 1829, in the following terms: "That whenever it might be necessary to form heavy embankments, piers or moles, at the mouths of creeks or along the river shore, for basins or other purposes, and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purpose may by them, when so improved, be sold out or let for a term of years, as they may deem most expedient for the company, on such conditions as may direct the application of the proceeds thereof to useful purposes, and at the same time repay the necessary expense of the formation of such banks, piers or moles; provided, that this power shall in no case be exercised so as to injure the navigation of the canal;" that by the second section of the act of 1837, penalties were declared against any person who should maliciously injure the canal or its necessary embankments, tow paths, bridges or drains; and, by the third section, enacted that "all condemnations of lands for the use and purposes of said canal company, which have heretofore been made by the marshal of the District or any lawful deputy

marshal, shall be as valid as though the same had been situated in the State of Maryland, and had been condemned in pursuance of the laws of said State through the action and agency of a sheriff of any of the counties of said State."

As the canal had been constructed and opened for navigation within the limits of the city before the passage of this act of 1837, and as it is not claimed or shown that any embankments, piers or moles were constructed on the route of the canal, within the city, since the passage of the act, it thus appears that no rights were acquired by the company on the strength of the act, which are interfered with by the improvements projected by Congress.

It was, indeed, alleged in paragraph 16 of the company's answer that "the company did construct a gate house at the foot of Seventeenth street, and a pier, embankment or mole at the foot of Seventeenth street, and extending into the Potomac River; and that said gate house and the made land appurtenant thereto, and part or all of said pier, embankment or mole at the foot of Seventeenth street, as the same now exists, are the property of this defendant."

Without stating the particulars of the evidence on this part of the subject, it is sufficient to say that it clearly appears that the basin at the mouth of Tiber Creek, at the foot of Seventeenth street, was constructed by the corporation of the city of Washington, and that the pier or embankment, mentioned in the company's answer, did not extend into the Potomac River, but into this basin, and that the gate house referred to was erected under a permission granted by the city council by an act approved May 20, 1837, in the following terms:

"That permission be and is hereby granted to the Chesapeake and Ohio Canal Company to use and occupy so much of the northwest corner of the wharf erected at the southern termination of Seventeenth street west as they may deem necessary, for the purpose of erecting thereon a house for the keeper of the river lock at that place: *Provided*, The extent thereof shall not exceed sixty feet measured south and thirty feet measured east from the northwest corner of the said wharf."

There is nothing in this or in any other legislation on the part of the city council which can be construed as conferring on the company any rights of property in the land intervening, according to the plans of the city, between the canal and the river.

The fair meaning and effect of the legislation of Congress and of the city respecting the Chesapeake and Ohio Canal Company were to permit that company to construct and maintain its canal within the limits of the city, and to approve its selection of the route and terminus. The purpose of the construction of the basin at the foot of Seventeenth street was to provide a commodious harbor, in which were to meet and be exchanged the commerce of the Potomac River and of the Chesapeake and Ohio Canal. But we find, in such legislation, no intimation, much less any clear and distinct declaration, of an intention to set aside the existing plans of the city in respect to its river front.

We do not deem it necessary to enter upon a consideration of the exact nature of the company's title to the lands occupied by its canal within the limits of the city, nor to discuss the legal consequences of a failure by the company to occupy and use such lands for canal purposes. Different conclusions might be reached in respect to lands derived by purchase or condemnation and public lands granted for the public purpose of a navigable highway. But such questions are not before us.

It is sufficient now to hold that the Chesapeake and Ohio Canal Company does not, either as to lots procured from private owners, or as to lands occupied under the permission of Congress and of the city authorities, own or possess riparian rights along the line of its canal within the limits of the city.

Accordingly, the decree of the court below in respect to the claim of the Chesapeake and Ohio Canal Company is affirmed. It was, however, found by the court below that there is a small strip of land north of Water street and owned by the Chesapeake and Ohio Canal Company, which lies within the limits of the government improvement, the value of which was determined by the court below at the sum of $353.33.

As the United States have not appealed from this part of the decree, and as the Chesapeake and Ohio Canal Company has not excepted to the finding of the value, it follows that the canal company is entitled to that sum out of the appropriation by Congress as compensation for the occupation by the Government of such strip of land.

5. The next class of claimants consists of lot owners between Seventeenth street west and Twenty-seventh street west.

All these lots, with respect to which riparian rights are claimed, lie to the north of Water street, which intervenes between them and the channels of the river. Under the principles already established, no riparian rights belonged to these lots. But some portions of the lots are embraced within the limits of the government plan of reclamation, and for such portions the court below awarded compensation. All of these claimants, save two, have accepted and received the compensation.

Richard J. Beall and the heirs and trustees of William Easby have refused to accept the compensation so awarded them, and have appealed. Their asserted grounds of appeal are, first, their alleged rights to riparian and wharfage privileges on the Potomac River as appurtenant to their lots, and, second, the insufficiency of the compensation allowed by the court below.

An effort is made to distinguish the case of these lots from that of the lots east of Seventeenth street by referring to a book marked "Register of Squares," produced from among the records of the city, and wherein squares 63 and 89 are bounded on the north by Water street and on the south by the Potomac River, and square 129 is bounded on the north by B street and on the south by the Potomac River.

It was the opinion of the court below that there was a lack of evidence to prove that the registers of squares were contemporaneous and original books which it was the duty of the Commissioners to keep, that the entries were not in their handwriting, nor in that of any person whose handwriting is proved, and that they have not the quality of a public record.

We agree with that court in thinking that, in no point of

view, on the evidence adduced in this case, can effect be given to these registers of squares as contradicting or overriding the plans of the city adopted by the President, wherein, as we have seen, the squares in question were bounded by streets interposed between them and the channels of the river.

The second complaint on behalf of these appellants is of the insufficiency of the amount allowed them by way of compensation.

We have read the evidence on this subject contained in the record, and have been surprised by the discrepancy in the values put on these parcels of land by the respective witnesses —a discrepancy so wide that we find it impossible to reconcile the testimony, or to reasonably compromise between the extremes. In such circumstances we think our proper course is to adopt the conclusions of the learned judge who disposed of this matter in the court below. Acquainted, as he presumably was, with the locality of the lands and with the character and experience of the numerous witnesses, his judgment would be much safer than any we could independently form. The fact that the larger number of those concerned have acquiesced in the valuation and accepted the award is not without significance. The claim of Mr. Beall that he should be allowed interest or rental value for his property which was taken possession of by the United States in 1882, seems entitled to further consideration by the court below.

The amount awarded to the estate of William Easby was made payable in the decree of the court below to William Easby's heirs. The estate was represented in the appeal to this court by Rose L. Easby and Fanny B. Easby, styling themselves trustees of the estate of said William Easby, and by Wilhelmina M. Easby-Smith, who is described as one of the heirs at law and administratrix *de bonis non cum testamento annexo* of William Easby, deceased. These parties appear by the record to have taken a joint appeal, but they are represented by different counsel. It is now claimed by the counsel representing Rose L. Easby and Fanny B. Easby, alleged trustees of the estate, that the decree awarding payment to William Easby's heirs should be amended so as to make the

award payable to said alleged trustees. It is said that they were the only parties to the record, representing said estate, at the time the said award was made, and apprehensions are expressed that if the award is distributed to the different heirs of William Easby injustice will be done the alleged trustees, because it will enable said heirs to receive their proportionate shares directly from the Government without being compelled to share in the expenses of the suit. This controversy does not seem to have been dealt with in the court below, where it properly belongs, and to which, affirming the award in other respects, we shall remit the question.

6. The next claim is one made by the descendants of Robert Peter to parcels of land included in the government plan of reclamation, and situated near the Observatory grounds.

In June, 1791, Robert Peter executed and delivered a conveyance of his lands to Beall and Gantt in trust that the Federal City should be laid out upon them and other lands similarly conveyed by other proprietors.

Robert Peter was one of the signers of the agreement of March 13, 1791, hereinbefore mentioned, and the terms of his conveyance to Beall and Gantt were substantially similar to those used in the conveyances of David Burns and Notley Young. There therefore passed by this deed to the trustees his entire title to the main land and all his riparian rights appurtenant thereto.

It is now claimed that, under the terms of the agreement and of the conveyance, such streets, squares and lots should be laid out as the President might direct, and conveyances be made of them to the United States, and the residue of said lots should be divided between the United States and Robert Peter, and the lots so divided to him, together with any part of said land which should not have been laid out in the city, should be conveyed to Robert Peter in fee by the said trustees; and it is further claimed that certain parts of said land were never laid out as part of the city, nor conveyed either to the United States or Robert Peter, and that the equitable title to such parts, with the riparian rights appurtenant thereto, is in his heirs, for which they are now entitled to compensation. It is

not denied that, in pursuance of the agreement and conveyance, the city was laid out, and its streets, squares, lots and boundaries defined in the several maps or plans approved by the President and adopted by the city authorities. Nor has any evidence been adduced that by any act or declaration of the President, or of any one in authority under him, was any portion of the lands conveyed by Peter and the other proprietors to Beall and Gantt, trustees, ever excluded from the city. Nor is it denied that there was a division of lots between Peter and the Commissioners in pursuance of the agreement and conveyance.

But reliance is placed upon the correspondence between Peter and the Commissioners tending to show that lands with riparian privileges remained undivided.

In June, 1798, Nicholas King, in behalf of Mr. Peter, addressed a letter to the Commissioners, representing that it was "an object highly interesting to Mr. Peter to know the bounds, dimensions and privileges of those parts of the city generally called water property, and assigned to him on the division. . . . The square south of No. 12 has not yet been divided between said Peter and the Commissioners. . . . The square No. 22 as at present laid off and divided with the Commissioners does not extend to the channel by several hundred feet. If another square be introduced to the south of it, that square will be covered to a small depth with water, and the proprietors thereof will want earth to wharf and fill it up with. It will perhaps be best therefore to redivide square No. 22 and attach the low ground to it."

Replying on June 28, 1798, the Commissioners said:

"When the Commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act on the subject. It appertains to the several courts of the States and of the United States to determine upon the rights which such division may give; any decision by us on the subject would be extrajudicial and nugatory; of this, no doubt, Mr. Peter, if applied to, would have informed you. *With respect to square No. 22, we do not conceive that it is entitled to*

any water privilege, as a street intervenes between it and the water; but as there is some high ground between Water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

This suggestion of the Commissioners, to lay out and divide a square south of Water street, was never acted on. It is plain that the Commissioners would have had no right to disregard the action of the President in establishing Water street as the southern boundary of the city. It also appears from the letter of Mr. King that such a proposed square would have been under the waters of the Potomac, and therefore consisted of territory belonging to the United States as successor to the sovereignty of Maryland, and not to them as grantees of Mr. Peter.

In November, 1798, Mr. Peter, with other persons, as appears in the record, appealed to the President to have corrections made in the plan of the city, and used the following language:

"We know your excellency will attend to the necessity of defining what water privilege or right of wharfage is attached to the lots on the Eastern Branch, the Potomac River and Rock Creek, also all such streets as are to be left in wharfing from the shore to the channel of said waters, and the extent to which those wharves are to be carried; and what ground, so made and filled up, shall be considered as subject to occupancy by buildings."

This memorial was referred by the President to the Attorney General, Charles Lee, who, in an opinion dated January 7, 1799, advised against the application to make any departure from the plans of the city already approved by the President.

In May, 1800, Mr. Peter and the Commissioners agreed upon a division of square south of square No. 12, by which four of the lots were given to Peter, one of which faced on Water street, and two others facing on Water street were assigned to the United States; and in a note attached to the map of square No. 22, signed in 1800 by Nicholas King, as

attorney for R. Peter, it is stated that the Commissioners conveyed to Robert Peter the lot No. 6 in square No. 22, in consideration of a balance due him by the public of square feet in the division of lots.

Since the year 1800 to the time of the institution of this suit no attempt to impeach this settlement, and no assertion of title to the land south of Water street, by the descendants of Robert Peter, appear to have been made.

The decree of the court below in respect to this claim is affirmed.

7. The next class of appellants consists of those who claim rights of property on the river front between the Long Bridge and the Arsenal. They all derive title under Notley Young, and the parcels of land they claim are all situated south of Water street, and fall within the limits of the government improvement.

In so far as the arguments advanced in support of these claims are based on the alleged abandonment of Water street in the Dermott plan, and on the legal consequences supposed to follow from the fact that the trustees never formally conveyed the streets or public reservations, they are disposed of by the conclusions already reached.

But it is further contended that, even if we conclude that Water street was designed to be the southern boundary of the city, and that the title to said street passed to the United States, yet the facts disclose such equities between the United States, on the one hand, and the private claimants, on the other, as to justify a decree in favor of these appellants. Those equities are said to arise out of grants made by the United States and the city authorities, from time to time, in respect to wharves and water fronts, under which the appellants and their predecessors acted, and out of the long lapse of time during which they have been in undisturbed possession.

In considering the facts relied on by the appellants we must not lose sight of the conclusions already reached, namely, that Notley Young, by his agreement with the other proprietors and by his conveyance to the trustees, had parted with his

entire title to the lands described and to the riparian rights appurtenant thereto; that all the lots subsequently conveyed to Notley Young were subject to the plans of the city establishing Water street, and did not reinvest him with his original riparian rights.

Hence these appellants, claiming under Notley Young, can only rely, in their contention now under consideration, on transactions that have taken place since the division between the Commissioners and Notley Young; and these we shall now briefly examine.

Our attention is first directed to the twelfth section of the Maryland act of December 19, 1791, Kilty's Laws Maryland, c. 45, in the following terms:

"That the Commissioners aforesaid, for the time being, or any two of them, shall, from time to time, until Congress shall exercise the jurisdiction and government within said territory, have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner and of the extent, they may judge durable, convenient and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance."

Here we may pause to observe that the only power given to the Commissioners was to grant *licenses*, from time to time, and *until* Congress should assume and exercise its jurisdiction within the territory, and it was declared that any wharf built in the waters of the Potomac, without such license or in disregard of its provisions, was declared to be a common nuisance.

The licenses contemplated therefore were temporary, and liable to be withdrawn by Congress on assuming jurisdiction. Such legislation certainly cannot be relied on as either conferring or recognizing rights to erect and maintain permanent wharves within the waters of the Potomac and the Eastern Branch.

Opinion of the Court.

On July 20, 1795, the Commissioners published the following regulations respecting wharves:

"The board of Commissioners, in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, and to regulate the materials, the manner and the extent thereof, hereby make known the following regulations:

"That the proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the Eastern Branch as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters, leaving a space, wherever the general plan of streets in the city requires it, of equal breadth with those streets, which if made by an individual holding the adjacent property shall be subject to his separate occupation and use, until the public shall reimburse the expense of making such street; and when no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of ground. The buildings on said wharves to be subject to the general regulations for buildings in the city of Washington as declared by the President. Wharves to be built of such materials as the proprietors may elect."

It will be seen that, in publishing these regulations, the Commissioners claimed no authority in themselves, but professed only to act in virtue of the act of Maryland, and must therefore be understood as having intended to grant temporary licenses, subject to the will of Congress when it should take jurisdiction.

It appears in the record that Notley Young himself procured from the Commissioners a license to build a wharf on the Potomac River, and that the wharf appears as an existing structure upon the map of 1797. The board of Commissioners was abolished by an act of Congress approved May 1, 1802, 2 Stat. 175, by the second section whereof it was enacted:

"That the affairs of the city of Washington, which have heretofore been under the care and superintendence of the said Commissioners, shall hereafter be under the direction of

a superintendent to be appointed by and under the control of the President of the United States; and the said superintendent is hereby invested with all the powers, and shall hereafter perform all the duties, which the said Commissioners are now vested with, or are required to perform by or in virtue of any act of Congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots of said city, or in other manner whatsoever."

This was followed by the act of May 3, 1802, entitled "An act to incorporate the inhabitants of the city of Washington, in the District of Columbia." 2 Stat. c. 53. In it was given to the corporation "full power and authority to regulate the stationing, anchorage and mooring of vessels," but no authority to license or regulate the building of wharves is given. Then came the act of February 24, 1804, 2 Stat. c. 14, wherein was given to the city councils power "to preserve the navigation of the Potomac and Anacostia Rivers adjoining the city; to erect, repair and regulate public wharves, and to deepen docks and basins."

By the act of May 15, 1820, 3 Stat. 583, c. 104, entitled "An act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose," the corporation was empowered "to preserve the navigation of the Potomac and Anacostia Rivers adjoining the city; to erect, repair and regulate public wharves; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the stationing, anchorage and mooring of vessels."

On July 29, 1819, Burch's Dig. 126, the city council enacted:

"Sec. 1. That the owners of private wharves or canals and canal wharves be obliged to keep them so in repair as to prevent injury to the navigation.

"Sec. 2. That no wharf shall hereafter be built, within this corporation, without the plan being first submitted to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same, and if it shall appear

to their satisfaction that no injury could result to the navigation from the erection of such wharf, then, and in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf shall approach the channel."

By acts of councils approved January 8, 1831, c. 84, it was enacted:

"SEC. 1. That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same; and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then, in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall approach the channel and at what angle they shall extend from the street on which they are erected."

The record discloses a continuous series of acts and joint resolutions of the city councils, on the subject of improving the navigation of the Potomac River, the erection and repair of sea walls on the river, granting special permission to named persons to build wharves in front of such walls. The last we shall notice is the act of March 23, 1863, entitled "An act authorizing the mayor to lease wharf sites on the Potomac River," etc. By this act the mayor was authorized to lease for any term of years, not exceeding ten, wharf sites in front of any sea wall theretofore built by the corporation, or in front of any sea wall that might thereafter be built in pursuance of any enactment for that purpose; and it was provided that at the expiration of ten years, or sooner, the said sites and all wharf improvements thereon should revert to the corporation, and that if the occupants should fail to keep said wharves in good repair and to comply with all the provisions of the act, the contract should cease, and the mayor should notify them to vacate the premises within ten days. And this was followed by similar acts in 1865, 1867, 1870 and 1871, all

asserting power by the corporation over the wharves on Water street.

We think it impossible to reconcile the succession of acts of Congress and of the city councils with the theory that the wharves south of Water street were erected by individuals in the exercise of private rights of property in defined parcels of land to them belonging. The legislation clearly signifies that during the entire history of the city Congress and the city authorities have claimed and exercised jurisdiction for public purposes over the territory occupied by these wharves; and that jurisdiction seems to have been recognized and submitted to by the appellants and their predecessors in many instances in which the evidence discloses the nature of the transactions.

It is earnestly urged by the learned counsel of the appellants that possession and enjoyment by successive occupants for so long a period warrant the presumption of a grant, and authorities are cited to show that such presumptive grant may arise as well from the Crown or the State as from an individual. As between individuals, this doctrine is well settled and valuable; and it may be that, in respect to the ordinary public lands held by the Government for the purposes of sale, occupation and settlement, there might exist a possession so long, adverse and exclusive, as to justify a court of equity or a jury in presuming a grant. But where, as in the present case, the lands and waters concerned are owned by the Government in trust for public purposes, and are withheld from sale by the Land Department, it seems more than doubtful whether an adverse possession, however long continued, would create a title. However, under the facts disclosed in this record, it is unnecessary to determine such questions; for, as we have seen, at no time have Congress and the city authorities renounced or failed to exercise jurisdiction and control over the territory occupied by these wharves and docks.

An effort is made to distinguish the claim of Edward M. Willis, as alienee of A. I. Harvey, defendant, to land lying between Thirteen-and-a-half street and Maryland avenue, and fronting on the Potomac, by the circumstance that Water

street has never been actually constructed and opened as a thoroughfare in front of this land. But it is not perceived that the failure of the city heretofore to open Water street could create any title in Willis to the land and water lying south of the territory appropriated for that street. His occupancy, or that of his predecessors, of such land for wharfing or other purposes may be presumed to have been with the consent of the city authorities, but could not, under the facts shown in this record, avail to raise the presumption of a grant.

Referring to a similar claim this court said, in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 692:

"Disputes undoubtedly arose, some quite early, not so much as to what rights belonged to 'water lots,' nor as to what properly constituted a 'water lot,' but, in regard to particular localities, whether that character attached to individual squares and lots. In part, at least, the uncertainty arose from the fact that the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and marked on the land. Complaints of that description, and of designed departures from the plan, seem to have been made. It is also true, we think, that mistakes arose, as perhaps in the very case of the lots on the north side of Water street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project; property appearing to be riparian, because lying on the water's edge, which, when the street was actually made, had lost its river front. They were thought to be 'water lots,' because appearing to be so in fact but were not so in law, because they were bounded by the street, and not by the river." *Barclay* v. *Howell's Lessee*, 6 Pet. 498, 505; *Boston* v. *Lecraw*, 17 How. 426.

There are also defendants who claim the right to hold certain wharf properties on the Potomac between the Long Bridge and the Arsenal, under licenses in writing issued by the Chief of Engineers for the time being, authorizing the erection of wharves. The power to grant such licenses is attributed to the Chief of Engineers as the successor of the office of Commissioner of Public Buildings under the act of

March, 1867. It was the opinion of the court below that, under the legislation that preceded the act of 1867, jurisdiction with respect to private wharves had been conferred upon the authorities of the city, and that hence the Chief Engineer was without any lawful authority to issue such licenses. In so holding the court below followed the decision of the Supreme Court of the District in the case of *District of Columbia* v. *Johnson*, 3 Mackey, 120.

We see no reason to doubt the soundness of this conclusion, though, for the reasons already given, even if the power to grant such licenses had belonged to the Chief of Engineers, they would not have vested any rights in fee in the land and water south of Water street in these appellants.

The contention, on behalf of the Washington Steamboat Company, as successor to the title of the Potomac Ferry Company by a purchase on June 1, 1881, that the act of Congress of July 1, 1864, creating the latter company, operated as a release of the title of the Government to such land as that company might acquire for its proper purposes, we cannot accept. The legal purport of that enactment was, as we interpret it, to authorize the ferry company to purchase and hold such real estate as should be necessary to carry its chartered powers into effect, but was not intended as a grant of land on the part of Congress, or as a legislative admission of the title of private parties. The power to purchase land thereby conferred had room to operate on land north of Water street and on land situated in the State of Virginia.

While, however, our conclusion is that no riparian rights in the waters of the Potomac River belong to the owners of lots lying north of Water street, and that no presumption of grants in fee can arise, in these cases, from actual occupation of lands and water south of that street, we do not understand that it is the intention of Congress, in exercising its jurisdiction over the territory in question, and in directing the institution of these proceedings, to take for public use, without compensation, the private property of individuals situated within the lines of the government

improvement, even where such property may lie south of Water street. Those who, relying, some of them, on express and others on implied licenses from the city authorities, have erected and maintained expensive wharves and warehouses for the accommodation of the public, are not to be treated, as we read the will of Congress, as mere trespassers.

That such is not the intention of Congress we infer not merely from the fact that, by the act of 1886, the inquiry was submitted to a court of equity and not to a court of law, but from the express language of the act. Thus, by the first section, it is made "the duty of the Attorney General of the United States to institute, as soon as may be, in the Supreme Court of the District of Columbia, a suit against all persons and corporations who may have or pretend to have any right, title, claim or interest in any part of the land or water in the District of Columbia within the limits of the city of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac River, and composing any part of the land or water affected by the improvements of the Potomac River or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto." The second section provides "that the suit mentioned in the preceding section shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations who may claim to have any such right, title or interest."

The third section provides that the cause "shall proceed with all practicable expedition to a final determination by the said court of all rights drawn in question therein; and that the said court shall have full power and jurisdiction by its decree to determine every question of right, title, interest or claim arising in the premises, and to vacate, annul, set aside or confirm any claim of any character arising or set forth in the premises."

The fourth section provides that if, on the final hearing of said cause, the said court "shall be of opinion that there exists any right, title or interest in the land or water in this act mentioned in any person or corporation adverse to the complete

and paramount right of the United States, the said court shall forthwith and in a summary way proceed to ascertain the value of any such right, title, interest or claim, exclusive of the value of any improvement to the property covered by such right, title or interest made by or under the authority of the United States, and report thereof shall be made to Congress."

It may be well here to mention that it is disclosed in the record that the wharves owned by the Potomac Steamboat Company opposite square 472, and other wharves on the Potomac, were rented by the Government during the civil war, and that rent was paid for them monthly by the Government during a period of several years. It is not to be supposed that the United States are now estopped by such conduct, but the fact is worthy of mention as going to show that the Government did not regard those who owned the wharves, and to whom the rent was paid, as trespassers, or that the structures were an obstruction to navigation and unlawfully there.

Such recognition by the Government of a right on the part of the wharf owners to receive rent, and the long period in which Congress has permitted private parties to expend money in the erection and repair of wharves and warehouses for the accommodation of the public, may be well supposed to have influenced Congress in providing for an equitable appraisement of the value of interests or claims thus arising.

In the twelfth section of the bill of complaint the United States "disclaim in this suit seeking to establish its title to any of the wharves included in the area described in paragraph 3 of this bill, and claim title only to the land and water upon and in which said wharves are built, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, to be decided in any other appropriate proceeding."

Apparently acquiescing in this allegation or disclaimer, the appellants put in no evidence as to the value of their improvements, and sought no finding on that subject in the court below, but stood, both there and in this court, on their claims of absolute title.

An examination, however, of the language of the act of 1886, hereinbefore quoted, discloses that it was the plain purpose of

Congress that the court should make "a final determination of all rights drawn in question," and should "in a summary way proceed to ascertain the value of any such right, title, interest or claim."

We think it was not competent for the counsel of the respective parties to disregard this purpose of Congress and to withhold a part of the controversy from the action of the court.

It is not disclosed in this record whether it is the design of the Government, on taking possession of the wharves and buildings belonging to the appellants, to continue them in the use of the public or to supersede them by other improvements. Whatever may be the course pursued in that respect, it should not deprive the appellants of the right conferred upon them by the act of Congress to have the value of their respective rights, titles, interests or claims ascertained and awarded them.

As to the method to be pursued in valuing property of so peculiar a character, the cases of *The Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, and *Hetzel* v. *Baltimore & Ohio Railroad*, 169 U. S. 26, may be usefully referred to.

While, therefore, we affirm the decree of the court below as to the claims of the Marshall heirs, and as to the Kidwell patent, and as to the several claims to riparian rights as appurtenant to lots bounded on the south by Water street, we remand the case to the court below for further proceedings in accordance with this opinion.

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

The court holds that the owners of lots fronting on the Potomac River, who are impleaded in this record, have no riparian rights appurtenant or attached to such lots, and that they never possessed rights of that description.

This conclusion rests primarily upon a finding of fact, that is, that it was the intention of the founders of the city that a street should bind the city on the entire water front, which street should be the exclusive property of the public, thus

cutting off all the lot owners facing the river from connection therewith. Applying to this premise of fact the legal principle that where property is separated from the water by land belonging to some one else, no riparian rights attach to the land of the former, it is held that the lot owners before the court have no riparian privileges which the Government of the United States is in any way bound to respect.

Lest the precise theory may not be accurately conveyed the clear statement thereof contained in the opinion is quoted, viz.:

"Our examination of the evidence has led us to the conclusion that it was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac River, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in commerce free access to the navigable water, and that such intention has never been departed from."

Again, at the end of the review of the evidence following the above extract, the court states as follows:

"The conclusion is warranted that, from the first conception of the Federal City, the establishment of a public street, bounding the city on the south, and to be known as Water street, was intended, and that such intention has never been departed from.

"With this conclusion reached, it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights; nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river."

From the legal proposition that where property is separated from a stream by land belonging to another person, such property is not abutting property, and hence not entitled to riparian rights, I do not dissent. I cannot, however, bring my mind to the conclusion that it was ever contemplated in the foundation of the city of Washington that there should be established a street on the water front so as to cut off the riparian rights of the lot holders. On the contrary, my ex-

amination of the record has forced me to the conclusion that from the legislation by which the city of Washington was founded, from the nature of the contracts made by the owners of the land upon which the city is situated, and from the subsequent statutory provisions relating to the foundation of the city, and their practical execution, it was understood and agreed that riparian rights should attach to the lots fronting on the river, and that any proposed street actually projected or which it was contemplated might ultimately be established was designed to be subordinate to the riparian rights of the lot holders, and was in nowise intended injuriously to impair or affect the same. It also, in my opinion, clearly appears that this result was understood by the lot owners, was contemplated by the founders, was approved by legislation, and was sanctioned by a long course of administrative dealing, ripening into possession in favor of the lot holders to such a degree that to now hold that they are not entitled to riparian rights would, as I understand the record, amount to a denial of obvious rights of property. Indeed, to disregard the riparian rights of the lot owners as shown by the record it seems to me will be equivalent to confiscation, and that in reason it cannot be done without imputing bad faith to the illustrious men who so nobly conceived and so admirably executed the foundation of the Federal City. Of course, I say this with the diffidence begotten from the fact that the court takes a different view of the record, which therefore admonishes me that, however firm may be my convictions on the subject, there is some reason which has escaped my apprehension.

Even if it be conceded that the record established that the intention of the founders was to bound the city towards the water by a street which would separate the land of the lot holders from the river, and that the fee of such street was to be in the public, such concession would not be conclusive in this case. For the record, as I read it, establishes such conclusive equities arising from the conduct of the Government in all its departments, in its dealings with the lot holders and the grantees of the Government and those holding under them,

as to conclusively estop the Government from now asserting any real or supposed technical rule of law so as to cut off rights of private property which the Government itself has solemnly avouched, upon the faith of which persons have dealt with it, and from which dealings the nation has reaped an abundant reward.

Before approaching the facts I eliminate propositions which seem irrelevant, and the consideration of which may serve to confuse the issue. Let it be at once conceded, *arguendo*, as found by the court, that whether riparian rights exist does not depend upon deciding whether one or the other of the particular maps or plans of the city is to be controlling. For in my view of the record, the riparian rights of the lot holders will be clearly shown to exist, whatever plan of the city may be considered. For the purposes then of this dissent, it is not at all questioned that the several plans of the city, referred to in the opinion of the court, are to be treated each as a progressive step in the evolution of the original conception of the city, and therefore are each entitled to be considered without causing one to abrogate the efficacy of the other, except where there is an essential conflict. It is also deemed unnecessary to refer to the events which led up to the selection of the sites of other cities, for instance Philadelphia, New Orleans, Pittsburgh and Cincinnati, decisions respecting which have been referred to, because in my judgment the existence of the riparian rights in the city of Washington depends upon the proceedings and legislation with reference to the city of Washington, and not to wholly dissimilar proceedings in relation to the foundation of other cities.

I come, then, to an examination of the record as to the foundation of the city of Washington. In doing so — in order to avoid repetition and subserve, as far as I can, clearness of statement — the subject is divided into three distinct epochs: First, that involving the conception of the city and the steps preparatory to its foundation, with the cessions by Maryland and Virginia of sovereignty over the land which was to form the Federal district, down to and including the 19th of December, 1791, when the general assembly of Maryland passed

an act ratifying the previous cession and conferring certain powers upon the Commissioners, etc.; second, the formative period of the city, in which the initial steps taken in the period just stated were in a large measure carried into execution, and this embraces the period from the Maryland act of 1791 down to and including the actual transfer and establishment of the seat of government in the city of Washington; and, third, the events subsequent to the last-stated period.

1. *Events connected with the conception of the city and the steps preparatory to its foundation down to and including the statute of Maryland of December* 19, 1791.

The cessions by Maryland and Virginia, in 1788 and 1789, of the territory intended for the seat of government of the United States need not be recapitulated, as they are fully stated in the opinion of the court. The acceptance by Congress, in 1790, of the cessions just mentioned is also stated fully in the opinion of the court. It is important, however, in considering this, to bear in mind a few salient facts: First, that whilst accepting the cessions, it was provided that the seat of the Federal Government should not be removed to the proposed capital until more than ten years thereafter, that is, the first Monday of December in the year 1800; second, that "until the time fixed for the removal thereto," and until Congress should by law otherwise provide, the operation of the laws of the State within the district should not be affected by the acceptance by Congress; third, whilst the act empowered the President to appoint three Commissioners, who should, under his direction, define and limit the district, and conferred upon the Commissioners authority to purchase or accept such quantity of land as the President might deem proper and to provide suitable buildings for the occupation of Congress and of the President and for the public offices of the Government, no appropriation was contained in the act for these essential purposes. On the contrary, the only means provided by the act was the authority conferred to accept grants of money or land for the purposes designated in the act.

The controversy which preceded the selection by Congress of the district ceded by Virginia and Maryland, in order to

establish therein the capital of the nation, is portrayed in the opinion of the court, and, indeed, if it were not, it is mirrored in the provisions of the act of acceptance already referred to. For, weighing those provisions, the conclusion cannot be escaped that an acceptance by Congress which left the territory ceded under the control of the ceding States for a period of ten years, and made no provision whatever, by appropriation of money, for the establishment of the city, affixed to the act of acceptance a provisional character depending upon the successful accomplishment by Washington of the plan for the foundation of the capital which he had so fervently advocated. In other words, that the accepting act devolved upon President Washington the arduous duty of bringing into being, within ten years, the establishment of the capital and of securing the means for constructing therein all the necessary buildings for the use of the Government, without the appropriation of one dollar of the public money. To the great responsibility thus imposed upon him, Washington at once addressed himself with that intelligence and foresight which characterized his every act. On January 17, 1791, he appointed as the Commissioners to execute the provisions of the act of Congress, Thomas Johnson, Daniel Carroll and David Stuart. The first two were owners of land within the limits of the proposed city. Mr. Johnson, after his designation as a Commissioner, was, in 1791, appointed an Associate Justice of this court, and although he qualified as such, he still continued to serve as Commissioner during and until after he had resigned his judicial office.

By the spring of 1791 the President had finally determined upon the precise situation of the proposed capital, locating it on the banks of the Potomac, within the ceded district, at the point where the city of Washington is now situated. The exact position of the land where the city was to be established is shown by the map annexed to the opinion of the court.

A casual examination of this map discloses that the proposed city began on the banks of the Potomac at Rock Creek, separating it at that point from Georgetown, following along

the course of the river to where the Eastern Branch emptied into the Potomac, and extending some distance along the banks of the Eastern Branch. It also shows that all the land fronting on the water within the designated limits was farming land, except at two points — the one where the town of Hamburgh (sometimes called Funkstown) was located, not far from Georgetown, and the other where the town of Carrollsburgh was situated, on the Eastern Branch. All the farming land fronting on the river and Eastern Branch was owned by Robert Peter, David Burns, Notley Young, Daniel Carroll, William Prout, Abraham Young, George Walker and William Young.

It is conceded that, at the time the city was located on the territory thus selected, the owners of all the farming land fronting on the water were entitled under the law of Maryland to riparian privileges as appurtenant to their ownership, and that the same right belonged to the owners of lots fronting on the water in the two towns of Hamburgh and Carrollsburgh. It is, moreover, indisputably established that at the time the selection was made some of the lot owners, by wharves or otherwise, were actually enjoying the riparian rights appurtenant to their property. Indeed, an inspection of the map already annexed makes it clear that the lots in Hamburgh and Carrollsburgh ran down to the water's edge, and in some instances extended into the water.

A few months after the appointment of the Commissioners, in March, 1791, in order to aid in the establishment of the city and to procure the funds wherewith to execute the duties imposed by the act of Congress, through the influence of President Washington most of the larger proprietors of the land embraced within the limits of the city executed an agreement, binding themselves to convey their lands, for the purposes of the Federal City, to such persons as the President might appoint, expressly, however, excepting from the operation of the agreement any lots which the subscribers might own in the towns of Hamburgh and Carrollsburgh. The main purposes of this contract were concisely expressed

by President Washington in a letter to Mr. Jefferson, then Secretary of State, of date March 31, 1791, enclosing the proclamation fixing the boundary lines of the Federal district. He said:

"The land is ceded to the public on condition that when the whole shall be surveyed and laid off as a city (which Major L'Enfant is now directed to do) the present proprietors shall retain every other lot — and for such part of the land as may be taken for public use, for squares, walks, etc., they shall be allowed at the rate of twenty-five pounds per acre — the public having the right to reserve such parts of the wood on the land as may be thought necessary to be preserved for ornament. The landholders to have the use and profits of all the grounds until the city is laid off into lots, and sale is made of those lots which, by this agreement, become public property — nothing is to be allowed for the ground which may be occupied as streets or alleys."

Subsequently, in order to carry out the agreement, the lot owners conveyed their lands to trustees. The draft of the conveyances, which were executed on June 28, 1791, there is every reason to believe was prepared by Commissioner Johnson.

Several of the conveyances are set out in full in the opinion of the court. Suffice it to say, that the land was conveyed to the trustees by described boundaries, with the appurtenances. Besides embodying the provisions contained in the previous agreement, the deeds also contained other provisions material to be noticed. Thus, in effect, the portion of the land conveyed which was to inure to the benefit of the public was divided into two classes: First, the public reservations, streets and alleys, not intended to be disposed of for purposes of profit but retained for the public use; second, the share of the public in the building lots (one half) intended as a donation. The land embraced in the first class was to be conveyed by the President to the Commissioners for the time being appointed under the act of Congress, 1790, "for the use of the United States forever." The lands included in the second class were stipulated to be sold and the proceeds applied as a

grant of money, etc., but the trustees were to retain the title and themselves execute deeds to purchasers of the public lots.

As already stated in the preliminary agreements and the conveyances to trustees executed by the larger proprietors, their lots situated in Carrollsburgh and Hamburgh were excepted. On February 21, 1791, a portion of the proprietors of lots in Hamburgh executed an agreement binding themselves to sell their lots in that town to the President of the United States or to such Commissioners as he might appoint. None of these lots would seem to have been situated on or near the river, and the agreement may be dismissed from view. On March 30, 1791, an agreement was executed by certain lot owners in Carrollsburgh, Commissioners Johnson and Carroll being among the number. It was stipulated that the lots of the subscribers should be subject to be laid out as part of the Federal City, each subscriber donated one half of his lots, and stipulated that his half should be assigned to him *in like situation as before;* it being moreover provided that in the event of a disagreement between the owners and the President as to the allotments made to them, a sale should be made of the lots and the proceeds be equally divided. A copy of the agreement is set out in the margin.[1]

---

[1] We the Subscribers holding or entitled to Lots in Carrollsburgh agree with each other and with the President of the United States that the lots and land we hold or are entitled to in Carrollsburgh shall be subject to be laid out at the pleasure of the President as part of the Federal City and that we will receive one half the Quantity of our respective Lots as near their present Situation as may agree with the new plan and where we may be entitled now to only one Lot or otherwise not entitled on the new plan to one entire lot or do not agree with the President, Commissioners or other person or persons acting on the part of the public on an adjustment of our interest we agree that there shall be a sale of the Lots in which we may be interested respectively and the produce thereof in money or Securities shall be equally divided one half as a Donation for the Use of the United States under the Act of Congress, the other half to ourselves respectively. And we engage to make Conveyances of our respective Lots and lands af'd to Trustees or otherwise whereby to relinquish our rights to the said Lots & Lands as the President or such Commrs. or persons acting as af'd shall direct to secure to the United States the Donation intended by this Agreement.

The contracts just referred to embraced all the territory included within the proposed city, except certain lots in Carrollsburgh and Hamburgh, the owners of which had entered into no contract, and also certain lots in these towns owned by non-residents and others who were incapable from infancy, coverture or imbecility to consent to a sale or division of their lots.

I submit that the contracts in question clearly point out the difference between a city laid out as was the city of Washington and a city laid out as the result of a plat made by a proprietor in which lots are located on a street fronting on the river and intervening between the lots and the water. The President and the Commissioners, in dealing with the land embraced within the proposed Federal City, were not acting as owners in their own right, but were acting under the terms and according to the covenants contained in the contracts between the parties. What was to be given by the proprietors was plainly specified, and what was to be retained by them was also clearly stated. Riparian rights having been vested in the owners at the time the contract was made, it cannot, it seems to me, with fairness be said that the former proprietors were to receive as an equal division, one half of their lots, if in making that division the Government was to strip all the lots, as well those assigned to the public as those retained by the proprietors, of the riparian privileges originally appurtenant to the land. The intention of the contracting parties is plainly shown by the provisions for the transfer of the property in Carrollsburgh, where the owners stipulated that they should retain one half of the lots, *in like situation;* and where the plan to which reference has been made shows that many of the lots abutted on the bank of the water in the Eastern Branch.

But if there be doubt as to the agreements from which it could be implied that the lot owners intended to give not only one half of their lots but all the riparian rights appurtenant to the lots which they were to retain, the official conduct of the Commissioners, the action of President Washington and of all concerned, including the former proprietors, demon-

strates that the understanding of everybody concerned in the transaction was that the half of the lots which were to remain, to the lot owners, should preserve their riparian privileges, and that they should be continued to be exercised, even although it was proposed, on a plan of the city, that there should be a street on the entire river front. And it seems to me it equally conclusively appears that it was plainly understood that the lots which were donated to the nation, and which were to be sold, for the purpose of raising money to erect the necessary buildings for the establishment of the government, should, so far as those lots fronted on the water, have attached to them the riparian rights which were originally appurtenant, and the fact that they had such original rights formed the basis upon which it was hoped that as to these lots a higher price would be obtained, because of the existence of the riparian rights which were intended to be conveyed, and as will be shown were actually conveyed along with the water lots which the Government sold.

It cannot be in reason successfully denied that the construction of the agreements between the parties contemporaneously made by all concerned, and followed by long years of official action and practical execution, furnishes the safest guide to interpret the contracts, if there be doubt or ambiguity in them.

In March, 1791, President Washington intrusted the preparation of a plan of the proposed city to Major L'Enfant. On April 4, 1791, that officer requested Secretary of State Jefferson to furnish him with plans of leading cities and maps of the principal "seaports or dock yards and arsenals," and in a letter to President Washington, dated April 10, 1791, Mr. Jefferson alluded to the fact that he had sent by post to L'Enfant the plans of a number of Continental European cities. Mr. Jefferson mentioned that he had himself procured these plans when he was visiting the named cities. The serious import of the plans thus sent and the significance resulting from them I shall hereafter comment upon.

Among the proprietors who joined in the agreement and had actually conveyed his land to the trustees was Robert

Peter. His property was situated abutting on Rock Creek, and on the river from the mouth of Rock Creek to the Hamburgh line. The record shows the following letter to the Commissioners from President Washington:

"PHILADELPHIA, *July* 24, 1791.

"I have received from Mr. Peter the enclosed letter proposing the erection of wharves at the new city between Rock Creek and Hamburgh. My answer to him is that the proposition is worthy of consideration, and that the transaction of whatever may concern the public at that place in future being now turned over to you, I have enclosed the letter to you to do therein whatever you may think best, referring him at the same time to you for an answer.

"The consequences of such wharves as are suggested by Mr. Peter will, no doubt, claim your first attention; next, if they are deemed a desirable undertaking, the means by which the work can be effected with certainty and dispatch; and lastly the true and equitable proportion which ought to be paid by Mr. Peter towards the erection of them."

The pertinent portions of the letter of Mr. Peter, which President Washington transmitted, are as follows:

"GEORGETOWN, *July* 20, 1791.

"SIR: Colonel L'Enfant, I understand, has expressed a wish that I should make propositions to join the public in the expense of erecting wharves to extend from the mouth of Rock Creek to the point above Hamburgh called Cedar Point, being about three thousand feet. . . . That the wood should be furnished by me on the same terms that it could be had from others, and that the whole expense should be divided between the public and me in proportion to the property held by each on the water. The streets I consider as belonging to the public and one half the lots, so that I suppose somewhere about one third of the expense would be mine, and about two thirds the public's."

On August 28, 1791, Mr. Jefferson wrote from Philadelphia to the Commissioners, acknowledging the receipt of a letter

from them to the President, and adding: "Major L'Enfant having also arrived here and laid the plan of the Federal City before the President, he (the President) was pleased to desire a conference of certain persons in his presence on these several subjects."

Further along in his letter Mr. Jefferson stated that Mr. Madison and himself "will be in George Town on the evening of the 7th or morning of the 8th of next month, in time to attend any meeting of the Commissioners on that day."

In accordance with this suggestion, on September 8, 1791, the records show a meeting of the Commissioners, and it is recited that "the Hon. Thomas Jefferson, Secretary of State, and the Hon. James Madison attended the Commissioners in conference."

It is further recited: "The following queries were presented by the Secretary of State to the Commissioners, and the answers thereto, with the resolutions following, were given and adopted: . . . Whether ought the building of a bridge over the Eastern Branch to be attempted, canal set about, and Mr. Peter's proposition with respect to wharves gone into now or postponed until our funds are better ascertained and become productive?"

In the margin is this notation: "Must wait for money."

The foregoing letter of Mr. Peter to President Washington clearly conveyed that his (Peter's) construction of the deed of conveyance which he made to the trustees was that the lots to be assigned to him along the river should preserve their riparian rights, since he proposed as such owner to exercise his riparian rights by building wharves under a joint agreement with the Commissioners, by which the work should be done between the Commissioners and himself as joint proprietors, he of his lots and they of their share of the building lots, and as owners of the intersecting streets and reservations. That such also was the view of President Washington necessarily follows from the fact that he transmitted Peter's letter to the Commissioners with what amounted to an express approval of Peter's construction of the contract, cautioning the Commissioners only to be circumspect as to the consequences

of constructing the wharves and the proper equitable proportion of the cost of construction between the respective parties; that is, Peter on the one hand in the exercise of his riparian rights in front of his lots, and the public on the other in the exercise of its riparian rights in front of its own lots and the public land. It is worthy of note that the letter of Peter states that he wrote the President under the inspiration and at the suggestion of Major L'Enfant. If it be true that L'Enfant, who was then engaged in making the plan under Washington's orders, had conceived the project of cutting off all the riparian rights of the lots fronting on the river by a proposed street, how can it be conceived, in consonance with honesty or fair dealing, that he would suggest to Peter the making of a proposition absolutely inconsistent with the very plan which he was then supposed to be carrying out? How can it be thought that if President Washington entertained the idea, that the engineer employed by him had such an intention, could he consistently have favorably indorsed the proposition which would destroy the very plan which it now is decided was then adopted and in process of actual execution? The scrupulous honor, the marvellous accuracy of detail and precision of execution as to everything which he supervised or undertook, which were the most remarkable characteristics of President Washington, exclude the possibility of any other construction being placed upon his acts with reference to Peter's letter than that which I have thus given. But the reasoning is yet more conclusive. Mr. Jefferson's letter shows that before the meeting of the Commissioners was held where Peter's letter was acted upon, the plan of Major L'Enfant had been laid before the President and by him transmitted to Mr. Jefferson. With this plan in his possession, do the proceedings at the meeting of the Commissioners at which Mr. Jefferson and Mr. Madison were present in conference with the Commissioners disclose the slightest repudiation by them or the Commissioners of the construction put by Peter upon the contract? Emphatically no, for the sole reason ascribed for not entering into an arrangement with Peter is the minute entry, "Must wait for money."

At the time this meeting of the Commissioners with Mr. Jefferson and Mr. Madison was held advertisement had been made of an intended sale of some lots at public auction in the following October. In a letter of Andrew Ellicott, a surveyor who had been assisting L'Enfant, which letter was addressed to the Commissioners under date of September 9, 1791, he offered suggestions with reference to the contemplated sale of lots, remarking that three things appeared necessary to be attended to:

"*First*, those situations which will be considerably increased in value when the public improvements are made; *secondly*, those situations which have an immediate value from other considerations; and, *thirdly*, those situations whose real value must depend upon the increase and population of the city."

With respect to the second of these considerations he further stated as follows:

"*Secondly*, it is not probable that the Public Improvements will considerably affect either the value of the Lots from Geo. Town to Funks Town; or generally on the Eastern Branch; the proximity of the *first* to a trading town and good navigation, and the *second* lying on one of the best Harbours in the Country, must have an immediate value, and are therefore the most proper plans to confine the first sales to."

On the same day, also, L'Enfant was instructed by the Commissioners that the Federal district should be called "the Territory of Columbia," and that the Federal City should be named the City of Washington; and that the title of the map should be "A Map of the City of Washington in the Territory of Columbia."

How can it be that Ellicott, the surveyor engaged with Major L'Enfant in laying off the plan of the city, would have suggested that the lots fronting on the water would obtain the best price because of an advantageous situation, if it had been supposed that those lots should be, by the effect of the plan of the city, stripped of their riparian rights, especially when the Peter's letter is borne in mind and the construction of the contracts which arise therefrom is taken into consideration.

On October 17, 1791, a first partial division of squares or parts of squares was made with one or more of the former proprietors; and on the same day and on the two days following a small number of lots were sold. At this sale plats of that portion of the city in which the lots offered for sale were situated were shown to those in attendance. As none of these appear to have been near the water, no further attention need be given to them.

On October 25, 1791, in his third annual address, President Washington informed Congress that "a city has been laid out agreeably to a plan which will be laid before Congress," and the plan prepared by L'Enfant was transmitted to Congress on December 13, 1791.

It is obvious from a glance at this plan, as contained in the record, that it projected an open space along the water front, and showed at various localities separate wharves extending beyond the open way. That L'Enfant never contemplated, however, that the effect of this was to cut off the riparian rights of the lot holders, and cause the water privileges to be merely appurtenant to the street, is shown by his suggestion to Peter and the cotemporaneous circumstances which have been already adverted to, and will be moreover shown hereafter. A vivid light on this subject is derived from an additional occurrence which took place at the meeting of the Commissioners with Mr. Jefferson and Mr. Madison.

At that meeting it is recited that a letter was written by the Commissioners to the general assembly of Maryland, in which occurs this passage:

"That it will conduce much to convenience and use, as well as beauty and order, that wharfing should be under proper regulations from the beginning. . . . Your memorialists therefore presume to submit to your honors whether it will not be proper to . . . enable the Commissioners or some other corporation, till Congress assumes the government, to license the building of wharves of the materials, in the manner and of the extent they may judge desirable and convenient, and agreeing with general order."

The request embodied in the memorial thus submitted

implied that in the judgment of those by whom it was drawn that riparian rights, embracing the privilege of wharfage, were attached to the lots fronting on the river, and authority was deemed necessary to regulate the exercise and enjoyment of such existing rights. There is not a word in the memorial which can lead to the supposition that the Commissioners desired power to *originate* rights of wharfage, for the memorial asks for authority to license the building of wharves "of the materials, in the manner and of the extent they may judge desirable and convenient, *and agreeing with general order.*" Indeed, if all the riparian rights, as to the lots facing on the river, had been destroyed by the effect of the drawing of the L'Enfant plan, then the requested authority was wholly unnecessary, for in that case all the riparian rights would have been appurtenant to a street which belonged to the public, and no one would have had the right to enjoy them without the consent of the Commissioners, and consequently they would have had the power in giving their assent to such enjoyment, to affix any condition they deemed proper, without legislative authority for that purpose. The mere fact that the right of a riparian owner to erect wharves is subject to license and regulation in nowise implies the non-existence of riparian rights and rights of wharfage, for all ownership of that character is held subject to control, as to the mode of its enjoyment, by the legislative authority. I do not stop to make any copious citation of authority on this subject, but content myself with referring to the opinion of Chief Justice Shaw, where the whole matter is admirably considered, in *Commonwealth* v. *Alger*, 7 Cushing, 53.

The argument, then, that because the riparian right was subject to license and regulation, it could not have preëxisted, amounts to saying that no riparian right can ever exist. This follows from an analysis of the contention, which may be thus stated: Riparian rights exist as rights of property and are ever subject to lawful legislative regulation. If, however, they are regulated, the necessary result of the regulation is to take away the right. I do not here further consider this question, because, as will hereafter be shown by a statement

of the Commissioners, which was in effect approved by President Washington, it was expressly declared that the sole object and purpose of the desired regulations was to compel the owners in the enjoyment of their existing riparian rights as to wharfage to conform to some general plan of public convenience.

On December 19, 1791, the general assembly of Maryland passed an act complying with the above request and conferring authority to license the building of wharves, as well as excavations and the erection of buildings within the limits of the city. The fact that in the same act in which was given the power to license and regulate wharves there was also conveyed the authority to license excavations and the erection of buildings, shows that it was considered that the act did not originate a right, but merely controlled its exercise. For, can it be said that because a lot holder was obliged to obtain a license before erecting a building on his lot, that therefore his ownership of his building was destroyed, and that he held it at the will of the Commissioners? If it cannot be so said in reason as to buildings, how can it be thus declared as to the wharves, which were placed by the act in exactly the same category? The act of the Maryland legislature in which the foregoing provisions were contained embraced besides other subjects. It subjected to division lands in Hamburgh and Carrollsburgh, not yet conveyed, for the purposes of the Federal City, and provided legal means to accomplish the division of such lands belonging to persons who, on account of mental or other incapacity, had not hitherto conveyed their rights. The act contained a provision as to building liens, provided for the existence of party or common walls between contiguous owners, for a record book, etc. Annexed in the margin[1]

[1] Extracts from act of general assembly of Maryland, dated December 19, 1791, c. 45:

After reciting the proclamation of President Washington, of date March 20, 1791, declaring the bounds of the territory, since called the Territory of Columbia, it was further recited in the first section as follows:

"And whereas, Notley Young, Daniel Carroll of Duddington, and many others, proprietors of the greater part of the land hereinafter mentioned to have been laid out in a city, came into an agreement, and have conveyed

are extracts from the act, and, without stopping to analyze its text, it seems to me that it evinces the clear intention of the legislature that the lot owners should receive in all and every

---

their lands in trust to Thomas Beall, son of George, and John Mackall Gantt, whereby they have subjected their lands to be laid out as a city, given up part to the United States, and subjected other parts to be sold to raise money as a donation to be employed according to the act of Congress for establishing the temporary and permanent seat of the government of the United States, under and upon the terms and conditions contained in each of the said deeds; and many of the proprietors of lots in Carrollsburgh and Hamburgh have also come into an agreement, subjecting their lots to be laid out anew, giving up one half of the quantity thereof to be sold, and the money thence arising to be applied as a donation as aforesaid, and they to be reinstated in one half of the quantity of their lots in the new location, or otherwise compensated in land in a different situation within the city, by agreement between the Commissioners and them, and, in case of disagreement, that then a just and full compensation shall be made in money; yet some of the proprietors of lots in Carrollsburgh and Hamburgh, as well as some of the proprietors of other lands, have not, from imbecility and other causes, come into any agreement concerning their lands within the limits hereinafter mentioned, but a very great proportion of the landholders having agreed on the same terms, the President of the United States directed a city to be laid out. . . .

"SEC. 3. *And be it enacted,* That all the lands belonging to minors, persons absent out of the State, married women, or persons *non compos mentis*, or lands the property of this State, within the limits of Carrollsburgh and Hamburgh, shall be and are hereby subjected to the terms and conditions hereinbefore recited, as to the lots where the proprietors thereof have agreed concerning the same; and all the other lands, belonging as aforesaid, within the limits of the said city of Washington, shall be, and are hereby subjected to the same terms and conditions as the said Notley Young, Daniel Carroll of Duddington, and others, have, by their said agreements and deeds, subjected their lands to, and where no conveyances have been made, the legal estate and trust are hereby invested in the said Thomas Beall, son of George, and John Mackall Gantt, in the same manner as if each proprietor had been competent to make, and had made, a legal conveyance of his or her land, according to the form of those already mentioned, with proper acknowledgments of the execution thereof, and where necessary, of release of dower."

The section then authorized the Commissioners, after due notice by advertisement, to allot to the owners one half of the lots owned by infants, married women, insane persons or owners absent out of the city. It was then further provided:

"And, as to the other lands within the said city, the Commissioners aforesaid, or any two of them, shall make such allotment and assignment

respect an equal division of their property upon the allotments authorized to be made by the Commissioners, and that thereby it rebuts the assumption that by the effect of allotments or the plan of the city, the lots fronting on the river were stripped of their riparian rights, and that all such riparian rights were vested in the public as the owners of a projected street bounding on the river. In passing, attention is directed to the fact that some of the very lots in controversy in this cause, and as to which riparian rights are now denied, were allotted by the Commissioners upon a division of water lots owned by persons incapable of acting for themselves, under the proceedings provided for in the Maryland statute, which clearly, as to such persons, negates the conception that their

---

within the lands belonging to the same persons, in alternate lots, determining by lot or ballot whether the party shall begin with the lowest number: *Provided*, That in the cases of coverture and infancy, if the husband, guardian or next friend will agree with the Commissioners, or any two of them, then an effectual division may be made by consent; and, in case of contrary claims, if the claimants will not jointly agree, the Commissioners may proceed as if the proprietor was absent; and all persons to whom allotments and assignments of lands shall be made by the Commissioners, or any two of them, on consent and agreement, or pursuant to this act without consent, shall hold the same in their former estate and interest, and in lieu of their former quantity, and subject in every respect to all such limitations, conditions and incumbrances as their former estate and interest, and in lieu of their former quantity, and subject in every respect to all such limitations, conditions and incumbrances as their former estates and interests were subject to, and as if the same had been actually reconveyed pursuant to the said deed in trust."

"SEC. 12. *And be it enacted*, That the Commissioners aforesaid for the time being, or any two of them, shall from time to time, until Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharves in the waters of Potowmac and the Eastern Branch, adjoining the said city, of the materials, in the manner and of the extent they may judge durable, convenient and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance; . . . they may also, from time to time, make regulations for landing and laying materials for building the said city, for disposing and laying earth which may be dug out of the wells, cellars and foundations, and for ascertaining the thickness of the walls of houses."

riparian rights had been or could be destroyed by the involuntary surrender of their property under the operation of the statute.

I am thus brought to a consideration of the second epoch.

2. *The formative period of the city in which the initial steps in the previous period were in a large measure carried into execution, which extends to the actual establishment of the seat of government in Washington.*

The L'Enfant plan was not engraved and put into general circulation, owing to the withdrawal of that gentleman from the employment of the city, in consequence of differences with the Commissioners, and his retention of the plan which he had prepared. In consequence, Andrew Ellicott was employed, about the middle of February, 1792, to prepare another plan of the city for engraving. A proof sheet of a plan by him made, which had been engraved at Boston, but which omitted to indicate the soundings of the Eastern Branch and the Potomac River, was received by the Secretary of State early in the following July. Proof from a plate of the same plan engraved in Philadelphia, which indicated the soundings, was, however, received by the Commissioners about the middle of November, 1792. Copies of both of the above plans were largely distributed throughout this country and abroad. The Ellicott plan, in its general features, was similar to that of L'Enfant, being practically based thereon. It indicated an open space along the water front, and wharves projecting from the further side thereof. A reduced copy of this plan is a part of the opinion of the court.

Incidentally it may be stated that a project of the Secretary of State for obtaining a loan upon the public property to meet the expenditures connected with the establishment of the new city was transmitted to the Commissioners on March 13, 1792, but action thereon was suspended owing to a financial crisis which occurred soon afterwards.

On September 29, 1792, President Washington transmitted to the Commissioners an order authorizing a public sale of lots on the 8th day of October, 1792, and conferring authority upon the Commissioners to dispose thereafter of lots by pri-

vate sale. The second public sale of lots was held on October 8, 1792, and the plan of the city engraved at Boston was exhibited. During 1792 some squares were divided with the proprietors, among others Nos. 4, 8, 160, 728 and 729.

Nothing else of material importance, requisite to be noticed, transpired in 1792.

On March 12, 1793, Major Ellicott, who had been in charge of the surveying department, left the service of the Commissioners. Two days afterwards Dermott, who had prepared a plan of that part of the city which is covered by Hamburgh, and who had laid down the lines of Hamburgh in different ink, was requested to do the like with respect to Carrollsburgh, so that each might be ready for division with the proprietors in April.

On April 9, 1793, a number of lot owners in Hamburgh and Carrollsburgh joined in a formal conveyance of lots owned by them, to the trustees named in the deeds of the proprietors of the farming tracts, for the purposes of the Federal City. This was after, it will be remembered, both the L'Enfant and Ellicott plans had been prepared, and the latter extensively circulated. It was stipulated in this deed that on the allotment and division to be made by the Commissioners, "one half the quantity of the said lots, pieces and parcels hereby bargained and sold shall be assigned and conveyed as near the old situation as may be to them, the said Thomas Johns, James M. Lingan, William Deakins, Jun., Uriah Forrest and Benjamin Stoddard, respectively, in fee simple, so that each respective former proprietor shall have made up to him one half of his former quantity and in as good a situation."

If the L'Enfant and Ellicott plans had destroyed all riparian rights, as it is now held, it is obvious that the provisions of this conveyance could not be carried out if the water lot owners were to receive half of their lands in the same or as good a situation.

On April 9, 1793, regulations were promulgated by the Commissioners relative to the subject of surveys by the surveying department, prescribing forms of returns to be made, etc., adding: "The work is from time to time to be added

on the large plat, which, on being finished, is to be considered as a record."

On April 10, 1793, James R. Dermott was appointed to lay off squares into lots, and regulations were prescribed with respect to the performance of his duties. He was to take minutes of the squares from the certificates of surveys returned to the office of the clerk of the Commissioners, and, from this, plat the squares by a scale of forty feet in an inch and divide the squares into lots, and in one corner of the paper containing the plat of the squares he was to write down the substance of the certificate from which it was made, giving the boundaries. Mr. Dermott, in answers to questions propounded by the Commissioners on February 28, 1799, enumerates thirty squares that were surveyed in the summer of 1792, having been in a manner bounded and a small ditch cut around them, but the dimensions were not noted on any document. He said that Mr. Ellicott's return of their survey and measurement was after the 10th of April, 1793, on which date Ellicott returned to the service of the city.

On June 17, 1793, Andrew Ellicott forwarded to the clerk of the Commissioners three sheets of different parts of Washington, with the returns of the bounds and dimensions of the several squares represented on the sheets. Sheet 2 contained the part which was formerly Hamburgh — the interferences between the new and old locations being delineated in different colors — Hamburgh, as formerly, being represented in red. Sheet No. 3 contained the town called Carrollsburgh drawn in yellow, so that the interferences, as in the case of Hamburgh, might be rendered conspicuous.

The map of Hamburgh showing interferences is contained in the record. No city squares are shown nearer to the water than Nos. 62 and 88. They abut on the south line of what was named Water street in Hamburgh, which street was the northerly boundary of the lower range of water lots. Squares 63 and 89 were subsequently made to embrace the water lots, those squares being bounded on the north by the south line of the old Water street, while in the return and plat of survey they are bounded on the south by the Potomac River.

A partial division was made with some of the lot owners of Hamburgh and Carrollsburgh in 1793. Concerning this, Dermott, in a report to the Commissioners made on February 28, 1799, answering the question as to whether he knew of any instance when the right of wharfage in the city had been so claimed or exercised *as to raise a dispute*, or was likely to do so, said:

"The Commissioners in 1793, when dividing Carrollsburgh and Hamburgh, *had the subject of wharfage under consideration*. There were only two places where any difficulty could arise, against which every precaution was taken. The one place was square south of 744. In compensating for what was termed *water property* of Carrollsburgh, which lay on that ground, there were some lots laid out on that square to satisfy claimants. Upon an investigation of the business it was found that that square must bind on Canal street to the east, and not the channel, and that it could have *no privilege* south, therefore the new locations of water property made in it were withdrawn (except one) and placed in square 705, in a much more advantageous situation than could be expected from the original location; to this the original proprietors acquiesced."

Three things are evident to me from this statement: First, that the Commissioners had considered wharfing and found no difficulty in recognizing it in every case but the instances mentioned, a condition of things impossible to conceive of if no wharfing rights existed and they had all been vested in the public; second, that the privilege in the water or water lots was treated by Dermott and the Commissioners as synonymous with the right of wharfing, in other words, with riparian rights; and, third, that as by the peculiar location of one of the squares which was entitled originally to the water privilege, such privilege was by the new plan impaired, a new water lot was given to the owner to enable him to have the full enjoyment of his water and wharfage privilege. But that to give the owner another allotment to secure him an existing right is utterly incompatible with the conception that the right did not exist, seems to me too clear for anything but statement.

Dermott also communicated the following as alterations made after the Ellicott plan had been published, having respect to the exercise of wharfing privileges:

"In running a water street on the southeast of Carrollsburgh *on the bank and establishing the right of wharfing to be governed by the parallel* (*or east and west streets to the channel*). This latter part is not considered as a difference, but an establishment of right, to regulate *the privilege by at all times.* This was done in order to accommodate the original proprietors of lots in that town already established by law. Without this there was no mode known at the time to do it. Similar regulations had taken place through the rest of the city, of which the returns of the surveyors in the office can testify. The whole of this met the approbation of the Commissioners under the regulations of the 10th of April, 1793."

This explains the presence on the Dermott map at this locality of a number of new squares, *in the water*, with the river side of the squares open towards the channel. As Dermott declares, they were designed to mark the direction for wharfing, and the evidence establishes that lots thus situated *in the water* were regarded as appurtenant to the water squares, or squares bounded towards the water by an apparent street, and of which squares an equal division was to be made.

May I again pause to accentuate the fact that every statement thus made by Dermott to the Commissioners of the changes in the Ellicott plan are absolutely inconsistent with the assumed non-existence of wharfing rights and, indeed, as I understand them, are irreconcilable with honesty on the part of Dermott or the Commissioners if the riparian rights had been obliterated. Remember that the lot owners had a right to have the share of the lots coming to them in "a like or as good situation" as before, and if not satisfied with the share given to them, had the power to cause the sale of the whole. To satisfy them and induce them to accept the allotment, here is the final declaration that in considering the question of wharfage the lot holders were assured that their rights would extend across the proposed street by *parallel east and west lines* to the channel. Can it be believed that all the hon-

orable men concerned in the division of the lands, would have given such assurances to the proprietors to cause them to accept the allotment, if they knew or believed that the rights of the lot holders were cut off by the proposed street, and that there could be no extension of the east and west lines across the street to the channel? Mark, moreover, the express declaration of Mr. Dermott, upon whom the duty had been cast of platting the surveys of the division, that "similar regulations had taken place through the rest of the city. . . . The whole of this met the approbation of the Commissioners under the regulations of the 10th of April, 1793." This, then, is the situation. An official concerned with duties respecting divisions with lot owners solemnly declares that throughout the whole city the lot holders had been assured that the riparian privileges attached to their water lots, which right of wharfage would extend by east and west lines across the proposed street to the channel, and that this declaration was approved by the Commissioners; but yet it is now decided that at the time all this was done there were no riparian rights to extend across the proposed street by east and west lines to the channel, because they had all been cut off by the street in question.

Dermott replied to the question: "Were any difficulties ever suggested as to the direction of the wharves or rights of purchasers until the time of Nicholas King?" as follows:

"None that I know of after the first arrangements had taken place, in 1793, respecting Carrollsburgh, Hamburgh and other parts of the city. Sometimes purchasers of water property could not at the first view understand their *privileges*, but when explained to them were generally satisfied; and I know of no one closing a bargain until fully convinced *of their rights of wharfage*."

Evidently the "first arrangements" referred to were those made on the initial division or sale of water property. "Privileges" and "rights of wharfage" are here also used as synonymous in meaning.

The Government having succeeded in selling, at an enhanced price, lots fronting on the river only after convincing the pur-

chasers of their rights to wharfage, it seems to me that, after all these years, it cannot in equity be allowed to hold on to the result of the sales and deny the right of wharfage, by giving positive assurance as to the existence of which the sales were alone made possible.

Mr. Dermott also alluded to the fact that variations had been made in the published plan of Ellicott "in order to compensate original proprietors of lots in Carrollsburgh with lots on the plan of the city upon the principles established by law, *and as near the original situation* as could be."

In December, 1793, Ellicott addressed another letter to the Commissioners, from which it is clearly inferable that the advantages attached to the lots having riparian rights were deemed to give to those lots a higher value than those not possessing such rights.

Dermott, in enumerating the sales of "public water squares, in lots on navigable waters," which were sold before a date stated, mentioned, among other property: "The public water property from squares Nos. 2 to 10, inclusive." The above squares were on land which formerly belonged to Mr. Peter, and was part of the land in front of which the negotiations were had in 1791, already referred to, for the erection of wharves in conjunction with the city. They were all bounded on the Ellicott map on the water side by a *street*. Square No. 3, appearing as a small triangular piece of ground and as abutting directly on the river street, was separated by a street on the west from square No. 8. Though appearing on the plan, square No. 3 had not been platted or officially admitted as a square. On December 22, 1793, John Templeman offered to buy one half — presumably the public half — of square 8, (which square had been divided October 8, 1792,) and one half of the square back of it, "provided that the slip of ground which lays between the water and street is given in, . . . and oblige myself to *build a good wharf* and brick store immediately." The proceedings of the Commissioners in January, 1794, recite the sale to Templeman of nine lots in square No. 8, and the delivery to him of a certificate with the following indorsement thereon: "It is the intention of

this sale that the ground across the street next the water, with the privilege of wharfing beyond the street in front, and of the breadth of the lots, pass with them *agreeably to the general idea in similar instances.*"

It will be observed that the conveyance, in the body of the certificate, was of lots in square 8, the indorsement evidently being designed to indicate what was to be regarded as appurtenant to *those* lots.

It seems hardly necessary to suggest that riparian rights, that is, rights of wharfage, could not possibly have been certified as existing in the land sold to Templeman, "*agreeably to the general idea in similar instances*," if all such rights had been already cut off by the effect of the L'Enfant and the Ellicott maps, for it must be borne in mind that the property certified, in effect, as *appurtenant* to the lots in square 8 and sold to Templeman was delineated on the map as being bounded on the water side by a proposed street.

Let me for a moment consider the consequences of the above transaction. When it took place it is not denied by any one that the Commissioners were sedulously engaged in an effort to dispose of the public lots for the purpose of obtaining the money to carry out the great object of establishing the city. The property sold to Templeman was unquestionably separated from the water by a street on the proposed plans which had been distributed and were known; but more than this, partially in front of it, on the further side of the street, lay a small strip of land, also bounded on the plan on the river side by an apparent street, and that such square was marked on the plan as a numbered square, though not actually platted. Templeman desired to buy the platted square, but he was unwilling to do so lest it might be claimed that the small piece of unplatted land on the opposite side of the street might cut him off from the river, and thereby deprive him of his riparian rights. That he needed the riparian rights and intended to use them results from the fact that his proposition contained a guarantee to erect a wharf. It is patent from such proposition that it entered into the mind of no one to conceive of the fact that a street laid down on the plan as in

front of the square would cut off riparian rights. Now, what did the Commissioners do? They accepted the proposition and sold square 8, expressly declaring that riparian rights should exist in front of the square, across the street, "agreeably to the general idea in similar instances." Put side by side the decision now made and the declaration of the Commissioners. There were no riparian rights across the street, because they had all been destroyed and taken away from the owners and given to the public by the L'Enfant and Ellicott plans. So, now, it is held. Riparian rights exist across the street, including wharfage, in all similar cases; that is, in all cases where the property substantially abuts upon the river, but is bounded by a proposed and projected street, is the declaration which the Commissioners made in the execution of the great trust reposed in them.

When the effect of this declaration is considered in connection with the previous acts of the Commissioners and the contracts and negotiations of the proprietors, and when the flood of light which it throws upon subsequent dealings is given due weight my mind refuses to reach the conclusion that riparian rights did not attach to the water lots. Can it be doubted that this formal and official declaration of the Commissioners became the guide and the understanding for the sales thereafter made by the Commissioners, and which they were then contemplating and endeavoring to consummate? Will it be said that the members of the commission and all those associated in the work would have allowed a declaration so delusive and deceptive to have been made and entered on the minutes of the commission, if it had in the remotest degree been conceived that riparian rights did not exist?

The sale to Templeman, as stated, was not consummated until January, 1794. No sales in the city took place deserving attention until the 23d of December, 1793, when a contract was made with Robert Morris and James Greenleaf for the sale of 6000 lots, (to be selected,) averaging 5265 square feet, at the rate of thirty pounds per lot, payable in seven annual instalments, without interest, commencing the 1st of

May, 1794, and with condition of building twenty brick houses annually, two stories high; covering 1200 square feet each; and with further condition that they should not sell any lots previous to the 1st of January, 1796, but on condition of erecting on every third lot one such house within four years from the time of sale. It was expressly stipulated that 4500 of the lots should be to the southwest of Massachusetts avenue, and that of those lots "the said Robert Morris and James Greenleaf shall have the *part of the city in Notley Young's land.*" Certain squares were next specifically excepted from the operation of the agreement, as also "the lots lying in Carrollsburgh, and . . . the water lots, including the water lots on the Eastern Branch, and also one half of the lots lying in Hamburgh, the lots in that part of the city and belonging to it, *other than water lots*, being to be divided by alternate choice between the said Commissioners and the said Robert Morris and James Greenleaf." Immediately thereafter was contained this proviso: "Provided, however, and it is hereby agreed by and between the parties to these presents, that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, *and of course to the privilege of wharfing annexed thereto.*"

The word "lots" in the proviso manifestly meant "water" lots, as there had been previously an express agreement that Morris and Greenleaf should "have the part of the city in Notley Young's land." As stated, the proviso followed a stipulation excepting "water lots" generally from the operation of the agreement. Evidently, therefore, the proviso was inserted out of abundant caution, to leave no room for controversy as to the right of Morris and Greenleaf to the "*water*" lots in Notley Young's land; and therefore clearly imported that the lots in Notley Young's land fronting on the river, and which had been bounded at that time by both the L'Enfant and the Ellicott plan and by the return of surveys by Water street, were notwithstanding water lots, and entitled to wharfage as a matter of course.

My mind fails to see that there were no riparian rights or rights of wharfage attached to the lots bounded by the pro-

posed Water street, in view of the express terms of the above contract. How could it have been declared that "of course" the water privilege and consequent right of wharfage went with the water lots, when it had been long determined, as the court now holds, that there were no water lots and no wharfing privileges to be sold? True, it has heretofore been suggested that this provision in the Morris and Greenleaf contract may have referred to lots in Notley Young's land which might be water lots other than those on the Potomac River, as, for instance, lots in Carrollsburgh or on the Eastern Branch. But *all* lots in Carrollsburgh and the water lots on the Eastern Branch were excluded from being selected by Morris and Greenleaf by the express terms of the contract, and besides there were no lots in the land conveyed by Notley Young which could be considered as water lots, other than those fronting on the Potomac River and on that portion of the Eastern Branch which the Government had already taken as a public reservation for an arsenal. The fact is then, that at the very time when it is now decided that all riparian rights had been wiped out and that no wharfing privilege existed as appurtenant to water lots, in order to accomplish the successful foundation of the city an enormous number of lots were sold under the express guarantee of the existence of water lots and under the unambiguous stipulation that such lots should, *of course*, enjoy the wharfing privilege. That this sale to Morris and Greenleaf was submitted to President Washington before its consummation no one can doubt, in view of the deep interest he took in the foundation of the city and of the manifest influence which the making of the sale was to have on the accomplishment of his wishes. Can it be said of Washington that he would have allowed a stipulation of that character to go into the contract if he believed that there were no water lots and no wharfing privileges because under his direction they had all ceased to exist? If this were a controversy between individuals, and it were shown that a conveyance had been made with statements in it as to the existence of water lots and rights of wharfage, would a court of equity be found to allow the person who had reaped the benefit of

his assurance by selling the property, to alter his position and assert as against the purchaser the non-existence of the very rights which he had declared, "of course," existed, in order to consummate the conveyance? If a court of equity would not allow an individual to take such a position, my conception is that a nation should not be allowed here to avail itself of an attitude so contrary to good faith and so violative of the elementary principles of justice and equity, and, especially, where the statute on which this controversy is based imposes upon the court the duty of administering the rights of the parties according to the principles of equity.

It is true that some time after the Morris and Greenleaf contract was made a certificate was issued by the Commissioners, giving more formal evidence of the title to the land, and describing the lots by reference merely to the numbers in the squares, without repeating the assurance that the lots were water lots, and that, "of course," the rights of wharfage attached as stated in the previous contract. But neither did the certificate reiterate or reëxpress the obligations assumed by the purchasers to erect buildings, and so on. Can the certificate be treated as changing the covenants of the contract as against Morris and Greenleaf so far as the water lots and wharfing privilege are concerned, because it was silent on this subject, and yet be not held to have discharged them from the burdens of the contract, as to which also the certificate was silent? Can it be imputed to the Commissioners that after the contract was made, and they had duly reaped the benefits arising from it, that, of their own accord, by the mere fact of the issue of the certificate, they could discharge themselves from the burdens of the contract and hold on to the benefits? Can a court of equity recognize such a principle or enforce it? If not, how in consonance with equity can such a principle be applied here? But the record in my judgment entirely relieves the mind of the possibility of imputing any such inequitable conduct to the Commissioners, for it shows beyond dispute that after the consummation of the allotments to Morris and Greenleaf and to Notley Young, both these parties or their grantees applied to the Commis-

sioners for license to erect wharves in front of their "water lots," and that licenses were issued as a matter of course. It should also be remembered that the expression "water lots" and "the wharfing privileges," which were, of course, attached "thereto," used in the contract with Morris and Greenleaf, affirmatively shows what was the signification of the words "water lots" as previously made use of by the Commissioners in dealing with other persons. As there were no lots in Notley Young's land embraced within the terms of the contract which were not separated from the river by the proposed street on the L'Enfant or Ellicott plan, it follows conclusively that the words "water lots" could only have referred to the lots fronting on the river and facing on the projected street, which were deemed water lots because of their situation, and which were of course entitled in consequence to the privilege of wharfage. It cannot be gainsaid that at the time the contract with Morris and Greenleaf was made the L'Enfant plan was known and the Ellicott reproduction of it had been engraved and was extensively circulated. Dealing with this ascertained and defined situation the covenants in the contract with Morris and Greenleaf were, in reason, it seems, susceptible alone of the construction which I have placed upon them. The importance with which the Morris and Greenleaf contract was regarded at that time and the influence which it was believed it would exert upon the successful accomplishment of the foundation of the city is amply shown by a report of the Commissioners made to President Washington, enclosing, on December 23, 1793, a copy of the Morris and Greenleaf contract. The Commissioners said:

"A consideration of the uncertainty of settled times and an unembarrassed commerce weighed much with us as well as Mr. Morris' capital, influence and activity. The statement of funds enclosed may enable the prosecution of the work even in a war, in which event we should (be?) *without this contract* have been almost still."

This summary of the events of the year 1793 is concluded with a reference to the Maryland act of December 28, 1793, passed as supplementary to the statute of December 19, 1791.

By the first section it would seem to have been designed to vest in the Commissioners the legal title to the lands which had been conveyed to the trustees, while the third section provided for division and allotment by the Commissioners of the lots within the limits of Carrollsburgh not yet divided. In the margin [1] the sections referred to are inserted.

As further evidence that the Commissioners regarded the special value of "water lots" to consist in the wharfing privilege, and that a water lot was not divested of riparian rights because the lots were bounded towards the water, (either on the plat of survey or on the plan of the city,) by a street, attention is called to the minutes of the Commissioners in March, 1794, with respect to squares 771 and 802, which, on both the Ellicott and Dermott maps, were separated from the water by Georgia avenue. Return of survey of square 802 was dated September 3, 1793, and bounded the square on all sides by streets.

---

[1] SEC. 1. *Be it enacted by the General Assembly of Maryland*, That the certificates granted, or which may be granted, by the said commissioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase money, and interest, if any shall have arisen thereon, and recorded agreeably to the directions of the act concerning the territory of Columbia and the city of Washington, shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance.

* * * * * * *

SEC. 3. *And be it enacted*, That the commissioners aforesaid, or any two of them, may appoint a certain day for the allotment and assignment of one half of the quantity of each lot of ground in Carrollsburgh and Hamburgh, not before that time divided or assigned, pursuant to the said act concerning the territory of Columbia and the city of Washington, and on notice thereof in the Annapolis, some one of the Baltimore, the Eastern and Georgetown newspapers, for at least three weeks, the same commissioners may proceed to the allotment and assignment of ground within the said city, on the day appointed for that purpose, and therein proceed, at convenient times, till the whole be finished, as if the proprietors of such lots actually resided out of the State; provided, that if the proprietor of any such lot shall object, in person, or by writing delivered to the commissioners, against their so proceeding as to his lot, before they shall have made an assignment of ground for the same, then they shall forbear as to such lot, and may proceed according to the before-mentioned act.

The minutes read as follows (6 : 162) :

"A copy of the following proposition was delivered Mr. Robert Walsh, of Baltimore : Mr. Carroll will sell only half of his half of the water lots, in square 771 & 802; he will divide so that the purchaser may have his part adjoining.

"The Commissioners have for the public a right in one half of these water lots. They are willing to dispose of that part.

"Mr. Greenleaf by his contract has a right to choose the public part in squares 770, 771, & 801, 802, except the water lots.

"The Commissioners have advised Mr. Greenleaf that they were in treaty for the public water lots in squares 771 and 802, and some adjoining lots, and expected that Mr. Greenleaf would have waived his right of choice in the back lots; he has not done so, but, desired in case the contract for the water lots was not finished that they might be reserved as a part of twelve. The Commissioners had promised to reserve for him to accom'odate his friends, under terms of speedy improvement. So circumstanced, the Commissioners can positively agree for the public interest in the water lots only, which they offer at the rate of 200 pounds each, and the public interest in the rest of the lots in the four squares, at 100 pounds each, to take place in case Mr. Greenleaf does not fix his choice on them.

"But the Commissioners, conceiving there is room *on three fourths of the water line* FOR WHARFAGE SUFFICIENT TO GRATIFY BOTH, and that the views of all would be promoted by the neighborhood and efforts of both interests, would wish rather that on Mr. Greenleaf coming here, from 10 to 15th of next month, the two interests might be adjusted. The Commissioners would have a pleasure in contributing all in their power, and assure themselves there would be no difficulty if all were met together."

These squares, because they were "water lots in the Eastern Branch," could not have been selected by Greenleaf under the large contract already referred to, and therefore the purchase of these lots was a separate transaction. The fact that the

respective parties referred to in the communication were contending for the acquisition of the water lots separated from the river by Georgia avenue, because they wanted the water privileges, clearly shows that it was deemed that such privilege was appurtenant; and that the Commissioners thought that on three fourths of the water line there was wharfage room sufficient to gratify both, makes it plain that it did not occur to the mind of anybody that the contemplated street would cut off the water lots from the possession of riparian rights or destroy the wharfing privilege.

As already stated, a division of the water lots in Hamburgh was not made until June, 1794. Without stopping to analyze these divisions, suffice it to say that in my opinion they affirm the fact that it was not intended to cut off the water privileges of the owners whose water lots were divided. It is clear from the proceedings as to the allotments in squares 63 and 89 (which embraced most of the former water lots) that some of these divisions in Hamburgh, as already mentioned, were made as against owners incapable of representing themselves, and that allotments were made by the Commissioners by virtue of the authority conferred by the Maryland act, which commanded, as I have already shown, that the allotments should be in *a like situation* and that the division should be *equal*. The acts of the Commissioners in the division of the squares referred to manifest, as understood by me, an effort and purpose to comply, not only with the terms of the contracts for the division of Hamburgh, but with the commands of the statute, and show the preservation of whatever rights were appurtenant to the water lots before the division took place. It may be worthy of note that one of the lots in square 63 which was so divided and fell to the public was sold contemporaneously with the transaction as a water lot by the front foot.

I have already referred to the fact that Dermott in 1799 enumerated the public water property previously sold, as part of "the public water property from squares Nos. 2 to 10, inclusive," formerly land of Robert Peter, and part of the water lots in front of which L'Enfant in 1791 had proposed that

Peter and the city should jointly erect wharves. On November 7, 1794, the Commissioners wrote to General W. Stewart in part as follows:

" . . . With respect to the water lots, the squares are also not yet divided, and the Commissioners can only sell you the part of the said two squares" (referring to squares 2 and 10) "which shall belong to the public on making divisions. Such we have no objections to sell you at 16 dollars the foot in front."

And on November 11 following the Commissioners again wrote General Stewart:

" . . . No. 2 contains at the termination of the wharf 317 feet. This is to be paid for by the number of feet in front, but it includes square No. 7," (a small square on the east,) "15,444 square feet, not taken into any other calculation. No. 10 contains in front, at high-water mark, 176 feet. At the termination of the wharf 246. Medium, on account of the vicinity of the channel.

"N. B. — It must be remembered that only one half of these squares belong to the public."

This shows that at the time of these negotiations wharves existed in front of the squares, and that though the squares were bounded *on the plan*, towards the water, *by a street*, yet that the squares lay partly in the water, and that the negotiations were conducted on that basis and with reference to the wharfing privileges. No other inference is possible in view of the fact that an actual charge was made for land beyond the street and out to the end of the wharf.

A sale was made to General Stewart on December 18, 1794.

At what was formerly Carrollsburgh, as already stated, a variation was made from the Ellicott map by running a water street on the southeast *on the bank*, and establishing the right of wharfage to be governed by the parallel (or east and west streets) to the channel. Dermott, in his report to the Commissioners, represented that "the public water squares, or lots on navigable water what fell to the public *after satisfying original proprietors of lots in Carrollsburgh* from square 611 round to square 705, both inclusive," except four lots in squares

610 and 613, were sold by a date named. The main portion of the water lots in front of Carrollsburgh would seem to have been allotted to former water lot owners. The evidence in this record, however, as to sales of public water lots in this locality, clearly exhibits the fact that *apparent* squares shown on the Dermott map as lying wholly or almost entirely *in the water*, outside of the line of the assumed street, were sold, simply as a part of the water lots on the other side of the projected street; that is to say, the conveyances were of those lots by the front foot, in some instances adding "with the water privileges east of the same," showing clearly that what lay east of the street was considered as simply a part of the property fronting on the street, and as necessarily following it in order not to impair its value. Instances of this kind are shown by the record in connection with squares 667 and east of 667, squares 665 and 666, and squares 662 and 709. And in the case of square s. s. 667, lying to the south of the street, which consisted of considerable fast land, a sale was made of a lot in that square with the privilege east of the same, being an unnumbered square lying in the water.

It is worthy to be mentioned, although out of the order of its date, that lots in one of the very squares above referred to (No. 667) were conveyed to General Washington himself, together with the appurtenant lots *lying in the water* beyond the street, and that General Washington, in his will, (1 Spark's Writings, 582, 585,) referred to the lots fronting towards the river on the street as water lots, and made no mention of the lots *in the water*.

Illustrations like unto those above made abound in the record, showing that lots which were separated from the river by a street delineated upon the plan of the city, and also by the return of actual survey, were yet sold by the Commissioners for an increased price as water lots, which imported, as has been shown and will hereafter further appear, that riparian privileges were attached to the lots. The record also cites instances where application was made to the Commissioners by the owner of a water lot for a license to wharf in front of his lot, and such license issued. I do not stop to refer

in detail to all such cases, because those already enumerated adequately show the conception of the situation entertained by all the parties at the time and on the faith of which they dealt. No single instance to the contrary has been found, nor has a case been pointed to where the Commissioners sold or offered to sell a water privilege or riparian right of any kind, including the right of wharfage, as appurtenant *to a public street.* The importance of this fact cannot be overestimated. The history of the times leaves no doubt of the solicitude of President Washington and of the Commissioners, whose hopes were enlisted in the permanent establishment of the capital, to avail of every resource to obtain the means wherewith to erect the public buildings, so that the capital might be ready for occupancy at the time designated in the act of Congress. If it be true that the riparian rights were cut off by the intention to make a street along the river, then all such rights along the whole river front belonged to the United States and were at the disposal of the Commissioners for sale. Seeking, as they were doing, to make use of every resource by which funds could be procured, can it be doubted that if they had deemed this to be the case, there would not have been mention of the fact on the plans which were put in circulation, and that there would have been effort made to sell these available rights in order to obtain the much-desired pecuniary aid? It is certain that the minds of the Commissioners were addressed to the importance and value of the water lots and of wharfage, because of the many contracts referring to this subject from the very beginning. The only inference to my mind permissible from this is, that as the Commissioners were seeking to obtain the highest possible price for the water lots, because they enjoyed riparian and wharfing privileges, the thought never entered their mind of destroying the sale of the water lots by stripping them of that attribute which gave peculiar value to them.

Let me come now to a circumstance which seems to throw such copious light on the situation that it is even more conclusive than the facts to which reference has heretofore been made.

In September, 1794, Messrs. Johnson and Stuart were succeeded as Commissioners by Messrs. Scott and Thornton. In May, 1795, Commissioner Stuart was succeeded by Commissioner White. The views of the new Commissioners on the subject of wharfage were expressed by them in a communication to the President dated July 24, 1795, the communication being one transmitting for the President's approval regulations formulated by the Commissioners as the result of their consideration of "the subject of regulating the building of wharves." In the communication it was expressly declared that the regulations had been prepared "with respect to the *private property on the water*." Referring to the Maryland act of December 17, 1791, which conferred the power to regulate wharfing, the Commissioners said:

"Had the legislature of Maryland been silent on the subject, the holders of water property in the city would have had a right to carry their wharves to any extent they pleased under the single restriction of not injuring navigation. The law of the State is therefore restrictive of that general right naturally flowing from the free use of property, and ought not to be construed beyond what sound policy and the necessity of the case may require."

Adverting to the importance of so drafting the regulations as not to impose restrictions calculated to discourage those intending to purchase water lots with their appurtenant privileges, the Commissioners said:

"Our funds depend in some measure on sales, and sales on public confidence and opinion. Any measure greatly counteracting the hopes and wishes of those interested would certainly be injurious, and ought not to be adopted without an evident necessity."

Does not the declaration that the rules were adopted with respect to private property on the water rebut the contention now advanced that there was no such property on the water, because all riparian rights and rights of wharfage were exclusively the property of the public?

Are these statements of the Commissioners not a complete answer to the contention that the Maryland act was intended

to *originate* rights of wharfing, and not merely to regulate the exercise of existing rights? At the outset attention was called to the fact that the Maryland law was passed at the request of the Commissioners, preferred at a meeting where Mr. Jefferson and Mr. Madison were present, and that the very terms of the request implied that the Commissioners desired power to *regulate* the riparian rights which they thought were then existing. Now, with all the intervening transactions, comes the letter to the President, showing beyond peradventure the construction and interpretation affixed to the Maryland act by those to whom it was addressed. Could Washington, could Jefferson, have remained silent if the letter of the Commissioners was an incorrect statement of the understood law on the subject? The declaration of what the rights of the water lot owners were as to wharfage is as full and complete it seems to me as human language could make it.

The draft of the proposed regulations adopted by the Commissioners and which was submitted by them to the President is not in the record, although the communication to the President indicates its character. Correspondence, however, on the subject ensued between the President represented by the Secretary of State and the Commissioners. It is to be inferred that the draft of the regulations sent to the President contained a provision forbidding water lot owners, in the construction of their wharves, from erecting on the wharves any buildings whatever, the intent appearing to be that the warehouses would be built on the water lot to which the wharfing privilege was attached. This would indicate that the Commissioners intended by their regulations to so arrange that any projected street would not cut off the water rights and right of wharfage, but would serve merely as a building line.

Complaint on this subject was made by a Mr. Barry, and such complaint was thus referred to in a letter of Commissioners Scott and Thornton to Secretary of State Randolph on May 26, 1795:

"Mr. Barry had purchased on the Eastern Branch, under

an idea of immediately building, and carrying on trade, but refuses to build, on being informed of the restrictions to which every one must be subject in support of a Water street, which we presume it was the intention of the executive to keep open to the wharves, as is the case in Bordeaux and some other cities in Europe. The inconvenience pointed out by Mr. Barry is that in unlading vessels it would be necessary to go through three operations: 1st, taking out the load; 2d, conveying it across the wharves *and Water street* to the warehouses; 3dly, by taking it up into the warehouses. Whereas, if the stores or warehouses were to stand on the water edge of the wharves, the unlading into the warehouses would only be one operation, and it would save five per centum, and the same in loading."

Observe that there is not an intimation in this communication that the Commissioners or anybody else had the faintest conception that the right to wharf did not exist in favor of the owner of the water lot because of a proposed street, but there was simply a question as to whether the regulations should restrict the water lot owner from building warehouses on his wharves. The wharfing regulations, as adopted, are annexed in the margin.[1] As approved, they contained no

---

[1] Building Regulation No. 4.

(Proceedings of Commissioners, p. 408.)

City of Washington, *July 20th*, 1795.

The Board of Commissioners in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, and to regulate the materials, the manner and the extent thereof, hereby make known to those interested the following regulations:

That all the proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the Eastern Branch as they think convenient and proper, not injuring or interrupting the channels of navigation of the said waters, leaving a space wherever the general plan of the street in the city requires it, of equal breadth with those streets; which if made by an individual holding the adjacent property, shall be subject to his separate occupation and use until the public shall reimburse the expense of making such street, and where no street or streets intersect said wharf to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground; the buildings on said wharves or made ground to be subject to the general regulations for buildings in the city of Washington,

restriction on the right of water lot owners to erect warehouses on their wharves, thereby clearly implying that the complaint of Barry was treated by President Washington as well founded, and that the regulations were corrected in that respect before final approval. Comment at much length upon the regulations is unnecessary, but their perusal refutes the idea that a street marked upon the plan of the city as running in front of water lots operated to deprive such water lots of riparian privileges. The regulations warrant the inference that the right of wharfage was intended to attach to such lots *at the boundary of the lot on the water side*, and that the water street was designed to be superimposed upon the water privileges. The requirement was that when the proprietor of the water lot wharfed out *in front of his lot*, he should leave a space for the street, which, *upon the plan of the city*, appeared as bounding the lot on the water, and if in so wharfing it became necessary to fill up and make the street, he was to have the exclusive right of occupancy until reimbursed "the expense of making such street."

It will also be observed that in the regulations the right is recognized, without qualification or reservation of any kind, of ALL proprietors of water lots to wharf into the river and the Eastern Branch.

While President Washington had under consideration the proposed wharfing regulations, Commissioners Scott and Thornton addressed a letter to Commissioner White on August 12, 1795. A sentence in this communication illustrates the important nature of the riparian privileges and refutes the thought that any one then supposed that such a right was received as a favor and was a mere temporary license, revocable at the pleasure of the Commissioners or of Congress. The letter discussed the advisability of not requiring a space of sixty feet to be left between the termination of the wharves and the channel, and in the course of the comments it was

---

as declared by the President, wharves to be built of such material as the proprietors may elect.

By order of the Commissioners:

(Signed) T. JOHNSON, Jr., *Sec'y.*

said: "Mr. Hoban, agent for Mr. Barry, says the intended wharf in his case, which he estimates to cost *upwards of twenty thousand dollars*, will terminate in four feet water." The regulations, as finally approved, were sent to the Commissioners on September 18, 1795, by President Washington, with the following communication:

"MOUNT VERNON, 18 *September*, 1795.

"GENTLEMEN: The copy of the letter which you wrote to the Secretary of State on the 21 ult., enclosing regulations relative to the wharves and buildings in the Federal City, came to my hand yesterday.

"If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation, and of their ideas on this head you have no doubt made some inquiries and decided accordingly. . . ."

Can this letter be reconciled with the theory that proprietors of water lots had no riparian privileges and no right to extend their wharves because of a proposed street? Does not the letter declare the existence of such rights in unequivocal terms, and also clearly point out that the words "water lots" meant property fronting on the river, to which riparian rights and consequently rights of wharfage attached, despite the presence of the proposed street?

Mark the declaration of President Washington that he considers the regulations as relating to the *extension* of wharves and buildings thereon, clearly implying the right to extend out the wharves from in front of the water lots, and also showing that he had in his mind the change which had been made in the regulations in consequence of the complaint of Mr. Barry, allowing buildings to be erected by the owners of water lots on the wharves which they were entitled to construct. In addition to these considerations, however, there is one of much greater import which arises from the letter of Washington, that is, the great importance which he attached to doing nothing to impair the riparian rights of the owners of water lots, for he expressly says:

"If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation."

If the rights of the owners of water lots were not deemed by him a matter of grave importance, why should one so scrupulously careful as Washington always was have declared, in a public document, that the satisfaction of the lot owners with the regulations constituted one of the moving causes for affixing his approval to them? Can it be said that Washington would have subordinated the execution of a public duty to the approval of private individuals who had no special rights in the matter?

It seems to me that this declaration on his part obviously implied that, as by the results of the contracts made with the former proprietors, under his influence and at his suggestion, they had given up their property upon the condition of an equal division, he was unwilling that anything should be done to deprive them of a part of their equal rights, and therefore he would not approve any regulation which he considered had such an effect. In other words, from reasons of public honor and public faith, he deemed it his duty to protect the rights of the owners of water lots. This obligation of public honor and public faith thus, it seems to me, expressly declared by Washington, rests, in my judgment, upon the nation today and should be regarded. As I see the facts, it ill becomes the nation now, when the rights have been sanctified by years of possession, to treat them as if they had never existed, and thus disregard the obligations of the public trust which Washington sought so sedulously to fulfil.

Mr. Barry, whose proposal to build a wharf has been above set forth, and at whose complaint the regulations were presumably amended so as to allow the building of a warehouse on the wharves, it would seem after the adoption of the regulations feared another difficulty. Certain lots situated in square No. 771, which had been sold by the Commissioners to Greenleaf under the express statement that they were entitled to the wharfing privilege, had been conveyed to Barry

as the assignee of Greenleaf. The regulations, as I have observed, provided that the wharf owner should where the plan of the city exhibited a street and at every three hundred feet leave a space for a street. Barry, conceiving the idea that a projected street (Georgia avenue) which would run across his wharf, would under his complaint previously made impair the utility of his wharf, entered into negotiations with the Commissioners on the subject. The majority of the Commissioners addressed him the following letter:

"CITY OF WASHINGTON, 5*th Oct.*, 1795.

"SIR: We have had your favor of the 3d inst., too late on that day to be taken up, as the board were about rising.

"It will always give us the greatest pleasure to render every possible aid to those who are improving in the city, especially on so large a scale as you have adopted. We think with you that an imaginary continuation of Georgia avenue through a considerable depth of tide water, *thereby cutting off the water privilege of square* 771 *to wharf to the channel*, too absurd to form a part of the plan of the city of Washington. That it never was a part of the plan that such streets should be continued through the water, and that your purchase in square 771 gives a perfect right to wharf to any extent in front or south of the property purchased by you not injurious to the navigation and to erect buildings thereon agreeably to the regulations published."

In other words, the Commissioners agreed to relieve him from the effect of the wharfing regulations. Because, in the letter of the Commissioners, the words are used "thereby cutting off the water privilege of square 771 to wharf to the channel," it has been argued that the Commissioners must have thought that the existence of a street in front of a water lot, between it and the water, would technically operate to deprive the lot of its riparian privileges. But this overlooks the entire subject-matter to which the letter of the Commissioners related. They were dealing with the operation which a projected street would have, as complained of by Barry, on a wharf *when built*, and not with the riparian right to wharf

to the channel, which was conceded. Indeed, this becomes perfectly clear when it is considered that the square referred to had been the subject not long before of express representations by the Commissioners to various would-be purchasers that it possessed wharfing privileges. This letter of the Commissioners also contains a statement which shows their estimate of the theory that a merely projected street in front of a water lot should cut off riparian privileges, since they declare that such an effect to be given to an imaginary street was, to use their language, "too absurd" to be considered.

The period following the approval of the wharfing regulations by General Washington affords other illustrations of the sale of water lots and the granting of licenses to lot owners to wharf across the street in front of their property — in other words, to enjoy their riparian rights — which I do not deem it essential to enumerate in detail, as they are simply cumulative of the examples which I have already given.

There is an interval of about fifteen months during this time where the records of the Commissioners no longer exist, and therefore approach is at once made to the Dermott map, which was transmitted by the Commissioners to the President on March 2, 1797. The court has inserted a reduced reproduction simply of that portion of this map on which is delineated the water front from the Long Bridge up the Eastern Branch, and this will answer the purpose of elucidating what I have to say in connection with the map.

On June 15, 1795, Dermott had been "directed to prepare a plat of the city with every public appropriation plainly and distinctly delineated." In consequence of departures made from the Ellicott map, resulting from changes in the public reservations or corrections of mistakes which were developed as existing by subsequent surveys, as well as from the creation of new squares and the obliteration of some old ones, it resulted that the Ellicott plan no longer accurately portrayed the exact situation of the city, and the Dermott map, when completed, exhibited the result of all such changes.

It was strenuously claimed in argument that this map was the final and conclusive plan of the city, and that an inspection

of it disclosed that the proposed water street marked on the plans of L'Enfant and Ellicott was omitted. The court finds that this map was only one step in the evolution of the city, and that whilst it is true that it did not mark Water street along the whole front of the city, it nevertheless delineated a line binding the front, which the court considers indicates that a Water street was either then projected or contemplated in the future to exist in accordance with the face of the L'Enfant and Ellicott maps. Whilst to my mind the line in question is but a demarcation of the tide line, this is immaterial; for it is conceded *arguendo* that the plan is what it is now decided to be.

One thing, however, is plainly noticeable on the Dermott map, viz., that whilst the line which it is now held indicates the fixed purpose to there locate a street is patent, Water street is not named upon the map at that locality, and such a street is only named in a short space from square 1079 to square east of square 1025. How the Water street came to be delineated and named at this particular locality by Dermott is shown by an order made by the Commissioners on March 22, 1796, directing the surveyor to "run Water street to eighty feet wide from square 1079 to square east of square 1025, and run out the squares next to the water and prepare them for division." In other words, at the one place on Dermott's map where a Water street is specifically stated to exist, it is shown that it was the result of a precise order to that effect given by the Commissioners. That the Commissioners could not have considered that this order cut off riparian rights from the water lots within the area in question is shown by the evidence in the record, which establishes that the lots there abutting on Water street were sold by the Commissioners as water lots, subsequent to the order referred to and with water privileges attached. (Square 1067, August 15, 1798, 1079 and 1080, November 9, 1796, and October 24, 1798; east of 1025, December 5, 1798.)

On the Dermott map was noted, as already mentioned, the changes and corrections which had taken place in the intervening time to which I have referred.

The Dermott map also makes clear this fact that, as by the

result of the surveys, in most instances, the measurement of the squares — certainly in front of Notley Young's land — carried them down to, or substantially to, the water line along the river bank, that the projected Water street, taking the line as delineating such street, was proposed to be established, in great part at least, in the water.

It seems to me, after what has been said, nothing further is required to show that, granting that the line on the Dermott map was intended to indicate a proposed street, it was not thereby the intention to abolish the distinctive characteristics of water lots and the riparian privileges which were appurtenant to them. Dermott himself was familiar with all the previous transactions, having been in the service of the city from early in 1792. He had made changes as reported in the situation of particular pieces of property in order to preserve the riparian rights and give them fruition. He stated to the Commissioners in 1799 (long after it is alleged his plan was approved by Washington) that riparian rights had been the basis of purchases, and that assurances and explanations as to their existence had caused purchases to be made which otherwise would not have taken place. He had supervised the division in Carrollsburgh, which preserved the riparian rights. In other words, he had dealt with the whole matter, as an officer of the city, upon the assured assumption of the existence of the riparian rights attached to water lots. In no instance, except in a few cases of an exceptional character, had he questioned such rights. And when, in 1799, he gave a summary of the prior dealings of the Commissioners in relation to water property — as to which, as stated, he was personally familiar — he observed, after stating that in some special instances squares touching or binding upon the water were not given the privilege of wharfing, in which case they were sold and divided *as upland lots*, he said as a sure criterion that a lot was a "water lot" and, as a corollary, was entitled to "water privileges;" that "where squares were entitled to water privileges, in the sales *these were sold by the front foot*, or the privilege generally mentioned to the purchasers."

Under these circumstances to suppose that the line drawn, on Dermott's plan, along the river, whether it indicated a projected street or the line of tide water, was intended to cut off the riparian rights, would attribute to him a conduct so inconsistent, not to use harsher words, as to be beyond explanation. And when the approval by President Washington of the Dermott plan is weighed, it strikes me as an express sanction by him of the existence of the riparian rights and wharfing privileges, as attached to water lots, especially in view of all the transactions to which reference has been made, and particularly in view of his language in approving the wharfing regulations, in which he said: "If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation."

During this period occurred the controversy between Nicholas King and the Commissioners, which led to a communication on June 25, 1798, which it is claimed contains language importing generally that the Commissioners denied that wharfing privileges attached to a lot when separated from the water by a street. But this inference, in view of all the circumstances, is unwarranted. Mr. King left the employ of the city in September, 1797, and thereafter looked after the interests of some of the original proprietors. As representing Robert Peter he wrote to the Commissioners on June 27, 1798, urging in substance that the wharfing regulations should be made more definite and complete. He enumerated a number of water squares owned by Mr. Peter as entitled to riparian privileges, and without expressly declaring that square 22 was a water square, suggested that the dimensions of that square as then platted should be enlarged rather than that a new square should be formed from the low ground on the south, thus implying that the square *as enlarged* would be bounded on the water side by a street. In answering this communication the Commissioners said in reference to square 22:

"With respect to square No. 22, we do not conceive that it is entitled to any water privileges as a street intervenes between it and the water; but, as there is some high ground

between the Water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

That the Commissioners did not intend to assert that a merely projected street appearing on a plan of the city would take a square adjacent to the water out of the category of water property is evident from the fact that they did not dispute Mr. King's assertion that the other squares enumerated in his letter which were bounded, on the plan of the city, on all sides by streets, were possessed of riparian privileges. The Commissioners evidently assumed that there was fast land of the entire dimensions of a street south of square 22, and also other fast land between that street and the water, and that the particular locality justified treating square 22 as upland property, and called for the creation of a new square to the south. It is to be remarked also that the Commissioners were dealing, not with would-be purchasers, but with the representative of the former proprietor, with whom it was competent to agree that in view of circumstances, such as stated, a square might be laid partly in the water below a street, which square should be the "water square" to which the riparian privileges should attach. As these very Commissioners, about this very time, sold lots as possessed of riparian privileges where a street was contemplated towards the water and where some fast land existed, (as in the case of squares 1067, 1079, 1080 and east of 1025, to which we have already referred as facing that portion of Water street expressly named on the Dermott map,) it is evident that the statement in question was not meant as a general declaration in the broad sense which might be ascribed to it if the circumstances under which it was made were not considered.

The examination of the events which transpired in the second period is concluded with mentioning that the Commissioners, at various times, made reports to the President, by whom they were transmitted to Congress. In each of these reports they gave a statement of the public property in the

city of Washington, distinguishing between "upland" and "water" property, describing the latter by the number of feet frontage on the water, and stating the average price which had been realized on the sales of water lots in the past by the front foot. This latter was a criterion which Dermott had previously declared to the Commissioners was one of the conclusive tests for determining whether a lot was entitled to be classed as a water lot, possessed of riparian rights and wharfing privileges. In none of these reports was the claim made that the public possessed all riparian rights as appurtenant to an existing or proposed street. Certainly such a claim would have been advanced — especially as the reports in question were made with a view to legislation authorizing the borrowing of money on the security of all the public property. The same remarks also apply to the forwarding of a copy of the plan of the city, in the same period, to a firm in Amsterdam, through whom the representatives of the city were endeavoring to negotiate a loan. The public property was marked upon that plan, but no intimation was given of the existence of riparian rights distinct from the squares appearing upon the plan. Can it be considered that, when all the public property was being tendered as a security for money proposed to be borrowed, so valuable a right as the entire wharfing privileges and riparian rights of the city, if believed to be concentrated in its hands as appurtenant to a proposed street, would not even have been referred to or tendered in order to aid in the consummation of the desired loan?

The facts which I have reviewed are not the only ones establishing the universal admission and acceptance of the existence of riparian rights as attached to water lots during the period examined. Many others tending in the same direction are found in the record, and are not referred to because they are merely cumulative. Among one of the facts not fully reviewed is the presumption which it seems to me arises from the book described as the register of squares. The importance and sustaining power of the results of this book are substantially conceded by the court, but it is held that the

book ought not to be treated as controlling. Grant this to be so, yet the power of the implications resulting from the book, when considered in connection with the other proof to which I have adverted, seems unquestionable. The book, however, is not reviewed at length, since it simplifies examination to refer only to such matters of proof as are unquestioned in the record and are undenied in the opinion of the court; and all the facts which I have above stated come under this category.

By these means, which have been merely outlined, the difficulties which beset the establishment of the city were overcome, and the seat of government at the time provided for in the act of Congress was transferred to its present location.

Before passing to the third period of time it seems to me well for a moment to analyze the situation as resulting from the events which have been narrated. One or two considerations arise by necessary implication from them. Either that all parties concerned in the foundation of the city contemplated that a space should separate the building line from the wharves, so as to have free communication along the river front, without impairing the rights of the owners of the water lots, or that they contemplated a street, the fee of which would be in the public along the whole river front; and, ignorant of the legal consequence of such a street, proceeded to dispose of the greater part of the water lots upon the express understanding that riparian rights would attach across the street just as if the street had not been contemplated, and that upon this understanding everybody contracted and the rights of every one were adjusted and finally settled. For the purpose of this dissent it becomes wholly immaterial to determine which of these propositions is true, because if either be so — as one or the other must be — then the riparian rights, in my opinion, should be adjudged to exist. It seems to me, however, that the first hypothesis is the one naturally to be assumed. It must be borne in mind that L'Enfant, the engineer selected by President Washington to draw the plan of the city, was a Frenchman. It is in evidence that he requested Mr. Jefferson to send him plans of European cities,

and that his request was complied with. Thus Mr. Jefferson wrote: "I accordingly send him by this post plans of Frankfort-on-the-Main, Carlsruhe, Amsterdam, Strasburg, Paris, Orleans, Bordeaux, Lyons, Montpelier, Marseilles, Turin and Milan, on large and accurate scales, which I procured while in those towns respectively." The fair presumption is that L'Enfant's request of Mr. Jefferson was the result of a previous communication to him by Mr. Jefferson that he possessed the desired information, for it is impossible to conceive, with all this information in his possession, that Mr. Jefferson, who must have come in contact with L'Enfant, would not have stated to him the fact. It is also fairly to be assumed that, as Mr. Jefferson had procured in person when abroad the plans of all these foreign cities, he was looking forward to them as means of information and guidance to be used for the future Federal City; otherwise he would not have undertaken such a labor. That Mr. Jefferson was familiar with the plans is of course manifest; for, with his phenomenal faculty of reaching out for sources of information on all subjects and storing his mind therewith for future use, it is impossible to conceive that he had not vividly before him the method by which the cities in question were laid out. Now, it is especially to be remembered that every one of the cities mentioned by Mr. Jefferson, the plans of which he had forwarded, were on the continent of Europe, that is, were situated in countries governed by the general principles of the civil law. By that law, whilst lot owners fronting on a navigable river have the enjoyment of riparian rights, this right vested in them is subject to what the civilians denominate a legal servitude, that is, an easement, by which they are compelled to leave around the entire river front an open space or way in order to afford convenient access to the water by the public. Whilst this open way may be used by everybody, it does not cut off the riparian rights, but is simply superimposed upon those rights, the lot owner having the enjoyment of the rights, but being obliged to furnish the open space which the public may use. (Civil Code of Louisiana, Art. 665; *Dubose* v. *Levee Commissioners*, 11 La. Ann. 165; Code Napoleon, Art. 650,

and note to the article in question in the Annotated Code by Fuzier-Herman (Paris, 1885), p. 880.)

Is it not natural to presume, in view of the country from which L'Enfant came, in the light of the plans which Mr. Jefferson sent him and of the knowledge which Mr. Jefferson had acquired of these plans, and by the personal investigation which he had made in procuring them, that the L'Enfant plan but exhibited the principle of legal servitude as embodied in the civil law? When one looks at the L'Enfant plan and bears in mind the civil law rule, it strikes me that the plan but illustrates and carries out that rule.

Strength is added to this view by considering the Maryland law of 1791 conferring authority upon the Commissioners to regulate wharfage and giving other directions as to the city. That law was passed at the request of the Commissioners, preferred at a meeting held when Mr. Jefferson and Mr. Madison were present. It may properly be assumed that the draft of so important a law was, before its passage, submitted to President Washington and his advisers. Now, the Maryland statute contains two provisions, then and now existing in substantially all civil law countries, but at that time not usual in countries controlled by the common law; that is, a provision for a builder's lien, and one directing that houses or buildings should be erected in accordance with the rule of party walls. Was this then new departure discovered by a member of the Maryland legislature, or was it not rather suggested because it prevailed in the continental cities, the mind of Jefferson being then directed to the rule in those cities, as it was upon the plans prevailing in them that the proposed capital was to be laid out? This view is greatly fortified by the wharfing regulations, which were formulated by the Commissioners and approved by the President. It will be seen that they provided that when a wharf was to be extended by the proprietor of a water lot a space should be left for a street wherever the general plan of the city required it, and at intervals of three hundred feet a space of sixty feet should be left for new streets. There is an analogy between the regulations in question and section 38 of the French ordinance of

1669 on the same subject. (Code Civil, by Fuzier-Herman (Paris, 1885), p. 880, note 1 to article 650, where the text of the French ordinance is stated in full.)

But we are not left to mere resemblance on this subject, for there exists the express declaration of the Commissioners to the effect that they considered that the continental rule governed in the plan of the city as to the wharves, which declaration was in effect approved by Washington himself. After the proposed wharfing regulations had been submitted to the President and while they were under consideration, the complaint of Mr. Barry was made, to which reference has been made, and the letter was written by the Commissioners to the Secretary of State regarding such complaint and explaining the nature thereof. Now, in that letter, in giving their reasons why, by the regulations which they finally submitted, the Commissioners had restricted the erection of buildings on the wharves, they referred to the open space, and added "which we presume it was the intention of the executive to keep open to the wharves as is the case in Bordeaux and some other cities of Europe." This must have been derived from an antecedent knowledge of the purposes of the plan. It must have been approved by Washington, for it is impossible to believe that with this important explanation made to the Secretary of State for submission to the President, when he was considering whether he would approve the regulations, he should not have corrected such a misapprehension if it was such. Besides, the general conditions involved in the foundation of the Federal City persuasively indicate why Washington and Jefferson and Madison should have established the city upon the continental plans, with which not only Jefferson but L'Enfant was familiar. The contracts with the proprietors required an equal division, those with the lot owners in Carrollsburgh and Hamburgh an allotment of one half the quantity of their former land in a like or as good a situation. As the laying off of a street so as to take away the riparian privileges of former water lot owners would be incompatible with an equal division or one in like situation, there was a serious difficulty in so doing. On the other hand, not to

keep an open way for public access might well have been conceived as injurious to the public interests. The theory of an easement furnished a ready solution for this otherwise insuperable difficulty. It afforded an apt means of protecting all the rights of the water lot owners by preserving their riparian rights and wharfing privileges, and at the same time it afforded full protection to the rights of the public by keeping an open space on the water front, subject, it is true, to the exercise of riparian rights, but in no way interfering with public utility. Another consideration bears this view out. That it was hoped that the means for establishing the city to be derived from the sale of lots would be readily aided by the purchase of lots by residents of France and Holland is shown by the record, for among the first uses made of the engraved plan was to send copies thereof to the continent in the hope of stimulating there a desire to purchase, and the record shows that a member of the Amsterdam firm, heretofore referred to, actually purchased lots in the city with reference to the plan. Now, the sagacious men who were Washington's advisers must have seen at once that the plan preserving the riparian rights, and giving access at the same time to the river front, in accordance with the system which, it may be assumed, existed in the countries where it was hoped that money would be obtained, was much more likely to accomplish the desired result than the adoption of a contrary plan.

But the strongest argument in support of this theory of the purpose of Washington and the object contemplated by the plan, is that if it be adopted all the facts in the record are explained and rendered harmonious, one with the other. The plans over which controversy has arisen all then coincide. The reason why so much of Water street was laid in the water becomes apparent. The contracts for the sale of water lots with riparian rights attached, the reports of the surveyors and the action of the Commissioners, all blend into a harmonious and perfect whole, working from an original conception to a successful consummation of a well-understood result. The contrary view produces discord and disarrangement, and leads

to the supposition either that the plan of a street, cutting off riparian rights, was devised in ignorance of its legal result — and, of course, I have not the audacity to make such suggestion as to Washington and Jefferson and Madison, and Mr. Justice Johnson of this court, and all the other wise men who lent their aid to the establishment of the city — or that the plan of the street, in that sense, having been devised it was at once departed from because it was discovered that it was not only in conflict with the rights of the lot owners, but also would destroy the sale of the water lots, hence all the contracts and dealings and declarations to which I have referred ensued. But if the theory that the plan of establishing an easement was adopted be not true, and it be conceded that it was the intention to lay out a street, in the fullest sense of that word, which would cut off the riparian rights, such conclusion, in my judgment, would not at all change the result in this case, for in that event, I submit, that the contracts and dealings and representations and admissions, upon which the lot owners dealt and upon which everybody acted in changing their respective positions, brings into play the principle of estoppel and compels, in accordance with the elementary principles of equity, that the riparian rights and rights of wharfage which were bought and paid for, and which were solemnly declared to exist in every conceivable form, should now be respected.

It would thus seem from the events of the two periods that the riparian rights of the water lot owners were conclusively established, and that it is unnecessary for me, in considering the last and final period, to do anything more than to state that nothing therein occurred by which the water lot owners abandoned or were legally deprived of their rights. But, from abundant precaution, let me, in a condensed form, refer to the events of the third period, simply to show that the riparian rights of water lot owners continued to be recognized down to so recent a period as the year 1863, and were not thereafter interfered with in such manner as to give even color to the contention that the rights were transferred to the Government.

3. *Events subsequent to March* 2, 1797.

The legislation by Congress and the municipality of Wash-

ington with respect to wharfing practically constitutes the only facts necessary to be considered in any review of this period. That legislation, I submit, until a comparatively recent date, in nowise imported a denial of private ownership of wharfing rights as attached to water lots, but, on the contrary, establishes their existence.

I first premise as to the existence of *public* wharves.

On one of the water lots of Hamburgh there existed in June, 1794, what was termed the "City Wharf." On the plat of survey of square 89 this wharf appeared, on lot 10, as "Commissioners' Wharf." Lot 10 was retained for the public. On January 26, 1801, the proceedings of the Commissioners recite that a "representation," which was set out, had that day been sent to the President. In it the public property of the city was enumerated, and in the course of such enumeration the statement was made that "Four wharves have been built at the expense of $3221.88, *which remain in a useful state.*" As I have heretofore shown, a number of private wharves had been built prior to 1800, three of which appear on the Dermott map, but in the representation no claim is advanced, that such wharves were *public* property.

The act of Congress of May 1, 1802, c. 41, 2 Stat. 175, abolished the Commissioners and vested their powers in a superintendent. The act of May 3, 1802, 2 Stat. 195, incorporated the inhabitants of the city. In 1802, as we have seen, there were at least four, and perhaps five, wharves, which were owned *by the public.* While authority was given to the corporation of Washington, by the act of May 3, 1802, to "regulate the stationing, anchorage and mooring of vessels," no authority to license or regulate the building of wharves was given. Presumably as to *private* wharves, the regulations of 1795 were deemed to be in force.

I pause here to interrupt the chronological review of the legislation as to wharfing, to call attention to a report, bearing date September 25, 1803, made by Nicholas King, as surveyor of the city, to President Jefferson on the subject of a water street and wharves, simply because this communication is referred to in the opinion of the court. It is submitted

that on the face of the communication, instead of tending to show that there was question as to the existence of the wharfing rights, it, on the contrary, expressly asserts their existence and relates only to their definition and regulation. Indeed, the main purpose of the communication seems to have been a complaint that the wharfing regulations as originally proposed should have been approved by President Washington without striking out the clause which forbade the wharf owners from building on their wharves. And all this becomes very clear when it is considered that Surveyor King, by whom the letter was written, was the same person who in previous years had avowedly asserted the existence of riparian rights in favor of a former proprietor, Robert Peter, and made claim in relation thereto.

The act of February 24, 1804, c. 14, 2 Stat. 254, gave the city councils power to "preserve the navigation of the Potomac and Anacostia Rivers adjoining the city; to erect, repair and regulate public wharves, and to deepen docks and basins." While, under the authority conferred "to preserve navigation," private wharves could have been regulated, manifestly no such power could have been exercised under an authority to "*erect* and REPAIR and regulate *public* wharves."

That private wharves were not regarded as public wharves is clearly evidenced in the ordinance of July 29, 1819, (Burch's Dig. 126,) passed under the authority granted by the act of 1804 "to preserve the navigation of the Potomac." The act reads as follows:

"SEC. 1. That the owners of private wharves or canals, and canal wharves, be obliged to keep them so in repair as to prevent injury to the navigation. . . .

"SEC. 2. That no wharf shall hereafter be built, within this corporation, without the plan being first submitted to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same, and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf, then, and in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which per-

mit shall express how near such wharf shall approach the channel."

How and where, may I ask, did the private wharves originate if no such wharves existed?

That the authority conferred with respect to public wharves was not supposed to vest power over *all* wharves is also indicated in the act of May 15, 1820, c. 104, 3 Stat. 583, which expressly distinguished the two classes. The corporation was empowered "to preserve the navigation of the Potomac and Anacostia Rivers adjoining the city; to erect, repair and regulate public wharves; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the stationing, anchorage and mooring of vessels."

The distinctive character of *private* wharves was still further recognized in the act of the city councils of May 22, 1821, (Rothwell's Laws, D. C. 275,) by section 1 of which the mayor was authorized and requested "to appoint three intelligent and respectable citizens, *not being wharf owners*, as Commissioners to examine and report to the two boards a suitable plan to be adopted for the manner of erecting wharves *upon the shores* of the Anacostia and Potomac Rivers."

And, by section 2, the mayor was solicited to wait upon the President, and to request his appointment of such persons as he might deem proper, to coöperate with those commissioners.

Again, by resolution of the councils, approved September 3, 1827, it was enacted "that a committee of two members from each board be appointed to act, in conjunction with the mayor, in regulating the mode of erecting wharves," conformably to section 2 of the act of councils approved July 29, 1819.

Similar recognition of private ownership of wharves is contained in the resolution of the councils of March 19, 1823, which established "*as fish docks*," amongst other sites, "the steamboat wharf on the Potomac, near the bridge over the Potomac, and at Cana's wharf."

That the preservation of navigation was the controlling object in the regulation of private wharves is very distinctly evidenced in the act of councils, approved January 8, 1831, Corp. Laws 1830–1, p. 34, which, in section 6, repealed the act

of councils of July 19, 1819, and in the first section enacted as follows:

"SEC. 1. That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation, who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee of the two boards of the city council shall examine the same; and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then, in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall approach the channel, and at what angle they shall extend from the street on which they are erected."

Four years after the enactment last referred to a slight controversy was precipitated as to the existence of rights of wharfage as attached to water lots on the Potomac River between the Long Bridge and the Arsenal grounds. On April 13, 1835, a resolution to the effect that the city had never attempted, and, without injury to the general interests, could not admit, the existence of "water rights" of individuals, between the Long Bridge and the Eastern Branch, was indefinitely postponed. A Mr. Force, then a member of the lower board of the city council, protested against the action thus taken. We have seen how unfounded was the assumption contained in this proposed resolution. In 1839, however, Mr. Force, as mayor of the city, approved a plan of William Elliott for the establishment of Water street and for the regulation of wharfing thereon. I shall, as briefly as possible, outline the history of the plan:

As surveyor of the city of Washington in 1833, William Elliott (the subject of "water privileges" then being before the councils of the city) suggested to William A. Bradley, mayor of the city, "that system" which was deemed by the former "best for securing those privileges in the most equitable manner amongst those who own property facing on Water street, as well as securing the public rights." It was proposed by Elliott, in his plan No. 2, that Water street, besides being

conformed to certain particular outlines, be rendered everywhere not less than one hundred feet in width, between the Long Bridge and the then Arsenal grounds, and that the construction of wharves and docks — of wharves, by individuals owning lots on the north side of Water street, and of wharves or docks, by the public, opposite public appropriations, or the ends of streets terminating at the north line of Water street — between that bridge and those grounds, be governed by the principle that the Water street front of any such lot, appropriation or end of street should furnish it a channel front, only in the proportion existing between the total frontage of Water street, estimated at 5280 feet, and the chord, estimated at 5050 feet, measuring the total channel front — between the Long Bridge and the then Arsenal grounds. The plan was described on its face as of that part of the city "exhibiting the water lots and Water street and the wharves and docks thereon, along the Potomac, from E to T street south." It assigned, in the ratio proposed by Elliott, to every square on the north side of Water street a wharfing site from the south side of that street to the "edge of the channel" of the Potomac, and to public appropriations and the ends of streets terminating at Water street, sites for docks or other like uses. It represented Water street as of varying width, and reduced, on its southern limits, to a curve lying parallel to that describing the edge of the channel; and the squares, on the north side of Water street, to which wharfing sites are assigned, are designated as "water lots" on the face of the plan. A more complete recognition of the preëxisting riparian rights of the water lot owners than is shown on and established by this plan my mind cannot conceive.

On February 22, 1839, the city councils adopted the following resolutions:

"*Resolution* in relation to the manner in which wharves shall be laid out and constructed on the Potomac River:

"*Resolved*, That the plan No. 2, prepared by the late William Elliott, in eighteen hundred and thirty-five, while surveyor of the city of Washington, regulating the manner in which wharves on the Potomac, from the bridge to T street

south, and the plan of Water street, shall be laid out, be, and the same is, adopted as the plan to be hereafter followed in laying out the wharves and the street on the said river: *Provided*, The approbation of the President of the United States be obtained thereto.

"*Resolved*, *also*, That the wharves hereafter to be constructed between the points specified in the said plan shall be so built as to allow the water to pass freely under them; that is to say, they shall be erected on piers or piles from a wall running the whole distance on the water line of Water street." Sheahan's Laws, D. C. 178 (ann. 1857).

These resolutions were approved by the mayor of the city, Mr. Peter Force.

Before their passage and on February 15, 1839, Secretary of the Treasury Woodbury, afterwards a Justice of this court, had referred plan No. 2 of William Elliott to William Noland, Commissioner of Public Buildings, and (intermediately) the successor in office of the Commissioners, for the opinion of that Commissioner upon the judiciousness of the improvement contemplated in the plan.

On February 21, 1839, the day following the passage of the ordinance, Mr. Noland, acknowledging the receipt of the plan and returning it to the Secretary, reports, "that after due deliberation," he believes "*the improvement proposed would be judicious and proper.*"

On February 23, 1839, the day following the passage of the resolutions, the plan, *approved by the President*, was transmitted by Mr. Woodbury to Mayor Force.

When it is considered that up to the time when the Elliott plan received the approval of President Van Buren, Water street, though contemplated, had not been further laid down than by the establishment of the upper boundary or building line, this action manifestly possesses great significance. The fact that action with respect to Water street was incomplete was expressly stated by Attorney General Lee in his opinion to President Adams on January 7, 1799, when he said, referring to the Dermott map:

"It is not supposed that this is incomplete in any respect,

except in relation to the rights appurtenant to the water lots and to the street that is to be next to the water courses. . . . The laying off of Water street, whether done in part or in whole, will stand in need of the sanction of the President."

As in the President of the United States therefore was vested the authority to complete the plan of the city in any particular in which it was defective, the approval of President Van Buren may properly be referred to the exercise of that power, and as entitled to be regarded as a distinct declaration that Water street was not to have the operation now asserted of divesting the water lots fronting towards the river on Water street of riparian rights. From Washington, then, to Van Buren, in every form in which it could be done, the riparian rights of the lot holders have been continuously and solemnly sanctioned. I cannot now by any act of mine destroy them on the theory that they have never existed.

On May 26, 1840, a permit was issued by Mayor Force, by virtue of the act of June 8, 1831, to William Easby to wharf in front of some of the water squares which originally formed part of the land of Robert Peter, situate on the Potomac River near Rock Creek. I set out in the margin[1] the document re-

---

[1] MAYOR'S OFFICE,
WASHINGTON, *May* 26, 1840.

William Easby of the city of Washington having made application for permission to erect a wharf in front of square No. 12, and extend a wharf in front of square south of square No. 12, and having submitted to me a plan of said wharves, which plan has been examined by a joint committee of the board of aldermen and board of common council, who have certified that "no injury will result to the navigation of the river from the erection and extension of the wharves upon said plan."

Permission is therefore granted to the said William Easby to erect a solid wharf the whole extent of square No. 12, in front thereof, and to extend a wharf in front of square south of square No. 12, thirty feet, fifteen feet of which to be solid, as laid down upon said plan which exhibits the situation of the wharves aforesaid as proposed to be built by his letter of 3d of February, 1840.

Which permission is granted on the terms and subject to all the conditions prescribed by the act entitled "An act to preserve the navigation of the Potomac and Anacostia Rivers, and to regulate the anchoring and mooring vessels therein," approved January 8, 1831; and of any act or joint reso-

ferred to, which exhibits that it was for an unlimited time, and with no provision that the wharf should revert to the Government as in permits of very recent date.

That on May 25, 1846, a committee of police, of the lower part of the city councils, presented to that board a report which in effect denied the existence of private rights of wharfing may be conceded. Like the resolution of 1835 it was based upon a superficial inquiry into the subject, and like its predecessor, the resolution of 1835, was "laid upon the table." Various acts of the city council, one dated March 8, 1850, another September 30, 1860, and the other May 3, 1866, appropriating in the aggregate $2600.00 for the repair of sea walls along the Potomac at points between the Long Bridge and the Arsenal grounds, are set out as evidence of an assertion by the city of the right of ownership to all the riparian privileges in that locality. I am unable, however, to see that these circumstances are entitled to the weight claimed for them. Under the wharfing regulations of 1795 the ultimate cost of making a Water street was to be borne by the city, and a sea wall may well be treated as part of such street. The evidence in the record also shows that a goodly portion of the sea walls along the Potomac in the locality referred to was built opposite to the water lots on the north side of Water street and by the owners of such lots, and that some of such owners had graded Water street in front of their lots in order to the exercise of their wharfing privilege. There is nothing in the record to support the claim that if the city had at any time constructed a sea wall, it claimed that the wharfing privileges in front of such wall had been taken away from the opposite lots. And the ordinance of the city councils of February 22, 1839, adopting the plan of William Elliott, clearly rebuts such an inference, for it is there provided that wharves thereafter "to be constructed" should "be erected on piers or piles from a wall running the whole distance of the water line of Water street." In other words, although in

---

lution that may hereafter be passed relating to wharves in the city of Washington.

PETER FORCE.

the most solemn form, it was declared that the owners of the water lots should enjoy their wharfing rights by extending their wharves from the sea wall towards the channel, yet it is now argued that the construction of the sea wall destroyed the right of the lot owners to the wharves built by them in accordance with the provisions of the ordinance.

That since the act of March 13, 1863, referred to in the opinion of the court, various enactments have been passed by the corporation or its representatives, asserting power in the nature of private ownership over the wharves on Water street, and not merely the possession of power as trustee for the purposes of public regulation or the protection of navigation, may be conceded. But it is not claimed nor does it appear from the evidence that there has been such interference with or disturbance of the actual possession of the rightful occupants as would constitute an adverse possession in the city operative to bar the lawful claims of the real owners of the wharfing privileges. Similar observations are also applicable to the licenses issued by the chief of engineers for the time being during a part of the period last referred to.

It is not necessary to review the evidence showing the unequivocal possession enjoyed by the wharf owners up to this *time* or to state the proof, as to the expenditures of time, labor or money by the owners of the water lots along the Potomac River — upon the faith of the wharfing regulations and the possession of riparian privileges — the filling in by them of Water street, the erection of sea walls, the filling in of parts of the bed of the river beyond Water street, as well as various other expenditures. Indeed, so self-evident are these things that the court deems it proper that the defendants should be compensated by the Government before being ousted of the possession of such improvements, as wharves and structures thereon. If the demands of equity require that the structures be paid for by the Government, far greater and stronger is the reason for concluding that the right of property, on the faith of which the structures were made, should not be denied or taken away without just compensation. Neither equity nor reason are subserved, it seems to me, by protecting the mere

incidental right whilst uprooting the fundamental principle of property upon which the incident depends.

Having in what has preceded fully expressed my view of the existence of the riparian rights as developed from this record, it remains only to consider certain previous decisions of this court relied upon and referred to in the opinion of the court. Nothing in the views above expressed is in any way affected by the case of *Van Ness* v. *Mayor &c. of Washington*, 4 Pet. 232. That case determined that the public streets in the city of Washington were public property. But the question in this case lies beyond that and is, first, was there a public street proposed around the entire river front or a mere creation of an easement superimposed upon the riparian rights? or, second, granting there was such public street, in view of the contracts between the original proprietors of the division of the squares and lots, and of all the contracts and dealings, can the Government be heard in a case of the character of that before the court, to deny the existence of riparian rights and rights of wharfage in the owners of water lots fronting on the alleged street? True it is that in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, the question whether a lot fronting on the Potomac River, lying in that portion of the city formerly constituting the land of Notley Young, had riparian rights, was considered and determined adversely to the lot owner, on the ground that the lots being bounded by Water street on the return and plat of survey, were thereby separated from the river, and hence not entitled to riparian rights. As I have said, from the principle of law therein enunciated I do not dissent, but rest my conclusion on the facts as they are disclosed in this record. That many of the facts which have been considered and stated were not present in the record in the case, is patent from the opinion in that case. Certainly, however, it is not contended that the defendants in this record were either parties or privies to the case there decided. A conclusion on one condition of fact is not binding as to another condition of fact between different parties in a subsequent law suit. I cannot bring my mind to adopt the inferences deduced by the court in the case just

referred to, in view of what I conceive to be the absolutely conclusive proof establishing the existence of riparian rights in favor of the owners of water lots in the city of Washington. To deny them, it seems to me, in view of the record now here, as was said at the outset, would be an act of confiscation. Of course this is said only as conveying my appreciation of the facts.

As it is beyond my power by this dissent to enforce the rights of the owners of water lots to riparian and wharfing privileges, it would serve no useful purpose for me to measure the claims of such owners by the principle which I have endeavored to demonstrate, that is, the existence of the riparian rights. Suffice it for me to say, therefore, that in my judgment, even granting that such rights exist, the owners thereof would not be entitled to compensation if the right was impaired or destroyed as the consequence of work done by the Government in the bed of the river for the purpose of improving navigation, for all riparian rights are held subject to this paramount authority. As a consequence, if injury resulted to riparian rights in the exercise of this controlling governmental power, such injury would be *damnum absque injuria.* But I think that where it is simply proposed, as is the case with many if not all the lots between the Long Bridge and the Arsenal grounds, to appropriate the riparian rights simply by an arbitrary line running along the edge of the water on the map, thereby cutting off all wharves and buildings thereon upon the theory that none of the riparian rights segregated by the line were private property, this is but an appropriation of private property requiring just compensation. By these general principles, in my judgment, the rights of the parties should be determined.

Mr. Justice Gray and Mr. Justice McKenna were not present at the argument, and took no part in the decision.

Statement of the Case.

RATON WATER WORKS COMPANY *v.* RATON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 272. Argued April 28, 1899. — Decided May 15, 1899.

The water works company contracted with the municipal corporation of Raton to construct and maintain water works for it, and the corporation contracted to pay an agreed rental for the use of hydrants for twenty-five years. The works were constructed, and the corporation issued to the company, in pursuance of ordinances, warrants for such payments falling due one in every six months. Subsequently the corporation repealed the ordinances authorizing payment of the warrants, and passed other ordinances in conflict with them, whereupon the corporation refused to pay the warrants which had accrued and others as they became due. Thereupon the company filed this bill to enforce the payments of the amounts of rental already accrued, and as it should become due thereafter. *Held*, That the remedy of the company upon the warrants was at law, and not in equity, and that the court below should have dismissed the bill, without prejudice to the right of the company to bring an action at law.

In August, 1895, the Raton Water Works Company, a corporation organized under the laws of the Territory of New Mexico, filed, in the district court of the county of Colfax, Territory of New Mexico, a bill of complaint against the town of Raton, a municipal corporation of that Territory.

It was narrated in the bill that a contract had been entered into, in July, 1891, between the water works company and the town of Raton, whereby the company agreed to erect and maintain water works and to supply the town and its inhabitants, and the town agreed to pay rental for the use of hydrants in certain amounts during a period of twenty-five years; that the water works company had fully performed and complied with the contract on its part, at an expenditure of $115,000; that the town, from time to time, made certain payments of rental for hydrants furnished; that on January 1, 1895, the town, in pursuance of ordinances, issued to the water works company in payment warrants of said town, of that date, and falling due one every six months, and aggregating several

thousand dollars. Each of said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town; that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town, in his hands for disbursement, the amount of each of said warrants, in the order in which the same were presented to him for payment; that, subsequently, the board of trustees of said town wrongfully and without authority of law, and in disregard of the contract rights of the water works company, undertook to repeal the ordinance in which the terms and method of payment for the rent of hydrants were prescribed, and to pass certain other ordinances in conflict with the preceding ordinances under which the rights of the company had accrued; that, in pursuance of the latter ordinances, the town treasurer refused to register warrants held by the company and presented for registration; that, in addition to the amount of said warrants, there will accrue and become due to the company semi-annually during the continuance of said contracts the sum of $1962.50; that said town refuses to pay the said several amounts heretofore accrued and payable, and refuses to pay the said several amounts which will hereafter accrue, and gives out and pretends that the said contract is inoperative and invalid, and refuses to perform the same on its part, although in the possession, use and enjoyment of the said water plant under said contract.

The bill prayed that the town of Raton should be decreed specifically to perform the said contract, and to pay the amounts of said rental which had theretofore accrued and become payable, and might thereafter accrue and become payable, in pursuance of the terms of the contract, and should be enjoined from enforcing said repealing ordinances.

The defendant, in its answer, admitted the making of the contract, the performance thereof by the company; that the board of trustees issued to the company the several warrants, drawn in manner, amount and number as alleged in the bill;

that it was the duty of the treasurer of the town to keep in his office a book of registry, but denied that it was the duty of the treasurer to enter and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of the town in his hands for disbursement the amount of each of said warrants in the order in which the same were presented, or in any other order, said warrants being illegal, null and void. Also admitted the passage of the original ordinance prescribing the method of payment of rental by the issuance of warrants, and the passage of the repealing ordinance complained of, and that it has been and now is in the possession, use and enjoyment of the water plant of the water works company. The answer likewise admitted that it has given out that said contract, so far as it calls for the payment of $1962.50 semi-annually, is inoperative and invalid, and that it has refused to pay said sum semi-annually.

By way of defence, the answer alleged that defendant, as a municipal corporation of the Territory of New Mexico, is authorized by law to levy each year and collect a special tax sufficient to pay off the water rents agreed to be paid to the complainant, provided that said special tax shall not exceed the sum of two mills on the dollar for any one year; that said alleged semi-annual rental of $1962.50 claimed by the complainant is far in excess of the amount derivable from a two-mill tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal; that said original ordinance, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax, or to impose a tax levy greater than said rate, was and is null, void and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers conferred upon them by the statutes of New Mexico; and that the warrants issued to complainant were and are null and void, because issued in excess of the amount derivable from a two-mill tax levy on each dollar of taxable property.

Having thus answered, the defendant pleaded "that all and every the matters the complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that it shall have the same benefit of this defence as if it had demurred to the complainant's bill."

The cause was heard on bill and answer, and in September, 1896, the said district court entered a decree in accordance with the prayer of the bill, decreeing that the said original ordinance, contract and agreement should in all things be specifically performed by and on the part of the town of Raton, and that the town should issue and pay the warrants out of any funds or moneys in the treasury of the town, whether derived from general or special taxes. From this decree an appeal was taken to the Supreme Court of the Territory, where the decree of the lower court was reversed and an order was entered directing the lower court to dismiss the bill at the cost of the water works company. The cause was then brought to this court on an appeal from the decree of the Supreme Court of the Territory.

Mr. Henry A. Forster for appellant.

Mr. N. B. Laughlin for appellee.

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

The water works company, when it filed its bill in this case, was in possession of warrants that had been issued to it by the town of Raton in pursuance of the provisions of a contract existing between the company and the town. Those warrants were in the form of drafts drawn on the treasurer of the town, signed by the mayor and countersigned by the recorder of the town. They were for specific sums of money, payable at fixed periods, bearing interest from date, and some of them past due when the bill was filed.

In short, the warrants, if valid, were legal causes of action enforceable in a court of law. The defendant did not waive the question, but averred in its answer that the matters complained of in the bill were matters which could be tried and determined at law. And the Supreme Court of the Territory in its opinion says: "If the warrants, upon which payment is sought here, are valid, an action at law is the proper remedy to enforce their payment. They have been issued and are claimed to be outstanding obligations against the defendant town, and it says they are void, and therefore declines to pay them. Then, if in an action at law judgment should be in favor of the legal holders, and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy."

In this state of facts we think the courts below erred in considering and determining the legal controversy in a suit in equity, but should have dismissed complainant's bill without prejudice to its right to bring an action at law. *Barney* v. *Baltimore*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423; *Rogers* v. *Durant*, 106 U. S. 644.

Accordingly, and without expressing or implying any opinion of our own on the merits of the controversy —

The decree of the Supreme Court of the Territory is reversed and the cause is remanded to that court with directions to amend its decree by directing the district court to dismiss the bill without prejudice to the right of the complainant to sue at law.

CONCORD FIRST NATIONAL BANK *v.* HAWKINS.

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

No. 187. Argued and submitted January 20, 1899. — Decided May 15, 1899.

The investment by the First National Bank of Concord, New Hampshire, of a part of its surplus funds in the stock of the Indianapolis National Bank of Indianapolis, Indiana, was an act which it had no power or

Statement of the Case.

authority in law to do, and which is plainly against the meaning and policy of the statutes of the United States and cannot be countenanced; and the Concord corporation is not liable to the receiver of the Indianapolis corporation for an assessment upon the stock so purchased made under an order of the Comptroller of the Currency to enforce the individual liability of all stockholders to the extent of the assessment.

The doctrine of estoppel does not apply to this case.

In May, 1895, Edward Hawkins, as receiver of the Indianapolis National Bank, brought a suit, in the Circuit Court of the United States for the District of New Hampshire, against the First National Bank of Concord. At the trial a jury was waived, and the court found the following facts:

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month.

"The capital stock of the bank was 3000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the Comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of stockholders, and an order made to pay such assessment on or before the 25th day of November, 1893; and the defendant was duly notified thereof.

"The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank

prior to July, 1893. The defendant has not paid said assessment or any part thereof."

After argument the court, on July 28, 1896, entered judgment in favor of the plaintiff for the sum of $11,646.67 and costs. From that judgment a writ of error from the United States Circuit Court of Appeals for the First Circuit was sued out, and by that court the judgment of the trial court was, on March 5, 1897, affirmed. 33 U. S. App. 747. From the judgment of the Circuit Court of Appeals a writ of error was allowed to this court.

Mr. Frank S. Streeter for the Concord National Bank submitted on his brief.

Mr. John G. Carlisle for Hawkins. *Mr. J. W. Kern* was on his brief.

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

The questions presented for our consideration in this case are whether one national bank can lawfully acquire and hold the stock of another as an investment, and, if not, whether, in the case of such an actual purchase, the bank is estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the Comptroller of the Currency.

By section 5136 of the Revised Statutes a national banking association is authorized "to exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of indebtedness; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

In construing this provision, it was said by this court, in

First National Bank v. *National Exchange Bank*, 92 U. S. 122, 128, that "dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

And in the recent case of *California Bank* v. *Kennedy*, 167 U. S. 362, it was said to be "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. . . . No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. . . . So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Accordingly it was held in that case that a provision of the laws of the State of California, which declared a liability on the part of stockholders to pay the debts of a savings bank, in proportion to the amount of stock held by each, could not be enforced against a national bank, in whose name stood shares of stock in a savings bank, it being admitted that the stock of the savings bank had not been taken as security, and that the transaction by which the stock was placed in the name of the national bank was one not in the course of the business of banking for which the bank was organized.

It is suggested by the learned Circuit Judge, in his opinion overruling a petition for a rehearing in the Circuit Court of Appeals, that the question considered in the case of *California Bank* v. *Kennedy* was the liability of a national bank as a stockholder in a state savings bank, while the question in the present case is as to its liability as a stockholder in another national bank, and that therefore it does not follow beyond question that the decision in the former case is decisive of the present one. 50 U. S. App. 178.

No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant States, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful. Thus, it is enacted, in section 5146, that "every director must, during his whole term of service, be a citizen of the United States, and at least three fourths of the directors must have resided in the State, Territory or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office."

One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be

managed by directors of their own selection, but by distant and unknown persons. Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one.

Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association."

This provision, forbidding a national bank to own and hold shares of its own capital stock, would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another.

Without pursuing this branch of the subject further, we are satisfied to express our conclusion, upon principle and authority, that the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds as an investment, and hold as such, shares of stock in the Indianapolis National Bank of Indianapolis.

The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank,

can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

This question has been so recently answered by decisions of this court that it will be sufficient, for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached.

In *Central Transportation Company* v. *Pullman's Car Co.*, 139 U. S. 24, after an examination of the authorities, the conclusion was thus stated by Mr. Justice Gray:

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defence to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the States, finds no support in the judgment of this court. . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped

to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

The principles thus asserted were directly applied in the case of *California Bank* v. *Kennedy*, 167 U. S. 362, 367, where the question and the answer were thus stated by Mr. Justice White:

"The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation, estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases . . . recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

There is then quoted a passage from the decision of the court in *McCormick* v. *Market National Bank*, 165 U. S. 538, 549, as follows:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The conclusion reached was thus expressed:

"The claim that the bank, in consequence of the receipt

by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory.

Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

However, whether, in the case of persons *sui juris*, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case.

If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act.

It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the validity of all the contracts by

which the registered shareholders acquired their respective shares.

The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted.

The judgment of the Circuit Court of Appeals is reversed, the judgment of the Circuit Court is also reversed, and the cause is remanded to that court with directions to enter a judgment in conformity with this opinion.

PRICE *v.* UNITED STATES AND OSAGE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 247. Argued April 19, 1899. — Decided May 15, 1899.

Under the act of March 3, 1891, c. 538, giving the Court of Claims jurisdiction over claims for property of citizens of the United States taken or destroyed by Indians no jurisdiction is given to the court over a claim for merely consequential damages resulting to the owner of property so taken by reason of the taking but not directly caused by the Indians.

This case came on appeal from the Court of Claims. The matter of dispute is disclosed by the second and fourth findings of the court, which are as follows:

Second. "On the 26th day of June, 1847, near the Arkansas River, on the route from western Missouri to Santa Fé, at a place in what is now the State of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of said decedent, which at the time and place of tak-

ing were reasonably worth the sum of four hundred dollars ($400).

"At the time said oxen were taken they were being used by said decedent in the transportation of goods along the route aforesaid, and in consequence of such taking decedent was compelled to abandon the trip and to sell his portion of said goods and four (4) wagons belonging to him for the sum of one thousand two hundred dollars ($1200).

"The goods and wagons of said decedent at the time of the depredation were reasonably worth the sum of seven thousand six hundred dollars ($7600).

"Said property was taken as aforesaid without just cause or provocation on the part of the owner or his agent in charge and has not been returned or paid for."

Fourth. "A claim for the property so taken was presented to the Interior Department in June, 1872, and evidence was filed in support thereof."

Judgment in that court was entered for $400, (33 C. Cl. 106,) to review which judgment the petitioner appealed.

Mr. John Goode for appellant. *Mr. F. N. Judson* was on his brief.

Mr. Frank B. Crosthwaite for appellees. *Mr. Assistant Attorney General Thompson* was on his brief.

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

The fourth finding simply shows that a claim was presented to the Interior Department and evidence filed in support thereof. The petition alleges not merely the fact of the presentation of the claim and of the filing of evidence to sustain it, but also an award by the Secretary of the amount of $6800, a sum covering both the value of the property taken by the Indians and the consequential damages resulting therefrom. A demurrer by the defendants having been overruled, a traverse was filed, denying all the allegations of the petition.

Taking the pleadings with the findings we might justly assume that there had never been any award by the Secretary of the Interior, but only a presentation of a claim and evidence in support thereof; but we notice that the Court of Claims speaks of the award as though it was a fact found. We feel, therefore, constrained to consider the case on that basis.

The conclusions of the Secretary, both as to liability and amount, were placed before the court for consideration by the election of the defendants to reopen the case. This election opened the whole case. *Leighton* v. *United States*, 161 U. S. 291.

The liability of the defendants is not disputed. The single question presented is as to the amount which may be recovered. The value of the property taken was awarded, and the only question is whether the plaintiff was entitled, not merely to the value of that property, but also to the damages to other property which resulted as a consequence of the taking. The property which was not taken or destroyed, which remained in the possession of the plaintiff's intestate, which he could do with as he pleased, the title and possession of which were not disturbed, was, as the findings show, reasonably worth $7600. Because out in the unoccupied territory in which the taking of the oxen took place there was no market, and because he had no means of transporting the property not taken to a convenient market, he was subject to the whim or caprice of a passing traveller, and sold it to him for $1200. The loss thereby entailed upon him he claims to recover under the provisions of the statute of March 3, 1891, c. 538, 26 Stat. 851.

The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Gov-

ernment is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, *Schillinger* v. *United States*, 155 U. S. 163, 166, in which this court said: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

Now the jurisdiction given by the act of 1891 to the Court of Claims is over "all claims for property of citizens of the United States taken or destroyed by Indians," etc. So far as any property was taken or destroyed by the Indians the judgment of the Court of Claims awards full compensation therefor, and no question is made as to the judgment in that respect. The single contention of the plaintiff is that because of the taking of certain property the value of other property not taken or destroyed was, under the conditions surrounding the petitioner and such property, diminished. This diminution in value did not arise because of any change in its quality or condition, but simply because the petitioner left in possession of that property was, in consequence of the taking away of the means of transportation, unable to carry it to a place where its full value could be realized. In other words, the damages which he thus claims do not consist in the value of property taken or destroyed, but are those which flow in consequence of the taking to property which is neither taken nor destroyed. In brief, he asks consequential damages. Now, as we have said, we are not at liberty to consider whether there may not be some equitable claim against the Government or the Indians for such consequential damages. We are limited to the statutory description of the obligations which the Government is willing to assume and which it has submitted to the Court of Claims for determination. We may not enter into the wide question of how far an individual taking or destroying prop-

erty belonging to another may be liable for all the damages which are consequential upon such injury or destruction. If Congress had seen fit to open the doors of the court to an inquiry into these matters doubtless many questions of difficulty might arise, but as it has only declared its willingness to subject the Government to liability for property taken or destroyed we may not go beyond that and adjudge a liability not based upon the taking or destruction of property, but resulting from the destruction or taking of certain property to other property not taken or destroyed. Questions, such as arose in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, as to the scope of constitutional limitations upon the right to take property without full compensation, are not pertinent to the present inquiry; for while if the court had free hand and could adjudge a liability upon the Government commensurate to the wrong done, one conclusion might follow therefrom; yet we are limited by the other fact that the liability of the Government to suit is a matter resting in its discretion, and cannot be enlarged beyond the terms of the act permitting it. Consequential damages to property not taken or destroyed are not within the scope of the act authorizing recovery for damages to property taken or destroyed.

We have thus far considered the case as though it were one *de novo* and in no way affected by prior proceedings in the Interior Department. As heretofore indicated, notwithstanding the limited scope of the findings, we think we ought in view of the opinion of the Court of Claims to consider the case in the attitude of one for which an award had been made by the Secretary of the Interior; that award including not merely damages for the property taken and destroyed but also what, as we have shown, were merely consequential damages. Here we are met by the contention of the plaintiff that larger jurisdiction is given to the Court of Claims in respect to matters thus determined by the Secretary of the Interior. Beyond the general jurisdiction given to the extent heretofore indicated by the quotation from the statute is this, expressed in the subsequent part of the same section:

"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 of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

It is contended that in cases coming under this clause the Court of Claims may award all damages which the Secretary of the Interior has or might have given to the petitioner. Conceding for the purpose of the argument that this contention is justified, we cannot see that therefrom any new measure of liability is established, or, at least, none that will avail this petitioner. The act of March 3, 1885, c. 341, 23 Stat., 376, which provided for the investigation by the Interior Department of claims on account of Indian depredations, and under which it is alleged that the Secretary acted in making his award, authorized the Secretary "to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid." The contention is that the terms "damaged" or "destroyed" enlarge the scope of the liability assumed by the Government. We are unable to perceive that this is of any significance in this case. The property left in the possession of the petitioner was neither damaged nor destroyed by the action of the Indians in taking away the other property. Its inherent intrinsic value was in no manner disturbed. The damages were not to the property, considered as property, but simply consequential from the wrong done, and consisted solely in the fact that the petitioner, wronged by the taking away of certain property, was unable to realize the real value of property not taken, damaged or destroyed. Nothing was done by the Indians to disturb the intrinsic value of the property left in possession of the petitioner. It remained his with full right of control and disposition, in no manner

marred or changed in value, and the sum of the injury results only from the fact that he could not remove it to a suitable market. The property, in itself considered, was neither taken, damaged nor destroyed. The only result was that his ability to make use of that value was taken away because his means of transportation were destroyed. The damages were, therefore, consequential, and not to the property itself. We do not perceive how, under the statute, the liability of the Government was enlarged by this fact.

The judgment of the Court of Claims is, therefore,

Affirmed.

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

NORTHERN PACIFIC RAILROAD COMPANY *v.* FREEMAN.

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

No. 241. Argued and submitted April 13, 1899. — Decided May 15, 1899.

A highway in the State of Washington crossed the Northern Pacific Railroad at about right angles. It approached the railroad through a deep descending cut, and the track was not visible to one driving down until he had reached a point about forty feet from it. Freeman was driving a pair of horses in a farm wagon down this descent. When he emerged from the cut and reached the point from which an approaching train was visible he was looking ahead at his horses. A train was coming up. The conductor, the engineer and the fireman testified that the whistle was blown. Three witnesses, who were not in the employ of the railroad, and who were in a position to have heard a whistle if it had been blown, testified that they did not hear it. When Freeman became conscious of the approaching train he tried to avoid it; but it was too late, and he was struck by the train and was killed. So far as there was any oral testimony on the subject, it tended to show that Freeman neither stopped, looked nor listened before attempting to cross the track. *Held*, That the testimony tending to show contributory negligence on the part of Freeman was conclusive, and that nothing remained for the jury, and that the company was entitled to an instruction to return a verdict in its favor.

Statement of the Case.

THIS was an action by the widow and minor children of Thomas A. Freeman, originally brought in the Circuit Court for the District of Washington against the receiver of the Northern Pacific Railroad Company, and subsequently, after the discharge of the receiver, continued against the Northern Pacific Railway Company, purchaser at the foreclosure sale, which, by virtue of the provisions of the decree of sale, had assumed the liabilities of the receiver. The object of the action was to recover damages on account of the death of Thomas A. Freeman, which was alleged to have occurred by reason of the negligence of the company.

The accident occurred at a highway crossing near the eastern corporate limits of the town of Elma, in the county of Chehalis, in the State of Washington, at a point where the highway crosses the railway track nearly at right angles.

Upon the trial, counsel for the railway company asked the court to instruct the jury to return a verdict for the defendant, upon the ground that the undisputed testimony showed that the deceased, as he approached the railway crossing did not look up or down the track, and did not see the train which was approaching in full view, and therefore was guilty of such contributory negligence as to preclude the plaintiffs from recovering damages. This the court refused, but left the case to the jury under the following instruction, to which exception was taken: "Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you to say; and if you believe from the evidence that deceased, Thomas A. Freeman, acted as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent and that the collision was due to their negligence."

Counsel further excepted to the following instruction: "There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few

feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable precaution and care to avoid the collision."

Exception was also taken to an instruction to the jury upon the subject of damages, which does not become material here.

Plaintiffs recovered a verdict, upon which judgment was entered for $9000. The judgment was affirmed on writ of error by the Circuit Court of Appeals for the Ninth Circuit, one judge dissenting. 48 U. S. App. 757.

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

Mr. Stanton Warburton for defendant in error submitted on his brief, on which were also *Mr. J. B. Bridges*, *Mr. O. V. Linn* and *Mr. Sidney Moor Heath.*

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

There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer and fireman that the whistle was blown. As the majority of plaintiffs' witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with respect to defendants' negligence, which was properly left to the jury.

The real question in the case was as to the contributory negligence of plaintiffs' intestate. For several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country, through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching, either from the north or the south, was cut off by the banks of the excavation on either side of the highway; but at a distance of about forty

feet before reaching the track the road emerged from the cut, and the view up the track for about 300 feet was unobstructed.

At the time of the accident, Freeman was driving along the highway, going eastward from the town of Elma in a farm wagon drawn by two horses at a slow trot. He was a man thirty years of age, with no defect of eyesight or hearing, and was familiar with the crossing, having frequently driven the same team over it. The horses were gentle and were accustomed to the cars.

The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary and has been affirmed so many times by this court, that a mere reference to the cases of *Railroad Company* v. *Houston*, 95 U. S. 697, and *Schofield* v. *Chicago & St. Paul Railway Co.*, 114 U. S. 615, is a sufficient illustration of the general rule.

There were but three witnesses to the accident. Two of these were women who were walking down the highway, and approaching the crossing on the opposite side, facing the team. At the time the deceased was struck by the train, they were from 200 to 250 feet away. They testified that the horses were coming down at a slow trot, not faster than a brisk walk, and that their speed was uniform up to the time of the accident; that the deceased looked straight before him, without turning his head either way; that the team did not swerve but trotted directly on to the crossing, and that the deceased made no motion to stop until just as the engine struck him. The other witness was a little girl, ten years of age, who was standing on the hill on the opposite side of the track, near the point where the descent of the highway into the cut began, and was consequently from 130 to 150 feet from the railway track. The deceased passed her and two other young children who were with her. She testified that as he passed his head was down, and he was looking at his horses; that "they went down aways, and then they run and flew back;" that they were going at a slow trot; that when Freeman saw the train he tried to pull the horses around, as

if he were trying to get out of the way, when the train struck them.

Another witness was driving behind the team, but he testified to nothing which bore upon the material question whether the deceased took any precaution before crossing the track.

So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. The comments of Mr. Justice Field in *Railroad Company* v. *Houston*, 95 U. S. 697, 702, are pertinent in this connection: "Negligence of the company's employés in these particulars" (failure to whistle or ring the bell) "was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty

of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track.

Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. The disposition we have made of this question renders it unnecessary to express an opinion upon the instruction as to damages.

The judgment of the court below must therefore be reversed, and the cause remanded to the Circuit Court for the District of Washington, with directions to grant a new trial.

The Chief Justice and Mr. Justice Harlan dissented.

UNITED STATES v. KRALL.

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

No. 216. Argued and submitted April 3, 1899. — Decided May 15, 1899.

On its face the decree of the Circuit Court of Appeals in this case is not a final judgment, and the appeal must therefore be dismissed.

THE case is stated in the opinion.

Mr. Charles W. Russell for appellants. *Mr. Solicitor General* was on his brief.

Mr. Edgar Wilson for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The United States alleged in its bill substantially as follows:

That in July, 1864, in Boise County, Territory of Idaho, (now Ada County, State of Idaho,) a tract of land was duly set aside as a military reservation for the establishment of a military post, and that the reservation was subsequently occupied as such post and so continued to be used by the Government of the United States, for the purpose in question, up to the time when the bill was filed. It was alleged, moreover, that flowing across the reservation was a stream of water known as Cottonwood Creek, which was non-navigable, but which afforded "an ample supply for the agricultural, domestic and practical purposes of the officers and troops of said military post, and no more, and that said stream of water, together with all the uses and privileges aforesaid, belong to and are the property of plaintiffs; and that from the time of the occupancy and location of said post, to wit, the month of July, A.D. 1864, the waters of said stream have been continually used and appropriated, and now are used and appropriated, for all

agricultural, domestic and practical purposes by plaintiff, through its said officers and troops."

The bill then averred that at a point on said stream above the reservation the defendant, his agents and employés, "are now, and have been since June, 1894, actually engaged in wrongfully and unlawfully diverting the waters of said Cottonwood Creek, and the whole thereof, from their natural course over and across the premises hereinbefore described. And the said defendant, his agents and employés have, since said June, 1894, been and now are actually engaged in diverting and appropriating the waters of said stream, and the whole thereof, and preventing and obstructing the same from flowing in its natural channel across the said military reservation, and thereby rendering the said premises unfit for use and occupancy as a military post."

Averring the illegality of defendant's acts in diverting the water from the stream and that all the water flowing in its natural course was essential for the purpose of the reservation, the bill asserted the title of the United States to all the water in the stream, and prayed that the defendant be enjoined from appropriating any portion thereof for his use "as aforesaid." In his answer the defendant denied that the water drawn off by him deprived the reservation of water necessary for any of its purposes, and on the contrary charged that there was sufficient water in the stream to meet the demands not only of the water right, which he asserted was vested in him, but also to supply every demand for water, which the reservation might need. He alleged that pursuant to the laws of the Territory of Idaho, in 1877 he had located a perpetual water right for five hundred cubic inches of water, at a point on the stream above the place where it flowed through the reservation, and that this location of water right was sanctioned by the laws of the United States. It was besides averred that during the years 1894 and 1895 "one Peter Sonna, and his associates, whose names are unknown to this defendant, without defendant's consent, diverted a large amount of the waters of said stream from the head waters thereof, and above the point on said stream where plaintiff alleges this defendant has obstructed and diverted the

same, and led the same through pipes to a reservoir on said military post, and that said military post, the officers and troops thereon stationed, have used the waters so stored in part, and have permitted large quantities thereof to pass across said reservation and to be used by the said Peter Sonna for mechanical and other purposes."

A stipulation was entered into between the parties containing an agreed statement of facts, which showed substantially this: That the reservation in question was established prior to the initiation by the defendant of his alleged water right; that "in 1877 the defendant located for agricultural, irrigation and other and domestic and useful purposes, 500 inches of the waters flowing in Cottonwood Creek, and diverted them upon the lands adjacent and in the vicinity of the easterly and southeasterly side of the military reservation, and has continuously used, and is now using, such waters, or portions thereof, for agricultural and irrigating purposes ever since that time upon such lands. His lands consist of a homestead of 160 acres, a desert entry of 160 acres, and his wife's desert of about 70 acres; he has expended between $8000 and $10,000 in the construction of necessary ditches, flumes, reservoirs, laterals and other improvements necessary for the reclamation of such lands, which were all desert in character, and of a class known as 'arid lands,' incapable of producing crops of fruit without the application of water. By means of the use of this water and the rights claimed under such location, he and his grantee have acquired title to said desert lands, and have been enabled to cultivate large annual crops of farm produce annually, and to propagate large orchards, which without the water they could not have done."

The statement, moreover, indicated the mode in which the reservation drew its supply of water from the stream, some of it being taken above the point where the defendant's water right was located, and contained the following:

"On or about the year 1894 one Peter Sonna and his associates, without the consent of the defendant, went upon the head waters of said 'Five-Mile Gulch,' one of the main tributaries of Cottonwood Gulch, and at sundry points gathered and

appropriated the waters of large and flowing springs there situated, and which are supply springs of said 'Five-Mile Gulch,' and the stream there situated, and about four miles above the point of the defendant's diversion, and conveyed the waters of said springs by means of pipes and mains, the latter being commonly known as '2-inch pipe,' down the mountains to the reservoir before mentioned as located above the officers' quarters on the reservation. The reservoir has a capacity of about 570,000 gallons. The waters so gathered and conducted were and now are stored in said reservoir, and distributed therefrom from time to time as hereafter shown. A portion of the waters from the springs, if not diverted, would eventually flow into Cottonwood Creek above defendant's point of diversion.

"The waters stored in the Sonna reservoir aforesaid are used for fire purposes only on the reservation, and are also conveyed through mains about three-quarters of a mile into Boise City, where they are used in the running of a passenger elevator in one of the largest office buildings of the city, for drinking and closet purposes therein, and for domestic [uses] in several city residences, and, in case of danger, for fire purposes, through hydrants located along the line of said main."

The lower court concluded that as the stream was not navigable and was wholly on the public domain, the defendant had no right to appropriate any of the waters as against the United States, and therefore enjoined the taking by him of any water, from the stream, above the reservation except to the extent that license to do so might be given by the commandant of the post.

The Circuit Court of Appeals, to which the cause was taken, referring to *Atchison* v. *Peterson*, 20 Wall. 507, 512; *Basey* v. *Gallagher*, 20 Wall. 682; *Broder* v. *Water Company*, 101 U. S. 274; and *Sturr* v. *Beck*, 133 U. S. 541, concluded that the defendant had acquired a valid water right even as against the United States, and therefore reversed the judgment of the trial court, and remanded the cause to that court for further proceedings in accordance with the views expressed in its opinion. The opinion of the court, after stating the right of

the defendant to acquire a water privilege, on public lands of the United States, even as against the United States, declared as follows:

"His [the defendant's] appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the government officials for the purpose of the military post reservation, which consisted of 640 acres of land, and was located on the stream in question below the point of the appellant's diversion."

It is charged in the assignment of errors that the decision of the Court of Appeals was erroneous, first, because it recognized the right of the defendant to acquire a water right as against the United States; and, second, because it held that the water right of the defendant, which originated after the establishment of the reservation, could deprive the reservation of water necessary for its purposes. This is asserted to be the consequence of the decree, because it is argued it may be construed as depriving the Government of the right to use but the quantity of water which had been previously actually appropriated for the use of the reservation, thus preventing it from enjoying the water essential for the purposes of the post, and rendered necessary by its expansion and development. To the first question the argument at bar was principally addressed.

Before considering the assignments, however, we are met on the threshold of the case with the question whether the record is properly here, because of the want of finality of the judgment rendered by the Circuit Court of Appeals. On its face the decree of that court is obviously not a final judgment, since it did not dispose definitively of the issues presented, but simply determined one of the legal questions arising on the record, and remanded the case to the lower court for further proceedings. When the state of the record, upon which the Court of Appeals passed, is considered in the light of the pleadings and agreed statement of facts, it becomes obvious that the decree, by that court rendered, was not only not in form, but also was not in substance a final disposition of the controversy. The cause of action alleged in the complaint was the

diversion of water by the defendant from the stream, to the detriment of the requirements of the reservation, by a water right acquired by the defendant after the establishment of the reservation. The agreed statement of facts, although it made it unquestioned that the defendant's asserted water right had been located on the stream above the reservation, after its establishment, also made it equally clear that after such location, above the point where the defendant's water right was fixed, water had been drawn off and carried to the reservation, and there retained in a reservoir and supplied, in part at least, to Boise City for purposes wholly foreign to the military post. There was nothing whatever in the agreed statement of facts by which it could be determined whether the amount of water thus drawn and carried to the post and used for purposes foreign to its wants would, if used for the purposes of the post alone, not have been entirely adequate to supply every present or potential need. Conceding on the general question of law that the defendant could acquire a water right, as against the United States, subject to the paramount and previous appropriation of the reservation, the court manifestly, from the state of the record, was not in a position to adjudge the rights of the parties without further proof as to exactly what would be the situation if water had not, subsequent to the establishment of the water right of the defendant, been taken from the sources of supply above his location and carried to the reservation and there distributed for other than reservation purposes. This condition of things rendered it therefore essential to remand the cause in order that the exact situation might be ascertained before the rights of the parties were finally passed upon. The fact that the decree appealed from was not final is moreover conclusively demonstrated by considering that if on the present appeal we should conclude that the judgment of the Court of Appeals was correct, we would be unable to dispose of the controversy, and we would be obliged, as did the Court of Appeals, to remand the case to the trial court for further proceedings. The gravamen of the complaint was that the alleged water right of the defendant had deprived the reservation of water required for its purposes.

Certainly if on a further trial the proof should establish that the deficiency of supply at the reservation arose not from the drawing off by the defendant of water covered by his water right, but from the act of those who, subsequent to the location of the defendant's asserted water right, tapped the sources of the supply of the stream and carried the water to the reservation whence it was distributed to Boise City, a very different condition of fact from that stated in the complaint would be presented. It follows, from these conclusions, that the judgment below was not final, and the appeal taken therefrom must be, and is,

Dismissed for want of jurisdiction.

ISRAEL *v.* GALE.

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

No. 265. Argued April 25, 26, 1899. — Decided May 15, 1899.

In this case the trial court at the close of the testimony, which is detailed in the opinion of this court, instructed a verdict in plaintiff's favor, which was affirmed by the Court of Appeals. This court affirms the judgment of the Court of Appeals.

The case is stated in the opinion.

Mr. Frank Sullivan Smith for plaintiff in error.

Mr. Martin Carey for defendant in error. *Mr. Wilson S. Bissell* was on his brief.

Mr. Justice White delivered the opinion of the court.

The receiver of the Elmira National Bank, duly appointed by the Comptroller of the Currency, sued George M. Israel, the plaintiff in error, on a promissory note for $17,000, dated New York, May 14, 1893, due on demand, and drawn by Israel to the order of the Elmira National Bank, and payable at that bank. The defences to the action were in substance these:

First. That the note had been placed by Israel, the maker,

in the hands of David C. Robinson, without any consideration, for a particular purpose, and that if it had been discounted by Robinson at the Elmira National Bank such action on his part constituted a diversion from the purposes for which the note had been drawn and delivered; that from the form of the note (its being made payable to the bank), from the official connection of Robinson with the bank, he being one of the directors, and his personal relations with the cashier of the bank, as well as from many other circumstances which it is unnecessary to detail, the bank was charged with such notice as to the diversion of the note by Robinson as prevented the bank from being protected as an innocent third holder for value.

Second. Even if the discount of the note was not a diversion thereof from the purpose contemplated by the drawer, the bank was nevertheless subject to the equity arising from the want of consideration between Israel, the drawer, and Robinson, because, although the note may have been in form discounted by the bank, it had in reality only been taken by the bank for an antecedent debt due it by Robinson. And from this it is asserted that as the bank had not parted, on the faith of the note, with any actual consideration, it was not a holder for value, and was subject to the equitable defences existing between the original persons.

At the trial the plaintiff offered in evidence the note, the signature and the discount thereof being in effect admitted, and then rested its case. The defendant thereupon offered testimony which it was deemed tended to sustain his defences. At the close of the testimony the court, over the defendant's exception, instructed a verdict in favor of the plaintiff. On error to the Court of Appeals this action of the trial court was affirmed.

Both the assignments of error and the argument at bar but reiterate and expand in divers forms the defences above stated and which it is asserted were supported by evidence competent to go to the jury, if the trial court had not prevented its consideration by the peremptory instruction which it gave.

The bill of exceptions contains the testimony offered at the trial, and the sole question which arises is, Did the court

rightly instruct a verdict for the plaintiff? From the evidence it undoubtedly resulted that the note was delivered by the maker to D. C. Robinson, by whom it was discounted at the Elmira National Bank. It also established that Robinson at the time of the discount was a director of the bank, had large and frequent dealings with it, that he bore close business and personal relations with the cashier, and occupied a position of confidence with the other officers and directors of the bank. The occasion for the giving of the note and the circumstances attending the same are thus shown by the testimony of the defendant:

"I reside in Brooklyn. I am 42 years of age. I am at present engaged in the insurance business. In the months of April and May, 1893, I was employed in the banking house of I. B. Newcomb & Co., in Wall street, New York, as a stenographer and typewriter. I was not then and am not now a man of property. I know D. C. Robinson. At the time I made this note I did not receive any valuable thing or other consideration for the making of it; I have never received any consideration for the making of the note. I had a conversation with D. C. Robinson at the time of the making of the note. He stated to me the object or purpose for which he desired the note. He said to me that he desired some accommodation notes, and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation note was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and that if we would give him these notes it would enable him to accomplish that. He also added that we would not be put in any position of paying them at any time; that he would take care of them, and gave us positive assurance on that point, and naturally knowing the man, and thinking that he was a millionnaire, as he probably was at that time, we had no hesitation about going on the notes."

There was no testimony tending to refute these statements or in any way calculated to enlarge or to restrict them.

The defence, then, amounts to this: That the form of the paper and Robinson's relation with the bank and its officers were such as to bring home to the bank the knowledge of the transaction from which the note arose, and that such knowledge prevents a recovery, because Robinson, taking the transaction to be exactly as testified to by the defendant, was without authority to discount the note. Granting, *arguendo*, that the testimony tended to show such a condition of fact as to bring home to the bank a knowledge of the transaction, the contention rests upon a fallacy, since it assumes that the note was not given to Robinson to be discounted, and that his so using it amounted to a diversion from the purpose for which it was delivered to him. But this is in plain conflict with the avowed object for which the defendant testified the note was drawn and delivered, since he swore that he furnished the note because he was told by Robinson that he needed accommodation, that his line of discount on his own paper had been exceeded and that if he could get the paper, of the defendant, he would overcome this obstacle; in other words, that he would be able successfully to discount the paper of another person when he could not further discount his own. This obvious import of the testimony is fortified, if not conclusively proven by the form of the note itself, which, instead of being made to the order of Robinson, was to the order of the Elmira National Bank. The premise then, upon which it is argued that there was proof tending to show that the discount of the note by Robinson at the Elmira National Bank was a diversion, is without foundation in fact. The only matters relied on to sustain the proposition that there was testimony tending to establish that the note was diverted, because it was discounted at the bank to whose order it was payable, are unwarranted inferences drawn from a portion of the conversation, above quoted, which the defendant states he had with Robinson when the note was drawn and delivered. The part of the conversation thus relied upon is the statement that Robinson said, when the note was given, "that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes it

would enable him to accomplish that." This it is said tended to show that the agreement on which the note was given was not that it should be discounted at the Elmira National Bank, but that it should be used by Robinson for obtaining money to build the power house. In other words, the assertion is that the mere statement, by Robinson, of the causes which rendered it necessary for him to obtain a note to be discounted at the Elmira National Bank had the effect of destroying the very purpose for which the note was confessedly given. When the real result of the contention is apprehended its unsoundness is at once demonstrated. Other portions of the record have been referred to, in argument, as tending to show that it could not have been the intention of the defendant, in giving the note, that Robinson should discount it, but on examining the matters, thus relied upon, we find they have no tendency whatever to contradict or change the plain result of the transaction as shown by the defendant's own testimony.

As the discount of the note at the Elmira National Bank was not a diversion, but on the contrary was a mere fulfilment of the avowed object for which the note was asked and to consummate which it was delivered, it becomes irrelevant to consider the various circumstances which it is asserted tended to impute knowledge to the bank of the purpose for which the note was made and delivered. If the agreement authorized the discount of the note, it is impossible to conceive that knowledge of the agreement could have caused the discount to be a diversion, and that the mere knowledge that paper has been drawn for accommodation does not prevent one who has taken it for value from recovering thereon, is too elementary to require citation of authority.

The contention that although it be conceded the note was not diverted by its discount, nevertheless the bank could not recover thereon because it took the note for an antecedent debt, hence without actual consideration, depends, first, upon a proposition of fact, that is, that there was testimony tending to so show, and, second, upon the legal assumption that even if there was such testimony it was adequate as a legal defence.

The latter proposition it is wholly unnecessary to consider, because the first is unsupported by the record. All the testimony, on the subject of the discount of the note, was introduced by the defendant in his effort to make out his defence. It was shown, without contradiction, that the note had been discounted by Robinson at the bank, and that the proceeds were placed to his credit in account. It was also shown that for some time prior to the day of the discount his account with the bank, to the credit of which the proceeds of the discount were placed, was overdrawn. The exact state of the account on the day the discount was made was stated by the cashier and a bookkeeper of the bank, and was moreover referred to by Robinson. On the morning of the discount the debit to the account of Robinson, by way of overdraft, is fixed by the cashier at $35,400, and by the bookkeeper at $35,000. Robinson made the following statement: "The amount of other notes wiped out the overdraft and made a balance." The bookkeeper's statement is as follows:

"There was an overdraft of $35,000 against Mr. Robinson upon the books of the bank on the morning of May the 4th. There were items coming through the exchanges that amounted to about $73,000, and there was a deposit made of $33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night for about $50,000 if it had not been for the entry on the books of the proceeds of these notes."

No other testimony tending to contradict these statements, made by the defendant's own witnesses, is contained in the record. They manifestly show that although at the date of the discount there was a debit to the account resulting from an overdraft that nearly the sum of the overdraft was covered by items of credit, irrespective of the note in controversy, and that subsequent to the credit arising from the note more than the entire sum of the discount was paid out for the account of Robinson, to whose credit the proceeds had been placed. With these uncontradicted facts in mind, proven by the testimony offered by the defendant, and with no testimony tending

the other way, it is obviously unnecessary to go further and point out the unsoundness of the legal contention relied upon.

Affirmed.

McDONALD, Receiver, *v.* WILLIAMS.[1]

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

No. 257. Argued April 21, 1899. — Decided May 15, 1899.

The receiver of a national bank cannot recover a dividend paid to a stockholder not at all out of profits, but entirely out of capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent.

This suit was commenced in the Circuit Court of the United States for the Southern District of New York. It was brought by the plaintiff, as receiver of the Capital National Bank of Lincoln, Nebraska, for the purpose of recovering from the defendants, who were stockholders in the bank, the amount of certain dividends received by them before the appointment of a receiver.

Upon the trial of the case the Circuit Court decreed in favor of the plaintiff for the recovery of a certain amount. The defendants appealed from the decree, because it was not in their favor, and the plaintiff appealed from it, because the recovery provided for in the decree was not as much as he claimed to be entitled to. Upon the argument of the appeal in the Circuit Court of Appeals certain questions of law were presented as to which that court desired the instruction of this court for their proper decision.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including the

[1] The docket title of this case is Hayden, Receiver, *v.* Williams.

defendants, have been assessed to the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of $5000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last, (July 12, 1892,) were paid to the defendant Williams, a stockholder to the amount of $5000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions:

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of the

profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

Second question. Has a United States Circuit Court jurisdiction to entertain a bill in equity, brought by a receiver of a national bank against stockholders to recover dividends which, as claimed, were improperly paid when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection, that there is an adequate remedy at law, is raised by the answer?

Mr. Edward Winslow Paige for appellant.

Mr. Theodore De Witt for appellees. *Mr. George G. De Witt* was on his brief.

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

It will be noticed that the first question is based upon the facts that the bank, at the time the dividends were declared and paid, was solvent, and that the stockholders receiving the dividends acted in good faith and believed that the same were paid out of the profits made by the bank.

The sections of the Revised Statutes which are applicable to the questions involved herein are set forth in the margin.[1]

---

[1] Sec. 5199. The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Sec. 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period

The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion

---

of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

SEC. 5205. (As amended by section 4 of the act approved June 30, 1876, 19 Stat. 63.) Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four: *And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

SEC. 5140. At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each, on the whole amount of the capital, as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

SEC. 5141. Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circula-

thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In *Graham* v. *Railroad Company*, 102 U. S. 148, 161, it was said by Mr. Justice Bradley, in the course of his opinion, that "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. And a court of equity, at the instance of the proper parties, will

---

tion in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be cancelled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

SEC. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount vested in such shares. (The balance of this section is immaterial.)

then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Hollins* v. *Brierfield Coal & Iron Company*, 150 U. S. 371, 383, 385, it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows:

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also:

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock

subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Wabash &c. Railway Company* v. *Ham*, 114 U. S. 587, 594, Mr. Justice Gray, in delivering the opinion of the court, said:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as yet unknown to anybody, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however,

the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it *bona fide* and for value. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say, that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such case, may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different

principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language

implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed under

this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses *or otherwise*, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *Concord First National Bank* v. *Hawkins*, just decided, *ante*, 364.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it, is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital which includes the case of an impairment produced by the payment of a divi-

dend, we think the payment and receipt of a dividend under the circumstances detailed in the question certified do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative. The second question relates to the jurisdiction of a court of equity over an action of this nature. It is evident that the question was propounded to meet the case of an affirmative answer to the first question.

In that event the second would require an answer. As we answer the first question in the negative, and the second question was scarcely touched upon in the argument, we think it unnecessary to answer it in order to enable the court below to proceed to judgment in the case.

The first question will be certified in the negative.

KENTUCKY BANK TAX CASES.

There were twenty-six of these cases in all. Of these, five were decided on the 3d of April, 1899, and are reported in volume 173, U. S. Reports, viz.: CITIZENS' SAVINGS BANK OF OWENSBORO *v.* OWENSBORO, at page 636; DEPOSIT BANK OF OWENSBORO *v.* OWENSBORO, at page 662; DEPOSIT BANK OF OWENSBORO *v.* DAVIESS COUNTY, at page 663; FARMERS' AND TRADERS' BANK OF OWENSBORO *v.* OWENSBORO, at page 663; OWENSBORO NATIONAL BANK *v.* OWENSBORO, at page 664, five were affirmed May 15, 1899, by a divided court, viz.: No. 356, STONE *v.* BANK OF KENTUCKY; No. 357, LOUISVILLE *v.* BANK OF KENTUCKY; No. 360, STONE *v.* LOUISVILLE BANKING COMPANY; No. 361, LOUISVILLE *v.* LOUISVILLE BANKING COMPANY; No. 387,

Statement of the Case.

STONE *v.* DEPOSIT BANK OF FRANKFORT, all argued February 28 and March 2, 1899, and the others are reported below.

STONE, Auditor, *v.* FARMERS' BANK OF KENTUCKY.

FARMERS' BANK OF KENTUCKY *v.* STONE, Auditor.

Nos. 385, 386. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court; and, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, is affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

THESE appeals were taken from a decree rendered in a suit in equity brought by the Farmers' Bank of Kentucky against Samuel H. Stone, auditor, Charles Findly, secretary of State, and G. W. Long, treasurer of the Commonwealth of Kentucky, constituting a state board of valuation and assessment; the board of councilmen of the city of Frankfort; the county of Franklin; the city of Henderson; the county of Henderson; the city of Georgetown; and the county of Scott. The object of the bill and of an amended and supplemental bill was to restrain the valuation of the franchise of the complainant under the provisions of a revenue act of Kentucky, enacted November 11, 1892, as also the certification of such valuation and the collection of taxes thereon for the years 1895, 1896, 1897 and 1898.

It was averred in the bill that the complainant was chartered on February 16, 1850, to endure until May 1, 1880; and that in and by the fifteenth section of the charter of complainant it was provided as follows:

"It shall be the duty of the cashier of the principal bank,

on the 1st day of July, 1851, and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this Commonwealth fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full for all tax or bonus: *Provided*, That no tax shall be paid until said bank goes into operation: *And provided further*, That the tax or bonus hereby proposed to be imposed on each share of stock in this bank, or such as shall hereafter be imposed on each share, is hereby set apart and forever dedicated to the cause of education on the common school system; and that whenever the same, or any part thereof, shall be diverted otherwise by legislative enactment, said bank shall then be exonerated from the payment of any tax or bonus whatever."

It was further averred that on March 10, 1876, the charter of the bank was extended to May 1, 1905, by the following enactment:

"SEC. 1. That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided*, That said charter and amendments shall be subject to amendment or repeal by the general assembly by general or special acts: *And provided further*, That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It was then averred that after the extension of the charter, in consequence of an attempt of the county of Franklin to collect a tax from the bank for county purposes, under the authority of an act of Kentucky passed in 1876, which statute, it was alleged by the bank, was in violation of the charter exemption of the bank, the complainant brought, and carried to a successful termination in 1888, in the Court of Appeals of Kentucky, a suit to enjoin the county named from collecting the taxes complained of. The judgment rendered was pleaded as *res judicata*.

The enactment, on May 17, 1886, of a law, commonly denominated as the Hewitt Act, relating to the taxation of

banks, was next stated in the bill. An acceptance of the terms of that act was averred, which it was claimed constituted an irrevocable contract with the complainant. It was next alleged that on November 11, 1892, the legislature of Kentucky passed a revenue act which subjected banks in the State to county and municipal taxation, and to a much greater rate of taxation than was provided in the Hewitt Act. Complainant then pleaded as *res judicata* judgments rendered in 1895 and 1896 in its favor by courts of the State of Kentucky, in suits brought by the bank to enjoin attempts to collect from it alleged franchise taxes under the supposed authority of the revenue act of 1892. The defendants, who were parties to the suits in question, were averred to be the county of Franklin and the sheriff of that county; the board of councilmen of the city of Frankfort; the city of Henderson; and the county of Henderson and its sheriff. The several decrees, it was alleged, conclusively established that the acceptance of the Hewitt Act constituted an irrevocable contract with the bank as respected taxation, and that the revenue act of 1892, in certain particulars, impaired such contract, and in so far as it did so was in violation of the Constitution of the United States and void.

Certain of the defendants filed pleas to the jurisdiction. All the defendants demurred to the bill, and some filed answers, to which plaintiff filed replications. The demurrers and pleas were overruled, and the cause was heard upon the pleadings and attached exhibits. On January 21, 1898, a final decree was entered sustaining the claims of *res judicata* made in the bill, and granting the relief prayed for so far as respected the assessment, certification and collection of franchise taxes for the benefit of the defendants the board of councilmen of the city of Frankfort, the county of Franklin, the city of Henderson and the county of Henderson. It was held, that by the judgments relied upon by complainant, it had been conclusively adjudicated as to those defendants that the Hewitt Act constituted an irrepealable contract, and that the provisions of the revenue act of 1892 in conflict with that act impaired the terms of such contract, and were void.

(88 Fed. Rep. 987.) The decree adjudged that as to the defendants the county of Scott and the city of Georgetown, who were found not to have been either parties or privies to the records and decrees constituting *res judicata*, that no irrevocable contract had been established, by judgment or otherwise, and as to those defendants the bill was therefore dismissed. From the decree thus entered both parties appealed to this court.

Mr. Ira Julian for Georgetown and Scott County. *Mr. Henry L. Stone* for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

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

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court. The decree, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, must be affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons, Tax Collector*, 173 U. S. 636.

And it is so ordered.

STONE *v.* BANK OF COMMERCE.

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

No. 362. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Citizens' Savings Bank v. *Owensboro*, 173 U. S. 636, followed to the point that in the case of a bank whose charter was granted subsequently to the year 1856, and which had accepted the provisions of the Hewitt Act,

Statement of the Case.

and had thereafter paid the tax specified therein, there was no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act.

The agreement set forth in the statement of facts between the city of Louisville, the sinking fund commissioners of that city, represented by the city attorney, and the various banks of that city acting by their attorneys, was not a valid agreement, within the power of an attorney at law to make.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced, or before he has been retained to commence one; and if, under such circumstances, he assumes to act for his principal, it must be as agent, and his actual authority must appear.

An equitable estoppel which would prevent the State from exercising its power to alter the rate of taxation in this case should be based upon the clearest equity; and the payment of the money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

THE bill in this case was filed in 1897 by the Bank of Commerce, a citizen and resident of the city of Louisville in the State of Kentucky, for the purpose of obtaining an injunction restraining the defendants from assessing the complainant and from collecting or attempting to collect any taxes based upon the assessment spoken of in the bill, and for a final decree establishing the contract right of the complainant to be taxed in the method prescribed by the act of May 17, 1886, known as the Hewitt Act, the terms of which it alleged it had accepted. The bill sought to perpetually enjoin the defendants from assessing the franchise or property of the complainant in any other manner than under that act. The material provisions of the Hewitt Act are set out in the opinion of the court, delivered by Mr. Justice White, in the case of the *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

In 1891 Kentucky adopted a new constitution, section 174 of which, providing for the taxation of all property in proportion to its value, is also set forth in the above-cited case.

The legislature of the State in 1892 passed an act in relation to the taxation of banks and other corporations which was in conflict with the Hewitt Act, and provided for taxing the

banks in a different manner from that act, and also subjected the banks to local taxation, the total being much more onerous than that enforced under the Hewitt Act.

The complainant was incorporated under an act of the legislature of Kentucky approved February 10, 1865, and it had all the powers granted by that act and the several amendments thereof as alleged in its bill.

There were various other banks in the city of Louisville which also alleged that they had accepted the terms of the Hewitt Act, and by reason thereof had a valid contract with the State that they should be taxed only under the provisions of that act.

The complainant alleges in its bill that early in the year 1894 a demand was made on the part of the defendant the city of Louisville, based upon the act of 1892 and the ordinance adopted in pursuance thereof, for the payment of a license tax equal to four per cent of its gross receipts into the sinking fund of the city. The banks denied their liability to pay any tax other than that provided in the Hewitt Act, and hence arose the differences between the city and the banks.

No litigation had been commenced for the purpose of testing the questions at issue between the city and the banks, although negotiations looking to that end had been in progress between the city attorney of Louisville and the members of the sinking fund board, on the one hand, and the counsel for the various banks and trust companies on the other. There is set forth in the bill of the complainant the action of the sinking fund board as follows:

"SINKING FUND OFFICE, *Feb'y* 13, 1894.

"A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund

from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

"After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

"First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for state taxes and the amount they would be required to pay for state taxes under the provisions of what is known as the 'Hewitt bill.' This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

"Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

"Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and

will receive therefor the obligations of the sinking fund as above described.

"Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

"A true copy. Attest: J. M. Terry,
Secretary and Treasurer."

Following the above, the complainant's bill contains what is termed a "Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville," which stipulation reads as follows:

"It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

"First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of liability of said banks and trust and title companies to pay municipal taxes, either license or *ad valorem*, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

"Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

"A. Banks whose charters had been granted prior to 1856.

"B. Banks whose charters had been granted subsequent to 1856.

"C. National banks.

"It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

"Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky representing class A, the Louisville Banking Company representing class B, and the Third National Bank representing class C, and these banks respectively applied for a writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

"It was distinctly understood and agreed at the time, and this agreement was made for the best interests of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

"Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further

reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation, until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For Banks, Trust and Title Companies of the City of Louisville.

H. S. BARKER, *City Att'y.*

Approved: C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy. Attest: HUSTON QUINN.
ARTHUR PETER.
M. McLOUGHLIN."

The Louisville Banking Company was one of the banks which brought an action for the purpose of testing the question of its liability to taxation. The charter of that company was granted subsequent to the year 1856, and, in that respect, it was like the defendant bank. It also claimed to have accepted the provisions of the Hewitt Act. In the litigation which followed, the Louisville Banking Company was adjudged by the Court of Appeals of Kentucky to have an irrepealable contract throughout its charter existence to be taxed under the Hewitt Act, and judgment pursuant to that adjudication was entered in favor of that company. The complainant herein claimed the benefit of the foregoing adjudication, and the Circuit Court allowed it, and gave judgment as follows:

"1. That the complainant is entitled to the benefit of the proceedings taken in the case of the *Louisville Banking Company* v. *R. H. Thompson, Judge, etc.*, in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the Court of Appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, Judge, etc., and the city of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

"2. That it is *res judicata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered and decreed that the defendants Samuel H. Stone, Charles Findley and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants appealed directly to this court from the judgment of the Circuit Court, under the provisions of section 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, because the case involved the application of the Constitution of the United States, and because a law of the State of Kentucky was claimed to be in contravention of that Constitution.

Mr. Henry L. Stone for Louisville. *The Attorney General of Kentucky* filed a brief for Stone.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

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

We have already decided, in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, that in the case of a bank whose charter was granted subsequently to the

year 1856, and which had accepted the provisions of the Hewitt Act, and had thereafter paid the tax specified therein, there was nevertheless no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act. And in the same case we held that the bank was properly taxed under the act of the legislature of Kentucky passed in 1892. Unless the complainant is right in its contention that it is a privy to the judgment in the case of the Louisville Banking Company, (mentioned in the foregoing statement,) and that the question is *res judicata* in its favor, the complainant has failed to make good its claim to be exempted from the provisions for its taxation under the act of 1892. The Circuit Court has held that the complainant was entitled to be regarded as privy to the judgment above mentioned in favor of the Louisville Banking Company, 88 Fed. Rep. 398, and that it could therefore avail itself of the judgment in that case as *res judicata.*

The sole question to be determined in this case is as to the validity and effect of the agreement above set forth. The complainant herein was not in fact a party to the judgment in the *Louisville Banking Company case*, and it can only obtain the benefit of that judgment by virtue of the agreement.

The commissioners of the sinking fund form a separate and distinct corporation from the city of Louisville, and no right is shown to sign or make the agreement for itself or to bind the city thereby. The agreement is not signed by the mayor, nor is it pretended that there was any action on the part of the general council of the city authorizing the making of the agreement. It was signed by the city attorney, and if he had no power to sign on behalf of the city there is nothing to create any liability on its part by virtue of the agreement, unless the payment of the money therein spoken of operates by way of estoppel to prevent the city from setting up the invalidity of such agreement. The effect of the payment of the money will be adverted to hereafter.

Upon its face there is no agreement even formally made between the city of Louisville and the banks of which the complainant herein is one, unless the signature of the city

attorney makes a valid agreement for the city. When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted, and what suits commenced, for the purpose of establishing the rights of the various parties, as claimed by them. The question as to what course should be pursued was not one of law only. It was also one of policy. The stipulation actually entered into was of an administrative as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide, and concerning which he would have no power to make any agreement.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing upon which the authority of an attorney to act for his client can be based. If before the commencement of any suit an attorney assumes to act for his principal it must be as agent and his actual authority must appear, and if it be not shown it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal. This was directly decided in *Starr* v. *Hall*, 87 N. C. 381, and *Reed* v. *Reed*, 19 S. C. 548, so far as regards a personal defendant, but the same rule would follow in case of a corporation unless authority to appear were specially given.

When an attorney has been retained he has certain implied powers to act for his client, in a suit actually commenced, in the due and orderly conduct of the case through the courts. In cases of suits actually pending he may agree that one suit shall abide the event of another suit involving the same question, and his client will be bound by this agreement. *Ohlquest* v. *Farwell*, 71 Iowa, 231; *North Missouri Railroad Company* v. *Stephens*, 36 Missouri, 150; *Eidam* v. *Finnegan*, 48 Minnesota, 53; *Gilmore* v. *American Central Insurance Company*, 67 California, 366; 1 Lawson's Rights, Rem. & Pr., section 173, page 292; 1 Thompson on Trials, section 195.

One case has gone to the extent of holding the attorney's authority to agree that the case of his client should abide that of another, included his right to agree that the case should abide that of another involving the same question, although his client was not a party to that case and had no power to interfere in its prosecution or defence. *Scarritt Furniture Company* v. *Moser*, 48 Mo. App. 543, 548.

There might perhaps be some doubt about the correctness of a decision which so extended the power of the attorney. It would be carrying the authority of an attorney a good way to thus hold. It is not, however, in the least necessary for us to decide the question in this case.

All the above cases relate to the authority of the attorney after the actual commencement of suit and after the jurisdiction of the court has attached and the agreements made were in the discharge of the duties owing as between attorney and client, and subject to the supervision and power of the court itself.

Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of an attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that, and of a different nature. As we have said, the question to be determined was one of policy as well as of law; eminently one for the consideration of the city authorities, its

mayor and its general council, aided and assisted by the advice of the attorney of the city. But it was a decision of a corporate nature, and not one to be decided by any but the corporation, and it was one which we think was beyond the power of an attorney to make while acting merely in his capacity as attorney before suit brought and without specific authority.

We are also of opinion that as city attorney he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual. The power of an attorney to conduct an actually existing suit, and in its proper conduct to agree to certain modes or conditions of trial, cannot be enlarged by implication, so as to embrace a power on the part of an attorney, before litigation is existing and before he has been retained to conduct it, to enter into an agreement of the nature of this one. It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such fact exists.

Section 2909, Revised Statutes of Kentucky, provides that —

"There shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members, of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

We do not think this section gave him the power to bind the city by the agreement in question. He is undoubtedly the retained attorney of the city in every suit brought against it, and it would have been his duty to take charge of the litigation when it should arise between the banks and the commissioners of the sinking fund or the city of Louisville. That is, when the suit was commenced, the statute operated in place

of a retainer in case of a personal client. When suits were commenced against the city it was his duty to defend them, but he had no power to appear for the city as a defendant in a suit which had not been commenced or to accept service of process and waive its service upon the proper officer, without authority from that officer. Merely as city attorney, he had no larger powers to bind his clients before suit was commenced than he would have had in the case of an individual in like circumstances. There must be something in the statute providing for the election or appointment of an attorney for a corporation that would give such power; otherwise it does not exist. We find nothing of the kind in the statute cited. The Supreme Court of New York held, at special term, that the counsel to the corporation of the city of New York had no greater powers than an ordinary attorney to bind his client. *People* v. *Mayor &c. of New York*, 11 Abb. Pr. 66.

The agreement here in question, it is perceived, is much more extensive than a mere agreement to abide the event of another suit, and it is quite plain that it embraces more than the attorney had the right to bind the city to, even if an action had then been commenced and the agreement was made in that action. However imperative may have been his duty to save costs and expenses to the city, he was not authorized on that account to enter into agreements of the nature of this one, where no suits had been commenced against the city and the commencement of which he had no power to provide for.

Nor do we see that the commissioners of the sinking fund were granted any power to make the stipulation in question; certainly none to bind the city of Louisville. Our attention has not been drawn to any statute giving them power to make an agreement of this nature.

Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly. *Murphy* v. *Louisville*, 72 Kentucky, 189.

As a result, we think the stipulation was not a valid one,

binding either the commissioners of the sinking fund or the city of Louisville.

It is contended, however, on the part of the complainant that the payment of the money to the commissioners of the sinking fund, pursuant to the provisions of the stipulation, and its receipt by them, estops the city of Louisville from asserting the invalidity of the stipulation. The claim of complainant on this branch of the case is in substance that it has the right under the agreement to the benefit of the judgment in favor of the Louisville Banking Company as *res judicata* in its favor, because the city, having received the money by virtue of the agreement, is estopped by that fact from insisting upon its invalidity.

The money was paid to the commissioners of the sinking fund and not to the city, which is a separate and distinct corporation. No corporate act on the part of the city is shown since the payment which recognizes or approves it. There is no ratification by the city of Louisville of this unauthorized act of its attorney. In speaking of the act of the attorney as unauthorized we do not mean to reflect in the slightest degree unfavorably upon the conduct of the city attorney, which seems by this record to have been prompted solely by a regard for the best interests of the city and by the most scrupulous good faith. We speak only of the act as one for which the law would not hold the city answerable.

But let us look for a moment at the position occupied by the respective parties and the facts which surround this alleged estoppel upon the city, and for this purpose the invalidity of the agreement is assumed. The banks of which complainant was one, at the time this agreement was entered into, conceded that they were liable to the payment of taxes under the Hewitt Act, and denied that they were liable to pay taxes under the act of 1892. The city, on the contrary, asserted the right to tax under the act of 1892, and the question became one for judicial decision. The banks paid the moneys spoken of in the agreement, and proceedings were inaugurated to test the legal question involved in the dispute.

It is alleged on the part of the complainant that the taxes under the act of 1892 were and are greater in amount than under the Hewitt Act, and it is not alleged or contended that the amount of moneys paid by the various banks was any greater than would have been due and payable under the act of 1892. That is, the banks have in fact paid no more than they ought to have paid if they had complied with the provisions of the act of 1892. This court has just decided in the *Owensboro case* (above cited) that the claim, on the part of the banks, of an irrepealable contract under the Hewitt Act was not well founded, and that the banks (so far as concerns that contention) have been liable to pay taxes under the act of 1892 ever since that act was passed. The complainant now asserts that because the banks paid the money which they did under the agreement above mentioned, (although such money was certainly no more than they were legally bound to pay under the act of 1892,) therefore the city is estopped from setting up the invalidity of this agreement. The result would be that complainant by virtue of the judgment in the *Louisville Banking Company case* could only be taxed under the Hewitt Act for the remainder of its corporate existence, although the act of 1892 is a perfectly valid act under which, but for the judgment above mentioned, the complainant would be liable to much greater taxation than the Hewitt Act provides for. We think these facts form no basis for the equitable estoppel claimed by the complainant. The payment of money by complainant under the agreement, when it ought to have paid at least as large a sum under the act of 1892, but which it refused to pay under that act, because it denied the validity thereof, we think is not the basis for an appeal to the equitable powers of a court. As a result of the judicial inquiry, it is seen that the banks have been at all times liable to pay taxes under the act of 1892. The fact that they disputed this liability and paid the money under an agreement which did not admit the validity of the act of 1892, forms no basis for this equitable estoppel, when the fact appears that the moneys actually paid were certainly no more than the banks were liable to pay under

the disputed act. If, however, it were found that the banks had paid at any time an amount greater than they would have been liable to pay under the act of 1892, the city, by the passage of the ordinance approved August 6, 1895, provided a means for crediting any bank with the amount of such overpayment. In no way, therefore, has the complainant been legally damaged by the payment of the money to the sinking fund. The only thing that may be said is, that by virtue of the agreement, the complainant paid, and the sinking fund received, the money at the times mentioned, which otherwise would have been refused; but when we come to consider that, although the legal question was in dispute, the right was really with the city, and the banks were really liable to pay taxes under the act of 1892, we think the payment they then made under the agreement would form no equitable estoppel in favor of complainant. If so, it would thereby be enabled to secure for itself the benefit of the plea of *res judicata*, and would thus prevent the application of the act of 1892 to it during its corporate existence. This result would not, in our opinion, be an equitable one, and as complainant has not in reality suffered legal injury by the payment of the money, there is no basis for the support of an estoppel.

An equitable estoppel which is to prevent the State from receiving the benefit of an exercise of its power to alter the rule or rate of taxation for all the time of the existence of a business corporation, should be based upon the clearest equity. It is fitly denominated an equitable estoppel, because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights. The payment of money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not seem to work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

Nor does the fact that the complainant bank, upon the execution of the agreement, omitted to sue and obtain

judgment against the city, add any force to the claim of estoppel.

The complainant, it must be assumed, knew the invalidity of the agreement because of the lack of power on the part of those who signed it to bind the city or the sinking fund as a corporation. There was no dispute as to facts, and no misrepresentations were made. The law made the invalidity. Knowing the agreement to be invalid, the omission to sue forms no ground upon which to base the estoppel. The complainant had no valid agreement upon which to stand, and if it omitted to sue it was at its own risk. There would seem to be no reason of an equitable nature springing out of the facts herein why the complainant should not hereafter be bound to pay the taxes prescribed in the act of 1892.

We think the judgment of the Circuit Court should be reversed and the case remanded with instructions to dismiss the bill, and it is so ordered.

Mr. Justice Harlan and Mr. Justice White dissented.

No. 363. Louisville *v.* The Bank of Commerce. Appeal from the Circuit Court of the United States for the District of Kentucky. Mr. Justice Peckham. In the above case the same question is involved that has just been determined in No. 362, and there will be a like order reversing the judgment and remanding the case to the Circuit Court with directions to dismiss the bill.

Mr. Justice Harlan and Mr. Justice White dissented.

FIDELITY TRUST AND SAFETY VAULT COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

LOUISVILLE TRUST COMPANY *v.* LOUISVILLE.

SAME *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 406, 407, 408, 409. Argued February 28, March 2, 1899. — Decided May 15, 1899.

On the authority of *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, and *Stone* v. *Bank of Commerce*, *ante*, 412, the decrees below are affirmed.

In these cases the respective trust companies who are appellants, all four being Kentucky corporations chartered subsequent to the year 1856, filed their respective bills to enjoin the assessment and collection of certain taxes. The want of power to assess and collect the taxes complained of was in each bill made to depend upon two substantially identical grounds, which were briefly these:

First. That a legislative act of the State of Kentucky, passed in 1886, and designated as the Hewitt Act, had created an irrevocable contract between the State and the complainants, from which it arose that the taxes sought to be enjoined could not be assessed and collected without violating the clause of the Constitution of the United States forbidding impairment by a State of the obligations of a contract.

Second. That in a suit previously brought by the Louisville Banking Company, a Kentucky corporation, it had been finally decided by the Court of Appeals of the State of Kentucky that the act in question (the Hewitt Act) had created in favor of the corporations accepting its provisions an irrevocable contract, which could not be impaired without violating the Constitution of the United States. It was averred in each of

Counsel for Louisville.

the bills that, although the complainants were not parties to the suit brought by the Louisville Banking Company, they were each, nevertheless, privies to the record and decree rendered therein, because of a certain agreement, which, it was averred, had been entered into between the complainants, the commissioners of the sinking fund and the city of Louisville, through the city attorney, from which the privity relied on was asserted to have been created. The agreement in question was stated in full in each of the bills. By virtue of the privity thus asserted the decree rendered in favor of the Louisville Banking Company was pleaded as establishing conclusively, by the estoppel arising from the thing adjudged, the irrevocable nature of the contract springing from the Hewitt Act and the want of power to impair it by assessing or collecting the taxes in controversy. The court below decided that the complainants were not privies to the decision in the case of the Louisville Banking Company, because there was such a difference between the business of a banking company proper and that of a trust company that neither the commissioners of the sinking funds nor the city attorney of the city of Louisville had lawful power to agree that the liability of the trust companies to taxation should abide the result of the case brought by the Louisville Banking Company to test the right to tax it contrary to the contract which it was charged the Hewitt Act had embodied. Because of the want of privity held not to exist, for the reason just stated, the court below decided that the plea of the thing adjudged was untenable. On the merits of the case, the court below held that, as each of the complainants had been chartered after the year 1856, subsequent to an act adopted by the Kentucky legislature in that year, reserving the right to repeal, alter or amend all charters thereafter granted, there was not an irrevocable contract, and, hence, that the levy of the taxes complained of did not impair contract obligations. For these reasons the court sustained demurrers to each of the bills, and dismissed them. 88 Fed. Rep. 407.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

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

It is unnecessary to determine whether the distinction between the business of a bank and that of a trust company was such as to cause it to be illegal to have agreed that the liability of the trust companies to taxation contrary to the Hewitt Act should abide the result of the controversy as to the Louisville Banking Company, since we have just decided in *Samuel H. Stone, Auditor, et al.*, v. *Bank of Commerce*, No. 362, *ante*, 412, that, irrespective of any distinction which might exist between the business of a bank *eo nomine* and that of a trust company, the commissioners of the sinking fund and the city attorney were without power to have made the agreement upon which the complainants relied in order to establish that they were privies to the decision in favor of the Louisville Banking Company. The plea of the thing adjudged depending upon the existence of privity being thus disposed of, there remains only to consider the alleged existence of an irrevocable contract arising from the Hewitt Act. That no such contract arose from that act as to corporations chartered after 1856, or whose charters were extended subsequent to that year, was decided in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636. Indeed, the opinion in that case and the opinion announced in *Stone* v. *Bank of Commerce*, *supra*, are decisive against the appellants, who were complainants below, as to every issue which arises for decision on these records, and the decrees below rendered are therefore

Affirmed.

THIRD NATIONAL BANK OF LOUISVILLE *v.* STONE, Auditor.

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

No. 404. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The assertion in this case of an irrevocable contract with the State touching the taxation of the plaintiff, arising from the Hewitt Act, is disposed of by the opinion of this court in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

The taxes which it was sought to enjoin in this suit were imposed upon the franchises and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal because in violation of the act of Congress.

THE statement of the case will be found in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

The appellant, a banking corporation organized under the National Banking act, and whose charter was renewed on August 6, 1894, for a period of twenty years, filed its bill to enjoin the assessment of certain taxes for the years 1895, 1896 and 1897. The grounds of relief set out in the original and amended bills were substantially as follows: First. That the corporation had accepted the terms of an act of the general assembly of the State of Kentucky, denominated as the Hewitt Act, from which it resulted that there was an irrevocable contract protecting the bank from all municipal taxation and from all state taxation except such as was imposed by the Hewitt Act. The provisions of the Hewitt Act thus relied on were fully stated in *Citizens' Savings Bank of Owensboro* v.

Owensboro, 173 U. S. 636. Moreover, it was alleged that on the 18th day of June, 1894, the city of Louisville, having theretofore attempted to collect from the bank certain license taxes, contrary to the terms and conditions of the contract created by the Hewitt Act, the bank commenced suit to prohibit the collection of said taxes, and that these proceedings culminated in a decree of the Court of Appeals of the State of Kentucky prohibiting the collection of the taxes in question, on the ground that the bank had an irrevocable contract, arising from the Hewitt Act, which could not be impaired. The bill specifically alleged that the decree thus rendered by the Court of Appeals of the State of Kentucky constituted the thing adjudged, and, by the presumption arising therefrom, established beyond power of contradiction the existence of the irrevocable contract right. In addition, the bill alleged that the taxes in question were illegal, because they were imposed on the franchise and property of the bank in violation of the act of Congress with reference to the taxation of national banks by the respective States. Rev. Stat. § 5219. The taxes were, moreover, averred to be in violation of the act of Congress, because they were discriminatory, and, in addition, were illegal, because they were, in certain designated respects, repugnant to the constitution and laws of the State of Kentucky.

An opinion was filed by the court holding that as well in this case as in another case considered at the same time relating to the taxes for the years 1893 and 1894, demurrers to the bills should be overruled and motions for preliminary injunctions granted. 88 Fed. Rep. 990. The record, however, establishes that, subsequently, on the attention of the court being directed to the fact that the term of the original charter of complainant had expired in the interval between the levy of taxes for the years 1894 and 1895, (the charter having been renewed and extended on August 6, 1894,) the court entered a decree in the case at bar sustaining demurrers to the original and amended bills and dismissing the suit. From the decree so made this appeal was taken.

The assertion of an irrevocable contract arising from the

Hewitt Act is disposed of by the opinion in *Citizens' Savings Bank* v. *Owensboro.* The contention that the presumption of the thing adjudged takes this case out of the ruling in that case, is without foundation, because the suit brought to prohibit the collection of the taxes and in which the judgment relied on was rendered related to taxes for years prior to the expiration of the charter and before the same was renewed. Indeed, the suit wherein the judgment relied upon as constituting *res judicata* was rendered was commenced before the expiration of the original charter. Manifestly, as decided by the court below, a decree establishing the existence of an irrevocable contract, exempting or limiting the bank from taxation for one charter term, is not the thing adjudged as to whether the bank was subject to taxation during a new period of existence derived from a renewal of its original charter life, for, however persuasive the reasons supporting the conclusion that the corporation could not be taxed during its original charter, it was obviously impossible to have decided that the same rule applied to an extension, which only commenced after the initiation of the suit, wherein was rendered the decree relied on as constituting *res judicata.* A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen. For these self-evident reasons, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, where a plea of *res judicata* as to a contract right of exemption was maintained, after the renewal of a charter, the court eliminated from consideration all the judgments which had been rendered prior to the period when the amended charter took effect.

These considerations would render it necessary to affirm the judgment but for the fact that the taxes which it was sought to enjoin were imposed upon the franchises and property of the bank and not upon the shares of stock in the names of the shareholders. It follows therefore that they were illegal, because in violation of the act of Congress. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

The decree below must therefore be reversed and the case be remanded for further proceedings in conformity to this opinion, and it is so ordered.

LOUISVILLE *v.* THIRD NATIONAL BANK.

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

No. 364. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor*, *ante*, 432, followed in holding that taxes like those here in question are illegal, because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders.

The case is stated in the opinion of the court.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

Mr. Justice White delivered the opinion of the court.

The appellee, the Third National Bank, filed its bill to enjoin the collection of certain taxes, relying upon grounds in all respects like unto those alleged in case No. 404, *ante*, p. 432. There was, however, this difference between the facts of the latter case and those arising on this record: In this case the taxes sought to be enjoined were levied prior to the renewal of the charter of the bank. Because of this difference the court below concluded that the want of power to assess and levy was conclusively established by the presumption of the thing adjudged arising from the decree of the Court of Appeals of Kentucky, to which we have referred in case No. 404. We need not, however, consider the question of *res judicata* upon which the court below based its conclusion, as we have in case No. 404, just announced, held entirely without reference to the plea of *res judicata*, that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that the decree below which restrained the collection of the taxes was correct, and it is therefore

Affirmed.

LOUISVILLE *v.* CITIZENS' NATIONAL BANK.

CITIZENS' NATIONAL BANK *v.* STONE, Auditor.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 365, 405. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Third National Bank of Louisville v. *Stone, Auditor*, *ante*, 432, and *Louisville* v. *Third National Bank*, *ante*, 435, followed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

MR. JUSTICE WHITE delivered the opinion of the court.

The Citizens' National Bank was organized on the 8th day of August, 1874, its charter being stipulated to endure for a period of twenty years. On April 1, 1894, the charter was renewed and extended for twenty years. The bank in these two cases filed its bills to enjoin the collection of certain taxes on the ground that by the effect of a statute of the State of Kentucky, usually referred to as the Hewitt Act, an irrevocable contract had been entered into between the State and the bank, from which it resulted that the taxes complained of could not be levied without impairing the obligations of such contract. It was moreover averred that the existence of this contract had been judicially determined in a suit between the Third National Bank and the city of Louisville, to which suit the Citizens' National Bank, although not a party, was a privy because of certain agreements alleged to have been made between the city of Louisville and the bank at the time the suit was brought by the Third National Bank. In consequence of this fact it was alleged that the existence of the contract between the Citizens' National Bank and the State had been

judicially determined, and the decree to that effect was pleaded as *res judicata*. In addition, the taxes in question were alleged to be illegal, because imposed upon the franchise and property of the bank, and because they were discriminatory, and they were averred besides to be illegal under the state constitution and laws. The lower court held that the plea of *res judicata* established an irrevocable contract as to the taxes for years prior to the date of the extended charter, but that the thing adjudged did not conclude that there was an irrevocable contract as to taxes imposed after the date of the extension of the charter, because such taxes were not and could not have been in controversy in the cause in which the prior judgment had been rendered. Upon these grounds, in the second case, that is No. 405, it decided that the complainant was without right to relief, and in the first case, No. 365, that it was entitled to the relief sought.

These two cases are in all material respects identical with the cases of *The Third National Bank of Louisville* v. *Samuel H. Stone, Auditor of Public Accounts, et al.*, *ante*, 432; and *City of Louisville* v. *The Third National Bank*, *ante*, 435, which have been just decided. For the reasons given in the decisions rendered in those cases, it is ordered that the decree below rendered in No. 365 be, and the same is hereby, affirmed, and that rendered in No. 405 be, and the same is hereby, reversed, and that the last-mentioned case (viz., No. 405) be remanded to the court below with directions to take such further proceedings as may be in conformity to this opinion, and it is

So ordered.

FIRST NATIONAL BANK OF LOUISVILLE *v.* LOUISVILLE.

SAME *v.* STONE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 635, 634. Argued February 28, March 2, 1899. — Decided May 15, 1899.

The decision of the court below that taxes imposed upon the franchise or intangible property of a national bank may be regarded as the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress in that respect, was erroneous and is reversed.

THE case is stated in the opinion.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the banks.

MR. JUSTICE WHITE delivered the opinion of the court.

In these two cases the appellant filed its bills to enjoin the assessment and collection of certain taxes. The grounds upon which the prayer for relief in each case was rested were substantially as follows:

First. That the taxes in question were levied upon the franchise and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal; second, that the taxes were discriminatory, because, as a consequence of the exemption of certain state banks from taxation by special contract, the property of the bank was taxed at a higher rate than other moneyed capital, in violation of the act of Congress; and, third, that the taxes were illegal, because not in conformity to the state constitution and certain provisions of the state laws.

The court below decided that, although the taxes were im-

posed or contemplated to be assessed on the franchise or intangible property of the bank, nevertheless they were the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress. It moreover held that the remaining grounds were without merit. 88 Fed. Rep. 409.

The law under which the taxes in question were levied is the same one which was considered in *Owensboro National Bank, Plaintiff in Error*, v. *The City of Owensboro and A. M. C. Simmons*, 173 U. S. 664. The theory of equivalency upon which the court below decreed the taxes to be legal was in that case fully examined, and held to be unsound.

It follows that the decrees below rendered in these cases were erroneous. It is therefore ordered that said decrees be

Reversed, and the cases remanded to the lower court with directions for such further proceedings as may be in conformity with this opinion.

LOUISVILLE *v.* BANK OF LOUISVILLE.

STONE, Auditor, *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Nos. 359, 358. Argued February 28, March 2, 1899. — Decided May 15, 1899.

Stone v. *Bank of Commerce*, 174 U. S. 412, affirmed and applied to the point that the agreement of the commissioners of the sinking fund of Louisville and the attorney of the city with certain banks, trust companies, etc., including the Bank of Louisville, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

Citizens' Savings Bank of Owensboro v. *Owensboro*, 173 U. S. 636, also affirmed and applied.

On questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption.

Statement of the Case.

THE Bank of Louisville in these two cases filed its bills to enjoin the collection of certain taxes. The matters to which the bill in the first case (No. 359) related were certain franchise taxes for the years 1893 and 1894, the assessment and certification of valuation whereof had been made prior to the filing of the bill. Those covered by the bill in the second case (No. 358) were, generally speaking, like those embraced in the preceding suit, but were for different years — that is, for 1895, 1896 and 1897, and by an amendment the taxes of 1898 were also included. These taxes, however, had not been certified at the time the bill was filed, and the relief contemplated was the enjoining of the valuation of the franchise and the certification of the same for the purposes of taxation, as well as the subsequent collection of the taxes to be levied thereon. Omitting reference to the averments distinctly relating to the jurisdiction in equity, the case made by the bills was this:

It was alleged that the bank was chartered on February 2, 1833, to endure until January 1, 1853; that pursuant to an act approved February 16, 1838, the provisions of which had been complied with, the charter existence was extended for nine years; that by an act of February 15, 1858, duly accepted by the bank, its charter privileges were continued in full force for twenty years from the 1st of January, 1863; and finally that by an act of May 1, 1880, which the bank had duly accepted, its charter was extended for twenty years from January 1, 1883. It was alleged that by the sixth section of the original charter it was provided, among other things, that the cashier of the bank "shall on the first day of July, 1834, and on the same day annually thereafter, pay unto the treasurer of the State twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank; provided, that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank." The tax, the bills admitted, by an act approved February 12, 1836, had been increased to fifty cents a share.

Statement of the Case.

In general language, it was averred that by certain decisions rendered by the courts of Kentucky in the years 1838, 1869 and 1888, it was held that similar language to that contained in the charter of complainant constituted a contract preventing a higher rate of taxation than that provided for in the charter, and that from all or some of these decisions it resulted that the extension of an original charter, under the law of Kentucky, carried with it all the rights and privileges, including the limit of taxation, contained in the original charter. No decision, however, prior to 1880, by the Kentucky Court of Appeals, was referred to, holding that the mere grant of a charter, or an extension thereof, was not subject to repeal, alteration or amendment, if such power was reserved, by a general law, in force when the charter was enacted or the extension was granted. There was no averment that the complainant was either a party or a privy to the suits in which the decisions referred to had been rendered.

In both bills it was averred at length that the general assembly of the State of Kentucky had enacted the statute known as the Hewitt Act, and that the bank had accepted its provisions. This act and its acceptance, it was asserted, constituted an irrevocable contract, protected from impairment by the Constitution of the United States, thus securing the bank against any form of taxation other than that provided in the Hewitt Act. It was in both bills then declared that in 1894 the city of Louisville, asserting a right to collect taxes from the bank, in violation of the contract embodied in the Hewitt Act, for the purpose of testing the right of the city to do so, an agreement was entered into between the commissioners of the sinking fund, the city of Louisville through the city attorney, and the attorneys of the complainant and of other banks and trust companies, by which representative suits were to be brought, and it was agreed that the liability of the complainant to any other taxation than that imposed by the Hewitt Act should abide the result of the test suits in question; that in compliance with this agreement a suit was brought by the Bank of Kentucky, which like the complainant had been originally chartered before 1856, in which last-

named year an act had been passed in Kentucky reserving the right to repeal, alter or amend all charters subsequently granted, subject to certain exceptions provided expressly in the act of 1856, and that this suit had culminated in a final decree by the Court of Appeals of Kentucky holding that the Hewitt Act was an irrevocable contract, and that the banks which had accepted it were not liable to any other taxation than that therein specified. Averring that the suit brought by the Bank of Kentucky was the test suit contemplated by the agreement, as determining the liability of the complainant to other taxation than that imposed by the Hewitt Act, the decree in the suit of the Bank of Kentucky was pleaded as *res judicata*. In addition, the bills asserted that if the Hewitt Act was held by this court not to constitute an irrevocable contract, then the complainant was entitled to be restored to its rights under its charter as extended, and was consequently not subject to the particular taxes, the assessing and collection of which it was the object of the bills to prevent.

The court below held that the complainant, by virtue of the agreement referred to, was a privy to the decree rendered by the Court of Appeals of the State of Kentucky in favor of the Bank of Kentucky in the test case in question, and hence decided that the plea of *res judicata* was well taken. From its decrees enforcing these conclusions the appeals in both these cases were taken.

Mr. Henry L. Stone for Louisville.

Mr. Alexander Pope Humphrey, *Mr. Frank Chinn*, *Mr. James P. Helm* and *Mr. John W. Rodman* for the bank.

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

The unsoundness of the plea of the thing adjudged, upon which the lower court rested its decision, results from the opinion announced in *Stone* v. *Bank of Commerce*, *ante*, 412, and *Louisville* v. *Same*, *ante*, 428. It was there held that the

agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

The want of foundation for the assertion that the Hewitt Act created an irrevocable contract between the complainants and the city is also disposed of by the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro.* There is no ground for distinguishing this case from the one last referred to. True it is that the original charter of the complainant differs somewhat from the charter of the Citizens' Savings Bank of Owensboro, inasmuch as the charter of the Citizens' Savings Bank contained simply a limitation of taxation to a fixed rate, whilst the charter now in question, although establishing a stated rate, provided that the named rate might be reduced or increased, but *should not be increased beyond a maximum sum.* This limit as to the power to increase, it has been argued, took the case out of the reach of the act of 1856, since it was a plain expression of the legislative intent that there should be no increase beyond the maximum stated.

At the time the charter was extended, in 1880, the act of 1836 had increased the limit of taxation, fixed by the original charter, to the maximum therein allowed of fifty cents on each share. Conceding, *arguendo*, that the charter, as thus extended, carried with it, into the new period, the limitation of taxation fixed by virtue of the original charter and by the act of 1836 increasing the sum to fifty cents on each share, nevertheless the case is covered by the decision in the Citizens' Savings Bank of Owensboro, *supra.* There is nothing in the extending act expressing the plain intent of the legislature that the charter as extended should not be subject to the repealing power reserved by the act of 1856. The act of

extension, therefore, was not taken out of the general rule arising from the act of 1856, that is to say, it was not embraced in the exception mentioned in that act, saving from the power to repeal, alter or amend "all charters and grants of or to corporations or amendments thereof" when "the contrary intent be therein plainly expressed." No such intent being plainly expressed in the extending act, it follows that the charter as extended was subject to repeal. It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right when there is no unlimited irrepealable contract from which the right can be derived. And yet to such conclusion does the reasoning necessarily conduce which asserts that a repealable charter gave rise to an irrepealable contract right. Granting that the extending act in substance amounted to a reënactment in so many words of the provision found in the original charter, such provision as reënacted became but a part of a whole contract which was subject to repeal. The right to repeal, embracing the whole, covered also necessarily the provisions found in the whole. The limitation of taxation in the original charter was during the life of the corporation. If carried forward by the amendment it was only for the new period, that is, during the extended charter. But for all this extended period the charter was subject to repeal, at the will of the legislature, and the power to terminate the charter involved the correlative right of ending those stipulations which were only to last during the charter. The argument that, although the power to repeal the charter was reserved, the power to alter the taxation, without repealing the charter, did not arise, is but a form of stating the proposition which we have already noticed, and which amounts to the assertion that the lesser is not contained in the greater power. We must construe the extending act as a whole, especially in view of the origin and implied import of acts reserving the power to repeal, alter or amend, as fully stated in *Citizens' Savings Bank of Owensboro* v. *Owensboro*. We think that the extending act was subject to the reserved power of repeal, free from limitations inconsistent with the exercise of the right. The elementary general rule is that on

questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption. We cannot imply from the mere presence in the extended charter of the limitation of taxation, found in the original charter, a restraint on the power to repeal, alter or amend, when such restraint does not flow from the provisions of the extending act taken as a whole. It results from the fact that the extended charter was subject to repeal, that the complainant had no irrevocable contract limiting the power of the State to tax. Having no such right, it, of course, cannot assert that it must, if the Hewitt Act was not an irrepealable contract, be restored to the contract rights existing at the date of the enactment of the Hewitt Act. The non-existence of the prior right precludes the thought that a restoration could be possible.

From the foregoing reasons it follows that the decrees below rendered were erroneous, and they must be and are

Reversed, and the cases remanded with directions to dismiss the bills, and it is so ordered.

Mr. Justice Harlan dissented on the ground that there was privity, and therefore *res judicata.*

STEPHENS *v.* CHEROKEE NATION.

CHOCTAW NATION *v.* ROBINSON.

JOHNSON *v.* CREEK NATION.

CHICKASAW NATION *v.* ROBINSON.

APPEALS FROM THE UNITED STATES COURT IN THE INDIAN TERRITORY.

Nos. 423, 453, 461, 496. Argued and submitted February 23, 24, 27, 1899. — Decided May 15, 1899.

Congress may provide for a review of the action of commissioners and boards created by it and exercising only *quasi* judicial powers, by a transfer of their proceedings and decisions to judicial tribunals for examination and determination *de novo.*

Statement of the Case.

The statute conferring jurisdiction upon this court to consider and act upon this class of cases was intended to operate retrospectively, and is not thereby rendered void.

The validity of remedial legislation of this kind cannot be questioned unless it is in violation of some provision of the Constitution.

The appeals to this court granted by the act extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory, and the limitation applies to both classes of cases mentioned in the opinion of the court, viz.: (1) citizenship cases; (2) cases between either of the Five Civilized Tribes and the United States.

The distribution of jurisdiction made by the act of March 3, 1891, c. 517, is to be observed in these cases; but the whole case is not open to adjudication, but the appeal is restricted to the constitutionality and validity of the legislation.

This legislation is not in contravention of the Constitution; on the contrary, the court holds it all to be constitutional.

By the sixteenth section of the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners "to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

The Commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895, c. 189, 28 Stat. 939, two additional members

were appointed. It is commonly styled the "Dawes Commission."

The Senate on March 29, 1894, adopted the following resolution:

"*Resolved*, That the Committee on the Five Civilized Tribes of Indians, or any sub-committee thereof appointed by its chairman, is hereby instructed to inquire into the present condition of the Five Civilized Tribes of Indians, and of the white citizens dwelling among them, and the legislation required and appropriate to meet the needs and welfare of such Indians; and for that purpose to visit Indian Territory, to take testimony, have power to send for persons and papers, to administer oaths, and examine witnesses under oaths; and shall report the result of such inquiry, with recommendations for legislation; the actual expenses of such inquiry to be paid on approval of the chairman out of the contingent fund of the Senate."

The Committee visited the Indian Territory accordingly, and made a report May 7, 1894. (Sen. Rep. No. 377, 53d Cong. 2d Sess.) In this report it was stated: "The Indian Territory contains an area of 19,785,781 acres, and is occupied by the five civilized tribes of Indians, consisting of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles. Each tribe occupies a separate and distinct part, except that the Choctaws and Chickasaws, though occupying separately, have a common ownership of that part known as the Choctaw and Chickasaw territory, with rights and interests as recognized in their treaties as follows: The Choctaws, three fourths, and the Chickasaws, one fourth. The character of their title, the area of each tribe, together with the population and an epitome of the legislation concerning these Indians during the last sixty-five years, is shown by the report of the Committee on Indian Affairs, submitted to the Senate on the 26th day of July, 1892," (Sen. Rep. No. 1079, 52d Cong. 1st Sess.) and so much of that report as touched on those points was set forth.

The Committee then gave the population from the census of 1890 as follows: Indians, 50,055; colored Indians, colored

claimants to Indian citizenship, freedmen and colored, wholly or in part, 18,636; Chinese, 13; whites, 109,393; whites and colored on military reservation, 804; population of Quapaw Agency, 1281; or a total of 180,182; and said: "Since the taking of the census of 1890, there has been a large accession to the population of whites who make no claim to Indian citizenship, and who are residing in the Indian Territory with the approval of the Indian authorities. It is difficult to say what the number of this class is, but it cannot be less than 250,000, and it is estimated by many well-informed men as much larger than that number and as high as 300,000." After describing the towns and settlements peopled by whites, and the character of the Indian Territory, its climate, soil and natural wealth, the report continued:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites and non-participation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers and to follow professional pursuits.

"It must be assumed in considering this question that the Indians themselves have determined to abandon the policy of

exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever."

The Committee next referred to the class of white people denominated by the Indians as intruders, in respect of whom there had been but little complaint in other sections of the Indian Territory than that of the Cherokee Nation; and went on to say:

"The Indians of the Indian Territory maintain an Indian government, have legislative bodies and executive and judicial officers. All controversies between Indian citizens are disposed of in these local courts; controversies between white people and Indians cannot be settled in these courts, but must be taken into the court of the Territory established by the United States. This court was established in accordance with the provision of the treaties with the Choctaws, Chickasaws, Creeks and Seminoles, but no such provision seems to have been made in the treaty with the Cherokees. We think it must be admitted that there is just cause of complaint among the Indians as to the character of their own courts, and a good deal of dissatisfaction has been expressed as to the course of procedure and final determination of matters submitted to these courts. The determinations of these courts are final, and, so far, the Government of the United States has not directly interfered with their determinations. Perhaps we should except the recent case where the Secretary of the Interior thought it his duty to intervene to prevent the execution of a number of Choctaw citizens."

The report then recapitulated the legislation conferring certain jurisdiction over parts of the Indian Territory on the District Courts of the United States for the Western District of Arkansas, the Eastern District of Texas and the District of Kansas; the establishment of the United States court in the Indian Territory; the inclusion of a portion of

the Indian Territory within the boundaries of the Territory of Oklahoma, and the creation of a new Indian Territory, over parts of which the jurisdiction of the District Courts of Arkansas and Texas remained; and, for reasons assigned, recommended the appointment of two additional judges for the United States court in the Indian Territory, and of additional commissioners, and that the jurisdiction of the District Courts should be withdrawn.

The matter of schools was considered; and finally the question of title to the lands in the Indian Territory; and the Committee stated:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises what is the duty of the Government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the Government does interfere to administer such trust.

"Is it possible because the Government has lodged the title in the tribe in trust that it is without power to compel the execution of the trust in accordance with the plain provisions of the treaty concerning such trust? Whatever power Congress possessed over the Indians as semi-dependent nations, or as persons within its jurisdiction, it still possesses; notwithstanding the several treaties may have stipulated that the Government would not exercise such power; and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes.

Statement of the Case.

"If the determination of the question whether the trust is or is not being properly executed is one for the courts and not for the legislative department of the Government, then Congress can provide by law how such questions shall be determined and how such trust shall be administered, if it is determined that it is not now being properly administered.

"It is apparent to all who are conversant with the present condition in the Indian Territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modification of the system. It cannot be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your Committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question."

On November 20, 1894, and November 18, 1895, the Dawes Commission made reports to Congress of the condition of affairs in the Indian Territory in respect of the manner in which the lands were held by the members of the tribes, and of the manner in which the citizenship of said tribes was dealt with, finding a deplorable state of affairs and the general prevalence of misrule.

In the report of November 18, 1895, the Commission, among other things, said: "It cannot be possible that in any portion of this country, government, no matter what its origin, can remain peaceably for any length of time in the hands of one fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the Territory

this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution."

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship, the manipulation of the rolls, and proceedings in Indian tribunals, stated: "The Commission is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

And further:

"The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property, and that security and order in government enjoyed by the people of the United States, will be in vain.

"The Commission is therefore brought to the consideration of the question: What is the duty of the United States Government toward the people, Indian citizens and United States citizens, residing in this Territory under governments which it has itself erected within its own borders?

"No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self-reform.

"Nothing has been made more clear to the Commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

"There is no alternative left to the United States but to

assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. Insecurity of life and person and property increasing every day makes immediate action imperative.

"The pretence that the Government is debarred by treaty obligations from interference in the present condition of affairs in this Territory is without foundation. The present conditions are not 'treaty conditions.' There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian Territory, but on the contrary the whole structure and tenor of the treaties forbid it. If our Government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, people and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty obligations but is a plea for permission to further violate those provisions.

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

By the Indian Appropriation Act of June 10, 1896, c. 398, 29 Stat. 321, 339, the Commission was "directed to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and report from time to time to Congress;" and it was further provided as follows:

"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such commissioners within three months after the passage of this act.

"The said Commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided, further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the

tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

By the act of March 1, 1889, c. 333, entitled "An act to establish a United States court in the Indian Territory, and for other purposes," 25 Stat. 783, a United States court was established, with a single judge, whose jurisdiction extended over the Indian Territory, and it was provided that two terms of said court should be held each year at Muscogee in said Territory on the first Mondays of April and September, and such special sessions as might be necessary for the despatch of business in said court at such times as the judge might deem expedient.

On May 2, 1890, an act was passed, c. 182, "to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," 26 Stat. 81, 93, which enacted "that for the purpose of holding terms of said court, said Indian Territory is hereby divided into three divisions to be known as the first, second and third divisions;" the divisions were defined; the places in each division where court should be held were enumerated; and it was provided that

the "judge of said court shall hold at least two terms of said court in each year in each of the divisions aforesaid, at such regular times as such judge shall fix and determine."

March 1, 1895, an act was approved, c. 145, entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory." 28 Stat. 693. The first section of this act declared: "That the Territory known as the Indian Territory, now within the jurisdiction of the United States court in said Territory, is hereby divided into three judicial districts, to be known as the Northern, Central and Southern Districts, and at least two terms of the United States court in the Indian Territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency and the townsite of the Miami Townsite Company. . . . The Central District shall consist of all the Choctaw country. . . . The Southern District shall consist of all the Chickasaw country."

The act provided for two additional judges for the court, one of whom should be judge of the Northern District, and the other, judge of the Southern District, and that the judge then in office should be judge of the Central District. The judges were clothed with all the authority, both in term time and in vacation, as to all causes, both criminal and civil, that might be brought in said district, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of *habeas corpus*, etc., as by law vested in the judge of the United States court in the Indian Territory or in the Circuit or District Courts of the United States. The judge of each district was authorized and empowered to hold court in any other district for the trial of any cause which the judge of such other district was disqualified from trying, and whenever on account of sickness or for any other reason the judge of any district was unable to perform the duties of his office, it was provided that either of the

other judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas and Texas, outside of the limits of the Indian Territory as defined by law as to offences committed within the Territory, were repealed and their jurisdiction conferred after September 1, 1896, on the "United States courts in the Indian Territory."

By section eleven of this act it was provided:

"SEC. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court; and said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the Supreme Court of Arkansas over the courts thereof by the laws of said State, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said Supreme Court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian Territory; and appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian Territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States. Said

appellate court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thousand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

By the Indian Appropriation Act of June 7, 1897, c. 3, 30 Stat. 84, provision was made for the appointment of an additional judge for the United States court in the Indian Territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the Territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided*, that no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act of June 7, 1897, it was also provided:

"That the Commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities: *Provided further*, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offence committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective

of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.

"That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances and resolutions of the council of either of the aforesaid Five Tribes passed shall be certi-

fied immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

From the annual report of the Commission of October 3, 1897, it appears that there had been presented, in accordance with the provisions of the act of 1896, "some seven thousand five hundred claims, representing nearly, if not quite, seventy-five thousand individuals, each claim requiring a separate adjudication upon the evidence upon which it rested;" and that "about one thousand appeals have been taken from the decisions of the Commission." And the Commission said: "The condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their people, has been fully set forth in former reports of the Commission as well as in the reports of Congressional committees commissioned to make inquiry on the ground. It would be but repetition to attempt again a recital. Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the Government which created them."

June 28, 1898, an act was approved, c. 517, entitled "An act for the protection of the people of the Indian Territory, and for other purposes." 30 Stat. 495. The second section read:

"SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief

or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

And the third and eleventh sections in part:

"SEC. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the Commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

* * * * *

"SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location and value of same. . . . When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of

Congress: *Provided further*, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

Section 21 was as follows:

"That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.[1]

[1] Article IX of the treaty of July 19, 1866, with the Cherokee Nation, (14 Stat. 799, 801,) is as follows: "The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that

Statement of the Case.

"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

"The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth,

---

never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated."

Referring to that article, the Court of Claims, February 18, 1896, transmitted a communication to the Commissioner of Indian Affairs, stating: "The court is of the opinion that the clauses in that article in these words, 'and are now residents therein, or who may return within six months, and their descendants,' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and, consequently, that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen, and the descendants of freedmen, who did not return within six months, are excluded from the benefits of the treaty and of the decree. The court is also of the opinion that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867." 31 Ct. Cl. 148.

eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

"It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

"It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

"The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however*, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

"Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and

it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrolment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish any one who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

"The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offence."

"Sec. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

"Sec. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore

authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

Section 29 ratified the agreement made by the Commission with commissions representing the Choctaw and Chickasaw tribes, April 23, 1897, as amended by the act, and provided for its going into effect if ratified before December 1, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose, "*Provided*, that no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election;" "and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

Then followed the agreement referred to, containing provisions as to allotments, railroads, town sites, mines, jurisdiction of courts and tribal legislation, and stating: "It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State in the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes." The agreement was

ratified by the two nations in August, 1898. Rep. Com. Ind. Affairs, 1898, p. 77.

Section thirty made similar provision in respect of an agreement with the Creek Nation, which is set forth.

The Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 591, continued the authority theretofore conferred on the Commission by law, and contained this provision:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States, involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

Thereupon numerous appeals were prosecuted to this court, of which one hundred and sixty-six were submitted on printed briefs, with oral argument in many of them. Four of these appeals are set out in the title, numbered 423, 453, 461, 496, and the remaining one hundred and sixty-two are enumerated in the margin.[1]

[1] No. 436, Cobb et al. *v.* Cherokee Nation; No. 438, Coldwell et al. *v.* Choctaw Nation; No. 445, Castoe et al. *v.* Cherokee Nation; No. 446, Anderson et al. *v.* Cherokee Nation; No. 447, Clark et al. *v.* Choctaw Nation; No. 449, Choctaw Nation *v.* Mickle et al.; No. 450, Same *v.* Skaggs; No. 451, Same *v.* Godard et al.; No. 452, Same *v.* Grady; No. 454, Morgan et al. *v.* Creek Nation; No. 456, Bridges et al. *v.* Creek Nation; No. 457, Cherokee Nation *v.* Parker et al.; No. 458, Same *v.* Gilliam et al.; No. 459, Bell et al. *v.* Cherokee Nation; No. 460, Truitt et al. *v.* Cherokee Nation; No. 464, Jor-

Statement of the Case.

The proceedings in these four appeals are sufficiently stated as follows:

No. 423.— Stephens et al. *v.* The Cherokee Nation.

William Stephens; Mattie J. Ayres, his daughter; Stephen G. Ayres, Jacob S. Ayres and Mattie Ayres, his grandchil-

---

dan et al. *v.* Cherokee Nation; No. 465, Ward et al. *v.* Cherokee Nation; No. 466, Wassom et al. *v.* Muskogee or Creek Nation; No. 469, Chickasaw Nation *v.* Roff et al.; No. 470, Same *v.* Troop; No. 471, Same *v.* Love; No. 472, Same *v.* Hill et al.; No. 473, Same *v.* Thompson et al.; No. 474, Same *v.* Love; No. 475, Same *v.* Poe et al.; No. 476, Same *v.* McDuffie et al.; No. 477, Same *v.* McKinney et al.; No. 478, Same *v.* Bounds et al.; No. 479, Same *v.* King et al.; No. 480, Same *v.* Washington et al.; No. 481, Same *v.* Fitzhugh et al.; No. 482, Same *v.* Jones et al.; No. 483, Same *v.* Sparks et al.; No. 484, Same *v.* Hill et al.; No. 485, Same *v.* Arnold et al.; No. 486, Same *v.* Brown et al.; No. 487, Same *v.* Joines et al.; No. 488, Same *v.* Halford et al.; No. 489, Same *v.* Poyner et al.; No. 490, Same *v.* Albright et al.; No. 491, Same *v.* Doak et al.; No. 492, Same *v.* Passmore; No. 493, Same *v.* Laflin et al.; No. 494, Same *v.* Law et al.; No. 495, Same *v.* Saey; No. 497, Same *v.* Woody et al.; No. 498, Same *v.* Cornish et al.; No. 499, Same *v.* McSwain; No. 500, Same *v.* Standifer; No. 501, Same *v.* Bradley et al.; No. 502, Same *v.* Alexander et al.; No. 503, Same *v.* Sparks et al.; No. 504, Same *v.* Story et al.; No. 505, Same *v.* Archard et al.; No. 506, Same *v.* Keys; No. 507, Same *v.* McCoy; No. 508, Same *v.* Vaughan et al.; No. 509, Same *v.* Dorchester et al.; No. 510, Same *v.* Duncan; No. 511, Same *v.* Phillips et al.; No. 512, Same *v.* Lancaster; No. 513, Same *v.* Goldsby et al.; No. 514, Same *v.* East et al.; No. 515, Same *v.* Bradshaw et al.; No. 516, Same *v.* Graham et al.; No. 517, Same *v.* Burch et al.; No. 518, Same *v.* Palmer et al.; No. 519, Same *v.* Watkins et al.; No. 520, Same *v.* Holder et al.; No. 521, Same *v.* Jones et al.; No. 522, Same *v.* Worthy et al.; No. 523, Same *v.* Sartin et al.; No. 524, Same *v.* Woolsey et al.; No. 525, Same *v.* Arnold et al.; No. 526, Same *v.* Paul et al.; No. 527, Same *v.* Peery et al.; No. 528, Same *v.* Stinnet; No. 529, Same *v.* Stinnett et al.; No. 530, Same *v.* Duncan; No. 531, Same *v.* Lea et al.; No. 532, Same *v.* Hamilton; No. 533, Same *v.* Pitman; No. 534, Same *v.* Carson et al.; No. 535, Same *v.* Shanks et al.; No. 536, Same *v.* Paul; No. 537, Clark et al. *v.* Creek or Muskogee Nation; No. 538, Tulk et al. *v.* Same; No. 539, Hubbard et al. *v.* Cherokee Nation; No. 540, McAnnally et al. *v.* Same; No. 541, Brashear et al. *v.* Same; No. 542, Condry et al. *v.* Same; No. 543, Dial et al. *v.* Same; No. 544, Munson et al. *v.* Same; No. 545, Hubbard et al. *v.* Same; No. 546, Trotter et al. *v.* Same; No. 547, Hill et al. *v.* Same; No. 548, Russell et al. *v.* Same; No. 549, Baird et al. *v.* Same; No. 550, Binns et al. *v.* Same; No. 551, Smith et al. *v.* Same; No. 552, Henley et al. *v.* Same; No. 553, Same *v.* Same; No. 554, McKee et al. *v.* Same; No. 555, Singleton et al. *v.* Same; No. 556, Brown et al. *v.* Same; No. 557,

dren, applied to the Dawes Commission for admission to citizenship in the Cherokee Nation, August 9, 1896; the nation answered denying the jurisdiction of the Commission, and on the merits; and the application was rejected, whereupon applicants appealed to the United States court in the Indian Territory, Northern District, where the cause was referred to a special master, who reported on the evidence that the applicants were Cherokee Indians by blood. The court, Springer, J., accepted the findings of the master that William Stephens was one fourth Indian and three fourths white; that he was born in the State of Ohio; that his father was a white man and a citizen of the United States; that his mother's name was Sarah and that she was a daughter of William Ellington Shoe-Boots, and that her father was known as Captain Shoe-Boots in the old Cherokee Nation; that his mother was born in the State of Kentucky, and that she moved afterwards to the State of Ohio, where she was married to Robert Stephens,

---

Flippin et al. *v.* Same; No. 558, Gambill et al. *v.* Same; No. 559, Brewer et al. *v.* Same; No. 560, Abercrombie et al. *v.* Same; No. 561, Watts et al. *v.* Same; No. 562, Hackett et al. *v.* Same; No. 563, Pace et al. *v.* Same; No. 564, Teague et al. *v.* Same; No. 565, Earp et al. *v.* Same; No. 566, Mayberry et al. *v.* Same; No. 567, Bailes *v.* Same; No. 568, Lloyd *v.* Same; No. 569, Rutherford et al. *v.* Same; No. 570, Braught et al. *v.* Same; No. 571, Black et al. *v.* Same; No. 572, Archer et al. *v.* Same; No. 573, Hopper et al. *v.* Same; No. 574, Bayes et al. *v.* Same; No. 575, Rowell et al. *v.* Same; No. 576, Armstrong et al. *v.* Same; No. 577, Goin et al. *v.* Same; No. 578, Bennight et al. *v.* Choctaw Nation; No. 579, Wade et al. *v.* Cherokee Nation; No. 582, Choctaw Nation *v.* Jones et al.; No. 583, Same *v.* Goodall et al.; No. 584, Same *v.* Bottoms et al.; No. 585, Same *v.* Brooks et al.; No. 586, Same *v.* Blake et al.; No. 587, Same *v.* Randolph et al.; No. 588, Same *v.* Goins et al.; No. 589, Same *v.* Dutton et al.; No. 590, Same *v.* Thomas; No. 591, Same *v.* Jones et al.; No. 592, Meredith et al. *v.* Cherokee Nation; No. 593, Poindexter et al. *v.* Same; No. 598, Steen et al. *v.* Same; No. 599, Couch et al. *v.* Same; No. 600, Pressley et al. *v.* Same; No. 601, Elliott et al. *v.* Same; No. 608, Walker et al. *v.* Same; No. 609, Harrison et al. *v.* Same; No. 612, Watts et al. *v.* Same; No. 613, Hazlewood et al. *v.* Same; No. 614, Frakes et al. *v.* Same; No. 615, Harper et al. *v.* Same; No. 616, Armstrong et al. *v.* Same; No. 617, Rogers et al. *v.* Same; No. 618, Isbell et al. *v.* Same; No. 619, Wiltenberger et al. *v.* Same; No. 637, Baker *v.* Creek Nation; No. 643, Caie *v.* Choctaw Nation; No. 644, Cundiff et al. *v.* Same; No. 645, Slayton et al. *v.* Same; No. 646, Willis et al. *v.* Same; No. 647, Coppedge *v.* Same; No. 648, Nabors et al. *v.* Same; No. 651, Phillips et al. *v.* Same.

the father of William; that William Stephens came to the Cherokee Nation, Indian Territory, in 1873, and has resided in the Cherokee Nation ever since; that soon after he came to the Cherokee Nation he made application for his mother and himself to be readmitted as citizens of that nation; that the Commission who heard the case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application on a technical ground; that the chief, in a message to the council, stated that he was convinced of the honesty and genuineness of the claim, and wished the council to pass an act recognizing Stephens as a full citizen; but this was never done. The court, referring to the master's report, said:

"It is further stated that he has improved considerable property in the nation, and has continuously lived there as a Cherokee citizen, and at one time was permitted to vote in a Cherokee election. It appears from the evidence in the case that this applicant comes within the following provision of the Cherokee constitution: 'Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on memorializing the national council for such readmission.' There was a provision precisely similar to this in the constitution of the old Cherokee Nation as it existed prior to the removal of the tribe west of the Mississippi River. The provision just quoted is from the constitution of the Cherokee Nation as now constituted.

"The mother of the principal claimant, as heretofore stated, was born in the State of Kentucky, and from that State she moved to the State of Ohio, where she married the father of the principal claimant in this case. Her status was then fixed as that of one who had taken up a residence in the States. She had ceased to be a citizen of the Cherokee Nation, and she cannot be readmitted to citizenship in the nation except by

complying with the constitution and laws of the nation as declared by the Supreme Court in the case of The Eastern Band of Cherokee Indians against The Cherokee Nation and The United States.

"The master states the claimant was rejected by the commission of the Cherokee Nation upon a technical ground. The ground upon which the decision was based was that the names of the claimants did not appear upon any of the authenticated rolls of the present Cherokee Nation or of the old Cherokee Nation. The commission which passed upon his application was created under the act of the council of December 8, 1886.

"Robert Stephens, the father of the principal claimant in this case, was a citizen of the United States and a resident of the State of Ohio, and the mother of the claimant William Stephens had abandoned the Cherokee Nation and ceased to be a citizen thereof. Therefore the principal claimant at the time of his birth was a citizen of the United States, taking the status of his father. I doubt whether he could become a citizen of the Cherokee Nation without the affirmative action of the Cherokee council. The evidence fails to disclose that he has ever applied to any of the commissions that had jurisdiction to admit him as a citizen of the Cherokee Nation. The commission to which he did apply for enrolment as a citizen of the Cherokee Nation having held that his name did not appear upon any of the Cherokee rolls of citizenship, his application was rejected. He never having been admitted to citizenship as required by the constitution and laws of the Cherokee Nation, the judgment of the United States commission rejecting this case is affirmed, and the application of the claimants to be enrolled as citizens of the Cherokee Nation is denied."

Judgment affirming the decision of the Dawes Commission refusing applicants' enrolment and admission as citizens of the Cherokee Nation was entered December 16, 1897, whereupon a motion for rehearing was filed, which was finally overruled June 23, 1898, and judgment again entered that applicants "be not admitted and enrolled as citizens of the Cherokee Nation, Indian Territory." From these decrees applicants prayed

an appeal to this court August 29, 1898, which was allowed and perfected September 2, 1898, and the record filed here October 3, 1898.

No. 453. — The Choctaw Nation *v.* F. R. Robinson.

September 7, 1896, F. R. Robinson applied to the Dawes Commission to be enrolled as an intermarried citizen. His petition set forth that he was a white man; that he married a woman of Choctaw and Chickasaw blood, September 21, 1873, by which marriage he had five children; that she died, and he married a white woman August 10, 1884, with whom he was still living. The Choctaw Nation answered, objecting that the Dawes Commission had no jurisdiction because the act of Congress creating it was unconstitutional and void; that Robinson had not applied for citizenship to the tribunal of the Choctaw Nation constituted to try questions of citizenship; and that he ought not to be enrolled "because he has not shown by his evidence that he has not forfeited his rights as such citizen by abandonment or remarriage." The Dawes Commission granted the application, and thereupon the Choctaw Nation appealed to the United States court in the Indian Territory, Central District. The cause was referred to a master, who made a report, and thereafter, June 29, 1897, the court, Clayton, J., found that Robinson was "a member and citizen of the Choctaw Nation by intermarriage, having heretofore been legally and in compliance with the laws of the Choctaw Nation married to a Choctaw woman by blood, and that said F. R. Robinson was by the duly constituted authorities of the Choctaw Nation placed upon the last roll of the members and citizens of the Choctaw Nation prepared by the said Choctaw authorities, and that his name is now upon the last completed rolls of the members and citizens of the said Choctaw Nation," and thereupon decreed that Robinson was "a member and citizen, by intermarriage with the Choctaw Nation, and entitled to all the rights, privileges, immunities and benefits in said nation as such intermarried citizen and said member;" and directed a certified copy of the judgment to be transmitted to the Commission. From this decree the

Choctaw Nation prayed an appeal September 21, 1898, which was on that day allowed and perfected.

No. 461. — JENNIE JOHNSON ET AL. *v.* THE CREEK NATION.

This was a petition of Jennie Johnson and others to the Dawes Commission for admission to citizenship and membership in the Creek Nation. It seems to have been presented August 10, 1896, on behalf of one hundred and nineteen applicants, to have been granted as to sixty-two, and to have been denied as to fifty-seven, by whom an appeal was taken to the United States court in the Indian Territory, Northern District. The cause was referred to a special master, and on June 16, 1898, the court, Springer, J., rendered an opinion, in which, after considering various laws of the Muskogee or Creek Nation bearing on the subject, certain decisions of tribal courts, the action of a certain "committee of eighteen on census rolls of 1895," and of the council thereon adopting the report of that committee, in respect of applicants, the court concluded that appellants were not entitled to be enrolled as citizens of the Creek Nation, and entered judgment accordingly, whereupon an appeal was prayed from said decree and allowed and perfected September 27, 1898.

No. 496. — THE CHICKASAW NATION *v.* RICHARD C. WIGGS ET AL.

Richard C. Wiggs filed an application before the Dawes Commission to be admitted to citizenship in the Chickasaw Nation, asserting, among other things, that he was a white man and prior to October 13, 1875, a citizen of the United States, on which day he lawfully married Georgia M. Allen, a native Chickasaw Indian and member of the Chickasaw tribe; and also an application on behalf of his wife, Josie Wiggs, at the time of their marriage, which was in accordance with the Chickasaw laws under such circumstances, a white woman and citizen of the United States, and their daughter Edna Wiggs, August 15, 1896. The Chickasaw Nation, September 1, 1896, filed with the Commission its answer to these applications, which, after denying the jurisdiction of the Commission, traversed the allegations of the applications.

Statement of the Case.

November 15, 1896, the Dawes Commission admitted Richard C. Wiggs to citizenship in the Chickasaw Nation, but denied the application as to Mrs. Wiggs and their daughter. Thereafter an appeal was taken on behalf of the wife and daughter to the United States court in the Indian Territory, Southern District, and a cross appeal by the Chickasaw Nation from the decision of the Commission admitting Wiggs to citizenship. The court referred the cause to a master in chancery, who made a report in favor of Wiggs, but against his wife and daughter. The court, Townsend, J., found "that all of the applicants are entitled to be enrolled as Chickasaw Indians, it appearing to the court that the said Richard C. Wiggs, being a white man and citizen of the United States, was married in the year 1875 to Georgia M. Allen, who was a native Chickasaw Indian by blood. Said marriage was solemnized according to the laws of the Chickasaw Nation; that in the year 1876 the said wife of the said Richard C. Wiggs died; that from and after said marriage the said Richard C. Wiggs continued to reside in the Chickasaw Nation and to claim the rights of citizenship in said nation, and as such he served in the Chickasaw legislature, and was also sheriff of Pickens County, in said nation; that in the year 1886 the said Richard C. Wiggs was lawfully married, according to the laws of the Chickasaw Nation, to Miss Josie Lawson, and that ever since said marriage the said Wiggs and his present wife have resided in the Chickasaw Nation and claimed the rights of citizenship therein, and that there has been born unto them a daughter, Mary Edna Wiggs;" and thereupon entered a decree, December 22, 1897, admitting Richard C. Wiggs, his wife and their daughter, "to citizenship in the Chickasaw Nation and to enrolment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation; and it is further ordered that this decree be certified to the Dawes Commission for their observance."

From this decree an appeal was allowed and perfected July 11, 1898.

Counsel for Parties.

Cherokee Nation cases. (*Some argued, some submitted.*)

Mr. S. M. Porter for appellants argued Nos. 445, 446 February 24. *Mr. Heber J. May* for appellants argued other Cherokee cases February 27. *Mr. A. H. Garland*, *Mr. R. C. Garland* and *Mr. M. M. Edmiston* were on Mr. May's brief.

Mr. William T. Hutchins and *Mr. Wilkinson Call* argued for the Cherokee Nation February 27.

Mr. Joseph M. Hill and *Mr. James Brizzolara* filed a brief for appellants in No. 436.

Mr. William M. Cravens filed a brief for appellants in No. 459.

Chickasaw Nation cases. (*All submitted.*)

Mr. Halbert E. Paine and *Mr. Holmes Conrad* for appellants, submitted February 23. *Mr. Joseph G. Ralls* also for appellants.

Mr. C. C. Potter submitted for appellees February 23. The following submissions were made subsequently. *Mr. Silas Hare* and *Mr. Charles A. Keigwin* for appellants in No. 527. *Mr. Thomas Norman* and *Mr. William I. Cruce* for appellees in No. 472. *Mr. C. C. Potter* for appellee in Nos. 473 and 477. *Mr. Robert H. West* and *Mr. James L. Norris* for appellee in No. 474. *Mr. Henry M. Furman*, *Mr. Calvin L. Herbert*, *Mr. William I. Cruce*, *Mr. Andrew C. Cruce* and *Mr. James C. Thompson* for appellees in Nos. 469 and others. *Mr. J. W. Johnson* and *Mr. Dorset Carter* for appellees in No. 513. *Mr. W. A. Ledbetter* and *Mr. S. T. Bledroe* for appellees in No. 520.

Choctaw Nation cases. (*Some argued, some submitted.*)

Mr. J. M. Wilson for the Nation argued March 6, 7. *Mr. C. L. Herbert* for appellees in Nos. 586, 588 and 589, argued March 7. *Mr. Yancey Lewis*, *Mr. W. W. Dudley* and *Mr. L. T. Michener* for claimants in No. 438; *Mr. Yancey Lewis* for claimants in Nos. 447, 452, and 454; *Mr. William Ritchie*

for claimants in No. 453; *Mr. M. M. Lindly*, *Mr. Jacob C. Hodges*, *Mr. P. D. Brewer* and *Mr. J. A. Hale* for claimants in No. 578; *Mr. Yancey Lewis* and *Mr. J. G. Ralls* for claimants in No. 644; *Mr. Walter A. Logan* and *Mr. William T. Hutchins* for claimants in No. 648; and *Mr. W. W. Dudley*, *Mr. L. T. Michener* and *Mr. Eugene Easton* for claimants in No. 450; and *Mr. Joseph G. Ralls* for appellants in Nos. 648, 647, 646, 645, 643 and 651 submitted on their respective briefs.

Creek or Muskogee Nation cases. (*All submitted March* 7.)

Mr. William M. Cravens for appellants in Nos. 454, 461.

Mr. Benjamin T. Du Val for the Muskogee Nation in Nos. 461 and 454.

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

These appeals are from decrees of the United States court in the Indian Territory, sitting in first instance, rendered in cases pending therein involving the right of various individuals to citizenship in some one of the four tribes named; most of them came to that court by appeal from the action of the so-called Dawes Commission, though some were from decisions of tribal authorities; many questions are common to them all; and it will be assumed that in all of them the decrees were rendered and the court had finally adjourned before the passage of the act of July 1, 1898, providing for appeals to this court.

The act of June 10, 1896, provided "that if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It must be admitted that the words "United States District Court" were not accurately used, as the United States Court in the Indian Territory was not a District or Circuit Court of

the United States, *In re Mills*, 135 U. S. 263, 268, and no such court had, at the date of the act, jurisdiction therein. But as, manifestly, the appeal was to be taken to a United States court having jurisdiction in the Indian Territory, and in view of the other terms of the act bearing on the immediate subject-matter, to say nothing of subsequent legislation, it is clear that the United States court in the Indian Territory was the court referred to. This conclusion, however, may fairly be said to involve the rejection of the word "District" as a descriptive term, and reading the provision as granting an appeal to the United States court in the Indian Territory, the question arises whether the judgments made final by the statute are the judgments of that court in the several districts delineated by the act of March 1, 1895, or of the appellate court therein provided for, which may be referred to later on, since it is objected in the outset that no appeal from the decisions of the Dawes Commission or of the tribal authorities could be granted to any United States court; and, furthermore, that, at all events, it was not competent for Congress to provide for an appeal from the decrees of the United States court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute.

As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities.

The other objection, though appearing at first blush to be more serious, is also untenable.

The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate

retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void.

And while it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder* v. *Bull*, 3 Dallas, 386; *Sampeyreac* v. *United States*, 7 Pet. 222; *Freeborn* v. *Smith*, 2 Wall. 160; *Garrison* v. *New York*, 21 Wall. 196; *Freeland* v. *Williams*, 131 U. S. 405; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334.

The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reëxamination by a higher court though subsequently authorized by general law to exercise jurisdiction.

This brings us to consider the nature and extent of the

appeal provided for. We repeat the language of the act of July 1, 1898, as follows:

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

This provision is not altogether clear, and we therefore inquire what is its true construction? Was it the intention of Congress to impose on this court the duty of reëxamining the facts in the instance of all applicants for citizenship, who might appeal; of construing and applying the treaties with, and the constitutions and laws, the usages and customs, of the respective tribes; of reviewing their action through their legislative bodies, and the decisions of their tribal courts, and commissions; and of finally adjudicating the right of each applicant under the pressure of the advancement of each case on the docket to be disposed of as soon as possible? Or, on the other hand, was it the intention of Congress to submit to this court only the question of the constitutionality or validity of the legislation in respect of the subject-matter? We have no hesitation in saying that in our opinion the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory.

Two classes of cases are mentioned: (1) Citizenship cases. The parties to these cases are the particular Indian tribe and the applicant for citizenship. (2) Cases between either of the Five Civilized Tribes and the United States. Does the limitation of the inquiry to the constitutionality and validity of the legislation apply to both classes? We think it does.

It should be remembered that the appeal to the United States court for the Indian Territory under the act of 1896 was in respect of decisions as to citizenship only, and that in those cases the jurisdiction of the Dawes Commission and of the court was attacked on the ground of the unconstitutionality of the legislation. The determination of that question was necessarily in the mind of Congress in providing for the appeal to this court, and it cannot reasonably be supposed that it was intended that the question should be reopened in cases between the United States and the tribes. And yet this would be the result of the use of the words "affecting citizenship" in the qualification, if that qualification were confined to the last-named cases. The words cannot be construed as redundant and rejected as surplusage, for they can be given full effect, and it cannot be assumed that they tend to defeat, but rather that they are in effectuation of, the real object of the enactment. It is true that the provision is somewhat obscure, although if the comma after the words "all citizenship cases" were omitted, or if a comma were inserted after the words "the United States," that obscurity would practically disappear, and the rule is well settled that, for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *Hammock* v. *Loan and Trust Company*, 105 U. S. 77, 84; *United States* v. *Lacher*, 134 U. S. 624, 628; *United States* v. *Oregon & California Railroad*, 164 U. S. 526, 541.

On any possible construction, in cases between the United States and an Indian tribe, no appeal is allowed, unless the constitutionality or validity of the legislation is involved; and it would be most unreasonable to attribute to Congress an intention that the right of appeal should be more extensive in

cases between an Indian tribe and an individual applicant for citizenship therein.

Reference to prior legislation as to appeal to this court from the United States court in the Indian Territory confirms the view we entertain.

By section five of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, as amended, appeals or writs of error might be taken from the District and Circuit Courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By section six, the Circuit Courts of Appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States, under this act."

The act of March 1, 1895, provided for the appointment of additional judges of the United States court in the Indian Territory and created a Court of Appeals with such superintending control over the courts in the Indian Territory as the Supreme Court of Arkansas possessed over the courts of that State by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the Circuit Court of Appeals for the Eighth Judicial Circuit in the same manner and under the same regulations as appeals are taken from the Circuit Courts of the United States," which thus in terms deprived that court of jurisdiction of appeals from the Indian Territory trial court under section 13 of the act of 1891. Prior to the act of 1895, the United States court in the Indian

Territory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them. And we held in *Brown* v. *United States*, 171 U. S. 631, that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court in the Indian Territory. Whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable need not be considered, as the judgments of the United States court in the Indian Territory in these citizenship cases were made final in that court by the act of 1896, and this would cut off an appeal to this court, if any then existed, whether the finality spoken of applied to the judgments of the trial court or of the appellate court. And when by the act of July 1, 1898, it was provided that "appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States, . . . under the rules and regulations governing appeals to said court in other cases," the legislation taken together, justifies the conclusion that the distribution of jurisdiction made by the act of March 3, 1891, was intended to be observed, namely, that cases falling within the classes prescribed in section five should be brought directly to this court, and all other cases to the appellate court, whose decision, as the legislation stands, would in cases of the kind under consideration be final. We do not think, however, that the analogy goes so far, in view of the terms of the act of 1898, that in cases brought here the whole case would be open to adjudication. The matter to be considered on the appeal, like the appeal itself, was evidently intended to be restricted to the constitutionality and validity of the legislation. The only ground on which this court held itself to be authorized to consider the whole merits of the case upon an appeal from the Circuit Court of the United States in a case in which the constitutionality of a law of the United States was involved, under section 5 of the act of March 3, 1891, c. 517, was because of the express limitation in another part of that section of appeals upon the question of jurisdiction; and there is no kindred limitation in the act now before us. *Horner* v. *United States*, 143 U. S. 570, 577. The judgments of the

court in the Indian Territory were made final, and appeals to this court were confined, in our opinion, to the question of constitutionality or validity only.

Was the legislation of 1896 and 1897, so far as it authorized the Dawes Commission to determine citizenship in these tribes, constitutional? If so, the courts below had jurisdiction on appeal.

It is true that the Indian tribes were for many years allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States; and numerous treaties were made by the United States with those tribes as distinct political societies. The policy of the Government, however, in dealing with the Indian Nations was definitively expressed in a proviso inserted in the Indian Appropriation Act of March 3, 1871, c. 120, 16 Stat. 544, 566, to the effect:

"That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe," which was carried forward into section 2079 of the Revised Statutes, which reads:

"SEC. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the

Government." *Thomas* v. *Gay*, 169 U. S. 264, 271, and cases cited.

As to the general power of Congress we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641, 653, from whose opinion we quote as follows:

"The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the Government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the General Government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester* v. *Georgia*, 6 Pet. 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583,) that 'in the executive, legislative and judicial branches of our Government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State, or separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to

the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the Government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the Government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers*, 4 How. 567, 572, the court, referring to the locality in which a particular crime had been committed, said: 'It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. . . . We think it too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority.' In *United States* v. *Kagama*, 118 U. S. 375, 379, the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and

thus far not brought under the laws of the Union or of the State within whose limits they resided. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' The latest utterance upon this general subject is in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, where the court, after stating that the United States is a sovereign nation limited only by its own Constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.'"

Such being the position occupied by these tribes, (and it has often been availed of to their advantage,) and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

By the act of June 10, 1896, the Dawes Commission was authorized "to hear and determine the application of all persons who may apply to them for citizenship in said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled," but it was also provided:

"That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all

treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

The act of June 7, 1897, declared that the Commission should "continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulation with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commis-

sion will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also,* That any one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, until thirty days after their passage: *Provided,* That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

The judgments in these cases were rendered before the pas-

sage of the act of June 28, 1898, commonly known as the Curtis Act, and necessarily the effect of that act was not considered. As, however, the provision for an appeal to this court was made after the passage of the act, some observations upon it are required, and, indeed, the inference is not unreasonable that a principal object intended to be secured by an appeal was the testing of the constitutionality of this act, and that may have had controlling weight in inducing the granting of the right to such appeal.

The act is comprehensive and sweeping in its character, and notwithstanding the abstract of it in the statement prefixed to this opinion, we again call attention to its provisions. The act gave jurisdiction to the United States courts in the Indian Territory in their respective districts to try cases against those who claimed to hold lands and tenements as members of a tribe and whose membership was denied by the tribe, and authorized their removal from the same if the claim was disallowed; and provided for the allotment of lands by the Dawes Commission among the citizens of any one of the tribes as shown by the roll of citizenship when fully completed as provided by law, and according to a survey also fully completed; and "that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

The act further directed, as to the Cherokees, that the Commission should "take the roll of Cherokee citizens of eighteen hundred and eighty, not including freedmen, as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood,

have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have legal right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws." And that the Commission should make a roll of Cherokee freedmen, in compliance with a certain decree of the Court of Claims; and a roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty; and a roll of Chickasaw freedmen entitled to any rights or benefits under the treaty of 1866, and their descendants; and a roll of all Creek freedmen, the roll made by J. W. Dunn, under the authority of the United States, prior to March 14, 1867, being confirmed, and the Commission being directed to enroll all persons now living whose names are found on said roll, and their descendants, with "such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

The Commission was authorized and directed to make correct rolls of the citizens by blood of all the tribes other than the Cherokees, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes."

It was also provided that "no person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship."

The Commission was authorized to make the rolls descriptive of the persons thereon, so that they might be thereby identified, and to take a census of each of said tribes, "or

to adopt any other means by them deemed necessary to enable them to make such rolls;" and it was declared that "the rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The act provided further for the resubmission of the two agreements, with certain specified modifications, that with the Choctaws and Chickasaws, and that with the Creeks, for ratification to a popular vote in the respective nations, and that if ratified, the provisions of these agreements so far as differing from the act should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification August 24, 1898, and was ratified by a large majority, but whether or not the agreement with the Creeks was ratified does not appear.

The twenty-sixth section provided that, after the passage of the act, "The laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory;" and the twenty-eighth section, that after July 1, 1898, all tribal courts in the Indian Territory should be abolished.

The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898; but provided that it should "not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

For reasons already given we regard this act in general as not obnoxious to constitutional objection, but in so holding we do not intend to intimate any opinion as to the effect that changes made thereby, or by the agreements referred to, may have, if any, on the status of the several applicants, who are parties to these appeals.

The elaborate opinions of the United States court in the Indian Territory by Springer, J., Clayton, J., and Townsend, J., contained in these records, some of which are to be found

in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and set forth the various treaties, tribal constitutions and laws, and the action of the many tribal courts, commissions and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

As we hold the entire legislation constitutional, the result is that all the

Judgments must be affirmed.

Mr. Justice White and Mr. Justice McKenna dissented as to the extent of the jurisdiction of this court only.

OFFICE SPECIALTY MANUFACTURING COMPANY *v.* FENTON METALLIC MANUFACTURING COMPANY.

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

No. 253. Argued April 20, 1899. — Decided May 15, 1899.

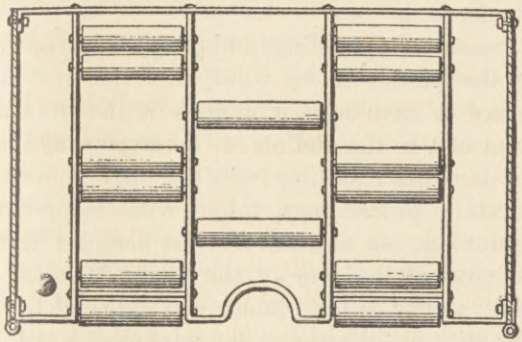
Every element of the combination described in the first and second claims of letters patent No. 450,124, issued April 7, 1891, to Horace J. Hoffman for improvements in storage cases for books, is found in previous devices, and, limiting the patent to the precise construction shown, none of the defendant's devices can be treated as infringements.

This was a bill in equity filed in the Supreme Court of the District of Columbia by the Fenton Metallic Manufacturing Company against the appellant to recover for the infringement of letters patent number 450,124, issued April 7, 1891, to Horace J. Hoffman, for improvements in storage cases for books.

In the specification the patentee declares that "the object of my invention is to facilitate the handling and prevent the abrasion and injury of heavy books, etc. It consists, essen-

tially, of the peculiar arrangement of the guiding and supporting rollers, and of the peculiarities in the construction of the case and shelves hereinafter specifically set forth."

The following drawing of one of the shelves exhibits the peculiar features of the invention. The drawing explains itself so perfectly that no excerpt from the specification is necessary to an understanding of the claims.



The two claims alleged to have been infringed are as follows:

"1. In a storage case for books, etc., the combination of a supporting rack or shelf composed of metallic strips and having a reëntrant bend or recess in its front edge and rollers journalled in said rack and projecting above and in front of the same on each side of said bend or recess, substantially as described.

"2. In a book shelf, the combination of a supporting frame, a series of horizontal rollers, the front roller in two separated sections, the intermediate part of the frame being carried back to permit the admission of the hand between said roller sections, substantially as described."

The defendant, the Office Specialty Manufacturing Company, was the assignee through mesne assignments of Jewell and Yawman, whose application for a patent, filed November 6, 1888, was put in interference in the Patent Office with the application of Hoffman, filed February 12, 1887, and the interference proceedings on behalf of Jewell and Yawman were

conducted by the parties who subsequently formed the Office Specialty Manufacturing Company. The Examiner of Interferences, the Board of Examiners-in-Chief, and the Commissioner of Patents successively decided in favor of Hoffman, to whose assignees the letters patent were subsequently issued. During the pendency of the interference, the Hoffman application was divided, as permitted by the rules of the Patent Office, to secure a patent for certain features not involved in the interference.

Upon a hearing on pleadings and proofs a decree was entered adjudging the patent to be valid, and the first and second claims thereof to have been infringed by the defendant; and the case was sent to the auditor to determine and report the profits and damages resulting from the infringement.

After certain proceedings, taken with respect to several infringing devices, not necessary to be here set forth, a final decree was entered in favor of the plaintiff, which, so far as respects the validity of the patent, was affirmed by the Court of Appeals, with an allowance for damages, which had been rejected by the Supreme Court. 12 App. Cas. D. C. 201. Whereupon the defendant appealed to this court.

Mr. Melville Church for appellant. *Mr. Joseph B. Church* was on his brief.

Mr. Charles Elwood Foster for appellee.

Mr. Justice Brown delivered the opinion of the court.

We consider the question of the validity of this patent as the decisive one in this case. The patent was adjudged to be valid by the Supreme Court of the District of Columbia, as well as by the Court of Appeals. It had been held to be invalid by Judge Lacombe, sitting in the Circuit Court for the Southern District of New York, upon a motion for a preliminary injunction, *Fenton Metallic Manufacturing Co.* v. *Chase*, 73 Fed. Rep. 831, and by Judge Wheeler, upon a final hearing of the same case, 84 Fed. Rep. 893.

The elements of Hoffman's combination, as described in the first claim alleged to be infringed, are (1) a supporting rack or shelf composed of metallic strips; (2) a reëntrant bend or recess in its front edge for the insertion of the hand; and, (3) rollers journalled in the rack and projecting above and in front of the same on each side of the recess. In the second claim the combination is described as (1) a supporting frame (apparently including one of wood as well as of metal); (2) a series of horizontal rollers, the front rollers being in two separated sections; (3) the intermediate part of the frame being carried back to permit the admission of the hand between said roller sections. It may be remarked in passing that none of the decisions in the Patent Office in the interference proceedings dealt with the question of prior devices.

The introduction of rollers in book shelves is undoubtedly a convenient and valuable device for preventing the abrasion of large and heavy books which are obliged to be laid flat upon the shelves, especially when they are subjected to frequent handling; but the employment of roller shelves at the time Hoffman made his application for a patent (February 12, 1887,) was by no means a novelty. Indeed, plaintiff's own expert testifies that "it was common to use what were called roller shelves, the same consisting of frames or supports and longitudinal parallel rollers, which extended the entire length of the shelf and served to reduce friction in putting books upon and withdrawing them from the shelf. One form of such shelves is shown in complainant's exhibit, Office Specialty Manufacturing Company's catalogue, Figure 16." This exhibit shows a shelf frame made of bent steel, firmly riveted together, containing three continuous rollers, each of the full length of the shelf made of steel in tubular form. Continuing the witness said:

"The use of such shelves was, and is, however, limited because of certain defects; for instance, one of the principal defects is the liability of the person placing the book upon the shelf to have the fingers pinched between the book and the front roller in placing the book on the shelf. With light, small books this, of course, was not a matter of special im-

portance, and the shelves can be used with such books, but the class of books for which such shelves are especially adapted is heavy books, such as are used in keeping Government records, weighing, in many instances, from ten to twenty-six or even thirty pounds, and quite large, and with such books the liability to injure the fingers in putting them on and taking them from the shelf is very great."

So long before Hoffman's application as the year 1870, Samuel H. Harris had obtained a patent, No. 107,042, for a shelf of three parallel wooden rollers covered with sheet metal, the specification of which seems to assume that wooden rollers had theretofore been used in iron cases for books.

A patent issued in 1876 to John L. Boone, No. 182,157, describes his invention as consisting "in attaching rollers to the front edges of book shelves, so that when a book is withdrawn from or placed upon the shelf it will move over the roller instead of over the edge of the shelf." This is to obviate the danger of the book being abraded by the sharp corners of the shelf over which it is dragged, especially if the shelf is higher than the level of the person's head who handles it.

A patent issued in 1885 to Walter H. Conant shows a similar arrangement of front rollers to protect the books.

In a patent to Marion T. Wolfe of October 7, 1879, No. 220,265, there is shown a book case in which three series of short rollers, each inserted in what the patentee calls a "box," are employed as a support for the books. These boxes run at right angles to the front of the case, and they are so constructed that the hand may be introduced between any two series of rollers in order to more readily grasp the back of the book, without liability of the fingers being caught by the edge of the shelf.

A device somewhat similar to that patented to Harris is shown in a patent issued in 1886 to A. Lemuel Adams, wherein a shelf is provided with a series of parallel short rollers, the front rollers being supported upon spring arms, which are carried forward so as to permit of the introduction of the hand between them, and thus facilitate the withdrawal of the book, without liability of contact of the fingers with any portion of

the shelf. When a book is to be placed in position, it is first rested upon the spring rollers, which by their elasticity assist in forcing the book upon the fixed rollers, when it is easily passed by such rollers to its proper place. The extension of the elastic rollers in front of the shelf would seem to prevent the use of doors in front of the shelves, and it is clear they do not support the books when in place.

There was also oral testimony showing that there were in use in the court house in Richmond, Indiana, in the year 1873, and thereafter, unpatented roller shelves for books, consisting of a wooden shelf, having the ordinary hand hole at the front, upon each side of which there were short rollers similar to Hoffman's, though some distance from the front edge, which enabled the back of the book to be readily grasped and easily withdrawn upon the rollers. The evidence showed that hundreds of these rollers were used, and one of them, taken from the court house in Richmond, was introduced as an exhibit.

Comparing these several devices with the patent in suit, it is manifest that every element of the combination, described in the first and second claims, is found in one or the other of such devices. Roller shelves are found in all the patents above described as well as in the Richmond shelf, and if there were any invention in substituting metal for a wooden frame, it appears to have been anticipated in the shelf used by the Specialty Company, known as figure 16, the existence of which before the Hoffman application for a patent is admitted by plaintiff's expert as well as by the manager of the plaintiff corporation. It was no novelty to place rollers at the front edges of the shelves, so as to project above and in front of the shelves, as this is shown in the Boone, Conant and Adams patent, and in the defendant's metallic shelf, used prior to the Hoffman application. The employment of semicircular hand holes or recesses, for more readily grasping the books, is such a familiar device in upright partitions for holding books that scarcely any banking or record office is without them, and the court may properly take judicial notice of their use long prior to this patent. *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v.

Phillips, 99 U. S. 592; *King* v. *Gallun*, 109 U. S. 99; *Phillips* v. *Detroit*, 111 U. S. 604, 606. If there were any invention in applying them to roller shelves, Hoffman is not entitled to the credit of it, since they are shown in the so-called Richmond shelf. The construction of the Wolfe and Adams patents is also such as to permit the introduction of the hand for grasping the book without coming in contact with the edge of the shelves.

Putting the Hoffman patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes* v. *Van Wormer*, 20 Wall. 353, 368; *Reckendorfer* v. *Faber*, 92 U. S. 347, 356; *Phillips* v. *Detroit*, 111 U. S. 604; *Brinkerhoff* v. *Aloe*, 146 U. S. 515, 517; *Palmer* v. *Corning*, 156 U. S. 342, 345; *Richards* v. *Chase Elevator Co.*, 158 U. S. 299. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill.

If there be any invention at all in this patent, it is not to be found in the combination described in the claims, but by a reference to the drawing, and in the words "substantially as described." This would confine the plaintiff to a metallic frame divided longitudinally into three sections, each fitted with short rollers, two of which project above and forward of the front bar of the frame, which is bent inward in front of the middle section to form the "reëntrant bend or recess" for the insertion of the hand.

But in whatever light this device be considered, it is evident that, limiting the patent to the precise construction shown, none of the defendant's devices can be treated as infringements, since none of them show a shelf divided into three sections, and none of them, except possibly one, the manu-

facture of which was stopped, indicate a bend in the front bar of the frame to form the recess for the insertion of the hand.

The decree of the court below must be

Reversed, and the case remanded to the Court of Appeals with directions to order the bill to be dismissed.

WADE *v.* TRAVIS COUNTY.

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

No. 267. Argued April 26, 1899. — Decided May 15, 1899.

Mitchell County v. *Bank of Paducah*, 91 Texas, 361, which was an action upon interest coupons on bonds issued by the county for the purpose of building a court house and jail, and for constructing and purchasing bridges, in which it was held that as the constitution and laws of Texas authorizing the creation of a debt for such purposes require that provision should be made for the interest and for a sinking fund for the redemption of the debt, it was the duty of the court, in an action brought by a *bona fide* holder of bonds issued under the law to so construe it as to make them valid and give effect to them, is followed by this court, even if it should be found to differ from previous decisions of the Supreme Court of Texas, in force when the decision of the court below in this case was made.

This was an action brought in the Circuit Court for the Western District of Texas by the plaintiff Wade, who is a citizen of the State of Illinois, against the county of Travis, to recover upon certain interest coupons detached from forty-seven bonds issued by the defendant for the purpose of building an iron bridge across the Colorado River.

The petitioner set forth that in July, 1888, the defendant, being authorized so to do, entered into a contract with the King Iron Bridge Manufacturing Company of Cleveland, Ohio, for the construction of a bridge for public use over the Colorado River, the company agreeing to complete the same by November 15, 1888, in consideration of which the defendant

agreed to pay the sum of $47,000 in six per cent bonds, payable in twenty years after date.

That, prior to the making of such contract, to wit, February 23, 1888, the defendant, acting through its commissioners' court, levied for the year 1888 and subsequent years, until otherwise ordered, an annual *ad valorem* tax of twenty cents for general purposes, and an annual *ad valorem* tax of fifteen cents for road and bridge purposes, on each one hundred dollars' worth of taxable property in such county; that on February 13, 1889, the commissioners' court of the county levied for the year 1889 an *ad valorem* tax of fifteen cents on each one hundred dollars' worth of property for road and bridge purposes, and an *ad valorem* tax of five cents to create a sinking fund for bridge bonds, and to pay the interest on such bonds; that the defendant delivered to the bridge company upon its contract for erecting the bridge five bonds on December 6, 1888, ten bonds on December 22, 1888, ten bonds on February 12, 1889, and the remaining twenty-two of such bonds on July 3, 1889, such bonds being signed by the county judge, countersigned by the county clerk and registered by the county treasurer; that the several levies in question had not been appropriated for any other purpose by the county, or, at least, a sufficient portion of them remained unappropriated to pay the interest and sinking fund upon such bonds, and that it was the intention of the commissioners' court to use these levies with a view of providing an annual fund sufficient to pay the interest, and to provide the sinking fund required by law. The petition further averred that plaintiff purchased the coupons for a good and valuable consideration in open market, and that he is the legal owner and holder of the same; that on January 16, 1896, he presented such coupons to the county treasurer and demanded payment thereof, which was refused.

The county demurred to the petition upon six different grounds, the first and material one of which was that the petition failed to allege that "at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the

interest, and at least two per cent sinking fund upon such bonds."

The Circuit Court was of opinion that, at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for the interest upon such bonds and for a sinking fund, and thereupon sustained the demurrer and dismissed the cause. 72 Fed. Rep. 985.

The plaintiff appealed to the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court. 52 U. S. App. 395. Upon plaintiff's petition a writ of certiorari was subsequently allowed by this court.

Mr. Joseph Paxton Blair and *Mr. Frank W. Hackett* for Wade.

Mr. Clarence H. Miller for Travis County. *Mr. Franz Fisat* was on his brief.

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

This case involves the validity of certain bonds issued by the county of Travis in payment to the King Iron Bridge Manufacturing Company for the construction of a bridge over the Colorado River; and, incidentally, the weight to be given to alleged conflicting decisions of the Supreme Court of Texas as to the validity of such bonds.

As bearing upon this question, the following sections of Article XI of the constitution of Texas, upon the subject of "Municipal Corporations," are pertinent:

"Sec. 2. The construction of jails, court houses and bridges, and the establishment of county poor houses and farms, and the laying out, construction and repairing of county roads, shall be provided for by general laws."

"Sec. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the taxpayers therein, (to be ascertained as may be

provided by law,) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and to provide at least two per cent as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

In apparent compliance with the sections above quoted, the legislature in 1887 enacted the following law, c. 141, § 1:

"SEC. 1. That the county commissioners' court of the several counties of this State are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, in such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bearing interest at any rate not to exceed eight per cent per annum.

"SEC. 2. The commissioners' court shall levy an annual *ad valorem* tax, not to exceed fifteen cents on the one hundred dollars' valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than four per cent on the full sum for which the bonds are issued."

It is admitted that no provision was made on July 3, 1888, "at the time of creating" the debt, for levying and collecting a sufficient tax to pay the interest thereon, and two per cent for a sinking fund, as required by the second clause of section seven, if said clause be applicable to a debt incurred for building bridges. It was alleged in the petition, however, that in the February preceding the commissioners' court ordered an *ad valorem* tax of twenty cents for general purposes, and an annual *ad valorem* tax of fifteen cents for road and bridge purposes; and it also appeared that in the following February (1889) it ordered an annual *ad valorem* tax of twenty-five cents for general purposes; fifteen cents for road and bridge purposes; court-house and jail tax of five cents, and an *ad valorem*

tax of five cents to create a sinking fund for bridge bonds to pay the interest on said bonds.

Plaintiff insisted in the court below that the language of the last clause of section seven, requiring a provision to be made for the levying and collection of a tax to pay the interest and to provide a sinking fund, must be read in connection with the preceding clause of the section, and, taking the two together, that the last clause must be held to apply only to counties bordering on the Gulf of Mexico. Both the Circuit Court and the Court of Appeals, however, held that the last clause contained a separate and independent provision, and was applicable to the contract made by the county for the building of this bridge, and that, the petition of the plaintiff failing to show compliance with it, the contract was void and the bonds issued without authority of law. Both courts relied upon the construction given by the Supreme Court of Texas in numerous cases to this section of the constitution.

It is important in this connection to note that the opinion of the Circuit Court was pronounced on March 13, 1896, and that of the Court of Appeals on June 16, 1897. Since that time, it is asserted that the Supreme Court of Texas has taken a somewhat different view of the law, and an examination of these several decisions becomes important. In the earliest of them, *Terrell* v. *Dessaint*, 71 Texas, 770, 773, (1888,) which was an action on a promissory note given by the city in payment for material for water works supplies, it was squarely held that the last clause of section seven, above quoted, must be held to apply to all cities alike, and that the clause contained no word or words which restricted its application to the cities previously mentioned in the same section. "The language is general and unqualified," said the court, "and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what it said; that is, that no city shall create any debt without providing, by taxation, for the payment of the sinking fund and interest." It was also held that a debt of $1500 for materials to extend its water works was within the clause in question, and that as the current expenses proper of the city exceeded its resources for

general purposes, and no appropriation was made for the payment of this debt, there could be no recovery.

In *Bassett* v. *El Paso*, 88 Texas, 168, (1895) it was held that the language and purpose of the constitution were satisfied by an order for the annual collection by taxation of a "sufficient sum to pay the interest thereon and create a sinking fund," etc., although it did not fix the rate or per cent of taxation for each year by which the sum was to be collected, but left the fixing of such rate for each successive year to the commissioners' court or the city council. It was contended that the ordinance, which provided for the issue of water works bonds, was void, because it did not levy a tax, but delegated to the assessing and collecting officers the power to make such levy from year to year. But it was said that "to so construe these provisions as to require, at the time the debt is created, the levy of a fixed tax to be collected through a long series of years, without reference to the unequal 'sums' that would in all probability be realized therefrom, instead of the collection annually of a certain 'sufficient sum' to pay the annual interest and create the sinking fund required by law, would be doing violence to the language used, and authorize, in cases where values rapidly increase, the extortion from the taxpayers of large amounts of money in excess of the amount necessary to satisfy the interest and principal of the bonds, and this in turn would invite municipal corruption and extravagance."

In *McNeal* v. *Waco*, 89 Texas, 83, (1895) plaintiff sued the city of Waco on a contract for building cisterns for fire protection, to recover the contract price for one and damages for refusing to allow him to complete the others. The petition failed to show a provision for taxes to pay interest and a sinking fund, or an existing fund for the payment; nor did the contract show facts from which the court could say that it was an item of ordinary expenditure. It was held that a general demurrer to the petition should have been sustained, and it was also held that the word "debt" included every pecuniary obligation imposed by contract outside of the current expenditures for the year. To same effect is *Howard* v. *Smith*, 91 Texas, 8.

Opinion of the Court.

Such was the construction placed by the Supreme Court of Texas upon the constitutional provision at the time when the case under consideration was decided by the courts below. It was held by the Circuit Court that the county commissioners' court should have made provision at the time the contract was executed, July 3, 1888, by levy of a tax or otherwise for a sinking fund, and the interest on the bonds issued for the erection of the bridge; that the levy made by the commissioners' court in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence nor even in the contemplation of the parties, so far as the allegations of the petition disclosed; that the general levy made in February, 1889, could not be held applicable to the bonds of the bridge company for two reasons: first, because it was made some six months after the execution of the contract; and, second, because the order of the commissioners' court, authorizing the levy, made no reference whatever to the bonds in controversy nor to the contract between the county and the bridge company. The Circuit Court of Appeals came practically to the same conclusion.

Since these cases were decided, however, the Supreme Court of Texas has put a construction upon the constitution which fully supports the position of the plaintiff in this case. In *Mitchell County* v. *Bank of Paducah*, 91 Texas, 361, decided in January, 1898, the action was upon interest coupons attached to bonds issued by the county for the purpose of building a court house and jail, and upon others for constructing and purchasing bridges. An act had been passed in 1881 with reference to the creation of court house debts similar to the act subsequently passed in 1887 respecting bridge bonds, a copy of which is given above. The same defence was made — that at the time of the creation of the debts the county made no provision for levying and collecting a sufficient tax to pay the interest and sinking fund, although for the year 1881 the court levied a court house and jail tax of twenty-five cents on the one hundred dollars, repeated during subsequent years, and increased to fifty cents; and every year after the issue of the

bonds for bridge purposes the court levied fifteen cents on the one hundred dollars as a tax for road and bridge purposes. It was held, quoting *Bassett* v. *El Paso*, 88 Texas, 168, 175, that it was unnecessary to ascertain the rate per cent required to be levied in order to raise the proper sum and to actually levy that rate of tax at the time; that if the laws of 1881 and 1887 had never been passed, the county would have had no authority under the constitution to contract the debts represented by the bonds, nor to levy a tax for the payment of the interest and sinking fund on such debts. The power to do so could be derived from the legislature only. "We understand," said the court, "that the provision required by the constitution means such fixed and definite arrangements for the levying and collecting of such tax as would become a legal right in favor of the bondholders of the bonds issued thereon, or in favor of any person to whom such debt might be payable. It is not sufficient that the municipal authorities should by the law be authorized to levy and collect a tax sufficient to produce a sinking fund greater than two per cent, but to comply with the constitution the law must itself provide for a sinking fund not less than two per cent, or require of the municipal authorities to levy and collect a tax sufficient to produce the minimum prescribed by the constitution." It was held that the laws of 1881 and 1887, having been enacted for the purpose of putting into force the constitutional provisions, it was the duty of the courts to so construe the laws as to make them valid and give effect to them. The court came to the conclusion that these laws did make such provision for the levying and collecting of a tax as was required by the constitution, and that, in case the court had refused to levy the tax after the bonds were issued and sold, the bondholders would have been entitled to a mandamus to compel the commissioners' court to levy such tax as purely a ministerial duty. The bonds, with certain immaterial exceptions, were held to be valid obligations of the county.

It is quite evident that if this case had been decided and called to the attention of the courts below, the validity of the bonds involved in this action would have been sustained, and

the main question involved in this case is whether we shall give effect to this decision of the Supreme Court of Texas, pronounced since the case under consideration was decided in the courts below, and giving, as is claimed at least, a somewhat different construction to the constitution of the State.

We do not ourselves perceive any such inconsistency between the case of *Mitchell County* v. *Bank of Paducah*, and the earlier cases, as justifies the county, in the case under consideration, in claiming that the Supreme Court of Texas had overruled the settled law of the State and set in motion a new departure. No such inconsistency is indicated in the opinion in the *Mitchell County case;* so far as the prior cases are cited at all they are cited with approval, and there is certainly nothing to indicate that the court intended to overrule them. That court had not changed in its *personnel* since the prior judgments, except the first, were pronounced, and it is not probable that the judges would have changed their views without some reference to such change. Indeed, but one of the earlier cases was cited in the *Mitchell County case*, (*Bassett* v. *El Paso*, 88 Texas, 168,) and that supports rather than conflicts with the opinion. As we read them, they merely decided that some provision for payment must be made. In the *Mitchell County case* the question was for the first time presented whether the laws of 1881 and 1887 were constitutional, and whether action taken under these laws was an adequate compliance with the requirement that provision should be made "at the time of creating" the debt for a sufficient tax to pay the interest and to provide a two per cent sinking fund. It was held that they were. This overruled nothing, because the question had never before been decided, and the point was not made in the courts below in this case. We are simply called upon, then, to determine what is the law of Texas upon the subject, since, under Revised Statutes, section 721, the "laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States." While, if this case had been brought before this court before the decision in the *Mitchell County case*, we might have taken the view that was

taken by the courts below, treating the question as one hitherto unsettled in that State, we find ourselves relieved of any embarrassment by the decision in the *Mitchell County case*, which manifestly applies to this case and requires a reversal of their judgment.

But assuming that the later case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several States are, which will be regarded as rules of decision, we are bound to look, not only at their constitutions and statutes, but at the decisions of their highest courts giving construction to them. *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *Luther* v. *Borden*, 7 How. 1, 40; *Nesmith* v. *Sheldon*, 7 How. 812; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Leffingwell* v. *Warren*, 2 Black, 599; *Christy* v. *Pridgeon*, 4 Wall. 196; *Post* v. *Supervisors*, 105 U. S. 667; *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555.

If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones. The case of *United States* v. *Morrison*, 4 Pet. 124, seems to be directly in point. The United States recovered judgment against Morrison, upon which a *fi. fa.* was issued, goods taken in execution and restored to the debtor under a forthcoming bond. This bond having been forfeited, an execution was awarded thereon by the judgment of the District Court, rendered April, 1822, which it was asserted created a lien upon the lands, and overreached certain conveyances under which the defendants claimed, dated February and March, 1823. The Circuit Court was of opinion that the lien did not overreach these conveyances. But the Court of Appeals of Virginia having subsequently decided that the lien of a judgment continued pending proceedings on a writ of *fi. fa.*, this court adopted this subsequent construction by such court, and reversed the decree of the Circuit Court.

In *Green* v. *Neal's Lessee*, 6 Pet. 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that State having been overruled, this court followed

the later case, although it had previously adopted the rule laid down in the overruled cases. See also *Leffingwell* v. *Warren*, 2 Black, 599; *Fairfield* v. *Gallatin County*, 100 U. S. 47.

In *Morgan* v. *Curtenius*, 20 How. 1, the Circuit Court placed a construction upon an act of the legislature in accordance with a decision of the Supreme Court of Illinois with reference to the very same conveyance, and it was held that that, being the settled rule of property which that court was bound to follow, this court would affirm its judgment, though the Supreme Court of the State had subsequently overruled its own decision, and had given the act and the same conveyance a different construction. We do not consider this case as necessarily conflicting with those above cited.

An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the State. To have held otherwise would enable the State to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their own security. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Mitchell* v. *Burlington*, 4 Wall. 270; *Riggs* v. *Johnson County*, 6 Wall. 166; *Lee County* v. *Rogers*, 7 Wall. 181; *Chicago* v. *Sheldon*, 9 Wall. 50; *Olcott* v. *Supervisors*, 16 Wall. 678; *Douglass* v. *Pike County*, 101 U. S. 677; *Burgess* v. *Seligman*, 107 U. S. 20.

Obviously this class of cases has no application here. The bonds were issued in good faith for a valuable consideration received by the county, and were purchased by the plaintiff with no notice of infirmity attaching to them. If certain decisions, pronounced after the bonds were issued, threw doubt upon their validity, those doubts have been removed by a later decision pronouncing unequivocally in favor of their

validity. In the theory of the law the construction given to the bonds of this description in the *Mitchell County case* is and always has been the proper one, and as such, we have no hesitation in following it. So far as judgments rendered in other cases which are final and unappealable are concerned, a different question arises.

The judgments of the Court of Appeals and of the Circuit Court must be

Reversed, and the case remanded to the Circuit Court for the Western District of Texas for further proceedings in conformity with this opinion.

THE OLINDE RODRIGUES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 704. Argued April 11, 13, 1899. — Decided May 15, 1899.

A blockade to be binding must be known to exist.

There is no rule of law determining that the presence of a particular force is necessary in order to render a blockade effective, but, on the contrary, the test is whether it is practically effective, and that is a mixed question, more of fact than of law.

While it is not practicable to define what degree of danger shall constitute a test of the efficiency of a blockade, it is enough if the danger is real and apparent.

An effective blockade is one which makes it dangerous for vessels to attempt to enter the blockaded port; and the question of effectiveness is not controlled by the number of the blockading forces, but one modern cruiser is enough as matter of law, if it is sufficient in fact for the purpose, and renders it dangerous for other craft to enter the port.

The blockade in this case was practically effective, and, until it should be raised by an actual driving away by the enemy, it was not open to a neutral trader to ask whether, as against a possible superiority of the enemy's fleet, it was or was not effective in a military sense.

After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship, on the ground of the ineffective character of the blockade and because the evidence did not justify a decree of condemnation; and in addition claimed the right to adduce further proofs, if its motion

Statement of the Case.

should be denied. *Held*, that the settled practice of prize courts forbids the taking of further proof under such circumstances.

The entire record in this case being considered, the court is of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause, except the fees of counsel, should be imposed upon the ship.

This was a libel filed by the United States against the steamship Olinde Rodrigues and cargo in the District Court for South Carolina, in a prize cause, for violation of the blockade of San Juan, Porto Rico. The steamship was owned and claimed by La Compagnie Générale Transatlantique, a French corporation.

The Olinde Rodrigues left Havre, June 16, 1898, upon a regular voyage on a West Indian itinerary prescribed by the terms of her postal subvention from the French government. Her regular course, after touching at Paulliac, France, was St. Thomas, San Juan, Port au Platte or Puerto Plata, Cape Haytien, St. Marque, Port au Prince, Gonaives, and to return by the same ports, the voyage terminating at Havre. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. The Olinde Rodrigues left Paulliac June 19, and arrived at St. Thomas July 3, 1898, and on July 4, in the morning, went into San Juan, Porto Rico. She was seen by the United States auxiliary cruiser Yosemite, then blockading the port of San Juan.

On the fifth of July, 1898, the Olinde Rodrigues came out of the port of San Juan, was signalled by the Yosemite, and on communicating with the latter asserted that she had no knowledge of the blockade of San Juan. Thereupon a boarding officer of the Yosemite entered in the log of the Olinde Rodrigues an official warning of the blockade, and she went on her way to Puerto Plata and other ports of San Domingo and Haiti. She left Puerto Plata on her return from these ports, July 16, 1898, and on the morning of July 17 was captured by the United States armored cruiser New Orleans, then blockading the port of San Juan, as attempting to enter that port. A prize crew was put on board and the vessel was

taken to Charleston, South Carolina, where she was libelled as before stated, July 22, 1898. Depositions of officers, crew and persons on board the steamship were taken by the prize commissioners *in preparatorio*, in answer to certain standing interrogatories, and the papers and documents found on board were put in evidence. Depositions of officers and men from the cruiser New Orleans were also taken *de bene esse*, but were not considered on the preliminary hearing except on a motion by the District Attorney for leave to take further proofs.

The cause having been heard on the evidence *in preparatorio*, the District Judge ruled, August 13, for reasons given, that the Olinde Rodrigues could not, under the evidence as it stood, be condemned for her entry into the blockaded port of San Juan on July 4, and her departure therefrom July 5, 1898; nor for attempting to enter the same port on July 17; but that the depositions *de bene esse* justified an order allowing further proofs, and stated also that an order might be entered, "discharging the vessel upon stipulation for her value, should the claimant so elect." 89 Fed. Rep. 105. An order was accordingly entered that the captors have ninety days to supply further proof "as to the entry of the 'Olinde Rodrigues' into the port of San Juan, Porto Rico, on July 4, 1898, and as to the courses and movements of said vessel on July 17, 1898;" and "that the claimants may thereafter have such time to offer testimony in reply as may seem proper to the court."

The cargo was released without bond, and on September 16 the court entered an order releasing the vessel on "claimants giving bond by the Compagnie Générale Transatlantique, its owners, without sureties, in the sum of $125,000 conditioned for the payment of $125,000 upon the order of the court in the event that the vessel should be condemned." The bond was not given, and the vessel remained in custody.

Evidence was taken on behalf of the United States, and the cause came on for hearing on a motion by the claimants for the discharge and restitution of the steamship on the grounds: (1) That the blockade of San Juan at the time of the capture of the Olinde Rodrigues was not an effective

blockade; (2) That the Olinde Rodrigues was not violating the blockade when seized.

The District Court rendered an opinion December 13, 1898, holding that the blockade of San Juan was not an effective blockade, and entered a decree ordering the restitution of the ship to the claimants. 91 Fed. Rep. 274. From this decree the United States appealed to this court and assigned errors to the effect: (1) That the court erred in holding that there was no effective blockade of the port of San Juan on July 17, 1898; (2) That the court erred in not finding that the Olinde Rodrigues was captured while she was violating the blockade of San Juan, July 17, 1898, and in not decreeing her condemnation as lawful prize.

Mr. J. P. K. Bryan and *Mr. Assistant Attorney General Hoyt* for appellant.

Mr. Edward K. Jones for appellee.

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

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris, (April 16, 1856,) was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied.

The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration." Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and

Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it."

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term 'definition' can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent, (1 Kent's Com. 146,) is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree, — of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

"It is impossible," says Mr. Hall, (§ 260,) "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In *The Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effec-

tive as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and coöperate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, (4th ed.) 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur*, (1814) 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a claim made by one of His Majesty's

ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

What then were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph: "The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico." (Proclamation No. 11, 30 Stat. 34.) The blockade thus announced was not of the coast of Porto Rico, but of the port

of San Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the Yosemite, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one half miles. While the Yosemite was blockading the port she ran the armed transport Antonio Lopez aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the Olinde Rodrigues, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimetre automatic guns, corresponding to 1-pounders. The range of her guns was five and one half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving, at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Assuming that the Olinde Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed;

her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

After the argument on the motion to discharge the vessel, application was made by counsel for the claimant to the District Judge, by letter, that the Navy Department be requested to furnish the court with all letters or dispatches of the commanders of vessels blockading the port of San Juan in respect to the sufficiency of the force. And a motion was made in this court "for an order authorizing the introduction into the record of the dispatches of Captain Sigsbee and Commander Davis," dated June 27, 1898, and July 26, 1898, and published by the Navy Department in the "Appendix to the Report of the Chief of the Bureau of Navigation, 1898," pp. 224, 225, 642.

To this the United States objected on the grounds that isolated statements transmitting official information to superior officers, and consisting largely of opinion and hearsay, were not competent evidence; that the claimants had been afforded the opportunity to offer additional proof, and had not availed themselves thereof; that if the court desired to have these papers before it, then the Government should be permitted to define their meaning by counter proofs; and certain explanatory affidavits were, at the same time, tendered for consideration, if the motion were granted.

We need not specifically rule on the motion, or as to the admissibility of either the dispatches or affidavits, as we are satisfied that the dispatches have no legitimate tendency to establish that the blockade was not effective so far as the exclusion of trade from this port of the belligerent, whether in neutral or enemy's trading ships, was concerned. This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter case than in the former is obvious. The difference is in kind, and in degree.

Opinion of the Court.

Our Government was originally of opinion that commercial blockades in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established. Dana's Wheat. Int. Law, (8th ed.) p. 671, note 232; 3 Whart. Int. Dig. § 361.

The letters of Captain Sigsbee, of the St. Paul, and of Commander Davis, of the Dixie, must be read in the light of this recognized distinction; and it is to be further remarked that after the letter of Captain Sigsbee of June 27 the New Orleans was sent by Admiral Sampson officially to blockade the port of San Juan, thereby enormously increasing its efficiency.

In his report of June 28, Appendix, Rep. Bur. Nav. 220, 222, Captain Sigsbee describes an attack on the St. Paul off the port of San Juan, June 22, by the Spanish cruiser Isabella II and by the torpedo boat destroyer Terror, in which engagement the St. Paul severely injured the Terror, and drove the attacking force back into San Juan, and in his letter of June 27 he wrote: "It is advisable to constantly keep the Terror in mind as a possible active force; but, leaving her out of consideration, the services to be performed by the Yosemite, of blockading a well-fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken."

It is true that in closing his letter of June 27 Captain Sigsbee said: "I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some to occasionally cruise about the island. West of San Juan the coast,[1] although bold, has outlying dangers, making it easy at

[1] The coast thus referred to is described in a work entitled "Navigation of the Gulf of Mexico and the Caribbean Sea," issued by the Navy Department, vol. I, 342, thus: "The shore appears to be skirted by a reef, inclosing numerous small cays and islets, over which the sea breaks violently, and it should not be approached within a distance of four miles."

present for blockade runners having local pilots to work in close to the port under the land during the night."

But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was, as to this vessel, ineffective in point of law.

And the letter of Commander Davis of the Dixie, of July 26, 1898, appears to us to have been written wholly from the standpoint of the efficiency of the blockade as a military blockade. He says: "Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night. There are in San Juan, Porto Rico, the Terror, torpedo gunboat; the Isabella II, cruiser; a torpedo boat, and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out." And further: "It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reënforced there with the least possible delay."

In our judgment these naval officers did not doubt the effectiveness of the commercial blockade, and had simply in mind the desirability of rendering the blockade, as a military blockade, impregnable, by the possession of a force sufficient to successfully repel any hostile attack of the enemy's fleet. The blockade was practically effective; had remained so; and was legal and binding, if not raised by an actual driving away of the blockading force by the enemy; until the happening of which result the neutral trader had no right to ask whether the blockade, as against the possible superiority of the enemy's fleet, was or was not effective in a military sense.

Opinion of the Court.

But was this ship attempting to enter the port of San Juan, on the morning of July 17, when she was captured? It is contended by counsel for the claimant that if the rulings of the District Court should be disapproved of, an opportunity should still be given it to put in further proofs in respect of the violation of the blockade, notwithstanding it had declined to do so under the order of that court. That order gave ninety days to the captors for further proofs, and to the claimant, thereafter, such time for testimony in reply as might seem proper. After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship on the ground of the ineffective character of the blockade, and because the evidence did not justify a decree of condemnation; but undertook to reserve the right to adduce further proof, in the event that its motion should be denied. The District Court commented with disfavor upon such an attempt, and we think the claimant could not as matter of right demand that the cause should be opened again. The settled practice of prize courts forbids the taking of further proofs under such circumstances; and in the view we take of the cause it would subserve no useful purpose to permit this to be done.

On the proofs before us the case is this: The Olinde Rodrigues was a merchant vessel of 1675 tons, belonging to the Compagnie Générale Transatlantique, engaged in the West India trade and receiving a subsidy from the French government for carrying its mails on an itinerary prescribed by the postal authorities. Her regular course was from Havre to St. Thomas, San Juan, Puerto Plata and some other ports, returning by the some ports to Havre. She sailed from Havre, June 16, and arrived at St. Thomas, July 3, and at San Juan the morning of July 4. The proclamation of the blockade of San Juan was issued June 27, while she was on the sea. The United States cruiser Yosemite was on duty in those waters, blockading the port of San Juan, and when her commander sighted the Olinde Rodrigues coming from the eastward toward the port he made chase, but before reaching her she had turned in and was under the protection

of the shore batteries. He lay outside until the next morning — the morning of July 5 — when he intercepted the steamship as she was coming out, and sent an officer aboard, who made this entry in her log: "Warned off San Juan, July 5th, 1898, by U. S. S. Yosemite. Commander Emory. John Burns, Ensign, U. S. Navy." The master of the Olinde Rodrigues, whose testimony was taken *in preparatorio*, testified that when he entered San Juan, July 4, he had no knowledge that the port was blockaded, and that he first heard of it from the Yosemite on July 5, when he was leaving San Juan. After the notification he continued his voyage on the specified itinerary, arriving at Gonaives, the last port outward, on July 12. On his return voyage he stopped at the same ports, taking on freight, passengers and mail for Havre. At Cape Haytien, on July 14, he received a telegram from the agent of his company at San Juan, telling him to hasten his arrival there by one day in order to take on fifty first class passengers, and he replied that the ship would not touch at San Juan, but would be at St. Thomas on the 17th. The purser testified that on the receipt of the cable from the consignee at San Juan, he told the captain "that since we were advised of the blockade of Porto Rico by the war ship, it was absolutely necessary not to stop;" and that "before me, the agent in Cape Haytien, sent a cablegram, saying 'Daim [the vessel] will not stop at San Juan, the blockade being notified.'"

The ship's master further testified that on the outward voyage at each port he had warned the agent of the company and the postal department that he would not touch at Porto Rico, that he would not take passengers for that point, and that the letters would be returned to St. Thomas, and that having received his clearance papers at Puerto Plata at half-past five o'clock on the evening of July 15, he did not leave until six o'clock in the morning of July 16, as he did not wish to find himself at night along the coast of Porto Rico.

The ship was a large and valuable one, belonging to a great steamship company of world-wide reputation; she was on her return voyage laden with tobacco, sugar, coffee and other products of that region; she had no cargo, passengers or mail for

San Juan; she had arrived off that port in broad daylight, intentionally according to the captain; her regular itinerary on her return to France would have taken her from Port au Platte to San Juan, and from San Juan to St. Thomas, and thence to Havre, but as San Juan was blockaded and she had been warned off, and could not lawfully stop there, her route was from Port au Platte to St. Thomas, which led her directly by and not many miles from the port of San Juan.

The only possible motive which could be or is assigned for her to attempt to break the blockade is that the consignee at San Juan cabled the captain at Cape Haytien that he must stop at San Juan and take fifty first class passengers. At this time the fleet of Admiral Cervera had been destroyed; Santiago had fallen; and the long reign of Spain in the Antilles was drawing to an end. Doubtless the transportation of fifty first class passengers would prove remunerative, especially as some of them might be Spanish officials, and Spanish archives and records, and Spanish treasure, might accompany them if they escaped on the ship. It is forcibly argued that these are reasonable inferences, and afforded a sufficient motive for the commission of the offence. But as, where the guilty intent is established, the lack of motive cannot in itself overthrow it, so the presence of motive is not in itself sufficient to supply the lack of evidence of intent. Now, in this case, the captain not only testified that he answered the cable to the effect that he should not stop at San Juan, but the purser explicitly stated that the agent at Cape Haytien sent the telegram for the captain, specifically notifying the agent at San Juan that the ship would not stop there, the blockade having been notified. It is true that the cablegram was not produced, but this was not to be expected in taking the depositions *in preparatorio*, and particularly as it was not the captain's own cablegram, but that of the agent at Cape Haytien. There is nothing in the evidence to the contrary, and under the liberality of the rules of evidence in the administration of the civil law, we must take this as we find it, and, as it stands, the argument that a temptation was held out is answered by the evidence that it was resisted.

Such being the situation, and the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion reasonably deducible from the facts above stated.

Among the papers delivered to the prize master were certain bills of health, five of them by consuls of France, namely, July 9, from St. Marc, Haiti, giving the ship's destination as Havre, with intermediate ports; July 11, from Gonaives, Haiti, giving no destination; July 13, from Port au Prince, July 14, from Cape Haytien, July 15, from Puerto Plata, all naming Havre as the destination; and three by consuls of Denmark, July 13, from Port au Prince, July 14, from Cape Haytien, and July 15, from Puerto Plata, all naming St. Thomas as the destination. When the captain testified August 2, in answer to the standing interrogatories, he said nothing about any Spanish bills of health. The deposition was reread to the captain, August 3, and on the next day, August 4, he wrote to the prize commissioners desiring to correct it, saying: "I fear I have badly interpreted several questions. I was asked if I had destroyed any papers on board or passports. I replied, no. The papers — documents — on board for our voyage had been delivered up proper and legal to the prize master. This is absolutely the truth, not including in the documents two Spanish bills of health, one from Port au Prince and one from Cape Haytien, which we found in opening our papers, although they had not been demanded. Not having any value for us, I said to the steward to destroy them on our arrival at Charleston, as we often do with papers that are useless to us. The regular expedition only counts from the last port, which was Puerto Plata, and I refused to take it from our agent for Porto Rico. I swear that at my examination I did not think of this, and it is only on my return from signing that the steward recalled it to me. I never sought to disguise the truth, since I wish to advise you of it as soon as possible."

On the 5th of August the purser answered the interroga-

tories, and testified that papers were given him by the consignees of the steamer at Port au Prince in a box at the time of sailing, and he found in the box one manifest of freight in ballast, and it was the same thing at Cape Haytien. At Puerto Plata the agent of the company came on board on their arrival there, and "the captain told him that there was no Spanish clearance; there was no need of it, and it was not taken." The captain said to the agent "it was not necessary, because we are not going to San Juan, being notified of the blockade." "When we arrive in a port we put up a placard of the date of departure and the time of sailing and the destination, and it was put up by my personal order from the captain that we sailed for St. Thomas directly, and it was fixed up in the night of the 15th of July. . . . We were to start on the morning of the 16th, at 6 o'clock in the morning, the captain saying he did not want to fall into the hands of the American cruisers during the night. The night before our arrival in Charleston, the doctor says to me, 'I have a bill of health, Spanish account, from Cape Haytien and Port au Prince,' and I told him I would speak to the captain and ask him what to do with these papers that I had found in sorting my papers — these papers in the pigeon holes. I told the captain that morning, and he told me that we had better destroy them, because we don't want them; that it is not our expedition, and that a true exposition is valuable only for the last port to the Spanish port."

On the 5th the captain was permitted to testify, in explanation, saying, among other things: "The reason that we did not give up the two bills of health is because they did not form a part of the clearance of our ship for our itinerary, and they were left in the pigeon holes where they were. It was at the time of our arrival at the quarantine at Charleston that the purser spoke to me of them, and I told him that they were good for nothing and to tear them up. The captain wishes to add that he did not remember the instance the other day about the destruction of papers, that he has just told us about, and that he never had any intention to disguise anything or to deceive."

Counsel for the Government insist that the intention of the Olinde to run the blockade is necessarily to be inferred from the possession of these bills of health and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offence, and authorizes the presumption of an intention to suppress incriminating evidence, though this is not an irrebuttable presumption.

In *The Pizarro*, 2 Wheat. 227, 241, the rule is thus stated by Mr. Justice Story: "Concealment, or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply."

It should be remembered that the first deposition of the captain was given in answer to standing interrogatories, and not under an oral examination; that the statute (Rev. Stat. § 4622) forbade the witness "to see the interrogatories, documents or papers, or to consult counsel, or with any persons interested, without special authority from the court;" that he was born and had always lived in France, and was apparently not conversant with our language; indeed, he protested, as "neither understanding nor speaking English," "against all interpretation or translation contrary to my thought;" that the deposition having been reread to him the day after it was taken, he detected its want of fulness, and immediately wrote the prize commissioners on the subject with a view to cor-

rection; and that it was after this, and not before, that the purser testified.

Transactions of this sort constitute in themselves no ground for condemnation, but are evidence, more or less convincing, of the existence of such ground; yet, taking the evidence in this case together, we are not prepared to hold that the explanation as to how these bills came to be received on board, neglected when the papers were surrendered, and finally torn up, was not sufficient to obviate any decisive inference of objectionable intention.

The Government further insisted that the Olinde Rodrigues refused to obey the signal from the New Orleans to heave to and stop instantly, and turned only after she had fired, and that this conclusively established an intention to violate the blockade. The theory of the Government is that the French ship purposely held on so as to get under the protection of the batteries of San Juan.

The log of the Olinde Rodrigues states: "6.30, noticed the heights of San Juan. At 7.20, took the bearings of the fortress at 45 degrees, eight miles and one half crosswise. Noticed, at 7.50, a man-of-war. At 8.10, she signalled 'J. W.,' ["heave to and stop instantly."] I went towards it and made arrangements in order to receive the whale boat which is sent to us."

In a communication to the Ambassador of France at Washington, written July 17, and purporting to give a full account of the matter, the captain said that he "was some time before seeing her signal, on account of the distance and of the sun. Suspecting what she wanted, I hoisted the 'perceived' and stopped."

He testified that he turned his vessel to the war ship before the gun was fired, which was at 8.12, but on this point the evidence is strongly to the contrary. We are inclined to think that some allowance should be made for imperfect recollection in the rapid passage of events. The Olinde Rodrigues was comparatively a slow sailer, (ten to twelve knots,) and if the captain stopped on seeing the signal, and turned towards the war ship with reasonable promptness, a settled purpose to

defy the signal ought not to be imputed, whether she started towards the New Orleans just before, just after, or just as the shot was fired.

The stress of the contention of the Government is, however, that the Olinde Rodrigues was on a course directly into the port of San Juan at the time her progress was arrested. It is extremely difficult to be precise in such a matter, as her course to reach St. Thomas necessarily passed in face of San Juan. The captain attached to his explanatory affidavit a sketch, "showing the usual route and the actual route which he was taking at the time of the capture, with the position of the capturing ship and his own ship," as follows, see p. 531.

But it appears from the entries of the second officer on the log of the Olinde Rodrigues that the ship was from one to five o'clock in the morning of July 17 on the course, (as corrected,) S. 69 E., and that from six to eight o'clock the course was S. 73 E.

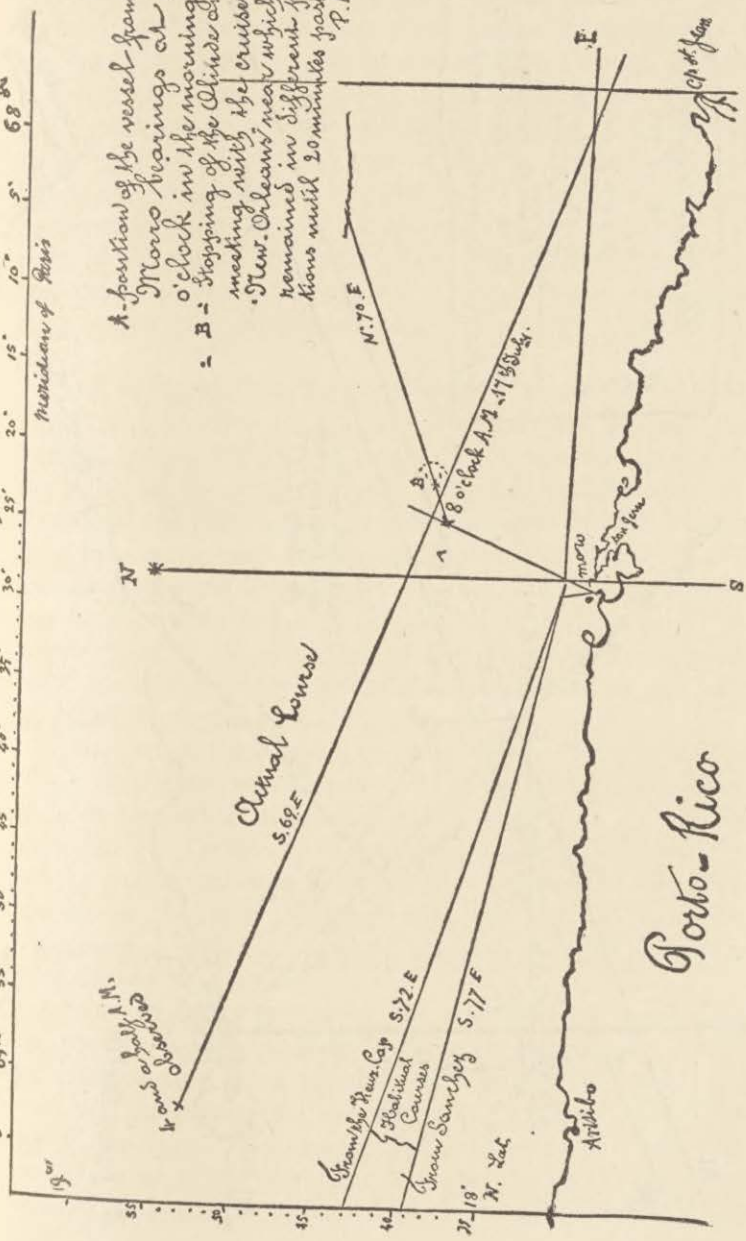
The captain testified that at the time of capture: "I had just passed the port of San Juan, about 7 or 8 miles eastward of the port, and about 9 miles from shore, about 9 miles from Morro. They judged the distance in passing as they do from all points."

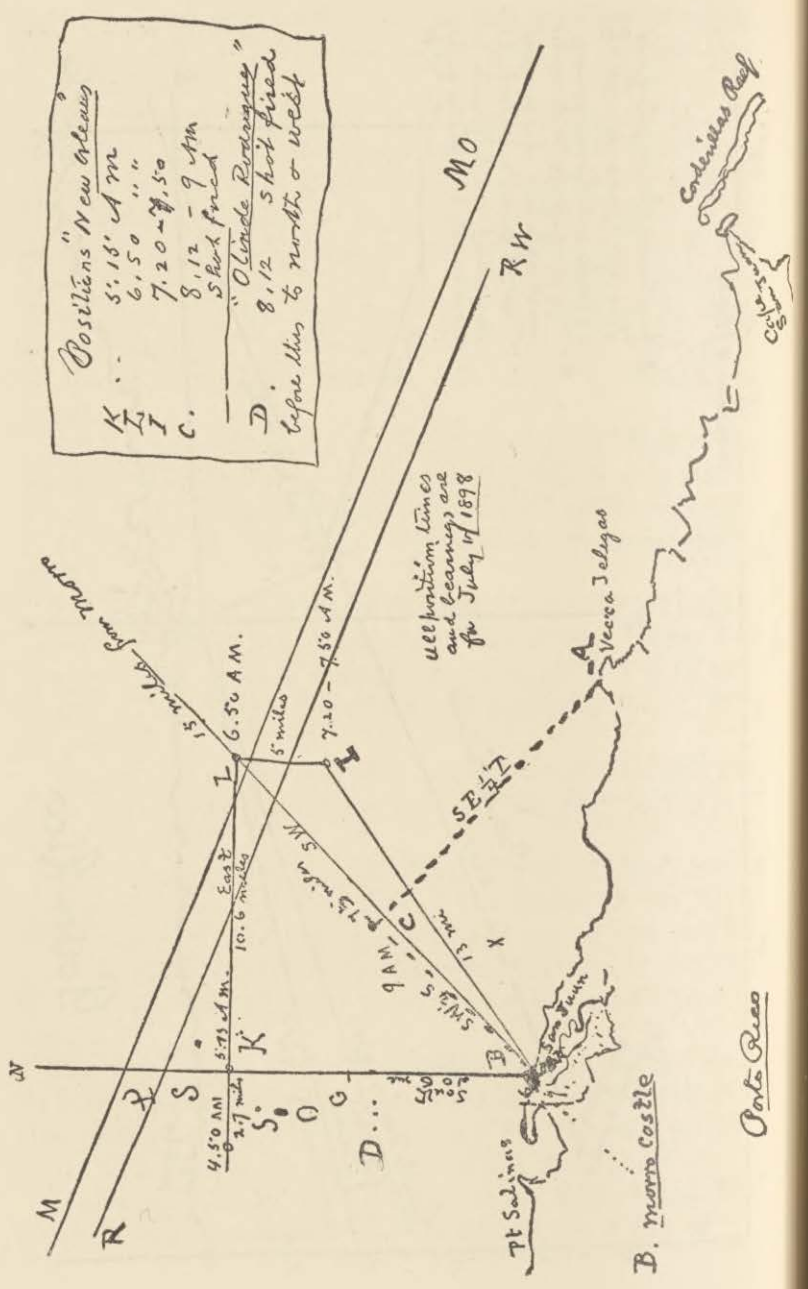
The second officer said that "they were 9 miles from San Juan after having passed the port of San Juan and gone 4 miles east of it."

This testimony strikingly confirms Captain Folger's candid expression of opinion that though the master of the Olinde Rodrigues may have been going in and out of that port for years, he did not measure the distances, but "would run so far down the coast and order them to steer to a certain point to head in."

The commander of the New Orleans admitted "that south 69 is the proper course beforehand for the Culebra Passage," (the passage through which to reach St. Thomas,) but contested that the French vessel was making that course.

Lieutenant Rooney, the navigator of the New Orleans, laid down the positions upon a chart as follows, see p. 532.


A. position of the vessel from Morro Hearings at 8 o'clock in the morning
B. Stopping of the Olinde and meeting with the cruiser New Orleans near which the remained in different positions until 20 minutes past 7 P.M.
Actual Course
S. 69 E
N. 70 E
8 o'clock A.M.
Morro
Porto-Rico
Arecibo
Cape San Juan
Cape Morro
Cape Rico
Mona Passage
Meridians of Paris
N
S
E


Positions "New Orleans"
K. 5:15 A.M.
L. 6.50 " "
T. 7.20 to 7.50
C. 8.12 - 9 A.M.
Short Speed
"Olinde Rodrigues"
D. 8.12 Short Speed
before this to north or west
Illustration lines and bearings are for July 14 1898
15 miles
6.50 A.M.
5 miles
7.20 - 7.50 A.M.
10.6 miles
East
9 A.M.
13 miles
S.W. by W.
4.50 A.M.
2.7 miles
5.33 A.M.
M
R
S
K
L
T
C
D
B
A
MO
RW
Vieques Island
Culebra Island
Culebritas Reef
Pt Salinas
B. morro Castle
Porto Rico

Opinion of the Court.

The point C is seven and two thirds miles from Morro, bearing S. W., and five miles from point D, the intersection of a line drawn west with north and south line through Morro. D is five and two thirds miles from Morro. The range of Morro guns was six and one half miles, and the range of the shore batteries, three miles east of Morro, also six and one half miles. According to this plat, the Olinde Rodrigues was slightly within the range of the Morro guns, but not within the range of the shore batteries. The New Orleans when she fired was close to the range of the shore batteries and something over a mile outside of the extreme range of the Morro guns.

And it is urged that the conclusion is inevitable that the French ship intended to run into the port and to draw the pursuing cruiser within the range of the Spanish guns. If her being in the neighborhood were not satisfactorily explained; if she persistently ignored the signal of the cruiser; and if her course was a course into the port of San Juan and not a proper course to reach St. Thomas, then the conclusion may be admitted; but it is not denied that she was in the neighborhood in the discharge of her duty, and we have already seen that she may be consistently regarded as not having defied the signal.

On the part of the captors, the witnesses concurred that the Olinde Rodrigues' course was laid for the port of San Juan, while on her behalf this was denied, except so far as her course for St. Thomas took her near the blockaded port. In addition to the witnesses from the New Orleans the telegraph operator on the Morro testified that the Olinde Rodrigues was coming directly toward the Morro, but changed her course when the shot was fired.

A principal reason given by the witnesses for concluding that the Olinde Rodrigues was making for San Juan was that her masts, as seen from the deck of the New Orleans, were open, thus indicating that she was sailing south or toward the port of San Juan. It was admitted that this would not necessarily be so unless the New Orleans was on the same line east and west with the other vessel, or, in other words, if the

New Orleans were to the north of the Olinde Rodrigues, the latter's masts might appear open without necessarily indicating that she was sailing south, or towards the land. Lieutenant Rooney did not see her until after she was captured. He is positive as to the approximate position of the New Orleans early in the morning before the Olinde Rodrigues was sighted, which had not occurred when he went below at 7.30, and he is positive as to the position of the New Orleans after the capture. He places the position of the New Orleans at 6.50, when the last bearing observation was taken, at fifteen miles north of the coast and of the Morro. At nine o'clock bearings were again taken, and she was about seven and two thirds miles from the Morro. Lieutenant Rooney explained in his testimony the proper courses for a vessel sailing to St. Thomas, and stated that several courses might be properly steered, that one of them would be to pass about twelve miles north of the harbor of San Juan, and that there was nothing impracticable in a vessel reaching Culebra Point, with a view of going to St. Thomas, on a course of S. 69 E. from midnight to 5 o'clock, and a change at 5 o'clock to S. 73 E. He also testified that a vessel bound for San Juan on an ordinary commercial voyage would have been nearer the shore than where the Olinde Rodrigues was when she was captured, and that it was probable that if she intended to go to San Juan and avoid the New Orleans she would have hugged the shore and not been out at sea.

Some of the evidence, in short, had a tendency to show that the Olinde Rodrigues, when sailing on a proper course for St. Thomas, would be drawing to the south, and that the New Orleans was to the north of her, in which case, obviously, the nearer the vessels approached the more open would the masts of the Olinde Rodrigues appear. But the clear preponderance was that the captured ship was to the west of a north and south line drawn through Morro, and running nearly south just before or when the New Orleans fired.

It is impossible to deny that the testimony of Captain Folger, the commander of the New Orleans, and of his officers, was extremely strong and persuasive to establish that the

Olinde Rodrigues, when brought to, was intentionally heading for San Juan, and pursuing her course in such a manner as to draw the blockading cruiser in range of the enemy's batteries, and yet we must consider it in view of the evidence on behalf of the captured ship, and of the undisputed facts tending to render it improbable that any design of attempting to violate the blockade was entertained. The Olinde Rodrigues had neither passengers nor cargo for San Juan; in committing the offence, she would take the risk of capture or of being shut up in that port; she was a merchantman engaged in her regular business and carrying the mails; she was owned by a widely known and reputable company; her regular course, though interrupted by the blockade of that port, led directly by it, and not far from it; and the testimony of her captain and officers denied any intention to commit a breach.

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed; and the case disclosed does not commend this vessel to the favorable consideration of the court.

Probable cause exists where there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not cannot be determined unless the customary proceedings of prize are instituted and enforced. *The Adeline*, 4 Cranch, 244, 285; *The Thompson*, 3 Wall. 155. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally as each case requires, and an order of restitution does not prove lack of probable cause. *The Adeline, supra; Jennings* v. *Carson*, 4 Cranch, 2, 28, 29.

In the statement of Sir William Scott and Sir John Nicholl,

transmitted to Chief Justice Jay, then Minister to England, by Sir William Scott, September 10, 1794, "the general principles of proceeding in prize causes, in British Courts of Admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions," are set forth as laid down in an extract from a report made to the King in 1753 "by Sir George Lee, then Judge of the Prerogative Court, Dr. Paul, His Majesty's Advocate General, Sir Dudley Rider, His Majesty's Attorney General, and Mr. Murray, (afterwards Lord Mansfield,) His Majesty's Solicitor General;" and many instances are given where in the enforcement of the rules "the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution." Wheaton on Captures, Appendix, 309, 311, 312; Pratt's Story's Notes, p. 35.

In *The Appollon*, 9 Wheat. 362, 372, Mr. Justice Story said: "No principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication."

Section 4639 of the Revised Statutes contemplates that, under circumstances, all costs and expenses shall remain charged on the captured vessel though she be restored, and this court has repeatedly held that damages and costs will be denied where there was probable cause for seizure, and that sometimes costs will be awarded to the captors. *The Venus*, 5 Wheat. 127; *The Thompson*, 3 Wall. 155; *The Springbok*, 5 Wall. 1; *The Dashing Wave*, 5 Wall. 170; *The Sir William Peel*, 5 Wall. 517; *The Peterhoff*, 5 Wall. 28, 61, 62.

In *The Dashing Wave*, Chief Justice Chase said: "We think it was the plain duty of a neutral claiming to be engaged in trade with Matamoras, under circumstances which

warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region. We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted."

In *The Springbok*, the ship was restored but costs and damages were not allowed because of the misconduct of the master.

In *The Peterhoff*, payment of costs and expenses by the ship was decreed as a condition of restitution. The Peterhoff was captured by the United States vessel of war Vanderbilt on suspicion of intent to run the blockade and of having contraband on board. Her captain refused to take his papers to the Vanderbilt, and, in addition, papers were destroyed and a package was thrown overboard. The Peterhoff was searched, and it is stated in the opinion: "The search led to the belief on the part of the officers of the Vanderbilt that there was contraband on board, destined to the enemy. This belief, it is now apparent, was warranted. It was therefore the duty of the captors to bring the Peterhoff in for adjudication, and clearly they are not liable for the costs and expenses of doing so." The court then commented on the destruction of papers, and the throwing overboard of the package, in regard to which it was unable to credit the representations of the captain, but in view of the other facts in the case, did not extend the effect of the captain's conduct and the incriminating circumstances to condemnation.

The case before us falls plainly within these rulings. This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had

not been officially notified of it; he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that "it would be blockaded some future time, but that was not officially." The vessel was boarded and warned by the Yosemite on July 5, and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

When the New Orleans succeeded the Yosemite her commander was informed of the facts by his predecessor, and knew that whatever the right of the Olinde Rodrigues to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearance directly into that port, and steadily pursuing it. And when he signalled, the Olinde Rodrigues apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range of the guns of Morro and of the shore batteries. In fact, when the shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal. The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed, though we do not hold that that was a presumption *de jure*.

The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, "said to be all the ship's papers," did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, therefore, in the ship's

possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent? Or that their destruction tended to make a case of "strong and vehement suspicion"?

The entire record considered, we are of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

Mr. Justice McKenna dissented on the ground that the evidence justified condemnation.

COHN *v.* DALEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 186. Argued and submitted April 4, 5, 1899. — Decided May 15, 1899.

For the reasons stated in the opinion of the court, it is precluded from looking at the so-called statement of facts, and when they are excluded from the record there is nothing left for review, and the judgment below is affirmed.

The statement of the case will be found in the opinion of the court.

Mr. Marcus A. Smith for appellant submitted on his brief.

Mr. James K. Redington for appellee. *Mr. James Reilly* was on his brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an action to quiet title to certain mining claims in the Territory of Arizona.

Opinion of the Court.

The appellant was plaintiff in the court below, and the appellee was one of the defendants impleaded with A. J. Mehan, Dewitt C. Turner and Bell H. Chandler.

Appellant claims to derive title from one A. J. Mehan under an execution sale upon a judgment obtained by him against Mehan in one of the justices' courts of Cochise County, in said Territory, and a deed executed in pursuance of such proceedings and purchase.

The appellee denied the ownership of appellant, and asserted a superior right upon the following allegations: That on the 11th of April, 1890, and for more than five years before, she and one James Daley were husband and wife, and lived together as such. At the time of the marriage he owned no money nor property of any kind, but that she had three thousand dollars "in United States coin and currency;" and prior to the 11th of April, 1890, she and Daley used all of said money "in prospecting for, locating and procuring, preserving and maintaining titles to mines and mining claims," and owned the claims in controversy on the said 11th of April. During the coverture she was uneducated and utterly ignorant of the language, laws and customs of the United States and the Territory, and Daley was fairly well versed therein; and, confiding and relying on "the advice of her said husband," advanced him her money "to procure, preserve and maintain the title" to the mining claims, and he took advantage of her ignorance and the confidence reposed in him, "and took and kept the title to all of said mining claims, and interests in mining claims in his own name," without her knowledge or consent, and on the 11th of April, 1890, he abandoned her, and has not since returned to or communicated with her.

On the 2d of September, 1890, Daley conveyed the claims by deed duly acknowledged and recorded in the recorder's office of Cochise County, of said Territory, to A. J. Mehan, who gave no value therefor, and who had full notice and knowledge of all her equities.

The appellant claims to own the claims by virtue of an attachment, judgment, execution sale thereunder, and a con-

stable's deed in the case of *Adolph Cohn* v. *A. J. Mehan.* Cohn was plaintiff in the action and the purchaser at the sale, and at that time and long prior thereto had full notice and knowledge of her equities, and notice and knowledge that Mehan had given no value for his conveyance. On the 15th of September, 1890, Mehan conveyed an undivided half interest in the claims, by a deed duly acknowledged and recorded, to Dewitt C. Turner, and on the 22d of November, 1890, a like deed of one third interest to the defendant Bell H. Chandler, neither of whom gave value for his conveyance, and both of whom had notice of her equities, and of Mehan's knowledge thereof, and that Mehan had given no value for his conveyance. On the 8th day of January, 1891, the defendant Turner conveyed an undivided one sixth to the defendant F. C. Fisher, who had knowledge of her equities, and the notice and knowledge of the prior parties. On the 15th of October, 1890, she commenced an action for divorce from said Daley, and on the 14th day of May, 1891, a decree was rendered therein in her favor dissolving the marriage and awarding her the mining claims in controversy, and permitting her to resume her maiden name of "Angela Dias."

On the 18th of October, 1890, and before Cohn bought the claims, she commenced an action against Daley, Mehan and Turner to quiet the title to the claims, and caused to be filed in the recorder's office of the county where the property was situated a notice of the pendency of the action, containing a statement of the nature of the action and of her ownership of and a description of the claims; and Adolph Cohn took title from Mehan after the filing and recording of such notice.

She prayed to be decreed owner of the claims, and that defendants be adjudged to have no interest in them, and that their deeds be cancelled.

The other defendants made default, and the trial proceeded on the issues made between appellant and appellee, and judgment was rendered for her and duly entered. A motion for a new trial was made, but was overruled on the 26th day of November, 1892.

A bill of exceptions was submitted by the appellant on the

1st of December, 1892, and settled and allowed on the 15th of said month by the judge who presided at the trial, after objections made by appellee were heard and considered.

The bill of exceptions recites "that on the 27th of May, 1892, the above cause came on regular for trial, and during the progress thereof the following proceedings were had, as more fully appears in the statement of facts filed herein expressly referred to, and the exceptions to rulings of court as therein shown are made a part of this bill of exceptions."

Then follows an enumeration of the rulings and the motion for new trial and the ruling thereon.

A statement of facts or what is called such was submitted to the counsel of appellee on the 16th of December, 1892. It was entitled in the court and cause, and contained the following recital:

"Transcript of shorthand notes of testimony, etc., taken from the trial of the above-entitled cause, at the court room of said court, in the city of Tombstone, on Friday, the twenty-seventh day of May, A.D. 1892, at 9.30 o'clock A.M., before the court (Hon. Richard E. Sloan, presiding) sitting without a jury, in the presence of W. C. Staehle, Esq., attorney for, and W. H. Barnes, Esq., of counsel with, plaintiff, and James Reilly, Esq., attorney for defendant Angela Dias de Daley; Allen R. English, Esq., for counsel."

Following this recital is a verbatim transcript of the proceedings and of the evidence by question and answer, and of the rulings of the court. It concluded by the following recital:

"The foregoing 102 pages and documents herein referred to and to be copied into the transcript of the clerk when directed is submitted to the opposite party, the defendant, by plaintiff as a full statement of facts in the trial of this cause, and is by the plaintiff agreed to as such.

"Dec. 16, 1892. W. H. Barnes,
Att'y for Plaintiff."

The record contains the following:

"We agree that the foregoing — pages of typewriting en-

titled in the above cause contain a transcript of the reporter's notes taken at the trial of said cause, which was filed therein with the clerk of the court November 25, 1892, but said pages also contain matter not in such transcript when so filed, to wit:

"'Clerk will here copy said notice in transcript,' and many such commands, commencing on page 3 of transcript, all commanding or directing the clerk to insert in his transcript all the documentary evidence introduced by plaintiff (appellant) at the trial, but none, except in one instance, of the documentary evidence of defendant (appellee), though defendant introduced in evidence many documents, including the deposition of A. J. Mehan, as shown by said transcript, pages 37 to 40, inc., and the alleged 'statement of facts' is not such nor even a fair statement of the evidence, and we do not agree thereto.

JAMES REILLY,
Attorney for Angela Dias.
ALLEN R. ENGLISH,
Of Counsel."

"Counsel for plaintiff in the above-entitled cause of *Cohn* v. *Mehan et al.* having heretofore, to wit, on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for defendants and being by them disagreed to as correct and being likewise found by me to be incomplete because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was on said sixth day of March, 1893, by me approved and signed.

RICHARD E. SLOAN, *Judge.*"

A completed statement was not filed till May, 1893. The judgment was affirmed on appeal to the Supreme Court of the Territory, and the case was then brought here.

If the so-called statement of facts was filed in time under the Arizona Revised Statutes, it was not a "statement of the facts in the nature of a special verdict made and certified by

the court below" under the act of April 7, 1874, c. 80, 18 Stat. 27, 28. We must assume therefore that the evidence supports the judgment. *Marshall* v. *Burtis*, 172 U. S. 630.

Was the statement filed in time to become a part of the bill of exceptions? Certainly not, if it was not on file at the time of the settlement of the bill of exceptions or did not afterward become a part of the record. It was submitted on the 16th of December, but not agreed to. It was not approved and signed by the judge who tried the case until March, 1893, and not filed until May, 1893.

The Revised Statutes of Arizona provide as follows:

"843. (Sec. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and the same shall be filed with the clerk during the term.

"844. (Sec. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge, with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of the facts proven on the trial, and such statement shall constitute a part of the record.

"845. (Sec. 197.) The court may by an order entered upon the record during the term authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The record shows that the November term of the court at which the case was tried was finally adjourned December 29, 1892. The statement was therefore not filed within the time required by the statute, and cannot be considered as part of the record.

The rulings of the court, as exhibited in the bill of exceptions, are assigned as error. But for an understanding of the rulings the testimony in the case is necessary, and we are

precluded from looking at it, because it is not properly a part of the bill of exceptions, for the reasons we have given.

It follows that on the record there is nothing for our review, and judgment is

Affirmed.

NEW MEXICO *v.* UNITED STATES TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 169. Resubmitted April 17, 1899. — Decided May 15, 1899.

The provision in the act of July 27, 1866, c. 278, exempting from taxation the right of way granted to the Atlantic and Pacific Railroad Company, does not operate to exempt the right of way when acquired from private owners and not from the United States; and the judgment in this case made at this term and reported on page 186 of 172 U. S., having been made under a mistake of facts, is modified to that extent.

The assessments on the superstructures, on so much of the right of way as was taxable, were not assessments of personal property, but were clearly assessments of real estate; and the fact that the improvements were designated by name, and some of them given a separate valuation, did not invalidate their assessment as real estate.

THE statement of the case will be found in the opinion of the court.

Mr. F. W. Clancy for appellant.

Mr. C. N. Sterry, *Mr. E. D. Kenna* and *Mr. Robert Dunlap* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

1. This case was submitted with No. 106, which was between the same parties, and on the authority of the opinion in that case the judgment of the Supreme Court of the Territory was affirmed. 172 U. S. 171, 186.

The cases were argued together, and it was supposed involved identically the same questions dependent upon a statement of facts which were stipulated. No distinction between the cases

was indicated in the oral argument, and a reference of a few lines in a brief of thirty-five pages was overlooked.

In the petition for rehearing our attention was called to the fact that there is a substantial difference between the matters involved in this cause and those arising in No. 106. The difference is this: In 106 the right of way was in Bernalillo County through land which was public domain, whilst in this case the right of way is in Valencia County across the public domain for 33 miles only, and for 66.7 miles over land which was held in private ownership at the time of the grant to the railroad by the act of 1866. In other words, the railroad company derived its right of way for 33 miles in Valencia County under section 2 of the act of July 27, 1866, and to 66.7 miles under the power conferred by section 7 of said act. This difference was not adverted to in No. 106, and we will now consider the effect of it. In the opinion in 106 we said:

"The right of way is granted to the extent of two hundred feet on each side of the railroad, including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase, 'the right of way'? A mere right of passage, says appellant. *Per contra*, appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted, that all that was attached to it became part of it and partook of its exemption from taxation.

"To support its contention appellant urges the technical meaning of the phrase, 'right of way,' and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute we find that whatever is granted is exactly measured as a physical thing, not as an abstract right. It is to be two hundred feet wide and to be carefully broadened, so as to include grounds for the superstructures indispensable to the railroad."

After further consideration of what was granted, we also said: "The interest granted by the statute to the Atlantic and Pacific Railroad Company therefore is real estate of corporeal quality, and the principles of such apply. One of these, and

an elemental one, is that whatever is erected upon it becomes part of it." And we concluded that not only the right of way was exempt, but all its superstructures were exempt. But our conclusion was expressly based on the terms of the statute, and we took care to affirm the rule of construction which had been announced many times and in many ways, that the taxing power of the State is never presumed to be relinquished unless the intention be expressed in terms too clear to be mistaken. If a doubt arise as to the intention of the legislature, that doubt must be solved against exemption from taxation.

Applying this rule to the act of July 27, 1866, c. 278, the exemption from taxation must be confined to the right of way granted by the United States by section 2 of the act, and to the superstructures which become a part of it, and not to the right of way which the railroad company may have acquired under section 7, or independently of that section. Section 1 creates the corporation and authorizes it to construct and maintain a continuous railroad and telegraph line from and to certain points, and invests the company with the powers, privileges and immunities necessary to effect that purpose. Section 2 provides: "That *the right of way* through the public lands be, and the same is hereby granted, to the said Atlantic and Pacific Railroad Company . . . for the construction of a railroad and telegraph line as proposed. . . . Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the *public* domain, . . . and *the right of way* shall be exempt from taxation within the Territories of the United States." 14 Stat. 292.

The right of way which is granted and the right of way which is exempt from taxation is precisely identified by the natural and first meaning of the words used and their relations. It would require an exercise of construction to extend the exemption, and even if there are reasons for it, there are certainly reasons against it, and in such conflict the rule requires that the latter shall prevail.

2. It is contended by the appellee that the assessment was invalid because the laws of the Territory required the assess-

ment of the right of way and its superstructures to be made as an entirety.

The contention is technical. It is not complained that the valuation of the superstructures was excessive, but that they were assessed as personal property, and hence invalidly assessed, because by the laws of the Territory the term "real estate" includes lands to which title has been acquired and improvements, and the term "improvements" includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired or not.

The record does not afford the means of judging of the contention as clearly as might be wished, but we think it is not tenable.

The intervening petition, which is the basis of the proceedings, proceeds upon the ground that omissions were made in assessments of property to the railroad company for a series of years beginning with the year 1892 and ending with 1896, and that additions were made of said property under the laws of the Territory for said years. The valuation of the property and the taxes levied against it are stated, and a description of the property is attached.

It is alleged that the receiver of the company refuses payment because he claims that the property is exempt from taxation under the act of July, 1866; but it is also alleged "that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad where it may pass through the public domain, and does not extend to any improvements made upon the right of way, nor to the said right of way itself where it passes through land not included in the public domain."

It is prayed that "the said taxes, so levied as aforesaid," be declared a lien on the property in the hands of the receiver, and that he be ordered "to pay the said taxes." General relief is also prayed.

To the petition of intervention the receiver submitted pleas respectively to the claim of taxes for each of the years. The pleas were substantially alike, and alleged the assessment of the company's property for each of the years, with a descrip-

tion or designation of it, the value at which it was assessed, and the taxes levied against it and the amounts of taxes paid by the company.

In the first plea it is alleged that the company through its officers made a return to the county assessor of its property situated in the county, and a copy of the return is attached and made part of the plea. Discriminating the property upon which the taxes were paid and that in the return of the company and assessed, the plea alleges:

"That the other property returned by the taxing officers of said railroad company for said year was and is the property upon which the taxes are paid as above stated, and as shown by Receiver's Exhibits 3 and 4.

"That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for the said year, remaining unpaid, is that shown to have been extended and levied upon the 'right of way' of the Atlantic and Pacific Railroad Company, which was and is assessed at the lump sum of $327,103, upon the assessment roll for said year, together with the further sums placed in said assessment roll in the column headed 'Value of cattle,' opposite the words contained in the column in said assessment roll headed 'Name of property owners,' save and except as hereinafter stated.

"The names and sums referred to are as follows:

Rio Puerco, 1st	$1888 00
El Rito, 3d	541 00
Laguna, 4th	677 00
Cubero, 6th	2145 00
McCarty's, 7th	682 00
Grants, 8th	1383 00
Blue Water, 9th	3150 00
San Jose, 2d	1316 00

"All of which is shown by the said assessment and levy of taxes upon said assessment roll, as will fully appear by reference to said Receiver's Exhibits No. 1 and No. 2, and the indorsements thereon.

"That prior to the first day of January, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia County, Territory of New Mexico, save and except only that levied against the assessed value of its 'right of way,' and that levied against the figures set opposite the names of the stations as hereinabove set forth and described."

The right of way, therefore, was assessed in 1892, and whatever taxes were due on it or any part of it were left delinquent.

As to the other years the record is not much less definite. It appears that the right of way was assessed and the taxes levied against it were not paid. In all the pleas there is a careful allegation of payment of the taxes which were conceded to be valid, and as careful a one that the company refused "to pay the balance of the taxes because of the fact that the assessment as made by the assessor was an assessment of the right of way and station grounds of the Atlantic and Pacific Railroad, which were and are exempt under the act of Congress creating said railroad company." It is manifest that the right of way was assessed and the taxes were delinquent. In what manner were the additional assessments made? It is shown in the exhibit to the intervening petition. We select the assessment for 1892. The assessments for the other years are the same, the amounts only being different to a small extent.

"The following was omitted in the assessment of the year 1892, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued and assessed by the collector:

The cross ties, rails, fish plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6500 per mile..... $214,500

Also the cross ties, rails, fish plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6500 per mile..... $394,550

Station houses, depots, switches, water tanks and all other improvements at Rio Puerco station.....	$1,800
Station houses, depots, switches, water tanks and all other improvements at San Jose station.....	540
Station houses, depots, switches, water tanks and all other improvements at El Rito station.....	600
Station houses, depots, switches, water tanks and all other improvements at La Guna station.....	2,100
Station houses, depots, switches, water tanks and all other improvements at Cubero station.....	600
Station houses, depots, switches, water tanks and all other improvements at McCarty's station.....	1,300
Station houses, depots, switches, water tanks and all other improvements at Grant's station.....	3,100
Station houses, depots, switches, water tanks and all other improvements at Blue Water station.....	1,300
	$11,340"

The assessments were not, as contended by appellee, of personal property. They were clearly of real estate, and because the improvements were designated by name and some of them given a separate valuation, did not invalidate their assessment as real estate. It was mere description, which did not change the essential or legal character of the superstructures.

It follows from these views that —

The judgment of the Supreme Court of the Territory must be reversed and the cause remanded for further proceedings in accordance with this opinion.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, Petitioner, *v.* LOUISVILLE TRUST COMPANY.

SAME *v.* LOUISVILLE BANKING COMPANY.

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

Nos. 29, 30. Argued May 4, 5, 1898. — Decided May 15, 1899.

The Circuit Court of the United States for the District of Kentucky has jurisdiction of a suit brought by a corporation, originally created by the State of Indiana, against citizens of Kentucky and of Illinois, even if the plaintiff was afterwards and before the suit made a corporation of Kentucky also, and pending the suit became a corporation of both Indiana and Illinois by reason of consolidation with a corporation of Illinois; but the court cannot, in such a suit, adjudicate upon the rights and liabilities, if any, of the plaintiff as a corporation of Kentucky, or as a corporation of Illinois.

A court of equity has jurisdiction of a bill by a corporation praying that its guaranty on a great number of negotiable bonds may be cancelled, and suits upon it restrained, because of facts not appearing on its face.

Under a statute authorizing the board of directors of a railroad corporation, upon the petition of a majority of its stockholders, to direct the execution by the corporation of a guaranty of negotiable bonds of another corporation, a negotiable guaranty executed by order of the directors, and signed by the president and secretary and under the seal of the first corporation, upon each of such bonds, without the authority or assent of the majority of its stockholders, is void as to a purchaser of such bonds with notice of the want of such authority or assent; but is valid as to a purchaser in good faith and without such notice.

This was a bill in equity, filed April 9, 1890, in the Circuit Court of the United States for the District of Kentucky, by the Louisville, New Albany and Chicago Railway Company, (hereafter called the New Albany Company,) described as "a corporation duly organized and existing under the laws of the State of Indiana," against the Ohio Valley Improvement and Contract Company, (hereafter called the construction company,) the Richmond, Nicholasville, Irvine and Beattyville Railway Company, (hereafter called the Beattyville Com-

pany,) and the Louisville Trust Company, all corporations of the State of Kentucky, and other citizens of Kentucky, of New York and of Illinois, for the cancellation of a contract between the New Albany Company and the construction company, and of a guaranty indorsed by the New Albany Company, in accordance with that contract, upon bonds issued by the Beattyville Company, and held by the other defendants, and for an injunction against suits thereon. The Louisville Banking Company, a corporation of Kentucky, and other bondholders were afterwards made defendants by a supplemental bill.

The bill alleged that the guaranty was fraudulently placed on the bonds of the Beattyville Company by a minority of the plaintiff's directors, who, as individuals, had secured the option to buy the bonds at a low price; and also averred that the guaranty was void, for want of the presence of a quorum of the directors at the meeting which directed it to be executed, as well as for want of a previous petition in writing by a majority of the stockholders, pursuant to a statute of Indiana.

Pleas to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, as well as demurrers to the bill for want of equity, were overruled by the court. 69 Fed. Rep. 431, 432; 57 Fed. Rep. 42.

The case was afterwards heard upon pleadings and proofs, and, so far as is material to be stated, appeared to be as follows:

The New Albany Company, by articles of incorporation, filed with the secretary of state of Indiana in January, 1873, reciting its purchase at a judicial sale at New Albany of the railroad and franchise, and all the property, real and personal, of another railroad company whose line of railroad ran from New Albany to Michigan City in the State of Indiana, and expressed to be made "for the purpose of carrying out the design of the said purchase, and forming a corporation of Indiana," became a corporation, under the statute of Indiana of March 3, 1865, which contained these provisions:

"The said corporation shall have capacity to hold, enjoy and exercise, within other States, the aforesaid faculties, powers, rights, franchises and immunities, and such others as

may be conferred upon it by any law of this State, or of any other State in which any portion of its railroad may be situate, or in which it may transact any part of its business; and to hold meetings of stockholders and of its board of directors, and to do all corporate acts and things, without this State, as validly and to the same extent as it may do the same within the State, on the line of such road." Indiana Stat. 1865, c. 20, § 5, p. 68; Rev. Stat. § 3949.

"Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises, of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; and may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States; and may assume such of the debts and liabilities of such corporations as may be deemed proper." "Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this State, upon such terms as may be agreed upon by the corporations owning the same." Indiana Stat. 1865, c. 20, § 7, p. 68; Rev. Stat. § 3951.

On April 8, 1880, the legislature of Kentucky passed a statute, entitled "An act to incorporate the New Albany and Chicago Railway Company," which took effect upon its passage, and the first two sections of which were as follows:

"Sec. 1. The Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

"Sec. 2. The Louisville, New Albany and Chicago Railway Company is hereby authorized to purchase or lease, for depot purposes in the city of Louisville or county of Jefferson, such

real estate as may be deemed by it to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same; and for all said purposes shall have the right to condemn all property required for the carrying out of the objects herein named; and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises."

The third section of that statute directed how proceedings for the condemnation of such real estate should be conducted in the courts of the State of Kentucky. Kentucky Stat. sess. 1879, c. 858, p. 233.

On May 5, 1881, the New Albany Company, (describing itself as "a corporation existing under the laws of the State of Indiana," and as owning and operating a line of railroad from New Albany to Michigan City in the same State,) and the Chicago and Indianapolis Air Line Railway Company, (describing itself as "a consolidated corporation organized and existing under the laws of the States of Indiana and Illinois," and as having in process of construction a line of railway extending from Indianapolis in Indiana to a connection with a railroad at or near Glenwood in Illinois so as to secure a connection with Chicago in that State,) consolidated their stock and property, under the laws of Indiana and of Illinois, "so as to create and form a consolidated corporation, to be called and known as the Louisville, New Albany and Chicago Railway Company," by articles of consolidation, the third of which provided, in accordance with the statutes of Indiana, that "the said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the laws of the respective States of Illinois and Indiana, wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities and franchises which before the execution

of these articles were lawfully possessed or exercised by either of the parties hereto;" and the ninth of which provided that "the principal place of business and the general office of the consolidated corporation shall be established in the city of Louisville, Kentucky."

On April 7, 1882, the legislature of Kentucky, by a statute entitled "An act to amend an act entitled 'An act to incorporate the Louisville, New Albany and Chicago Railway,' approved April 8, 1880," enacted that "the Louisville, New Albany and Chicago Railway Company is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the State of Kentucky; and may consolidate its rights, franchises and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line; such indorsement, guarantee or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the State of Kentucky: Provided, it shall not lease or consolidate with any two lines of railway parallel to each other." Kentucky Stat. sess. 1881, c. 870, p. 251.

The New Albany Company was not shown to have formally accepted the statutes of Kentucky of 1880 and 1882, or to have ever organized as a corporation under those statutes. But the defendants, as evidence that it had accepted a charter of incorporation from the State of Kentucky, relied on the following documents:

1st. Two deeds to it of lands in Jefferson County, made and recorded in 1881, in which it was described as "of the city of Louisville, Kentucky."

2d. Two mortgages executed by it to trustees in 1884 and 1886, including its railway in Indiana and in Jefferson County, in each of which it was described as "a corporation duly created and existing under the laws of Indiana and Kentucky."

3d. A lease to it from the Louisville Southern Railway

Company, in 1888, (more fully stated below,) in which it was similarly described.

4th. A petition (the date of which did not appear in the transcript) that an action brought against it in a court of the State of Indiana might be removed into the Circuit Court of the United States, upon the ground that it was a corporation of Kentucky.

5th. Proceedings in 1887, in a court of Jefferson County, for the condemnation of lands in that county upon a petition in which "the Louisville, New Albany and Chicago Railway Company states that it is a corporation, and that it is duly empowered by its charter by an act of the general assembly of the Commonwealth of Kentucky to purchase, lease or condemn in said State such real estate as may be necessary for railway, switches, side tracks, depots, yards and other railway purposes, and to construct and operate a railroad in said State."

On March 8, 1883, the legislature of Indiana passed a statute, entitled "An act to authorize railroad companies organized under the laws of the State of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining State," the material provisions of which were as follows:

"SEC. 1. The board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"SEC. 2. The petition of the stockholders, specified in the preceding section of this act, shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"SEC. 3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act." Indiana Stat. 1883, c. 127, p. 182; Rev. Stat. §§ 3951*a*–3951*c*.

On December 10, 1888, the New Albany Company took a lease, in which it was described as "a corporation organized and existing under the laws of the State of Indiana and of the State of Kentucky," from the Louisville Southern Railroad Company, a corporation of Kentucky, of the railroad of the latter, running from Louisville to Burgin through sundry other places in Kentucky, and connecting at Versailles in that State with a railroad then being constructed by the Beattyville Company to Beattyville, and which would, if completed, extend the connections of the New Albany Company a considerable distance towards the Virginia line.

The Beattyville Company had, on October 11, 1888, made a contract with the Ohio Valley Improvement and Contract Company, by which that company agreed to construct and equip its line of railroad; and, in consideration thereof, the Beattyville Company agreed to execute and issue to the construction company its first mortgage bonds for $25,000 a mile, dated July 1, 1889, and payable in thirty years, with interest at the annual rate of six per cent; and to transfer to that company the subscriptions received from municipalities, and to issue to that company all its capital stock, except what would have to be issued on account of such subscriptions.

On October 8, 1889, the board of directors of the New Albany Company, as appeared by its records, passed a resolution ordering the president and secretary to execute, under the seal of the company, a contract with the construction company, which contract described that company as a corporation of the State of Kentucky, and the New Albany Company as "a corporation organized and existing under the laws of the States of Indiana and Kentucky," and contained these stipulations:

"Fourth. The said New Albany Company agrees to and

with the said construction company that it will, from time to time, as the said first mortgage bonds are earned by and delivered to the said construction company pursuant to the terms of their said construction contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following, that is to say, by indorsing upon each of said bonds a contract of guaranty as follows:

"'For value received, the Louisville, New Albany and Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof.

"'In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary.'"

"Sixth. In consideration of the premises, the said construction company agrees to transfer and deliver to the said New Albany Company three fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: $3000 at par of the said stock being delivered for each $4000 of bonds guaranteed."

This contract was dated October 9, 1889; was signed in the name of each company by its president and secretary and under its corporate seal; and a copy of it was spread upon the records of the board of directors of the New Albany Company.

The charges of fraud against the directors who took part in that meeting were disproved; and the evidence failed to establish that the meeting was not in every respect a lawful one.

But no petition of a majority of the stockholders for the execution of the guaranty was presented, as required by the statute of Indiana of 1883, above cited. Nor was there any evidence that the stockholders ever authorized or ratified the contract between the New Albany Company and the construction company, or the guaranty executed in accordance therewith.

Pursuant to that contract, and before March 12, 1890, the

stock of the Beattyville Company was delivered to the New Albany Company; a guaranty, in the terms specified in the fourth article of that contract, and bearing the signature of the New Albany Company by its president and secretary and its corporate seal, was placed on 1185 bonds for $1000 each of the Beattyville Company; and the bonds thus guaranteed were put on the market by the construction company.

On March 12, 1890, the annual meeting of the stockholders of the New Albany Company was held, a new board of directors was elected, and the meeting was adjourned to March 22, 1890, when it was voted by a majority of the stockholders to reject and disapprove the contract with the construction company, and the guaranty placed on the bonds of the Beattyville Company, as having been made without legal authority or the approval of the stockholders, and to empower the board of directors to take all proceedings necessary or proper to cancel such contract and guaranty, and to relieve the company from any obligation or liability by reason thereof.

Many of the bonds so guaranteed and put on the market, including one hundred and twenty-five bonds purchased by the Louisville Trust Company, and ten bonds purchased by the Louisville Banking Company, were taken from the construction company by the purchasers in good faith, and without notice or knowledge that there had been no petition of a majority of the stockholders for the execution of the guaranty; and forty-five of the bonds were purchased from the construction company by the Louisville Banking Company after the meeting in March, 1890, and with notice that the majority of the stockholders had not petitioned for, but had disapproved, the guaranty.

The Beattyville Company and the construction company went on with the work of constructing the Beattyville railroad until the summer of 1890, when they both became insolvent, and their property passed into the hands of receivers.

The plaintiff, in its bill, tendered back the stock which it had received, and the stock was deposited in the office of the clerk of the court.

The Circuit Court entered a decree for the plaintiff against

all the defendants. 69 Fed. Rep. 431. The Louisville Trust Company and the Louisville Banking Company and other bondholders appealed to the Circuit Court of Appeals, which reversed the decree of the Circuit Court, and ordered the bill to be dismissed as to the Louisville Trust Company and the Louisville Banking Company, except as to the forty-five bonds held by the latter company; and, as to these bonds, ordered an injunction against suits on the guaranty against the plaintiff as a corporation of Indiana and Illinois, and that there be stamped on each of these forty-five bonds, under its guaranty, these words: "This guaranty is binding only on the Louisville, New Albany and Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana and Illinois." 43 U. S. App. 550. The plaintiff applied for and obtained these writs of certiorari. 164 U. S. 707.

Mr. E. C. Field and *Mr. G. W. Kretzinger* for petitioner. *Mr. James S. Pirtle* was on their brief.

Mr. St. John Boyle and *Mr. Swagar Sherley* for the Louisville Trust Company and the Louisville Banking Company.

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

The plaintiff, the Louisville, New Albany and Chicago Railway Company, undoubtedly became a corporation of the State of Indiana in 1873 by its incorporation according to the general statute of 1865 of that State.

Whether it afterwards became a corporation of the State of Kentucky also was strongly contested at the bar, and depends upon the legal effect of the statute of Kentucky of 1880.

That statute (being the first statute of Kentucky affecting this corporation) is described indeed in its title, as well as in the title of the statute of 1882 amending it, as "An act to incorporate" this company, although in the title of the first

statute the word "Louisville" in its name is omitted. By the first words of the enacting part of the statute of 1880, it is "the Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana," and not any other corporation, or any association of natural persons, that is "hereby constituted a corporation," with the usual powers of corporations, and with "authority to operate a railroad." And it is the corporation so described that, by the other provisions of that statute, may purchase, lease or condemn real estate required for railroad purposes in the county of Jefferson, and may connect with any other railroad in that county, or build, lease or operate any such connecting line, "and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights and franchises;" and, by the amendatory statute of 1882, may guarantee the bonds of, or consolidate with, other corporations authorized to construct railroads in Kentucky.

This court has often recognized that a corporation of one State may be made a corporation of another State by the legislature of that State, in regard to property and acts within its territorial jurisdiction. *Ohio & Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, 297; *Railroad Co.* v. *Harris*, 12 Wallace, 65, 82; *Railway Co.* v. *Whitton*, 13 Wall. 270, 283; *Railroad Co.* v. *Vance*, 96 U. S. 450, 457; *Memphis & Charleston Railroad* v. *Alabama*, 107 U. S. 581; *Clark* v. *Barnard*, 108 U. S. 436, 451, 452; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 334; *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161, 169; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 677. But this court has repeatedly said that, in order to make a corporation, already in existence under the laws of one State, a corporation of another State, "the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this." *Pennsylvania Railroad* v. *St. Louis, Alton & Terre Haute*

Railroad, 118 U. S. 290, 296; *Goodlett* v. *Louisville & Nashville Railroad*, 122 U. S. 391, 405, 408; *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545, 561.

The acts done by the Louisville, New Albany and Chicago Railway Company, under the statutes of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of Kentucky.

But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits.

As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or other citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286; *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545; *St. Joseph Railroad* v. *Steele*, 167 U. S. 659, 663; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 106.

In *St. Louis & San Francisco Railway* v. *James*, the company was organized and incorporated under the laws of the State of Missouri in 1873, and owned a railroad extending from Monett in that State to the boundary line between it and the State of Arkansas. The constitution of the State of Arkansas provided that foreign corporations might be authorized to do business in this State under such limitations and restrictions as might be prescribed by law, but should not have power to appropriate or condemn private property. The legislature of Arkansas, by a statute of 1881, provided that any railroad company incorporated by or under the laws of any other State, and having a line of railroad to the boundary

of Arkansas, might, for the purpose of continuing its line of railroad into this State, purchase the property, rights and franchises of any railroad company organized under the laws of this State, and thereby acquire the right of eminent domain possessed by that company, and hold, construct, own and operate the railroad so purchased as fully as that company might have done; and that "said foreign railroad company" should be subject to all the provisions of all statutes relating to railroad corporations, including the service of process, and should keep an office in the State. Pursuant to that statute, the St. Louis and San Francisco Railway Company, in 1882, purchased from railroad corporations of Arkansas their railroads, franchises and property, including a railroad connecting at the boundary line with its own railroad, and extending to Fort Smith in Arkansas, and thenceforth owned and operated a continuous line of railroad from Monett in Missouri to Fort Smith in Arkansas. In 1889 the legislature of Arkansas passed another statute, providing that every railroad corporation of any other State, which had purchased a railroad in this State, should, within sixty days from the passage of this act, file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and should "thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding." And the St. Louis and San Francisco Railway Company forthwith filed with the secretary of state of Arkansas a copy of its articles of incorporation under the laws of Missouri, as required by this statute.

In an action brought by a citizen of Missouri against that company in the Circuit Court of the United States for the Western District of Arkansas, to recover for its negligence on that part of its road within the State of Missouri, the company pleaded to the jurisdiction that it was a citizen of Missouri; and the question was certified to this court whether the company, by filing a copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that State, became a corporation and citizen of the State of Arkansas.

Opinion of the Court.

This court, speaking by Mr. Justice Shiras, upon a careful review of the earlier cases, answered that question in the negative.

The fundamental proposition deduced from the previous decisions was thus stated: "There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in 'controversies between citizens of different States.'"

The court frankly recognized that "it is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State;" and that "such corporations may be treated by each of the States whose legislative grants they accept as domestic corporations." 161 U. S. 562.

But the court went on to say: "The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation." And after referring to the provisions of the statutes of Arkansas of 1881 and 1889, the court added, "But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the Federal Constitution, so as to subject it as such to a suit by a citizen of the State of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to create

it out of natural persons, whose citizenship of the State creating it could be imputed to the corporation itself." 161 U. S. 562, 565.

In that case, the constitution of Arkansas denied to foreign corporations the right of eminent domain; and the Missouri corporation acquired that right, and owned and operated a railroad in Arkansas, in virtue of statutes authorizing it to purchase the property, rights and franchises of Arkansas corporations, and requiring it to file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and enacting that it should "thereupon become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding." Yet it was held that it was not thereby made a corporation of Arkansas, in the sense of the provisions of the Constitution, and of the acts of Congress, conferring jurisdiction on the courts of the United States by reason of diverse citizenship.

The statutes of Arkansas in that case went quite as far, to say the least, towards constituting a corporation of another State a corporation of the State enacting those statutes, as the statutes of Kentucky did in the case at bar.

The consolidation of the Louisville, New Albany and Chicago Railway Company, under the same name, with a railroad company of Illinois in 1881, clearly does not affect the question of jurisdiction. That consolidation appears, by cases cited at the bar, to have been in accordance with the law of Indiana, but not to have been authorized by the law of Illinois. *Louisville, New Albany & Chicago Railway* v. *Boney*, 117 Indiana, 501; *American Trust Co.* v. *Minnesota & Northwestern Railroad*, 157 Illinois, 641. It may have been ratified by very recent legislation in Illinois. Illinois Stat. June 9, 1897; Laws of 1897, p. 281; *McAuley* v. *Columbus, Chicago & Indiana Railway*, 83 Illinois, 348, 352. But jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit. *Morgan* v. *Morgan*, 2 Wheat. 290; *Clarke* v. *Mathewson*, 12 Pet. 164; *Koenigsberger* v. *Richmond Co.*, 158 U. S. 41, 49.

Opinion of the Court.

The demurrers to the bill for want of equity were rightly overruled, and were not insisted on in this court. The object of the bill was that the guaranty upon a great number of negotiable bonds, which might otherwise pass into the hands of *bona fide* purchasers, might be cancelled, and suits upon the guaranty restrained, because of facts not appearing upon its face. The relief sought could only be had in a court of equity. *Peirsoll* v. *Elliott*, 6 Pet. 95, 98; *Grand Chute* v. *Winegar*, 15 Wall. 373, 376; *Robb* v. *Vos*, 155 U. S. 13; *Springport* v. *Teutonia Savings Bank*, 75 N. Y. 397; *Fuller* v. *Percival*, 126 Mass. 381.

We are then brought to the question of the validity of the guaranty by the Louisville, New Albany and Chicago Railway Company of the bonds of the Beattyville Company, as between the parties before us, and under the circumstances shown by this record.

A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful and void, and incapable of being made good by ratification or estoppel. *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, and 171 U. S. 138; *Jacksonville &c. Railway* v. *Hooper*, 160 U. S. 514, 524; *Union Pacific Railway* v. *Chicago, Rock Island & Pacific Railway*, 163 U. S. 564, 581; *California Bank* v. *Kennedy*, 167 U. S. 362, 367, 368; *Davis* v. *Old Colony Railroad*, 131 Mass. 581; *Humboldt Co.* v. *Variety Co.*, 22 U. S. App. 334.

The real question in the case is whether this guaranty was valid under the laws of Indiana, the State by which the guarantor was originally created a corporation, and as a corporation of which it brought this suit.

Some reliance was placed upon the statute of Indiana of 1865, authorizing any railroad company incorporated under its provisions, (as the New Albany Company was,) to consolidate with any railroad corporation having a connecting line, either within or without the State, or to acquire, by purchase or

contract, its property, rights and franchises, or the use and enjoyment thereof, in whole or in part, and to "assume such of the debts and liabilities of such corporations as may be deemed proper." It was argued that the powers thus given embraced the contract by which the New Albany Company agreed with the construction company, in consideration of receiving from it a controlling interest in the stock of the Beattyville Company, to guarantee the bonds of that company.

But the New Albany Company never consolidated itself with the Beattyville Company, or acquired by purchase or contract its property, rights and franchises, or the use or enjoyment thereof, in whole or in part. It is doubtful, to say the least, whether a mere purchase of three fourths of its stock could authorize an assumption of its debts, under the statute of 1865, if that statute had remained in full force. In *Hill* v. *Nisbet*, 100 Indiana, 341, cited at the bar, a purchase of the stock of one railroad company by another was upheld, not as equivalent to a purchase of the property and franchises, but as a reasonable means to the accomplishment of the consolidation of the two companies.

But we cannot doubt that, as was held by both courts below, the statute of Indiana of 1883 superseded and repealed, as to matters within its scope and terms, the provisions of all former statutes of the State on the subject.

The statute of Indiana of 1883 is entitled "An act to authorize railroad corporations organized under the laws of the State of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining State;" and enacts, in section 1, that "the board of directors of any railway company organized under and pursuant to the laws of the State of Indiana, whose line of railway extends across the State in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining State, the construction of whose line or lines of railway would be bene-

ficial to the business or traffic of the railway so indorsing or guaranteeing such bonds." Section 2 provides that such petition of the stockholders shall state the facts relied on to show the benefits accruing to "the company indorsing or guaranteeing the bonds." And section 3 provides that "no railway company shall, under the provisions of this act," indorse or guarantee such bonds to an amount exceeding half the par value of the stock of "the railway company so indorsing or guaranteeing."

The Louisville, New Albany and Chicago Railway Company was a railway company organized under and pursuant to the laws of Indiana, and its line of railway extended across the State from south to north. On October 8, 1889, the board of directors, at a regular meeting, passed a resolution, entered upon its records, authorizing the president and secretary to execute under seal of the company a contract by which the company agreed with a corporation which was constructing the railroad of the Beattyville Company, a railroad corporation of Kentucky, to guarantee the payment by the Beattyville Company of the principal and interest of bonds of that company, by indorsing on each bond a guaranty, executed in like manner, by which "for value received, the Louisville, New Albany and Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof." The contract, as well as the guaranty on many of the bonds, was accordingly executed by the president and secretary and under the seal of the company, and the contract was spread upon the records of the board of directors. No petition of a majority of the stockholders for the execution of the guaranty was ever presented, as required by the statute; there was no evidence that the stockholders ever authorized or ratified the contract or the guaranty; and, at the next annual meeting of the stockholders, in March, 1890, it was voted to reject and disapprove both the contract and the guaranty, as having been made without legal authority or the approval of the stockholders.

Before that meeting was held, one hundred and twenty-five

of the bonds thus guaranteed had been sold by the construction company to the Louisville Trust Company, and ten bonds to the Louisville Banking Company, each of which companies took those bonds in good faith and without notice that no petition had been presented by a majority of the stockholders for the execution of the guaranty.

Forty-five more of the bonds were purchased by the Louisville Banking Company from the construction company after that meeting, and with notice that a majority of the stockholders had never petitioned for, but had disapproved, the execution of the guaranty. The Louisville Banking Company, thus having notice, when it took these forty-five bonds, that the prerequisite to the execution of the guaranty, under the statute of Indiana of 1883, had not been complied with, was not a *bona fide* holder of these bonds, and should not be allowed to enforce the guaranty thereon against the plaintiff.

The controverted question is whether the bonds which the Louisville Trust Company and the Louisville Banking Company, respectively, purchased in good faith, and without notice of the want of the assent of the majority of the stockholders, are valid in the hands of these companies.

The guaranty by the Louisville, New Albany and Chicago Railway Company of the bonds of the Beattyville Company was not *ultra vires*, in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court.

It was clearly indicated in two of its earliest judgments on

the subject of *ultra vires*, both of which were delivered by Mr. Justice Campbell.

In *Pearce* v. *Madison & Indianapolis Railroad*, 21 How. 441, two railroad corporations of Indiana were held not to have the power to purchase a steamboat to be employed on the Ohio River, to run in connection with their railroads, because this "diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction;" "persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation;" "the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority;" and the contract in question "was a departure from the business" of the railroad corporations, and "their officers exceeded their authority." 21 How. 443, 445.

In *Zabriskie* v. *Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, the statutes of Ohio empowered railroad corporations, "by means of their subscription to the capital stock of any other company, or otherwise," to aid it in the construction of its road, for the purpose of forming a connection between the two lines, provided that no such aid should be furnished until two thirds of the stockholders represented and voting, at a meeting called by the directors, should have assented thereto. The directors of three railroad corporations made a contract with another railroad corporation to guarantee its bonds, as part of an arrangement for connecting the four roads; and the bonds were accordingly guaranteed, and were issued to *bona fide* holders, without any meeting of the stockholders having been called. But, upon evidence that the stockholders had subsequently assented to the transaction, the bonds were held to be valid; and the court expressly declared that the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization, does not apply to "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regula-

tion which it should not have neglected, but which it has chosen to disregard." 23 How. 398.

Again, in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, this court, in summing up the result of previous decisions, stated the same distinction as follows: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect; the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it; the contract cannot be ratified by either party, because it could not have been authorized by either; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." 139 U. S. 59.

In *St. Louis, Vandalia & Terre Haute Railroad* v. *Terre Haute & Indianapolis Railroad*, 145 U. S. 393, one of the parties relied on a provision of a statute of Illinois that it should not be lawful for any railroad company of Illinois, or its directors, to consolidate its road with any railroad out of the State, to lease its road to any railroad company out of the State, or to lease any railroad out of the State, "without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void."

Of that statute, this court said: "It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny." 145 U. S. 403.

A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others. Shaw, C. J., in *Burrill* v. *Nahant Bank*, 2 Met. 163, 166, 167; Comstock, J., in *Hoyt* v. *Thompson*, 19 N. Y. 207, 216. And the appropriate form of verifying any written obligation to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal.

The bonds of the Beattyville Company were instruments negotiable by delivery; and the guaranty indorsed upon each of them by the Louisville, New Albany and Chicago Railway Company was signed by the president and secretary and under its corporate seal, and was in terms payable to the holder thereof and itself negotiable.

One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.

In *Merchants' Bank* v. *State Bank*, 10 Wall. 604, this court stated, as an axiomatic principle in the law of corporations, this proposition: "Where a party deals with a corporation in good faith — the transaction is not *ultra vires* — and he is unaware of any defect of authority or other irregularity on the

part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." 10 Wall. 644, 645. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank* v. *Turquand*, (1856) 6 El. & Bl. 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank* v. *Turquand* as well decided upon its facts. *Knox County* v. *Aspinwall*, 21 How. 539, 545; *Moran* v. *Miami County*, 2 Black, 722, 724; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203; *St. Joseph* v. *Rogers*, 16 Wall. 644, 666; *Humboldt* v. *Long*, 92 U. S. 642, 650. And see *Zabriskie* v. *Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, above cited.

Royal British Bank v. *Turquand* was an action upon a bond signed by two directors, and under the seal of the company, and given for money borrowed by a joint stock company formed under an act of Parliament limiting its powers to the acts authorized by its deed of settlement, and whose deed of settlement provided that the directors might so borrow such sums as should, by a resolution passed at a general meeting of the company, be authorized to be borrowed. The defence was that no such resolution had been passed, and that the bond had been given without the authority of the shareholders. The Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, without passing upon the sufficiency of the resolution in that case, held the company liable on the bond; and, speaking by Chief Justice Jervis, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a

permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." 6 El. & Bl. 332.

The decision in *Royal British Bank* v. *Turquand* has been followed, and Lord Wensleydale's *dicta* to the contrary, a year later, in *Ernest* v. *Nicholls*, (1857) 6 H. L. Cas. 401, 418, 419, have been disapproved or qualified, in a long line of decisions in England. *Agar* v. *Athenæum Life Assurance Society*, (1858) 3 C. B. (N. S.) 725, 753, 755; *Prince of Wales Assurance Society* v. *Harding*, (1858) El. Bl. & El. 183, 221, 222; *In re Athenæum Society*, (1858) 4 K. & J. 549, 560, 561; *Fountaine* v. *Carmarthen Co.*, (1868) L. R. 5 Eq. 316, 321; *Colonial Bank of Australasia* v. *Willan*, (1874) L. R. 5 P. C. 417, 448; *Mahony* v. *East Holyford Co.*, (1875) L. R. 7 H. L. 869, 883, 893, 894, 902; *County of Gloucester Bank* v. *Rudry Merthyr Co.*, (1895) 1 Ch. 629, 633. The only English decision cited at the bar, which appears to support the opposite conclusion, is *Commercial Bank* v. *Great Western Railway*, (1865) 3 Moore P. C. (N. S.) 295, which, unless it can be distinguished on its peculiar circumstances, is against the general current of authority. See also a very able judgment of the Court of Errors and Appeals of New Jersey, delivered by Mr. Justice Depue, in *Hackensack Water Co.* v. *De Kay*, 9 Stewart, (36 N. J. Eq.) 548, 559–567.

In the present case, all natural persons or corporations by whom bonds of the Beattyville Company bearing the guaranty of the Louisville, New Albany and Chicago Railway Company, signed by the proper officers of the company and under its seal, were purchased in good faith, and without notice that there had been no petition of a majority of the stockholders for their execution, had the right to assume that such a petition had been presented, as required by the statute of 1883.

The records of the railroad corporation and of its board of directors, which would naturally show whether such a petition had or had not been filed, were private records, which a pur-

chaser of the bonds was not obliged to inspect, as he would have been if the fact had been required by law to be entered upon a public record. Brewer, J., in *Blair* v. *St. Louis, Hannibal & Keokuk Railroad*, 25 Fed. Rep. 684; *Hackensack Water Co.* v. *De Kay*, 9 Stewart, (36 N. J. Eq.) 548, 568; *McCormick* v. *Market Bank*, 165 U. S. 538, 551; *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366, 379.

It follows that the decree of the Circuit Court of Appeals, so far as it ordered the bill to be dismissed with regard to the guaranty on the bonds which the Louisville Trust Company and the Louisville Banking Company took in good faith, and without notice of any want of authority to execute the guaranty, was correct.

But, in regard to the guaranty on the bonds which the Louisville Banking Company took with notice that the guaranty had not been authorized by a majority of the stockholders, the decree of the Circuit Court of Appeals needs to be modified.

That court, in its opinion and decree, undertook to determine whether the Louisville, New Albany and Chicago Railway Company was liable upon the guaranty as a corporation of Kentucky, and as a corporation of Illinois.

Apart from the question whether it was a corporation of Kentucky, and from the difficulty of treating the negotiable guaranty upon each bond as itself divisible, binding the guarantor as a corporation of one State, and not binding it as a corporation of another State, there is an insurmountable objection to the decree in its present form.

The Louisville, New Albany and Chicago Railway Company is a party to this suit as a corporation of Indiana only, and not as a corporation of Kentucky. It could not, either as a corporation of both States, or as a corporation of Kentucky only, have brought this suit against corporations and citizens of Kentucky, in the Circuit Court of the United States for the District of Kentucky, without ousting the jurisdiction of the court. *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286; *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545. And citizens of Illinois also being defendants in the bill, it

is equally impossible to take jurisdiction of the plaintiff as a corporation of Illinois.

It necessarily follows that the rights and liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois, cannot be adjudicated in this case; and that the decrees, both of the Circuit Court and of the Circuit Court of Appeals, so far as regards the Louisville Banking Company, must be reversed, and the case remanded to the Circuit Court with directions to dismiss the bill as to the guaranty on the ten bonds of which the Louisville Banking Company was a *bona fide* purchaser, and to enter a decree, as to the guaranty on the forty-five bonds of which it was not a *bona fide* purchaser, that an injunction be issued against bringing suit upon the guaranty on these bonds against the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and that there be stamped on these bonds the following word: "This guaranty is not binding on the Louisville, New Albany and Chicago Railway Company, a corporation of Indiana, and is to that extent cancelled, without prejudice to the rights or liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois."

Accordingly, in the first case, the decree of the Circuit Court of Appeals is affirmed, and the case remanded to the Circuit Court of the United States with directions to dismiss the bill as against the Louisville Trust Company; and, in the second case, the decrees of both those courts are reversed, and the case remanded to the Circuit Court of the United States with directions to enter a decree in conformity with the opinion of this court.

UNITED STATES *v.* COE.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 8 of October term, 1897. Petition for rehearing submitted June 29, 1898.—Denied May 22, 1899.

A petition for the rehearing of this case, which was decided May 23, 1898, and is reported 170 U. S. 681, is denied, on the ground that, after a careful reëxamination of the record, the court adheres to the judgment heretofore rendered, remaining of the opinion that from and after the adoption of the Mexican constitution of 1836, no power existed in the separate states to make such a grant as the one in this case.

This was a motion for leave to file a petition for a rehearing of a case decided at October term, 1897, and reported in volume 170 U. S. at page 681.

Mr. Amos Steck for petitioner.

Mr. A. M. Stevenson and *Mr. John F. Shafroth* opposing.

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

After a careful reëxamination of this record we adhere to the judgment heretofore rendered, and the petition for rehearing must be denied.

In the opinion heretofore delivered, and reported 170 U. S. 681, it was stated that a grant from the state of Sonora was relied on and not a grant from the Mexican government. This was in accordance with the petition originally filed, but it appears that it had been stipulated and agreed below between counsel for the Government and the claimant that the petition should be considered as amended so as to claim title from both the nation and the state. That stipulation, however, did not appear in the record, but this was not material, as we did not regard the grant, whichever its alleged source, as a valid one, for the reasons given.

We remain of opinion that, from and after the adoption of the constitution of 1836, no power existed in the separate

states to make such a grant as this. *Camou* v. *United States*, 171 U. S. 277, related to a grant made prior to 1836, and ruled nothing to the contrary of the decision in this case.

Construing the various applicable statutes and decrees in relation to the sale of public lands, which were in force April 12, 1838, the date of the alleged grant, together, we think it clear that the Board of Sales which assumed to act in this matter had no power to sell and convey these lands so as to vest the purchaser with title, unless the sale was approved by the general government, and that it was not so approved. Furthermore, this Board of Sales did not assume to comply with the requirements of the law in making this sale. The members of the board really professed to be officers of the State, and to act for the State, although the grant was declared to be made in the "name of the free, independent and sovereign State of Sonora as well as of the august Mexican government." But it seems to us that they referred to the nation as it existed under the Federal system of 1824, as contradistinguished from the supreme central system that was in existence in 1838. We understand that when this grant purports to have been made, the officers and people of Sonora were undertaking to carry on their government as a sovereign and independent State under the national constitution of 1824 and the laws passed thereunder, as well as the state constitution of 1825, and subsequent laws, in violation of the national constitution of 1836 and the laws promulgated under that instrument. This refusal to recognize their constitutional obligations put them in antagonism to the general government, and, although appellee's counsel deny that Sonora was in rebellion, and say that at the time of the sale she "was a conservative protestant against the dictatorial proceedings which gave rise to the central system," we cannot agree that this sale was conducted in accordance with the paramount law, and it does not appear that the national government ever ratified or approved the grant. The various constitutions and laws bearing on the subject are set out in our previous opinion, and also to a considerable extent repeated in *Faxon* v. *United States*, 171 U. S. 244.

Petition denied.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* McCANN.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 11. Argued October 11, 1898. — Decided May 22, 1899.

Section 944 of the Revised Statutes of Missouri of 1889, provided that, "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained." In commenting on this statute the Supreme Court of Missouri said: "The provision of the statute is that 'wherever property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier. There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route." *Held*, That the statute as thus interpreted could not be held to be repugnant to the Constitution of the United States.

THE statement of the case will be found in the opinion of the court.

Mr. George P. B. Jackson for plaintiff in error.

Mr. J. H. Rodes for defendants in error. *Mr. R. B. Bristow* and *Mr. Charles E. Yeater* were on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

A statute of the State of Missouri, found in the Revised Statutes of that State, 1889, c. 26, reads as follows:

"SEC. 944. Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained."

Whilst this statute was in force the defendants in error shipped from Stoutsville in the State of Missouri, on the line of the Missouri, Kansas and Texas Railway, to Chicago, Illinois, which was beyond the line of that road, ninety-nine head of cattle. At the time of the shipment a bill of lading was delivered to the shippers. The portions of the contract pertinent to the questions here arising for consideration are as follows:

"This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that whereas the receivers of the Missouri, Kansas and Texas Railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof, as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stouts-

ville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

"1st. That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive release, and does hereby release, said first party from any and all liability for and on account of any delay in shipping said stock, after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent."

* * * * *

"4th. That the said second party for the consideration aforesaid, hereby assumes, and releases said first party from risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another, or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part."

* * * * *

"13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part

hereby so expressly stipulates and agrees, the understanding of both parties hereto — that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas and Texas Railway, excepting to protect the through rate of freight named herein."

When this bill of lading was executed an ancillary agreement was indorsed thereon, as follows:

"We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass furnished us by the Missouri, Kansas and Texas Railway, Geo. A. Eddy and H. C. Cross, receivers, and of the other covenants and agreements contained in said contract, including rules and regulations at the head thereof and those printed on the back thereof, all of which for the consideration aforesaid are hereby accepted by us and made a part of this contract, and of the terms and conditions, of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employés of said receivers of the Missouri, Kansas and Texas Railway, for the purposes of said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment, and that said receivers shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employés.

(Signed) J. O. Richart.
M. B. Smizer."

The cattle were transported over the line of the Missouri, Kansas and Texas Railway to Hannibal, Missouri, and from that point the cars in which they were contained passed to the line of the Wabash Railway destined for Chicago. At or near Chicago an unreasonable delay was occasioned in the transportation of the cattle by the negligence of employés of the Wabash Railway, resulting in damage, for which the shippers subsequently brought an action against the receivers of the Missouri, Kansas and Texas Railway to recover for the breach

of the contract of shipment. Judgment having been entered upon the verdict of a jury in favor of the plaintiffs, an appeal was prosecuted by the receivers to the Supreme Court of the State, and was heard in division No. 2. There was a judgment reversing the lower court, and a motion for a rehearing was denied. Between the time of the decision of the Supreme Court and the overruling of the motion for a rehearing both the receivers had died, and the railway company had resumed possession of its road. This fact having been called to the attention of the Supreme Court, the railway company was substituted as appellant instead of the receivers, and a rehearing was ordered. The case was transferred to the court in banc, and was argued before that tribunal. Thereafter a decision was rendered affirming the judgment of the trial court, and motion for a rehearing was denied. 133 Missouri, 59. The case was then brought by writ of error to this court.

By the assignments of error it is asserted, and in the argument at bar it has been strenuously urged, that the Missouri statute above quoted is in conflict with the Constitution of the United States, because it is a regulation of commerce between the States, and that the Supreme Court of Missouri hence erred in giving effect to the statute in the decision by it rendered. The statute as interpreted by the Supreme Court is asserted to operate to deprive the railway of the power of making a through shipment of interstate commerce business over connecting lines, without becoming liable for the negligence of the connecting carriers. In other words, the argument is that the effect of the Missouri statute, as interpreted by the highest court of that State, is to deprive a railway company, transacting the business of interstate commerce, of all power to limit its liability to its own line, and, hence, compels it, if interstate commerce is engaged in or a through bill of lading for such traffic is issued, to become responsible for the articles carried throughout the entire route, thereby entailing upon the carrier receiving the goods the risk of negligence by other carriers along the line, even although such lines are situated beyond the State in which the contract was made or the business originated. This, it is insisted, is a direct

burden imposed by the State upon interstate commerce, since it forbids a carrier from engaging in that commerce, unless it subjects itself to a liability for the faults of others, against which it cannot guard and for which it was not previously liable, and, moreover, by necessary effect, punishes the carrier for issuing a through bill of lading for interstate commerce, thereby tending to discourage the through transportation of merchandise from State to State, and having a direct and inevitable tendency to defeat the portion of the provisions of the sixth section of the act to regulate commerce, as amended March 2, 1889, c. 382, 25 Stat. 855, referring to the subject of joint rate of tariffs over continuous roads of different carriers, and the seventh section of the original act, approved February 4, 1887, c. 104, 24 Stat. 382, which was designed to cause the carriage of freight to be continuous from the place of shipment to the place of destination.

The contention advanced in these several propositions is, however, without foundation, from the fact that it proceeds upon an erroneous assumption of the purport of the Missouri statute in question, since the Supreme Court of Missouri, in applying that statute in the case before us, has, in the most positive terms, declared that it was not intended to and did not prevent a carrier engaged in interstate commerce traffic from limiting his liability to his own line, and that far from doing this the statute left the carrier the amplest power to make such limitation in receiving goods for interstate carriage and in issuing a through bill of lading therefor. In commenting on the statute the court said:

"The provision of the statute is that 'wherever property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier.

"There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route."

Again, in summing up its conclusions, the court said:

"We are unable to see, as contended by defendant, that the construction we give this statute makes it repugnant to that provision of the Constitution of the United States, which gives to Congress alone the power to regulate commerce among the States.

"The act in no way operates as a regulation of trade and business among the States. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the States, subject to Congressional regulations."

The reasoning now relied on then is, that, although the Supreme Court of the State of Missouri has interpreted the statute of that State as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, this court should disregard the interpretation given to the state statute, by the court of last resort of the State, and hold that the statute means the very contrary of its import, as declared by the Supreme Court of the State, and upon such construction decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof. *Sioux City Trust Company* v. *Trust Company*, 172 U. S. 642, and authorities there cited.

It is urged, however, that even although it be conceded that the Supreme Court of Missouri has interpreted the statute in question, in an abstract sense, as not depriving a railway company of the power to limit its liability to its own line when receiving goods for interstate shipment, the court has nevertheless given the statute practical enforcement as if it meant exactly the contrary of the interpretation affixed to it. In other words, the proposition is, although the Supreme Court of Missouri has declared that the statute did not deprive a carrier of its right to limit its liability to its own line, yet it has, as a necessary consequence of its application of the statute to the bill of lading in controversy in this cause, given to the statute the very meaning which it expressly declared it

had not. An examination, however, of the opinion of the Supreme Court of Missouri demonstrates that it is not justly susceptible of the construction thus placed upon it. Analyzing the opinion of the court, it results that the court decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract, in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn.

Considering the statute as thus interpreted by the Supreme Court of the State of Missouri, it cannot be held to be repugnant to the Constitution of the United States. The subject of the power of the States to legislate as to the mere form of contracts for interstate commerce carriage was fully considered in *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, 169 U. S. 311. In that case the court said (p. 314):

"The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form, is as obvious as is the difference between the sum of the obligation of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown."

* * * * *

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 proved, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary."

But it is pressed that, conceding the statute to have the purport given it by the Missouri court, nevertheless it does not come within the rule announced in the case just referred to, because the requirement of the Missouri statute, as interpreted, is so unreasonable as to amount in substance to a denial of the right of a carrier to confine by contract his duty of carriage and his liability for negligence to his own line. If the regulation of the statute be equivalent to a denial of the right to so limit, this court, it is asserted, must consider its substantial results, and not its mere theoretical significance. This contention, however, is also without a solid basis to rest upon. The requirement as to form held to be valid in *Richmond & Alleghany Railroad* v. *Patterson Tobacco Co.*, *supra*, was that every contract confining the liability upon an interstate shipment to the line of the receiving carrier should be signed by the shipper or be invalid. The manifest intent of such a regulation was to protect the shipper, by having it clearly manifested by his signature that his attention had been directed to the contract limitation of liability, so that no question might arise of inadvertence on his part in delivering the merchandise and accepting the contract for its carriage, which is usually prepared by the railroad company receiving goods for transportation. Whilst differing in form of requirement, the exaction that the carrier, in unambiguous terms, in the portion of the contract acknowledging the receipt of the goods and expressing the obligation to transport, should state the limitation of his obligation as a carrier to his own line, but effectuates the purpose designed by the Virginia statute, which was upheld in the *Patterson case.*

If the bill of lading in the case before us did not contain a

positive statement of an obligation by the receiving carrier to transport from the point of shipment to the ultimate destination of the cattle, of course it would not come under the control of the statute. But as, on the contrary, the contract contains an expression of such obligation, limited by reference solely to subsequent conditions inserted in the bill of lading, it is plainly brought within the import of the statute as interpreted by the Missouri court. It would have been within the power of the receivers of the Missouri, Kansas and Texas Railway to have stipulated that the goods were received, to be transported by them from Stoutsville to the termination of the line of railway operated by the receivers, and there to be delivered to a connecting carrier, who was to complete the transportation. If this had been done, the bill of lading would have had the plain import which the statute requires; nothing would have been left for construction, and the contract would have conveyed its obvious significance to the shipper who accepted it from the carrier. Because, instead of doing this, the carrier chose, in the body of the bill of lading, to stipulate that they were "to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville Station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union stock yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois," thus carving out the limitation with respect to carriage, if any, by reference to subsequent conditions, it cannot be reasonably complained that the contract is governed by the statute. The ancillary agreement which was indorsed on the bill of lading, it is to be noted, adds cogency to this view, since it declares that during the whole length of the transit the parties who were to be in charge of the cattle should be deemed employés of the receivers of the Missouri, Kansas and Texas Railway, the initial carrier, and that they should have no right to recover in the event of an injury or damage sustained for which the receivers would not be liable to their regular employés.

Syllabus.

To assert that because there is a liability arising from the application of the statute to the bill of lading which would not result from the bill of lading itself, therefore the statute must necessarily have been held to impose on the carrier a liability for an interstate shipment beyond its own line, is without merit. True, if there had been no statute regulating the form of the bill of lading, and we were called upon to construe the instrument, we might consider that the limitations referred to in the contract restricted the liability of the carrier to his own line. This result, however, is rendered impossible in view of the statute, not because from its provisions a liability is imposed, but because of the failure of the contract to conform to the requisites of the statute. Such was the exact condition in the *Patterson case*, *supra*, for it cannot be doubted that if in that case there had been no statute requiring the signature of the shipper to a contract limiting liability, a contract not signed by the shipper containing an exemption would have been efficacious. But, as the statute required the signature, the contract, unsigned by the shipper, was ineffective to relieve the carrier from a liability stipulated against, it is true, but which was inoperative because not expressed in legal form. Such is, in substance, the situation here presented.

Judgment affirmed.

Mr. Justice Harlan dissented.

WEST COMPANY *v.* LEA.

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

No. 755. Submitted May 1, 1899.—Decided May 22, 1899.

As a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defence to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law.

Opinion of the Court.

THE statement of the case will be found in the opinion of the court.

Mr. W. W. Henry for appellant.

Mr. Emmett Seaton and *Mr. J. H. Ralston* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The facts stated in the certificate of the Circuit Court of Appeals are substantially as follows:

Lea Brothers & Company and two other firms filed, on December 18, 1898, a petition in the District Court of the United States for the Eastern District of Virginia, praying that an alleged debtor, the George M. West Company, a corporation located in Richmond, Virginia, be adjudicated a bankrupt, because of the fact that it had, on the date of the filing of the petition, executed a deed of general assignment, conveying all its property and assets to Joseph V. Bidgood, trustee. The George M. West Company pleaded denying that at the time of the filing of said petition against it the corporation was insolvent, within the meaning of the bankrupt act, and averring that its property at a fair valuation was more than sufficient in amount to pay its debts. The prayer was that the petition be dismissed. The court rejected this plea, and adjudicated the West Company to be a bankrupt. The cause was referred to a referee in bankruptcy, and certain creditors secured in the deed of assignment, who had instituted proceedings in the law and equity court of the city of Richmond, under which that court had taken charge of the administration of the estate and trust under the deed of assignment, were enjoined from further prosecuting their proceedings, in the state court, under said deed of assignment. From this decree an appeal was allowed to the Circuit Court of Appeals for the Fourth Circuit. On the hearing of said appeal the court, desiring instructions, certified the case to this court. The certificate recites the facts as above stated, and submits the following question:

"Whether or not a plea that the party against whom the petition was filed 'was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him' is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors."

The contentions of the parties are as follows: On behalf of the debtor it is argued that under the bankrupt act of 1898 two things must concur to authorize an adjudication of involuntary bankruptcy, first, insolvency in fact, and, second, the commission of an act of bankruptcy. From this proposition the conclusion is deduced that a debtor against whom a proceeding in involuntary bankruptcy is commenced is entitled entirely irrespective of the particular act of bankruptcy alleged to have been committed, to tender, as a complete bar to the action, an issue of fact as to the existence of actual insolvency at the time when the petition for adjudication in involuntary bankruptcy was filed. On the other hand, for the creditors it is argued that whilst solvency is a bar to proceedings in bankruptcy predicated upon certain acts done by a debtor, that as to other acts of bankruptcy, among which is included a general assignment for the benefit of creditors, solvency at the time of the filing of a petition for adjudication is not a bar, because the bankrupt act provides that such deed of general assignment shall, of itself alone, be adequate cause for an adjudication in involuntary bankruptcy, without reference to whether the debtor by whom the deed of general assignment was made was in fact solvent or insolvent.

A decision of these conflicting contentions involves a construction of section 3 of the act of July 1, 1898, c. 541, 30 Stat. 546. The full text of the section in question is printed in the margin.[1]

---

[1] Sec. 3. Acts of Bankruptcy. — *a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

It will be observed that the section is divided into several paragraphs, denominated as *a*, *b*, *c*, *d* and *e*. Paragraph *a* is as follows:

---

(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defence to any proceedings in bankruptcy, instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed, as hereinbefore provided under the second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to examination, and give testimony as to all matters tending to establish solvency or insolvency, and, in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representative, all costs, expenses

"SEC. 3. Acts of Bankruptcy. — *a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4 and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph *a*, it results that the non-existence of insolvency, at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in 1, 4 or 5 (which embrace the making of a deed of general assignment) does not constitute a defence to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice.

The result arising from considering the paragraph in ques-

---

and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent, or respondents, shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bonds.

tion would not be different if it be granted *arguendo* that the text is ambiguous. For then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern. Applying this rule to the enumerations contained in paragraph *a*, it follows that the making of a deed of general assignment, referred to in enumeration 4, constitutes in itself an act of bankruptcy, which *per se* authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency. This is clearly demonstrated from considering the present law in the light afforded by previous legislation on the subject.

Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modelled), and our own bankruptcy statutes down to and including the act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy *per se*. This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co.* v. *Cleveland Insurance Co.*, 14 N. B. R. 311; 10 Fed. Cas. 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in *In re Beisenthal*, 14 Blatchford, 146, where it was held, that a voluntary assignment, without preferences, valid under the laws of the State of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed* v. *McIntyre*, 98 U. S. 513. So, also, in *Boese* v. *King*, 108 U. S. 379, 385, it was held, citing (p. 387) *Reed* v. *McIntyre*, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867, March 2, 1867, c. 176, 14 Stat. 536, or the amendments thereto of June 22, 1874, c. 390, and July 26, 1876, c. 234, 18 Stat. 180; 19 Stat. 102. Neither, how-

ever, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result, of the clause, in the act of 1867, forbidding assignments with "intent to delay, defraud or hinder" creditors and from the provision avoiding certain acts done to delay, defeat or hinder the execution of the act. (Rev. Stat. 5021, par. 4, 7.) Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement, in the present statute have been lucidly expounded by Addison Brown, J. *In re Gutwillig*, 90 Fed. Rep. 475, 478.

But it is argued that whatever may have been the rule in previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition reliance is placed upon paragraph *c* of section 3, which reads as follows:

"*c*. It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt."

The argument is that the words "under the first subdivision of this section" refer to all the provisions of paragraph *a*, because that paragraph, as a whole, is the first part of the section, separately divided, and although designated by

the letter *a*, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words "first subdivision of this section," if considered intrinsically and apart from the context of the act, would be held to refer to paragraph *a* as an entirety or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph *a*. Thus, in the last sentence of paragraph *c* the matter intended to be referred to by the words "first subdivision of this section," used in the prior sentences, is additionally designated as follows: "and under said subdivision one," etc., language which cannot possibly be in reason construed as referring to the whole of paragraph *a*, but only to subdivision 1 thereof.

This is besides more abundantly shown by paragraph *d*, which provides as follows:

"*d*. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegations of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers and accounts and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

This manifestly only refers to enumerations 2 and 3 found in paragraph *a*, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent. Indeed, if the contention advanced were followed, it would render section 3 in many respects meaningless. Thus, if it were to be held that the words "first subdivision of this section," used in paragraph *c*, referred to the first division of the section — that is, to paragraph *a* as a whole — it would follow that the words "second and third subdivisions of this section," used in paragraph *d*, would relate to the second and third divisions of

the section — that is, to paragraphs *b* and *c*. But there is nothing in these latter paragraphs to which the reference in paragraph *d* could possibly apply, and therefore, under the construction asserted, paragraph *d* would have no significance whatever. To adopt the reasoning referred to would compel to a further untenable conclusion. If the reference in paragraph *c* to the "first subdivision of this section" relates to paragraph *a* in its entirety, then all the provisions in paragraph *a* would be governed by the rule laid down in paragraph *c*. The rule, however, laid down in that paragraph would be then in irreconcilable conflict with the provisions of paragraph *d*, and it would be impossible to construe the statute harmoniously without eliminating some of its provisions.

Despite the plain meaning of the statute as shown by the foregoing considerations, it is urged that the following provision contained in paragraph *b* of section 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proven that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph *c*, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph *a*, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph *d*, conforming in this respect to the requirements of paragraph *a*, contemplates an issue as to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor *at the time of the commission of the act of bankruptcy*. Further, a petition in a proceeding in involuntary bankruptcy is defined in section 1 of the act of 1898, enumeration 20, to mean "A paper filed . . . by creditors *alleging the commission of an act of bankruptcy* by a debtor therein named."

It follows that the mere statement in the statute, by way of recital, that a petition may be filed "against a person who is insolvent and who has committed an act of bankruptcy," was not designed to superadd a further requirement to those contained in paragraph *a* of section 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer. These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.

Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defence to a petition based upon the making of a deed of general assignment, is not warranted by the bankruptcy law; and, therefore, that the question certified must be answered in the negative; and it is so ordered.

Counsel for the Motion.

COLUMBUS CONSTRUCTION COMPANY *v.* CRANE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 462. Submitted April 17, 1899. — Decided May 22, 1899.

The judiciary act of March 3, 1891, c. 517, 26 Stat. 826, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and therefore the writ in this case in this court, which was taken while the case was pending in the Circuit Court of Appeals, is dismissed.

In May, 1891, the Columbus Construction Company, a corporation of the State of New Jersey, brought in the Circuit Court of the United States for the Northern District of Illinois an action at law against the Crane Company, a corporation of the State of Illinois. The case was put at issue, and the trial resulted in a verdict and judgment in favor of the plaintiff in the sum of $48,000. This judgment was reversed by the Circuit Court of Appeals upon a writ of error sued out by the defendant. 46 U. S. App. 52. Thereafter the case was again tried and resulted in a verdict and judgment in favor of the defendant, upon a plea of set-off, in the sum of $98,085.94, as of the date of March 2, 1898.

On the 25th day of August, 1898, a writ of error to reverse this judgment was sued out by the plaintiff from the Circuit Court of Appeals of the Seventh Circuit, where the case is now pending.

On the 27th day of September, 1898, the plaintiff also sued out a writ of error from this court. On April 17, 1899, the defendant in error filed a motion to dismiss this writ of error; and on the same day the plaintiff in error filed a petition for a writ of certiorari to the Circuit Court of Appeals of the Seventh Circuit.

Mr. Charles S. Holt, *Mr. Russell M. Wing* and *Mr. Thomas L. Chadbourne, Jr.*, for the motion.

Mr. J. R. Custer and *Mr. S. S. Gregory* opposing.

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

This record discloses that there are pending two writs of error to the judgment of the Circuit Court — one in the United States Circuit Court of Appeals for the Seventh Circuit, sued out on the 25th day of August, 1898, and one in this court, sued out on the 27th day of September of the same year. It also appears that the jurisdiction of the Circuit Court is not in question, but the contention is that that court erred in the exercise of its jurisdiction.

We are of the opinion that the act of March 3, 1891, c. 517, 26 Stat. 826, under which these writs of error were sued out, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and that, therefore, the writ in this court, which was taken while the case was pending in the Circuit Court of Appeals, ought to be dismissed.

Such a question was considered by this court in *McLish* v. *Roff*, 141 U. S. 661, 667.

That was a case of a writ of error from this court to the United States court for the Indian Territory, where a suit was pending and undecided, and the object of the writ was to get the opinion of this court on the question whether the lower court had jurisdiction of the suit. This court held that it was not competent for a party denying the jurisdiction of the trial court to bring that question here on a writ of error sued out before final judgment, and the writ was accordingly dismissed.

In the opinion, read by Mr. Justice Lamar, it was said:

"It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this court, while the case on its merits would be cer-

tified to the Circuit Court of Appeals; that the case would be before two separate appellate courts at one and the same time; and that the Supreme Court might dismiss the suit upon the question of jurisdiction while the Circuit Court of Appeals might properly affirm the judgment of the lower court upon the merits. The fallacy which underlies this argument is the assumption that the act of 1891 contemplates several separate appeals in the same case, and at the same time to two appellate courts. No such provision can be found in the act, either in express terms or by implication. The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

We think the main purpose of the act of 1891, which was to relieve this court of an enormous overburden of cases by creating a new and distinct court of appeals, would be defeated, if a party, after resorting to the Circuit Court of Appeals and while his case was there pending, could be permitted, of his own motion, and without procuring a writ of certiorari, to bring the cause into this court.

Moreover, it is evident that such a movement is premature, for the controversy may be decided by the Circuit Court of Appeals in favor of the plaintiff in error, and thus his resort to this court be shown to have been unnecessary.

Pullman's Palace Car Co. v. *Central Transportation Co.*, 171 U. S. 138, is referred to as a case in which there was pending at the same time an appeal from a decree of the Circuit Court to the Circuit Court of Appeals and to this court. An obvious distinction between that case and this is that there the appeal was first taken to this court. Accordingly the Circuit Court of Appeals declined either to decide the case on its merits or

Statement of the Case.

to dismiss the appeal, while the case was pending on a prior appeal to this court, and continued the cause to await the result of the appeal to the Supreme Court. 39 U. S. App. 307.

Without, therefore, considering other grounds urged in the brief of the defendant in error on its motion to dismiss, we think a due regard for orderly procedure calls for a dismissal of the writ of error.

Dismissed.

No. 782. COLUMBUS CONSTRUCTION COMPANY, Petitioner, *v.* CRANE COMPANY, Respondent. On petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. The petition for the writ of certiorari is

Denied.

RIO GRANDE IRRIGATION AND COLONIZATION COMPANY *v.* GILDERSLEEVE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 254. Argued April 20, 21, 1899.—Decided May 15, 1899.

When a defendant, who has been duly served with process, causes an appearance to be entered on his behalf by a qualified attorney, and the attorney subsequently withdraws his appearance, but without first obtaining leave of court, the record is left in a condition in which a judgment by default for want of an appearance can be validly entered.

THIS was action of assumpsit begun in the district court for Bernalillo County, Territory of New Mexico, on the 17th day of July, 1894, by Charles H. Gildersleeve against the Rio Grande Irrigation Company. The declaration is in the ordinary form, containing a special count upon a promissory note for the sum of $50,760, dated June 30, 1890, bearing interest at the rate of twelve per cent, and containing also the common counts in assumpsit. The note sued on was payable to P. R. Smith and indorsed by him and defendant in error, and a copy thereof was filed with the declaration, and also a copy

of a resolution of the directors of defendant authorizing the giving of a note, not to P. R. Smith, but to the Second National Bank of New Mexico. Upon this declaration process was issued, service of which was made upon J. Francisco Chavez, a director and stockholder of plaintiff in error. Process was returnable on the first Monday of August, 1894, under the provision of the practice act of 1891, and on the 3d day of August, 1894, defendant below entered its appearance by H. L. Pickett, its attorney. On the 15th day of September, 1894, the plaintiff filed in the office of the clerk of the district court a letter from Mr. H. L. Pickett, addressed to plaintiff's attorneys, in which the writer states that he withdraws the appearance at the request of Colonel P. R. Smith (who is the original payee of the note sued on). Thereupon the clerk of the district court made and filed a certificate of non-appearance, and on the same day a judgment was entered, based upon the said certificate, which judgment is for the sum of $76,393.80.

Afterward, and on the 15th day of November, 1894, during the next term of the district court after the judgment had been entered in vacation, the defendant below filed a motion to vacate the judgment for defects and irregularities apparent on the face of the record. This motion was not heard until the 6th of September, 1895, when it was denied by the court; and on the 9th day of September, 1895, defendant below filed a second motion to vacate the judgment for reasons set forth in the accompanying affidavit filed therewith, and also filed at the same time its proposed pleas verified by oath. The affidavit with said motion shows, in substance, that the plaintiff below received from defendant below, in the summer of 1889, 50,000 shares of its capital stock and the sum of $1,510,000 in its first mortgage bonds, for the purpose of purchasing certain property in New Mexico for said company. It further appears from said affidavit that the plaintiff below did purchase a portion of the property in New Mexico and turned back to the company a portion of the bonds and stock in lieu of the property which he did not purchase, and retained the remainder of the bonds and stock as his own property, but induced

the company to assist him in raising the money necessary to make final payment for the Vallecito grant by executing a promissory note for $47,000, the note in the present case having been subsequently given in renewal of the first note. In other words, it is shown that the indebtedness was that of the plaintiff below and not of the company; that the company never received any money on said note nor any benefit therefrom, but was merely an accommodation maker to assist the plaintiff below in carrying out his contract with the company. At the time of the execution of said note for $47,000 the plaintiff below agreed to deposit as collateral security thereto $120,000 of bonds of the company, and it is further shown by said affidavit that the said collateral has never been accounted for in any manner. The district court entered judgment denying the motion.

The defendant company sued out a writ of error to review the case in the Supreme Court of the Territory, where the judgment of the district court was affirmed. The case was then brought to this court by writ of error, and afterwards an appeal was taken, the case thus appearing twice on the docket of this court as Nos. 163 and 254.

Mr. F. W. Clancy for appellant.

Mr. J. H. McGowan for appellee. *Mr. H. L. Warren* was on his brief.

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

It is conceded that the Rio Grande Irrigation and Colonization Company was duly served with process, and that an appearance was entered on its behalf by H. L. Pickett, a qualified attorney. The essential question in the case is whether the subsequent withdrawal of his appearance by the attorney, without leave of the court, left the record in a condition in which a judgment by default for want of an appearance could be validly entered.

Cases are cited by the appellant's counsel in which it has been held that the appearance of a defendant, once regularly entered, cannot be withdrawn without leave of the court. *United States* v. *Curry*, 6 How. 106, 111; *Dana* v. *Adams*, 13 Illinois, 691.

But an examination of those cases discloses that this is a rule designed for the benefit and protection of the plaintiff. Usually the question has arisen where there had been no service of process on the defendant, and where, therefore, a withdrawal of appearance by the attorney would leave the plaintiff without ability to proceed by defaulting the defendant for want of an appearance. It was said by this court in *Creighton* v. *Kerr*, 20 Wall. 8, 13: "The appearance gives rights and benefits in the conduct of a suit, to destroy which by a withdrawal would work great injustice to the other parties."

United States v. *Curry*, *supra*, was a suit in equity which had passed to a final decree, and the defendant, desiring to appeal, issued a citation to the complainant, which citation was served on the person who had been attorney of record during the trial of the suit. The attorney subsequently by affidavit stated that he was not the attorney of the appellee at the time the citation was served on him; that he had been discharged from all duty as attorney, and had so informed the marshal at the time of the same. The validity of the appeal was therefore attacked on the ground that there had been no proper service of the citation. This court said:

"The citation is undoubtedly good and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to withdraw his name after the case was finally decided. For if that could be done, it would be im-

possible to serve the citation where the party resided in a distant country or his place of residence was unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

Sloan v. *Wittbank*, 12 Indiana, 444, was a suit on a promissory note, and to which the defendant appeared. He then withdrew his appearance and the case went to trial, and resulted in a judgment in favor of the plaintiff. On error, the Supreme Court of Indiana held that the withdrawal of appearance carried with it the answer, and the court should then have entered judgment as by default, instead of going to trial, but that this was a mere irregularity which could not injure the defendant, and could not be taken advantage of on appeal.

So it was held by the Supreme Judicial Court of Massachusetts, that it was no ground for reversing a judgment rendered on the default of the defendant, after he had appeared and then withdrawn his appearance, that the date of the writ was a year earlier than the fact. *Fay* v. *Hayden*, 7 Gray, 41.

A case, indeed, might arise of collusion between the plaintiff and the attorney of the defendant, but in such case the court, on due and prompt application to it, would no doubt defeat any attempt on the part of the plaintiff to take advantage of a corrupt dereliction of duty on the part of the defendant's attorney. But it is not pretended, in the present case, that there was any collusion practised between the plaintiff and the defendant's attorney, nor that the latter, either in entering or withdrawing defendant's appearance, acted without authority or by mistake.

It is, however, strenuously contended that the record does not show that the defendant below ever attempted to withdraw its appearance, and that hence the judgment by default for want of an appearance had no basis. By this is meant that the letter of Pickett, the attorney, cannot be regarded as part of the record.

We agree, however, with the Supreme Court of the Territory, that this letter, which constituted the withdrawal of appearance, was sufficiently brought into the record by the defendant's bill of exceptions, in which it is set forth at length, and wherein it is averred that said paper, signed by Pickett, was filed by plaintiff in said cause. The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. But it may be put into the record by a bill of exceptions, or something which is equivalent; so, at least, to enable the Supreme Court of the Territory to deal with it as part of the record. *England* v. *Gebhardt*, 112 U. S. 502.

It is not claimed that this court, upon this record, can look into the merits of the case. The only matter for our consideration is whether the Supreme Court of the Territory erred in affirming the judgment of the trial court denying the defendant's motion to vacate the judgment entered in default of an appearance.

The judgment by default was entered on September 15, 1894, in vacation, and on November 15, 1894, and during the next succeeding term, a motion was made on behalf of the defendant company to vacate the judgment. This motion was, on September 5, 1895, denied; and on September 9, 1895, another motion, accompanied with an affidavit of a defence on the merits, was filed, and this motion was likewise denied.

There is a rule prescribed by the Supreme Court of the Territory, in the following terms:

"No motion to set aside any finding or judgment rendered in vacation shall be entertained, unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment."

As no discretionary power was reserved to the trial judge, he could not dispense with this rule of court. As was said in *Thompson* v. *Hatch*, 3 Pick. 512:

"A rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . . The courts may

rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

However, the Supreme Court of the Territory did not consider it necessary to determine whether the trial court could have set aside the judgment on an application filed after the ten days had expired, if a diligent effort and a showing of merit had been made, but held that there was such an apparent lack of diligence in this case that the trial court properly refused to set the judgment aside.

A motion, even if made within the time prescribed by the rule, to set aside a judgment, is addressed to the discretion of the trial court, and where the exercise of that discretion has been approved by the Supreme Court of the Territory, we should not feel disposed to overrule those courts, unless misuse or abuse of discretionary power plainly appeared; and we cannot say that this is such a case.

Even if we could regard this not as a mere application under the rule to vacate a judgment, but as a proceeding of an equitable character outside of the rule, we should be compelled to reach the same conclusion. In *Bronson* v. *Schulten*, 104 U. S. 410, 417, it was said:

"The question relates to the power of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.

"We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could

not, according to its established principles, have granted the relief which was given in this case. It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief."

The judgment of the Supreme Court of the Territory, affirming that of the district court, is

Affirmed.

In the case of THE RIO GRANDE IRRIGATION AND COLONIZATION COMPANY, Plaintiff in Error, *v.* CHARLES H. GILDERSLEEVE, No. 163, October term, 1898, the writ of error is

Dismissed.

McDONALD, Receiver, *v.* CHEMICAL NATIONAL BANK.

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

No. 242. Argued April 13, 1899. — Decided May 22, 1899.

The several payments and remittances made to the Chemical Bank by the Capital Bank before its insolvency were not made in contemplation of insolvency, or with a view to prefer the Chemical Bank.

These cheques and remittances were not casual, but were plainly made under a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital Bank, but were to be credited to its constantly overdrawn account; and when letters containing them were deposited in the post office, such mailing was a delivery to the Chemical Bank, whose property therein was not destroyed or impaired by the insolvency of the Capital Bank, taking place after the mailing and before the delivery of the letters containing the remittances.

IN January, 1896, Kent K. Hayden, as the duly appointed receiver of the Capital National Bank of Lincoln, Nebraska, filed in the Circuit Court of the United States for the Southern District of New York a bill of complaint against the Chemical National Bank of New York.

Statement of the Case.

The bill alleged that the Capital National Bank, on the 21st day of January, 1893, was insolvent and stopped doing business, and that on the 22d day of January, 1893, the Comptroller of the Currency closed said bank and took possession of its assets and affairs; that for a period long prior to the 15th day of January, 1893, the said bank was insolvent, and its insolvency was known to all its officers; that ever since the 2d day of June, 1884, there had been mutual and extensive dealings between the two banks above named, in which each had acted for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof; that the Capital National Bank kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled.

That the defendant bank had refused to pay or honor the drafts drawn upon it by the Capital National Bank presented on or since January 21, 1893; that since January 22, 1893, the defendant bank had received many and large sums of money belonging to and for the account of the Capital National Bank, some of it being the sums of $2935.60, $815.79 and $735, from the officers of the Capital National Bank, and the rest from the third parties which remitted the same to the defendant for account of the Capital National Bank, and that, in particular, it had received on January 23, 1893, five thousand dollars from the Packers' National Bank, and two thousand dollars from the Schuster Hax National Bank, and divers other sums from others, on that day and since; that the defendant had refused to account for and pay over to the complainant the said collections. Wherefore it was prayed that an accounting be had, and that the defendant be ordered to pay over what might be thereby found due.

The defendant bank answered, admitting the preliminary allegations of the bill, but denying its knowledge of the

insolvency of the Capital National Bank on or prior to January 21, 1893, but averring that up to the 23d day of January, 1893, it was informed and did believe that the said Capital National Bank was entirely solvent, and dealt with it and gave it credit as a solvent bank.

The answer denied that on and after January 21, 1893, it had ceased to pay and refused to pay all drafts drawn upon the defendant by the Capital National Bank, but admitted that on the 23d day of January, 1893, because of information then for the first time received of the struggling condition of said bank, the defendant bank did refuse to pay the drafts of the Capital National Bank, which was then indebted to the defendant in the sum of at least $13,992.93 on balance of account, besides large amounts of negotiable paper, indorsed by the Capital National Bank, then held by and previously purchased or discounted by the defendant bank, and the proceeds of which had been credited to the account of the Capital National Bank — all of which transactions were averred to have been made in the usual course of business between the banks, and without any knowledge, notice or belief on the part of the defendant bank that the Capital National Bank was insolvent or in any danger of becoming so.

The answer denied that the defendant had, since January 22, 1893, received many and large sums of money belonging to and for account of the Capital National Bank, but admitted that since January 21, 1893, it had received certain remittances and payments in the form of cheques or drafts, for account of the Capital National Bank, all which it had placed to the credit of the Capital National Bank, which had left the Capital National Bank indebted to the defendant bank in a large sum, in the form of balance of account and negotiable paper indorsed to the defendant by the Capital National Bank; and the answer alleged, on information and belief, that said remittances and payments were made by the Capital National Bank, or by other banks and bankers, by the direction and order of said Capital National Bank, through the United States mails, and were so ordered, made and remitted

Statement of the Case.

before the appointment of any receiver for said Capital National Bank, and before it ceased to pay its obligations or had suspended its usual and ordinary banking business, and that said remittances by said Capital National Bank, or by other banks and bankers, by it ordered to be made to the defendant, were made in the ordinary and accustomed course of business between the defendant and the Capital National Bank, and when received by the defendant were by it placed to the credit of the Capital National Bank.

The answer admitted that it had received the sums of $2935.60, $815.79, $735, $5000 and $2000 on the 23d day of January, 1893; that the said sums of $2935.60 and $815.79 were remitted to the defendant on or about the 19th day of January, 1893, and the said sum of $735 on or about the 20th day of January, 1893, by the said Capital National Bank, which, on said respective days, deposited and delivered the same in the United States mail, in letters addressed to the defendant, in the usual and accustomed course of business, and before said Capital National Bank had suspended payment or stopped business, and before it was taken charge of by the receiver; that the said sum of $5000 was remitted to the defendant on or about the 19th day of January, 1893, by the Packers' National Bank, and the said sum of $2000 was remitted to this defendant by the Schuster National Bank on or about January 19, 1893, by being by said banks respectively deposited in the United States mail, in letters addressed to the defendant, in the usual course of business, and before the Capital National Bank suspended payment or stopped business, and before it was taken charge of by the receiver. And the answer alleged, on information and belief, that said remittances to it by the Packers' National Bank and the Schuster National Bank respectively were made in virtue of orders and directions previously given to them by said Capital National Bank on or about January 18, 1893, in the usual course of business between them and the Capital National Bank.

A replication was filed and evidence put in on behalf of the respective parties. It was stipulated that the Capital National

Bank continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893; that the ordinary mail time between Lincoln, Nebraska, and the city of New York is fifty hours; between Lincoln and South Omaha, Nebraska, where the Packers' National Bank is situated, is two hours and forty minutes; between South Omaha and New York City, forty-eight hours and thirty-seven minutes; between Lincoln and St. Joseph, Missouri, where the Schuster Hax National Bank is located, is seven hours and twenty-eight minutes, and between St. Joseph and New York City is fifty hours and fifty-five minutes. The complainant put in evidence an account or statement, furnished by the defendant to the complainant, showing the transactions between the Capital National Bank and the Chemical National Bank from January 3, 1893, to January 27, 1893, showing a balance on the last day of $13,317.94, against the Capital National Bank and in favor of the Chemical National Bank.

The complainant likewise put in evidence a draft drawn on January 13, 1893, by the Capital National Bank on the Chemical National Bank for $5000, to the order of T. M. Barlow, cashier; and a protest of said draft for non-payment on January 17, 1893; also a statement of various drafts drawn by the Capital National Bank on the Chemical National Bank, at different times, in favor of third parties, and protested for non-payment on and after January 24, 1893. These protested drafts amounted to $44,264.66.

The defendant called as a witness its cashier, William I. Quinlan, who testified that when the draft for $5000 to the order of T. M. Barlow, cashier, was presented and payment refused, the Capital National Bank had no deposits or funds on deposit with the Chemical National Bank out of which such draft could be paid, and that the account of the Capital National Bank had been overdrawn for some time. The defendant put in evidence a letter dated January 19, 1893, from the Packers' National Bank, enclosing its draft for $5000 on the Fourth National Bank of New York, to be placed to the credit of the Capital National Bank, and letter, dated January

18, 1893, from the Schuster Hax National Bank, enclosing its draft for $2000 on the Chemical National Bank, to the credit of the account of the Capital National Bank.

Further evidence was put in by the respective parties, which it does not seem necessary to state.

On March 16, 1897, after argument, upon the pleadings and proofs, the Circuit Court dismissed the bill of complaint with costs. An appeal was taken from this decree to the Circuit Court of Appeals for the Second Circuit, and on January 31, 1898, that court affirmed the decree of the Circuit Court. And from the decree of the Circuit Court of Appeals an appeal was taken and allowed to this court.

Mr. Edward Winslow Paige for appellant.

Mr. George H. Yeaman for appellee. *Mr. George C. Kobbé* was on his brief.

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

The Capital National Bank of Lincoln, Nebraska, was organized as a banking association under the laws of the United States in June, 1884, and continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893. On January 22, 1893, a bank examiner took possession, and thereafter, about February 6, 1893, a receiver was duly appointed.

The Chemical National Bank of New York, a banking association organized under the laws of the United States and doing business as such in the city of New York, carried on, for some years, a large business intercourse with the Capital National Bank.

The receiver filed the bill in this case, seeking to make the Chemical National Bank account for certain moneys received by it after the suspension of the Capital National Bank.

The nature of the intercourse between the two banks was thus described in a paragraph of the bill:

"Ever since the second day of June, 1884, there have been mutual and extensive dealings between the two banking associations above named, in which each was acting for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof and transmitting accounts of the same, including costs of protest and other expenses, and the Capital National Bank also kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance, after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled."

The complainant's case depends, under the evidence, on an application of the provisions of section 5242 of the Revised Statutes, which is as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt, owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court."

It appears in evidence that on January 18, 1893, the account of the Capital National Bank with the defendant bank was overdrawn to the amount of $84,486.19, and that, by sundry remittances made, the amount overdrawn stood, on January 21, 1893, at the sum of $25,515.32. It further appears that on January 18, 1893, the Schuster Hax National Bank of St.

Joseph, Missouri, remitted by mail $2000 to the defendant for the credit of the Capital National Bank; on January 19 the Packer's National Bank of South Omaha, Nebraska, remitted by mail to the defendant $5000 for the credit and advice of the Capital National Bank; on January 20 the Capital National Bank remitted to the defendant by mail a package of small items amounting to $735 and a package amounting to $2935.60, and on the 21st a similar package amounting to $833.64. On January 23 the defendant received the remittance of $2000 of the 18th, and of $5000, $815.79 and $2935.60 of the 19th, and of the remittance of $735 of the 20th; and on the 24th of January it received the remittance of $833.64. With these remittances credited the account of the Capital National Bank stood, on January 24, 1893, overdrawn $13,317.94.

The claim of the complainant is to recover all the sums received by the defendant bank on January 23 and 24 as having been transferred and received contrary to the statute. The bill of complaint contains no allegation of any act of insolvency prior to January 22, 1893, or of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the statute, or of any payment made with a view to the preference of one creditor to another.

It is true that, in the course of the trial, it appeared that, on the 17th day of January, 1893, the Chemical National Bank refused to pay a check for $5000 drawn on it by the Capital National Bank to the order of T. M. Barlow, and it is contended that such refusal by the Chemical National Bank is to be regarded as an act of insolvency on the part of the Capital National Bank. It is difficult to see any foundation for this contention in the mere fact that the Chemical National Bank refused, on January 17, to make further advances on the credit of the Capital National Bank. Such refusal may have been occasioned by a shortage of money on the part of the bank in New York, and because its funds on that day were needed for other purposes, and was entirely consistent with the absolute solvency of the Nebraska bank.

Nor can a finding that the payments and remittances made to the Chemical National Bank, on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.

In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893.

The view of the courts below was that these payments and remittances were not made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, and our examination of the evidence has led us to the same conclusion.

It remains to consider another proposition very strongly pressed on behalf of the appellant, and that is, that the moneys and checks remitted to the defendant bank which did not reach it till after the bank examiner had taken possession could not, in law, become the property of the defendant bank, but remained part of the assets of the insolvent bank, for which the defendant must account to the receiver, in order that the proceeds may be ratably divided among the creditors.

It is said that the taking possession of the bank by the Comptroller of the Currency is a distinct declaration of insolvency, and cases are cited in which it has been said by this court that the business of the bank must stop when insolvency is declared, *White* v. *Knox*, 111 U. S. 784; and that the state of case, where the claim sought to be offset is acquired after the act of insolvency, cannot sustain such a transfer, because the rights of the parties become fixed as of that time. *Scott* v. *Armstrong*, 146 U. S. 499.

The law is, doubtless, as thus stated, but does it apply to the present case?

It is conceded in his brief by the learned counsel of the appellant that if the drafts and checks had been deposited in the mail pursuant to any agreement, or even if the defendant had known any thing about them, they might have been regarded as the property of the Chemical National Bank as of the date of mailing. But he urges that this was only the case of a bank sending the checks of other parties to its agents for collection and deposit; that it could have sent them to any other agent had it pleased, and that after it had once put them in the mail it could have taken them out again. And queries are put as to which bank would have suffered the loss if the checks had been destroyed in transit, or if they had proved to be worthless.

But here we have the case, not of a casual remittance, but of remittances sent from time to time, and frequently, during a

long course of business between the banks concerned. There may have been no special agreement as to each particular remittance, but there was plainly a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital National Bank, but were to be credited to its constantly overdrawn account.

Whose the loss might be, if the packages were destroyed *in transitu*, or if the checks proved uncollectible, are not questions that concern us now. It is sufficient, for present purposes, to say that the inference is warranted that it was understood between the parties that these remittances were to be made through the mails, and that they were in the nature of payments on general account.

Nor can it be conceded that, except on some extraordinary occasion and on evidence satisfactory to the post office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post office they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the persons to whom they are addressed. *United States* v. *Pond*, 2 Curtis C. C. 265; *Buell* v. *Chapin*, 99 Massachusetts, 594; *Morgan* v. *Richardson*, 13 Allen, 410; *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390.

However, it is not pretended in this case that the checks were destroyed or proved worthless, or that the Capital National Bank either withdrew the remittances or countermanded their delivery.

We think that the courts below well held that, under the facts of this case, the mailing of these checks and remittances was a delivery to the Chemical National Bank, whose property therein was not destroyed or impaired by a subsequent act of bankruptcy.

It is finally urged that, however it may be as to the remittances received through the mail on January 23, 1893, yet that the payment or remittance of $833.64, received on January 24, was a payment made after the declaration of insolvency, and must therefore be accounted for by the defendant bank.

Opinion of the Court.

It is claimed that there was no evidence that this remittance came by mail, and that all there is in the case is the admission by the defendant bank of its receipt of that sum on January 24, 1893.

But it is to be observed that no mention is made in the bill of this particular item, though the other litigated items are specified, and to the latter only was the proof directed. In the absence of evidence as to any other method of transmission, and in view of the fact that all the other payments were made by mail, it would seem to be a reasonable inference that such was the case of this remittance. The record discloses that the cashier of the Chemical National Bank testified in the case. He had furnished the complainant with a statement of the accounts between the banks from January 3, 1893, to January 24, 1893, including this particular item; but he was not cross-examined as to this item. Had he been so examined, a more particular statement in respect to it would have been, no doubt, elicited. It was apparently assumed that the history of this payment did not differ from that of the others; and the effort now made in respect to it seems to be in the nature of an afterthought, too late to permit an explanation.

Upon the whole case, we are of the opinion that the decree of the Court of Appeals was correct, and its decree is accordingly

Affirmed.

Mr. Justice White, Mr. Justice Peckham and Mr. Justice McKenna dissented.

NORTHERN PACIFIC RAILWAY COMPANY *v.* DE LACEY.

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

No. 154. Argued and submitted January 18, 1899. — Decided May 22, 1899.

The right of Flett, under whom De Lacey claims, was a right of preëmption only, which ceased at the expiration of thirty months from the filing of its statement, by reason of the failure to make proof and payment within the time required by law, and it is not necessary, in order that the law shall have its full operation, that an acknowledgment of the fact should be made by an officer in the land office, in order to permit the law of Congress to have its legal effect; and when the defendant settled upon the land in April, 1886, and applied to make a homestead entry thereon, his application was rightfully rejected.

The record shows that at the time of the commencement of this action the railway company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor.

This is an action of ejectment brought by the plaintiff in error against the defendant to recover possession of 160 acres of land situated not far from Tacoma in the State of Washington.

The land lies within the primary limits of the land grant both of the main line of the railroad of plaintiff in error, as definitely located between Portland and Puget Sound, and the Cascade branch, as definitely located between the point where the railroad leaves the main line and crosses the Cascade Mountains to Puget Sound.

It appears from the facts found upon the trial, without a jury, that the plaintiff's predecessor was incorporated under the act of Congress of July 2, 1864, c. 217, 13 Stat. 365, and received a grant of public lands by virtue of section 3 of that act. A further grant was made by virtue of the joint resolution of Congress, adopted May 31, 1870. 16 Stat. 378, Resolution No. 67.

The company surveyed and definitely located the line of its

branch road extending from Tacoma to South Prairie, and on March 26, 1884, filed its map, showing such line of definite location, in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant to the company as defined by this map of definite location, and is within the limits of the grant under the act of July 2, 1864.

The following statement is taken from the finding of facts by the trial judge:

"XII. April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase certain lands which are described in the complaint, under the laws of the United States authorizing the preëmption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the preëmption or homestead laws does not appear.

"XIII. In the fall of 1869 Flett left the land in controversy and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, De Lacey, Flett, et al., before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim; that they told him it was railroad land and that he had lost it; that Flett did not then actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to submit proof under his filing."

"XV. The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

"XVI. September 7, 1887, John Flett submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869.

"XVII. Afterward, under the instructions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Secretary of the Interior. September 28, 1891, the Secretary of the Interior reversed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

"December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff."

"XIX. Flett's declaratory statement was not formally cancelled upon the records until December 23, 1891.

"XX. The defendant is in possession of the land and withholds such possession from the plaintiff."

It also appeared that the railroad company on May 10, 1879, transmitted to the office of the Secretary of the Interior a map showing its relocated line of general route, which map was on June 11, 1879, sent to the Commissioner of the General Land Office by the Secretary for filing, with instructions to withdraw the lands coterminous therewith from sale, preemption or entry for the benefit of the railroad company, and the map was duly filed on that day. The land in controversy is within the line as relocated.

The conclusions of law of the Circuit Court were in favor of the railroad company, and the court held that prior to June 11, 1879, when the map of general route as relocated was filed, and after the abandonment of the land by John Flett, the same was public land of the United States, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, and that from that date (June 11, 1879) the land was reserved from sale,

Counsel for Parties.

preëmption or entry, except by the railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith; that this reservation became effective from and after the receipt of the order of the Commissioner at the United States district land office on July 19, 1879.

Judgment in favor of the plaintiff for the recovery of the possession of the land was duly entered. Upon appeal by the defendant to the Circuit Court of Appeals for the Ninth Circuit, that court reversed the judgment and remanded the cause to the Circuit Court for further proceedings not inconsistent with the views expressed in the opinion of the Court of Appeals. Judgment in accordance with the opinion of that court was subsequently entered by the Circuit Court, dismissing the plaintiff's complaint, and awarding costs to the defendant. This was done under objection of plaintiff, which claimed the right to a new trial, and exception was taken thereto.

It appearing that the plaintiff, the Northern Pacific Railway Company, had subsequently to the hearing acquired the rights of the original plaintiff to the property described in the complaint, it was substituted as plaintiff in this action. A writ of error was then taken to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was affirmed. The plaintiff by writ of error brought the case here for review.

The opinion of the Circuit Judge, given upon the trial of the cause, is reported in 66 Fed. Rep. 450, and that of the Circuit Court of Appeals in 44 U. S. App. 257.

Mr. C. W. Bunn for plaintiff in error. *Mr. James B. Kerr* was on his brief.

Mr. W. H. Pritchard for defendant in error submitted on his brief.

Mr. Solicitor General and *Mr. Assistant Attorney Russell* for the United States submitted on their brief.

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

The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, between Portland and Puget Sound, dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, 292.

At the time of the adoption of the resolution of 1870 there had been filed, April 9, 1869, in the local land office the statement of John Flett, declaring his intention to purchase the lands in dispute under the laws of the United States authorizing the preëmption of unoffered lands, and that entry being unforfeited and uncancelled, operated to except the lands from that grant. We may therefore confine our attention to the grant under the act of July, 1864, and the subsequent proceedings which relate to that grant.

At the time of the passage of that act the United States owned the land in question as public land, and as to that land it had, as specified in the third section thereof, "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights," and no portion of this land had at that time been "granted, sold, reserved occupied by homestead settlers, or preëmpted, or otherwise disposed of." On the 26th of March, 1884, the plaintiff had filed its map of definite location in the office of the Commissioner of the General Land Office, which map embraced the land in controversy.

The filing of such a map of definite location of a railroad determines the right of the railroad company to the land under the land grant acts of Congress. *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629; *Sioux City &c. Company* v. *Griffey*, 143 U. S. 32, a grant similar in its nature to the one under consideration.

If there had been a preëmption claim at the time of the passage of the act of 1864, the land would not have passed under that grant. *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535.

Opinion of the Court.

It is contended that at the time (March 26, 1884) when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a preëmption claim, and the defendant maintains that under the case of *Whitney* v. *Taylor*, 158 U. S. 85, the land described in that declaratory statement was excepted from the grant to the railroad company, and that the company therefore never acquired title to the land by filing its map of definite location under the grant contained in the act of 1864.

The learned judge, in delivering the opinion of the Circuit Court of Appeals in the case at bar, quoted the following language from the opinion of this court in *Whitney* v. *Taylor*, 158 U. S. 85, 92.

"That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard."

The Circuit Judge then stated that the controlling fact in this case was "that at the time of the definite location of the plaintiff's road, opposite which the land in controversy is situated, there was on the record of the local land office Flett's declaratory statement which had not been altered, amended, cancelled or set aside; and that fact operated to except the land in respect to which the claim existed from the grant to the railroad company."

The single question in this case is, therefore, whether the proceedings in the case of Flett were of such a nature as to prevent the grant to the company under the act of 1864 from taking effect at the time of the filing of its map of definite location, March 26, 1884.

The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands. If at that time (1870) certain claims had been filed against this land by reason of which it was excepted from the grant of 1870, such fact has no bearing upon the provisions of the act of 1864, at which time there was no claim upon this land, and if none existed when the map of definite location was filed in 1884, the grant included the land. The assertion that when the grant of 1864 was made there was a preëmption claim in existence is not borne out in law or fact by asserting the existence of such a claim when the grant of 1870 was made, and that by operation of that resolution the grant of 1864 was so amended as to exclude that land. It was not excluded. The fact that no claim existed at the time the act of 1864 was passed remained notwithstanding the adoption of the resolution of 1870, and the question therefore still recurs whether in 1884, when the map of definite location was filed, there was any claim upon this land which excepted it from the grant by virtue of the act of 1864.

It is well to examine the statutes relating to the right of preëmption under which the declaratory statement of Flett was filed in order to determine the rights, if any, which he had at the time when the company's map of definite location was filed.

That statement, filed by Flett in 1869, was to the effect that he intended to purchase the land which he described, "under the laws of the United States, authorizing the preëmption of unoffered lands." By the term "unoffered lands" is meant those public lands of the United States which have not been

offered at public sale. By section 3, chapter 51, of the act of Congress making further provision for the sale of public lands, approved April 24, 1820, c. 51, 3 Stat. 566, the price for which public lands should be offered for sale after the first day of July, 1820, was fixed at $1.25 an acre, and it was provided that at every public sale the highest bidder, who should make payment as prescribed, should be the purchaser, but no land was permitted to be sold at either public or private sale for a less price than $1.25 an acre; and it was further provided in that section that "All the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception," etc.

After the passage of this act the public lands came to be spoken of as "unoffered lands," or those which had not been exposed to public sale, and "offered lands," or those which had been so exposed and remained unsold, and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. *Johnson* v. *Towsley*, 13 Wall. 72, 88.

By the act approved September 4, 1841, c. 16, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," 5 Stat. 453, there was granted, by the tenth section thereof, to every person being the head of a family, etc., "who since the first day of June, A.D. eighteen hundred and forty, has made or who shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office

for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions," etc.

By this section it will be seen that the right of preëmption was extended equally to unoffered and offered lands.

By section 14 it was provided, however, that the selection of unoffered lands should not delay the sale of such lands beyond the time which might be appointed by the proclamation of the President, nor should the provisions of the act be available to any person who should fail to make the proof and payment and file the affidavits required, under section 13 of the same act, before the day appointed for the commencement of the sales.

In regard to the so-called offered lands, it was provided by section 15 of the act as follows:

"SEC. 15. *And be it further enacted*, That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

The result of the passage of this act was to grant the right to preëmpt 160 acres of either offered or unoffered land, and

that as to the unoffered lands the filing of a preëmption declaratory statement was not required, and the right of the preemptor to make due proof and payment remained until the time fixed by the proclamation of the President for the public sale of lands, at which time (if the proper proof and payment had not been made) the lands might be offered and sold to the highest bidder, and if not sold they would become subject to private entry by the first applicant at the minimum price. As to the offered lands, the right of the preëmptor was dependent upon his filing a declaratory statement in the local office, as stated in section 15 of the act above quoted.

By the fifth section of the act approved March 3, 1843, c. 86, 5 Stat. 619, it was provided that settlers under the preemption act of 1841, upon unoffered land, should "make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has already been made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice and otherwise complied with the conditions of the law."

Taking these two acts of 1841 and 1843 and reading them together, it is seen that there was a difference between unoffered and offered lands by reason of the fact that on unoffered lands the right or privilege to secure land by a preëmption filing continued up to the commencement of the public sale whenever that might be, and if that right or privilege had not been exercised and the land was offered at public sale and not sold, it then became subject to private entry by the first applicant, while on offered lands the right or privilege to secure them by a preëmption filing continued for twelve months after the date of the settlement, and if the preëmptor failed to file the declaratory statement or make the proper affidavit within the twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Congress by an act approved May 20, 1862, c. 75, 12 Stat. 392, provided for the sale of public lands for homesteads, and since that time the practice of disposing of the public lands at public sale has gradually been abandoned, although the authority remained. The abandonment of these public sales resulted in giving to those who had made preëmption filings upon unoffered land an uncertain time within which to prove or complete their proof and payment, because their time lasted until the day of the public sale proclaimed by the President. As these public sales were abandoned, the result was that these claimants were not under any obligation to make proof and payment at all.

By the second section of the act approved July 14, 1870, c. 272, 16 Stat. 279, it was provided that "all claimants of preëmption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage of this act, said preëmptors shall have one year after the passage hereof in which to make such proof and payment."

That act was amended by resolution No. 52, approved March 3, 1871, 16 Stat. 601, by which twelve months in addition to that provided in the act were given to claimants to make proof and payment. Adding the twelve months given by this resolution to the eighteen months given by the act of 1870, all claimants of preëmption rights were given thirty months to make the proper proof and payment for the lands claimed.

These various provisions are found in the United States Revised Statutes from section 2257 to and including section 2267, the latter section giving the thirty months as stated.

We thus find that since 1871 all claimants of preëmption rights lost those rights by operation of law, unless within thirty months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed. The filing of their declaratory statement,

and the record made in pursuance of that filing became without legal value if within the time prescribed by the statute proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and if they were not so made the original claim was cancelled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and cancelled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancellation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is a most effective cancellation.

In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that an acknowledgment of the fact should be made by an officer in the land office. The law is not thus subject to the act or the omission to act of that officer.

The case of *Whitney* v. *Taylor*, 158 U. S. 85, cited in the opinion of the Circuit Court of Appeals as decisive of the case at bar, we think has not the effect given to it by the learned court below. The land in that case was within the granted limits of the grant to the Central Pacific Railroad Company by the act of July 1, 1862, c. 120, 12 Stat. 489. That company filed its map of definite location March 26, 1864. It was held that the tract being subject to the preëmption claim of one J., at the time when the grant to the railroad company took effect, was excepted from the operation of that grant. It was subject to the claim of J. because in May, 1857, he had filed his statement, paid the fees required by law, and the filing was duly entered in the proper government record; and at that time, as has been seen by the above review of the stat-

utes, there was no period within which a preëmptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President. The tract in dispute had not been so offered at the date of the definite location of the road, and it was held that J.'s time to make proof and payment had not expired at the time of the filing of the map of definite location, and that consequently his was an existing claim of record at that date.

The citation from the opinion of the court in *Whitney* v. *Taylor* shows that the statement was made with reference to that important and material fact; that it was an existing claim on the part of the claimant at the time of the filing of the map of definite location. Whether that claim were an enforceable one or whether there were facts which when brought to the attention of the Government might induce it to cancel it, or the fact that the Government might at its own suggestion cancel the claim, were held not to affect the question. The material fact that it was an existing claim was the fact upon which the case was decided.

In this case, such fact does not exist. There was no existing claim at the time of the filing of the map of definite location by the plaintiff herein. It had expired and become wholly invalid by operation of law. The thirty months had expired years before the filing of this map.

In *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, 388, it was stated in the course of the opinion that there were "other questions in this case, such as the significance of an *expired filing*," which were not considered by the Supreme Court of the State or noticed by counsel, and which were left for consideration thereafter. This shows that the case of *Whitney* v. *Taylor* was not regarded by the court, or by the justice who wrote the opinion therein, as having a controlling bearing upon the question as to the effect of an expired filing under circumstances such as are developed in this case.

If claims which were of such a nature as to be described as "existing" were made in regard to any of the lands which

otherwise might be included in the grant to the railroad company, we reiterate what was said in the *Dunmeyer case*, that it is not conceivable that Congress intended to place those parties, the railroad company and the various claimants to the land, in the attitude of contestants, with the right in each to require proof from the other of complete performance of its obligations. On the contrary, we would say that if there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant. This has been decided as lately as *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620. In the case under consideration there was, at the time of the filing of the map of definite location, no claim within the meaning of the statute.

The right of Flett, obtained by the filing of his statement, was the right of preëmption only. In other words, the right of purchase before any other person, and by the law of Congress that right ceased at the expiration of thirty months from the filing of that statement. Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed. After the filing of a statement and while the time is running within which to make proof, there is an inchoate right on the part of the preëmptor which the Government recognizes, as in *Frisbie* v. *Whitney*, 9 Wall. 187.

It was held in *Johnson* v. *Towsley*, 13 Wall. 72, 90, that in case the preëmptor failed to file his declaration of intention within three months from the time of settlement, as provided for in the fifth section of the act of 1843, c. 86, 5 Stat. 619, 620, he nevertheless would have the right after the expiration of the three months, being in possession, to then make and file his declaration, provided no other party had made a settlement or had given notice of his intention to make one and no one would be injured by the delay. But the case is far from holding that after the declaration has been filed and the time in which to prove up and make pay-

ment upon his claim has wholly expired, the claim nevertheless still exists in sufficient force to prevent the transfer of title to the company under the act of Congress, simply because the officer of the land office has failed to perform a mere ministerial duty by cancelling of record a claim which has really ceased to exist by operation of law. A claim is not an existing one where by the record it appears that the right to make proof and payment has expired under the terms of the statute.

It appears that it has not been the practice of the Interior Department to enter any formal cancellation of an expired preëmption filing upon the books of the office; its practice has been to take no action concerning them. They have simply been treated as abandoned claims. *State of Alabama*, 3 L. D. 315, 317.

Reference is made in the briefs to the circular of Commissioner Drummond, dated September 8, 1873, in which he says:

"By the operation of law limiting the period within which proof and payment must be made in preëmption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

And again in the circular of November 8, 1879, the Commissioner said:

"Where application is made by a railroad company to select lands on which preëmption filings have heretofore been made and cancelled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

The effect given by the land department to what is termed an "expired filing" of the nature of the one in suit has not been uniform. It was in substance held in some cases that such expired filing amounted to a claim within the meaning

of the statute, and that the land did not pass under the grant to the railroad company. *Emmerson* v. *Central Pacific Railroad Company*, 3 L. D. 117; same case on motion for a rehearing, 3 L. D. 271; *Schetka* v. *Northern Pacific Railroad Company*, 5 L. D. 473; *Allen* v. *Northern Pacific Railroad Company*, 6 L. D. 520; *Fish* v. *Northern Pacific Railroad Company*, 21 L. D. 165; same case on motion for a rehearing, 23 L. D. 15. On the other hand, we have been referred to the cases of *Northern Pacific Railroad Company* v. *Stovenour*, 10 L. D. 645; *Meister* v. *St. Paul &c. Railroad Company*, 14 L. D. 624; *Union Pacific Railroad Company* v. *Hartwich*, 26 L. D. 680; *Wight* v. *Central Pacific Railroad Company*, 27 L. D. 182; *Central Pacific Railroad Company* v. *Hunsaker*, 27 L. D. 297. The last two cases cited touch the question very remotely, if at all.

The latest decision of the land office to which our attention has been called is that of *Union Pacific Railroad Company* v. *Fisher*, decided February 1, 1889. 28 L. D. 75. In that case the Secretary refers to the cases which have been cited above, holding that an expired filing excepted the land from a grant to the railroad company, and he gives his reasons for the decisions of the department in those cases, which he thinks render them not altogether in conflict with the other decisions of the department.

Although these decisions are somewhat inharmonious, it would seem that the practice of the department not to enter as cancelled an expired filing has been uniform, and the record has been left to speak for itself.

For the reasons which we have already given, we think it was unnecessary to enter the cancellation on the record of the office in order to permit the law of Congress to have its legal effect. That effect should not be dependent upon the action or non-action of any officer of the land department. When no proof and no payment have been made within the time provided for by the law, the record will show that fact, and that the right of the claimant has expired and the claim itself has ceased to exist.

A case of this kind, which simply necessitates a reference

to the record to ascertain whether the filing had expired and with it the rights of the claimant, differs from the case where a filing may have become subject to cancellation; but the record does not show it, and the right to cancel depends upon evidence to be found *dehors* the record. In such case, while the facts might invalidate the claim, yet as they are not of record and require to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancellation had taken place or some other act done legally terminating the existence of the claim.

Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the act of 1864, and that years before the time of the filing of the map of definite location in 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title to the land passed to the railroad company by virtue of the grant contained in the act of 1864 and by reason of the filing of its map of definite location March 26, 1884. When, therefore, the defendant settled upon the land in April, 1886, and applied to make homestead entry thereon, his application was rightfully rejected for the reason that title to the land had passed to the railroad company, as above mentioned, and therefore he was not entitled to make the entry.

For the same reason, when John Flett, in September, 1887, submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869, (and which claim he had abandoned since 1870,) he was too late. His right had expired many years before 1884, at which time the right to the land passed to the company, and he had no right to prove up on his abandoned and expired claim.

The record shows that at the time of the commencement of this action the railroad company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor, and the courts below erred in dismissing its complaint.

Syllabus.

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit is reversed, and the case remanded to the Circuit Court for the Western Division, District of Washington, for further proceedings not inconsistent with the opinion of this court.

Mr. Justice Harlan and Mr. Justice McKenna dissented.

McMULLEN *v.* HOFFMAN.

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

No. 271. Argued April 27, 28, 1899. — Decided May 22, 1899.

The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe line, Hoffman of Portland and McMullen of San Francisco entered into a contract in writing as follows: "This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom. And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike." Both put in bids for the work which forms the subject of dispute in this case. Hoffman's bid was for $465,722. McMullen's was $514,664. There were several other bids, but Hoffman's was the lowest of all. The contract was awarded to him. He did the work and received the pay. This

Statement of the Case.

action was brought by McMullen to recover his portion of the profit, according to the contract. *Held*, that this contract was illegal, not only as tending to lessen competition, but also because the parties had committed a fraud in combining their interests and concealing the same, and in submitting the different bids as if they were *bona fide*, and that the court will not lend its assistance in any way towards carrying out the terms of an illegal contract, nor will it or any court enforce any alleged rights directly springing from such a contract.

While distinguishing *Brooks* v. *Martin*, 2 Wall. 70, from this case, the court holds that, taking that case into due consideration, it will not extend its authority at all beyond the facts therein stated.

This action was originally brought by the complainant McMullen against one Lee Hoffman, and he having died before the trial, the action was revived against the defendant Julia E. Hoffman, as the executrix of his will. When the defendant is hereinafter spoken of, the original defendant is intended.

The complainant filed his bill against the defendant, seeking an accounting of profits that he alleged had been made by the defendant upon a certain contract for the construction of what is termed the Bull Run pipe line, and which contract was entered into between the city of Portland, in the State of Oregon, and the defendant on or about March 10, 1893. The complainant bases his right to share in the profits of that contract by virtue of another contract in writing between himself and the defendant herein, executed March 6, 1893. That agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid:

Statement of the Case.

"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom.

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike.

"Witness our hands and seals this 6th day of March, A. D. 1893.

"JOHN McMULLEN. [SEAL.]
"LEE HOFFMAN. [SEAL.]"

The contract for manufacturing and laying the steel pipe was awarded to the defendant at a public letting of the whole work at Portland, of which the manufacturing and laying of the pipe was a part, and the whole work was divided into classes, and separate bids called for and received for each class.

The defendant put in bids in the name of Hoffman & Bates for several classes, while the plaintiff, in the name of the San Francisco Bridge Company, (of which he was an officer,) put in separate bids for the same classes.

The bids of complainant and defendant for the several classes of the work were as follows:

Conduit from head works to Mount Tabor of wrought iron or steel, making and laying pipe:

Hoffman & Bates	$465,722 00
San Francisco Bridge Company	514,664 00

(The profits arising out of this contract are the subject of the controversy herein.)

Head works—

Hoffman & Bates	$17,800 00
San Francisco Bridge Company	16,550 00

Bridges—

Hoffman & Bates	$33,562 94
San Francisco Bridge Company	31,279 07

Also for steel conduit for head works to Mount Tabor—

Hoffman & Bates	$359,278 00
San Francisco Bridge Company	348,781 00

There were several other bids by different bidders for these various classes. The bid in the name of Hoffman & Bates for the manufacture and laying of the wrought iron or steel pipe from the head works to Mount Tabor being $465,722, was the lowest out of eight bids, the various bids from the highest to the lowest being as follows:

The Risdon Iron & Locomotive Works	$600,737 00
The Bullon Bridge Company	533,507 00
Oscar Huber	521,775 40
San Francisco Bridge Company	514,664 00
Wolff, Buener & Zwicker	495,682 00
Ferry Hinckle & Robert Wakefield	481,040 00
E. W. Jones & O. W. Wagner	477,552 00
Hoffman & Bates	465,722 00

All these bids were before the committee on the part of the city and were taken into consideration at the time the award was made to the defendant. After the acceptance of his bid for the manufacturing and laying of the pipe, the defendant entered into a contract with the city of Portland to do the work mentioned in such bid, and commenced the performance of the contract as provided for therein. The work was duly completed and the city paid defendant the contract price for the same, retaining the percentage provided for therein, as security that the terms of the contract had been fully complied with.

The complainant alleges that defendant, after securing the contract, went on with the work thereunder, but refused to permit him to participate in the profits arising therefrom or to examine the books of the partnership, and that although he (complainant) furnished some of the capital and performed

some of the services provided for in the contract with the city, and participated in some of the expenses of the execution of the contract, and devoted some of his time and attention to the proper performance thereof, and was at all times ready to do everything required of him by his agreement of partnership, yet that the defendant received all the moneys paid by the city and absolutely refused to account to him for any part thereof, and denied that he had any interest in or right to any portion of such moneys. The complainant, therefore, asked for an accounting between himself and defendant, as partners, and for a decree for the payment to him of one half the profits arising from the contract, the whole of which he alleged amounted to $80,000, (the courts below say the evidence shows they were $140,000;) that a receiver might be appointed to take charge of the property of the partnership, its records, books, papers, etc., and that the defendant might be restrained during the pendency of the suit from making sale or other disposition of the tools, equipment or other personal property belonging to the partnership, and from drawing from the city of Portland the moneys withheld by it on account of the contract, as well as any other money due for other work done by the defendant under the contract of partnership.

The answer of the defendant, while denying many of the allegations of the complaint, set up as a special defence the making of an agreement between the parties, (of which the partnership agreement was a portion,) by the terms of which they were to put in bids for the construction of the work, the complainant in the name of the San Francisco Bridge Company and the defendant in the name of Hoffman & Bates; that the bids should not be in reality competitive, but should be submitted to each other before they were put in, and their terms should be mutually agreed upon, the higher bids to be merely formal, and the bids themselves as agreed upon should be delivered to the water committee; that if either party received the contract, they should both share in the profit or loss resulting from its performance, but that their mutual interest in each other's bids should not be made known when the bids were offered, so that it would appear that they were apparently

competing for the various classes of the work and for furnishing the material, when in fact they were not. This agreement, the defendant alleged, was carried out, and the contract secured by means thereof.

The court upon motion of the complainant granted a temporary injunction as prayed for in the bill. Exceptions were taken to certain parts of the answer of the defendant as being insufficient. Material portions of these exceptions were overruled by the court upon the ground that the answer set up an illegal contract between the parties, and one which could not be enforced by either. 69 Fed. Rep. 509.

Upon the final hearing of the case the same judge, becoming convinced that he had erred in his former decision in overruling the exceptions to the answer, decided that the case as made on the part of the defendant showed no defence to the complainant's cause of action, and thereupon he made a decree for an accounting substantially as asked for in the complainant's bill. 75 Fed. Rep. 547.

An appeal from the decree of the Circuit Court was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and that court held that the contract between the parties was illegal, and that no action could be maintained thereon by either, and the decree in favor of the complainant was therefore reversed. 48 U. S. App. 596. Complainant then applied to this court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, which was granted May 9, 1898. 170 U. S. 705.

Mr. L. B. Cox and *Mr. William A. Maury* for petitioner. *Mr. R. Percy Wright* was on their brief.

Mr. Rufus Mallory for respondent.

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

The foregoing statement shows that there is a difference of opinion in the courts below as to the law applicable to the

case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract and upon the right of the complainant to obtain redress for his alleged wrongs.

It was on account of the general importance of the question and the many lettings for public works by the Government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and so far as possible to remove the doubts which seemingly have arisen in this branch of the law.

Looking in the record before us, we find that the pleadings and proofs taken herein show that for some time prior to the 6th of March, 1893, the city of Portland intended to add to its water supply by bringing to the city the water from a creek or river called Bull Run, some thirty miles distant, and for that purpose it had issued through its water committee proposals for bids to build the works, which proposals were divided into several different classes as already stated.

The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and

all bids were to be put in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly $50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a *bona fide* bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, viz., that relating to the partnership, was reduced to writing, and is set out in the foregoing statement.

Upon these facts the question arising is whether a contract between the parties themselves such as is above set forth is illegal? In order to answer the question we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a *bona fide* bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid thus made

amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. The fact that there were other bids even higher than that of the San Francisco Bridge Company, for the manufacture and laying of the pipes, does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in the fact of an active competition and the *bona fide* character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been.

The natural tendency and inherent character of the agreement are also unaffected by any evidence produced on the part of the complainant, that the chairman of the water committee had, when examined nearly three years after the occurrence, no recollection as to the bid of the bridge company or that it had any particular effect upon his mind, and that he said that the contract was awarded to the lowest bidder simply because he was the lowest bidder, and without reference to the bid of the bridge company.

The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made between the parties; and that tendency

or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made. The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of a *bona fide* character, the more the committee would be impressed with the idea that there was active competition for the work to be done.

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural.

In *Richardson* v. *Crandall*, 48 N. Y. 348, 362, the court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate," citing *Atcheson* v. *Mallon*, 43 N. Y. 147.

Although these remarks were made when the court was dealing with the case of a bond taken *colore officii*, yet the principle applies equally to a case like the one at bar, and indeed it is seen that such was the view of the judge delivering the opinion, since he cited *Atcheson* v. *Mallon*, which in its nature is a case very similar to the one now before us.

The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.

In *Tool Company* v. *Norris*, 2 Wall. 45, 56, the court said, in speaking as to illegal agreements:

"It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution."

And in *Rex* v. *De Berenger*, 3 M. & S. 67, 72, cited in *Scott* v. *Brown*, (1892) 2 Q. B. D. 724, 730, Lord Ellenborough, C. J., said:

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them.

In the case at bar the illegal character of the agreement is founded not alone upon the fact that it tends to lessen competition, but also upon the fact of the commission of a fraud by the parties in combining their interests and concealing the same, and in submitting different bids as if they were *bona fide*, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. The tendency of such agreements is bad, although in some particular case it might be difficult to show that it actually accomplished a fraud, while its intention to do so would be plain enough. Therefore, when it is urged that these parties had no intention of bidding for this work alone, and that unless they had combined their bids neither would have bid at all, and hence the agreement between them tended to strengthen instead of to suppress competition, this answer to

the illegality of the transaction is insufficient. The evidence, however, does not show that if these parties had not agreed upon a combination neither would have bid alone. It shows the complainant came to Portland to see the defendant and to conclude their arrangements to go into the combination, but we are by no means of the opinion that the evidence shows that if they had not combined they would not have bid at all. Complainant's company had bid alone at a prior letting, some time before, and had then been the lowest bidder for the contract, which the city did not award because of a lack of means of payment for the work consequent upon a veto by the governor of the bill providing for the issuing of bonds to make such payment. And it seems that the defendant himself was well able to carry on the contract alone.

If it be granted that the fact was proved that neither party would have bid separately, and that by virtue of the combination a bid was made which otherwise would not have been offered, the significance of the other facts in the case is not thereby altered. Those other facts are the concealment of the interest which the parties had in each other's bids, and the making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement.

The reason given for the making of these fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light.

Opinion of the Court.

Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is to but carry into effect the public policy upon which the rule itself is founded. People who have been guilty of the conduct exhibited in this record cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because the bids show they were the lowest bidders. The bids might have been lower yet if there had been competition where there was in fact combination. The parties must accept the consequences resulting from entering into the agreement proved in this case, all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves.

In *Hyer* v. *Richmond Traction Company*, 168 U. S. 471, in

speaking as to the character of the agreement in that case, Mr. Justice Brewer remarked that the vice of a combination "lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse, but in fact friendly, source."

In that case the demurrer admitted the allegation of the complaint that the combination of the two interests asking for the concession from the common council was known and announced to that body before its decision was made. The case simply shows the part which concealment takes in a combination, being in fact one of the great dangers springing therefrom.

In *Atcheson* v. *Mallon*, 43 N. Y. 147, 151, Judge Folger, in delivering the opinion of the court, said:

"But a joint proposal, the result of honest coöperation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and, where no concealment is practised and the fact is known, there may be no ground whatever for judging it to be in any manner improper.

But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect

good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

The evidence shows that this written partnership agreement was only a part of the entire agreement existing between the parties. That agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. The agreement (of which that for a partnership was but a portion) was that they should combine their interests; that they should put in bids known to each; that they should conceal the fact of their combination; that they should put in fictitious bids without expectation or purpose of having them taken; that if the contract were procured they should perform the work as partners and share expenses and divide profits. No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties, can be made. The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the

contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol.

Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.

There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman.* It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th ed. 94, note *n;* 9 Law Quarterly Review, (London) pp. 105–197.)

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

Opinion of the Court.

The following are only a few of the numerous cases upon the subject in England and in this country: *Holman* v. *Johnson*, (1775) 1 Cowper, 341; *Booth* v. *Hodgson*, (1795) 6 T. R. 405; *Thomson* v. *Thomson*, (1802) 7 Ves. 468; *Shiffner* v. *Gordon*, (1810) 12 East, 296; *Sykes* v. *Beadon*, (1879) L. R. 11 Ch. Div. 170; *Scott* v. *Brown*, (1892) 2 Q. B. D. 724; *Belding* v. *Pitkin*, (1804) 2 Caines, 147*a*; *Atcheson* v. *Mallon*, (1870) 43 N. Y. 147; *Leonard* v. *Poole*, (1889) 114 N. Y. 371; *Wheeler* v. *Russell*, (1821) 17 Mass. 258, 281; *Snell* v. *Dwight*, (1876) 120 Mass. 9; *Marshall* v. *Baltimore & Ohio Railroad Co.*, (1853) 16 How. 314, 334; *McBlair* v. *Gibbes*, (1854) 17 How. 232; *Coppell* v. *Hall*, (1868) 7 Wall. 542; *Trist* v. *Child*, (1874) 21 Wall. 441, 448; *Woodstock Iron Company* v. *Richmond & Danville Extension Co.*, (1888) 129 U. S. 643; 1 Lindley on Partnership, 5th ed. 93, note, giving the result of the American cases.

The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.

If the partnership agreement that is contained in the writing above set forth is in truth but part of an entire agreement, which contains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him without resorting to the contract, the court will permit a recovery in such case. The cases cited as illustrating the exception are, among others, *Tenant* v. *Elliott*, (1797) 1 Bos. & Pul. 2; *Farmer* v. *Russell*, (1798) 1 Bos. & Pul. 295; *Sharp* v. *Taylor*, (1849) 2 Phil. Ch. 801, 817;

Armstrong v. *Toler*, (1826) 11 Wheat. 258, 269; *McBlair* v. *Gibbes*, *supra*, 17 How. 232, 235; *Brooks* v. *Martin*, (1863) 2 Wall. 70; *Planters' Bank* v. *Union Bank*, (1872) 16 Wall. 483; *Armstrong* v. *American Exchange National Bank of Chicago*, (1889) 133 U. S. 433, 466.

Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. *Booth* v. *Hodgson*, 6 T. R. 405, 408; *Thomson* v. *Thomson*, 7 Ves. 468; *Embrey* v. *Jemison*, 131 U. S. 336, 348.

In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord Kenyon, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff "That if the whole case were disclosed to the court there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

Mr. Justice Ashhurst, in the same case, said: "The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover."

Mr. Justice Grose said: "We cannot decide on a part of the case; and taking the whole together, an assumpsit cannot be raised from one part of the case when the other parts

of it negative an assumpsit." The defendant therefore had judgment.

In *Thomson* v. *Thomson*, *supra*, the plaintiff was not permitted to recover, because he had no claim to the money except through the medium of an illegal agreement. The Master of the Rolls (Sir William Grant) said: "If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party; for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it. I must therefore dismiss the bill."

And in *Embrey* v. *Jemison*, *supra*, although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice Harlan, in delivering the opinion of the court, said that the plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected

with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defence he makes is not allowed for his sake, but to maintain the policy of the law," citing *Coppell* v. *Hall*, 7 Wall. 542, 558.

In the latter case Mr. Justice Swayne, delivering the opinion of the court, said:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance, which it was not necessary for plaintiff to prove.

The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action being founded on some new consideration, or upon a contract collateral to the original illegal one.

In *Tenant* v. *Elliott*, *supra*, it was held that where two persons had entered into an illegal contract in regard to insurance, and a loss having occurred, the insurer paid the money to a third person to be paid to plaintiff, the third person could not himself retain the money because it arose out of an illegal contract. Eyre, Chief Justice, asked, "Whether he who had received the money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him?"

In such case clearly the defendant had nothing whatever to do with the illegality of the original contract. He received

the money to be paid to another, and when he received it for that purpose he promised, either expressly or by implication arising from the facts, that he would deliver the money to the plaintiff, and when he refused to do it the plaintiff could recover upon this express or implied contract, without resorting in any manner to the original contract between himself and another, which in its nature was illegal, but with which the defendant was in nowise concerned.

Farmer v. *Russell*, *supra*, is to the same effect. The defendant received the money from a third person to deliver to the plaintiff, and it was held that he was bound to pay it to the plaintiff, although the original consideration upon which the money was to be paid the plaintiff by the third person was illegal. Eyre, Chief Justice, said:

"It seems to me that the plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* in law arises, and on that an action on the case may be maintained. . . . The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract; for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz., that he was lending his assistance to an infamous traffic. In that case, the rule *Melior est conditio possidentis* will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a court of law."

The verdict in this case had been for the defendant.

There was a question in the case whether the defendant was privy to the contract between the plaintiff and the man at Portsmouth. The goods transported were counterfeit pennies or half-pence, and it was the opinion of Eyre, Chief Justice, that if the defendant had been privy to the original illegal agreement so that the whole thing was but one transaction, the plaintiff could not have recovered. Mr. Justice Rooke was of opinion that it was not important whether the defendant were privy or not; that if the contract were illegal, the plaintiff could not recover from the defendant in any event. The other two judges were of opinion that the money having been delivered to the defendant for the purpose of being paid to the plaintiff, the defendant was bound to make such payment without reference to the illegality in the original transaction.

The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defence in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defence of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise to pay the plaintiff, would have no possible defence to an action by the plaintiff to compel such payment. Such an action is in no sense founded upon an illegal contract. That matter was closed when the party

owing the money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character.

The next case cited by complainant as an authority for the maintenance of this action is *Sharp* v. *Taylor*, *supra*. It was stated by the Chancellor in that case that where one of two partners had possessed himself of the property of the firm, he could not be allowed to retain it by merely showing that in realizing it some provision of some act of Parliament had been violated or neglected or that some provision of a foreign statute relating to the registry of vessels had not been complied with.

Lord Chancellor Cottenham, in the course of his opinion, said:

"The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a Parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in

Tenant v. *Elliott* and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*. But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell* v. *Innes*. The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one: assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defence to Sharp's claim. Upon these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right."

These observations show that the judgment did not go upon the illegality arising from a mere violation or neglect of a provision of an act of Parliament relating to vessels, and the agreement was not classed among those contracts which are of such an illegal nature that courts refuse to enforce them. Some of the observations of the Chancellor, made by way of illustration regarding the rule itself, have been since doubted by the English courts, as in the case of *Sykes* v. *Beadon*, *supra*, where Jessel, Master of the Rolls, in holding that an illegal contract could not be enforced by one party to it as against the other, directly or indirectly, said that there were several dicta of Lord Cottenham's in *Sharp* v. *Taylor*, which he thought were not good law, and the Master of the Rolls remarked:

"It is no part of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

Continuing, the Master of the Rolls observed:

"Then Lord Cottenham goes on, in *Sharp* v. *Taylor*, to say: 'Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant* v. *Elliott* and *Farmer* v. *Russell*,

and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*.' Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to an illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp* v. *Taylor* in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it directly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it."

Sharp v. *Taylor* should not be carried at all beyond the facts of the case as set out in the report.

In *McBlair* v. *Gibbes*, *supra*, the question was in relation to the validity of an assignment by an assignor of his interest in an illegal contract. The payment of the money arising therefrom had been, subsequently to the assignment, provided for by the party owing it, and the dispute arose between the representatives of the assignor and those of the assignee as to which were entitled to the share originally due to the assignor. It was claimed on the part of the representatives of the assignor that the original contract being illegal, the sale and assignment of an interest therein from him to the assignee was also illegal, and consequently that such interest, equitable or legal, passed to the assignor's executors. Mr. Justice Nelson, however, in delivering the opinion of the court, said:

"But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver (the as-

signee) was not a party to these transactions, nor in any way connected with them. It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfilment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defence, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfilment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."

What is meant by a collateral contract or a cause of action arising therefrom, which does not require reference to the principal illegal contract or transaction, is still further illustrated in *Armstrong* v. *Toler*, 11 Wheat. 258. In the course of his opinion Mr. Chief Justice Marshall assumed the facts to be that the plaintiff, during a war between this country and Great Britain, contrived a plan for importing goods on his own account from the country of the enemy, and goods were also sent to B by the same vessel. The plaintiff, at the request of B, became surety for the payment of the duties which accrued on the goods of B and was compelled to pay them, and the question was whether he could maintain an action on the promise of B to return this money, and the

court held that such an action could be sustained. The court said:

"The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted."

And again: "The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation."

And at page 274: "In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction."

The case of *Armstrong* v. *American Exchange Bank*, *supra*, is similar to the cases of *Tenant* v. *Elliott* and *Farmer* v. *Russell*, and was decided upon the same principle.

Counsel for the complainant also refer to a case where a plaintiff had let his horse to the defendant on Sunday, and the defendant had injured the horse by his recklessness and negligence, and a recovery against him was had for the damages

occasioned by such negligence, notwithstanding the illegality of the contract of hiring, because in violation of the law relating to the Sabbath day. *Hall* v. *Corcoran*, 107 Mass, 251.

In that case the court held the cause of action was not founded upon the contract, but the defendant was held liable by reason of his improper and neglectful conduct in regard to the horse in his possession, and which conduct was a violation of the legal duty he owed to the owner of such horse, irrespective of contract. The case was a clear instance of a proper recovery based upon collateral facts, and not founded upon any original illegal contract.

The same principle was held in *Welch* v. *Wesson*, 6 Gray, 505, as the damage done plaintiff by the wilful act of defendant in running into him with his sleigh had nothing to do with the race they were engaged in.

To the same effect is *Woodman* v. *Hubbard*, 5 Foster, [N. H.] 67. The act of damage to the horse upon which the liability rested was not connected with or part of the illegal Sunday hiring.

We think it clear that these cases cited as authority for a recovery in this case upon the ground of completion of the illegal contract or of a new contract upon a good consideration, do not touch the case before us, with the possible exception of *Sharp* v. *Taylor*, *supra*, and that case ought not to be extended.

In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was illegal. The partnership part of the agreement cannot be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he cannot separate his cause of action from the illegal part, and claim a recovery upon the written portion providing for and evidencing the partnership.

We come now to a consideration of the two cases upon which the counsel for the complainant specially rely for the maintenance of this action. They are *Brooks* v. *Martin*, 2 Wall. 70, and *Planters' Bank* v. *Union Bank*, 16 Wall. 483. Of the

two cases, *Brooks* v. *Martin* is the more like this one, although the cases are by no means precisely similar. The partnership in that case was stated by the court, in its opinion, to have been really engaged, probably with the full knowledge of all its members, in dealing in soldiers' claims long before any scrip or land warrants were issued by the Government and contrary to the ninth section of the act of February 11, 1847, providing for the granting of land warrants to be issued to the soldiers.

The main object of the ninth section of the act was, as the court stated, to protect the soldiers against improper contracts of the precise character of those shown in the record. It was further said that the traffic for which this partnership was formed was illegal, and that if a soldier who had sold his claim to these partners had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it or give them any relief against it; or if one of the partners, after the signing of the articles, had said to the other, "I refuse to proceed with this partnership because the purposes of it are illegal," the other partner would have been entirely without remedy. And if, on the other hand, one of the partners had said, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance, according to your contract," the other partner might have refused to comply with such demand, and no court would have given either of the partners any remedy for such refusal.

The court further stated that upon the facts existing, all the claims purchased by the partner having been turned into land warrants and the warrants having been sold or located, and where the purchase of the claim had been made prior to the date of the warrant, assignments having been subsequently made by the soldiers, and the portion of the lands located having been sold partly for cash and partly on mortgage, and the assets of the partnership consisting then almost wholly of cash securities or of lands; — all these facts appearing, the partner in whose possession the profits of the partnership

were could be compelled to account by the other partner, and that the fact that such partner had given a release procured from him by fraud was no bar to his action for such an accounting.

The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands; and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The wrong originally done or intended to the soldier had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts, and could not be affected by any action which the court might take. The cases of *Sharp* v. *Taylor*, *Tenant* v. *Elliott*, *Farmer* v. *Russell*, *Thomson* v. *Thomson* and *McBlair* v. *Gibbes* were cited as authority for the proposition.

We have already adverted to each of them, and we admit it is quite difficult to see how, with the exception of *Sharp* v. *Taylor*, the principle upon which they were decided could be applied to the case then before the court.

There is a difference between the case before us and that of *Brooks* v. *Martin*, because in the latter case the fact existed that the transactions, in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated. We think it should not control the decision of the case now before us.

Opinion of the Court.

In *Planters' Bank* v. *Union Bank*, *supra*, Confederate bonds had been sent by one party to the other for sale, and the bonds had been sold by such party as agent of the plaintiff and their price paid to such agent of the party selling, and the court held that an action would lie to recover the proceeds of that sale thus paid to the plaintiff's agent, although no suit could have been maintained by plaintiff against the purchaser for the purchase price of the bonds, because their sale was an illegal transaction. But when the purchase price of the bonds was paid, it certainly did not rest with the person who received the money upon an express or implied promise to pay it over to set up the illegality of the original transaction. When the bank received the funds, there was raised an implied promise to pay them to their owner, and a recovery could be sustained upon the same ground taken in *Tenant* v. *Elliott* and the other cases above mentioned.

It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

We must, therefore, come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defence is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal

contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them.

The judgment of the Circuit Court of Appeals was right, and must be

Affirmed.

UNITED STATES *v.* DUDLEY.

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

No. 103. Argued April 19, 1899. — Decided May, 22, 1899.

Sawed boards and plank, planed on one side and grooved, or tongued and grooved, should be classified under the tariff act of August 28, 1894, 28 Stat. 508, as dressed lumber, and admitted free of duty.

THIS case originated in a petition filed in the Circuit Court of the United States for the District of Vermont, for the review of a decision of the board of general appraisers to the effect that certain imports made by the petitioner into the port of Newport, of "sawed boards and plank, planed on one side, tongued and grooved," and entered as "dressed lumber," were not entitled to be admitted free of duty as "sawed boards, plank, deals and other lumber, rough or dressed," under the tariff act of August 28, 1894.

In June, 1895, Dudley imported from Canada eight carloads

of boards and plank, planed on one side and grooved, or tongued and grooved. The collector imposed a duty of twenty-five per cent upon this lumber as a "manufacture of wood," under paragraph 181 of the tariff act of August 28, 1894, c. 349, 28 Stat. 509, 521, which reads as follows: "House or cabinet furniture, of wood, wholly or partly finished, manufactures of wood or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The importer protested, claiming that they should have been imported free of duty as "dressed lumber" under paragraph 676.

The board of general appraisers sustained the action of the collector, and the importer filed this petition for review in the Circuit Court, which reversed the decision of the board. On appeal by the United States to the Circuit Court of Appeals, where the cause was heard by two judges, who were divided in opinion, the judgment of the Circuit Court was affirmed.

Whereupon the United States applied for and were granted a writ of certiorari from this court.

Mr. Assistant Attorney General Hoyt for the United States.

Mr. C. A. Prouty for Dudley.

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

The imports in this case were eight carloads of spruce boards and plank, planed on one side, and tongued and grooved. They varied from one to three inches in thickness; from four to eleven inches in width, and from twelve to twenty feet in length. Some were "butted to exact lengths." They were prepared for use by what is known as a "flooring machine," which is a combination of a simple planing machine with a matching — or tonguing and grooving — machine. Some of the smaller mills use separate machines for planing and matching, the combination machine seeming to be of comparatively

recent origin. The boards were adaptable for flooring, ceiling, sheathing, etc.

They were assessed for duty under paragraph 181 of the tariff act of August 28, 1894, which imposed a duty of twenty-five per cent ad valorem upon "house or cabinet furniture, of wood, wholly or partly finished, manufactures of wood or of which wood is the component material of chief value, not specially provided for in this act."

Upon the other hand, the importer insisted that they should have been admitted free of duty under paragraph 676, which exempts "sawed boards, plank, deals and other lumber, rough or dressed," except certain lumber of valuable cabinet woods.

Forty-seven witnesses were examined before the board of general appraisers, twenty-three of whom testified that lumber which had been planed, grooved, tongued or beaded was still "dressed lumber," even when finally shaped for the carpenter to put together in roofing, flooring, ceiling, etc., and twenty-four testifying, in substance, that the term was only applicable to such as had been merely planed upon one or both sides, and brought to an even thickness. It was admitted by witnesses upon both sides that in ordering such articles the term "dressed lumber" would not sufficiently describe them, and that they were usually ordered by description or by their specific designation, as flooring, etc.

Ordinarily, the fact that an article in the process of manufacture takes a new name is indicative of a distinct manufacture, as was intimated in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, but we do not think it important in this case that "dressed lumber" is divisible into flooring, sheathing and ceiling, since sawed lumber is none the less sawed lumber, though in its different forms and uses it goes under the names of beams, rafters, joists, clapboards, fence boards, barn boards and the like. In other words, a new manufacture is usually accompanied by a change of name, but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one

thing only. So long as "dressed lumber" is in a condition for use for house and ship building purposes generally, it is still "dressed lumber;" but if its manufacture has so far advanced that it can only be used for a definite purpose, as sashes, blinds, mouldings, spars, boxes, furniture, etc., it becomes a "manufacture of wood." It follows that the words "flooring, ceiling, sheathing," do not under this act describe a new manufacture, but rather the different purposes for which sawed lumber may be used. It is much like the commercial division of lumber into "selects, common and culls," which are all lumber, but of different qualities. None of these are in reality new names, but merely specifications of the more general term "lumber." Indeed a manufacturer receiving an order for lumber could not possibly fill it to the satisfaction of his customer, without knowing the purpose for which it was designed, or the quality desired.

The fact that "dressed lumber" is ordered under the names of flooring, ceiling, sheathing, does not indicate that it is not still "dressed lumber," but rather that it is of a quality or width specially adapted to those purposes. Had it been of a particular quality, width and thickness, and sawn into lengths which would make it usable only for the manufacture of boxes, perhaps it might be termed a "manufacture of wood" for the purposes of this act. It is true that the lumber in question was in a condition to be used for flooring without further manufacture, except such reductions in length as the dimensions of the room might require; but it was also usable for ceiling, sheathing and for similar purposes with no further alterations. Had it so far been changed as to be serviceable for only one thing, it is possible that it might be regarded as a separate and independent manufacture, though under the case of *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, this may admit of some doubt. But while lumber planed upon one or both sides may be "dressed lumber," we think that when tongued and grooved it is still "dressed lumber," and not a new and distinct manufacture. In other words, that tonguing and grooving is an additional dressing, but it does not make it a different article. Lumber treated in this

way is still known in the trade as lumber; advertised as lumber; handled as lumber; shipped as lumber; bought and sold by the thousand feet like lumber.

We also think that some light upon the proper construction of the words "manufacture of wood" in paragraph 181 is afforded by the fact that it is used in connection with "house or cabinet furniture of wood, wholly or partly finished," and is followed by the words "or of which wood is the component material of chief value." This would indicate an article "made up" of wood analogous to furniture or other article in which wood is used alone or in connection with some other material. It seems to us quite clear that it could not have been intended to apply to lumber which had only passed beyond the stage of planed lumber by being tongued and grooved.

Upon the facts of the present case we are of opinion that the imports in question should have been classified as "dressed lumber," and the judgment of the Circuit Court of Appeals is therefore

Affirmed.

LOUISVILLE TRUST COMPANY *v.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

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

No. 263. Argued April 24, 1899. — Decided May 22, 1899.

The New Albany Railway Company, whose road was in several States, guaranteed bonds of a Kentucky railway company to a large amount. It attempted by suit to avoid this guarantee as *ultra vires*. Its contention was sustained by the Circuit Court, but that decree was reversed by the Circuit Court of Appeals, and this court has sustained that decision. After the decision of the Circuit Court of Appeals, Mills, a creditor of the company, commenced suit in the Circuit Court of the United States. The company appeared and confessed judgment, and execution was issued and returned unsatisfied. Thereupon the creditor filed a bill praying for the

Statement of the Case.

appointment of a receiver for the entire road, and that the court would administer the trust fund, and order the road sold, and the proceeds from the sale divided among the different creditors according to their priority. The New Albany Company admitted the allegations of the bill, and interposed no objections, whereupon a receiver was appointed. These proceedings took place on the same day. Subsequently proceedings were commenced at different times for the foreclosure of different mortgages, all of which suits were consolidated. Then the Trust Company, as holder of some of the guaranteed bonds, intervened. Then a decree of foreclosure was entered, and a sale ordered, made and confirmed. Then the Trust Company filed another intervening petition, charging that Mills' proceedings had been procured by the New Albany Company for the purpose of hindering and delaying the general or unsecured creditors in the enforcement of their debts, and praying that the decree of foreclosure might be set aside, and other prayers. This was denied, and a sale was ordered. An appeal by the Trust Company to the Circuit Court of Appeals resulted in the affirmation of the decree below. The proceedings being brought here on certiorari, it is *Held* that, under the circumstances as presented by this record, there was error; that the charge of collusion was one compelling investigation, and that the case must be remanded to the Circuit Court, with instructions to set aside the confirmation of sale; to inquire whether it is true, as alleged, that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both, and destroy the interests of unsecured creditors; and that, if it shall appear that such was the agreement between these parties, then to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved.

The facts in this case are as follows: The Louisville, New Albany and Chicago Railway Company, hereinafter called the New Albany Company, in 1889 and 1890 placed a guarantee upon $1,185,000 of the first mortgage bonds of a Kentucky railroad corporation. In April, 1890, the New Albany Company, guarantor, commenced a suit in the Circuit Court of the United States for the District of Kentucky against divers parties claiming to hold such bonds, to have the guarantee declared void. In 1894 that court rendered a final decree, sustaining its contention, and adjudging the guarantee *ultra vires* and void. 69 Fed. Rep. 431. From that decree the holders of the guarantee bonds appealed to the Circuit Court of Appeals for the Sixth Circuit, which, in June, 1896, reversed the decree of cancellation, and held the guarantee binding. 43

U. S. App. 550. On application of the New Albany Company the case was then removed on certiorari to this court, and at the time of the proceedings hereinafter referred to was still undecided. Judgment therein has since been entered sustaining the guarantee. *Louisville, New Albany and Chicago Railway Company* v. *Louisville Trust Company*, *ante*, 552.

After the decision in the Circuit Court of Appeals, and on August 24, 1896, one John T. Mills, Jr., commenced an action in the Circuit Court of the United States for the District of Indiana, alleging that he was a creditor of the New Albany Company to the amount of $494,911.35. That company appeared and confessed judgment, and an execution was issued and returned unsatisfied. Whereupon Mills filed his bill of complaint in the same court, based upon this unsatisfied execution, and praying the appointment of a receiver. The bill set forth the property belonging to the judgment debtor, the New Albany Company, alleged that its capital stock amounted to $16,000,000, of which $7,000,000 was preferred; that its outstanding funded debt, divided into five classes, amounted to $7,700,000 in six per cent bonds, and $6,100,000 in five per cent bonds. The bill also alleged the existence of a floating debt, amounting to nearly $1,000,000, consisting of outstanding notes and other obligations, held by the complainant and other *bona fide* creditors. It then set forth the guarantee of the bonds of the Kentucky railroad company, the proceedings in court by which the guarantee had been sustained, and averred that the officers of the defendant company reported a diminution of current earnings by reason of a short wheat crop and lessened traffic, and that it would be impracticable to realize from the earnings after the payment of operating expenses, taxes and rentals a sum sufficient to pay the shortly accruing mortgage interest. The bill also alleged many matters, among others the fact that the lines of the New Albany Company were in three different States and subject to the jurisdiction of different courts, which seemed to justify the taking possession of the property by a receiver to prevent its dismemberment or any disturbance of its continued operations as a common carrier. The prayer of the bill was:

"Inasmuch, therefore, as the complainant has no adequate remedy at law for the grievances hereinbefore stated and can only have relief in equity, he files this bill of complaint in behalf of himself and all others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany and Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments, executions or levies, this court will forthwith appoint a receiver for the entire railroad. . . . That the court will fully administer the trust fund, in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation, and ascertain the several liens and priorities existing upon the said system of railways or any part thereof, and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens and equities of each and all of the creditors of the said Louisville, New Albany and Chicago Railway Company, as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to, not only the said line of railroad, appurtenances and equipment, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem proper and as may be necessary to

further enforce the rights and equities of the complainant and all other creditors of such corporation."

The New Albany Company appeared by its general solicitor, filed its answer admitting the material allegations of the bill and interposing no objections; whereupon the court made an order appointing as receiver a gentleman who was the vice president of the company and its general manager. The order of appointment was in the ordinary form of such orders.

All of these proceedings, including the filing of the original complaint, the confession of judgment, the issue and return of the execution, the filing of the bill and the appointment of a receiver, took place on the same day, to wit, August 24. Up to this time there had been no default in any of the interest due on the several series of bonds. On November 12, 1896, the trustees in one of the mortgages, one executed May 1, 1890, filed a bill of foreclosure, alleging default in the payment of interest on November 1, 1896. On the same day the trustee in another mortgage, dated January 1, 1896, filed a similar bill, alleging default on October 1, 1896. On November, 24, 1896, the court, on application of the receiver, entered an order authorizing the receiver to borrow $200,000 on receiver's certificates, payable out of the earnings, and expend the same in the construction of new bridges, the repair of freight cars and engines, the ballasting and making new alignment of track, and the equipment of engines and cars with air brakes and automatic couplers. What action was taken under this order is not disclosed in the record, although the final decree provided for payment in advance of the bonds "of any indebtedness of said receiver which has not been or shall not be paid out of the earnings and income of the property coming into the hands of said receiver." On the 14th day of December, 1896, the trustee in a mortgage executed September 1, 1894, commenced foreclosure, alleging default on December 1, 1896. On the 21st of December, 1896, an order of consolidation was made of these several foreclosure suits.

On the 23d of January, 1897, the petitioner, the Louisville

Trust Company, filed its petition asking generally to be admitted to appear in the suit and to take such steps and proceedings in its own behalf as it might deem necessary, which petition was sustained, and leave granted accordingly. This petition alleged the indorsement heretofore referred to of the bonds of the Kentucky railway company by the New Albany Company, that it, the petitioner, was the holder of $125,000 of those bonds, and had obtained a decree adjudging the validity of the guarantee.

On the same day the various parties to the foreclosure suits having all appeared and filed so far as was necessary answers admitting the allegations of the bills, a decree was entered foreclosing the three mortgages in suit and directing a sale of the property.

On February 27, 1897, the Louisville Trust Company filed a full intervening petition, verified by affidavit, setting forth the guarantee of the Kentucky bonds, its ownership of $125,000 of them, the decree of the Court of Appeals and the certiorari obtained from this court by the New Albany Company, the proceedings in the action instituted by John T. Mills, Jr., in respect to which it alleged that "the said J. T. Mills, Jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value whereof is unknown to your petitioner. And your petitioner charges that the proceedings in behalf of the said John T. Mills, Jr., were procured by the said New Albany Company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to ascertain or to bring into court the assets, which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors." It then set forth the filing of the foreclosure bills, the entry of the decree of foreclosure, and alleged "that prior to the entry of the said decree the

holders of the bonds secured by the mortgages to the Farmers' Loan and Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany and Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination and reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

It also alleged that the New Albany Company was formed by consolidation, and that one of the consolidating companies was a corporation of Illinois and had its property in that State; that it had no power to enter into such consolidation, as had been decided by the Supreme Court of that State, and therefore that the mortgages executed by the New Albany Company and which were being foreclosed were not liens upon so much of its property as had belonged to the Illinois corporation and was situated in that State. It also claimed that under the provisions in the mortgages there had been no such default as justified a foreclosure, and prayed as follows:

"Wherefore, your petitioner prays that the decree of foreclosure and sale heretofore entered in this cause be set aside, that the pretended consolidations herein mentioned be adjudged void, and that the said mortgages before mentioned be declared to be invalid; that this cause be referred to a commissioner to ascertain and report what assets of the said New Albany Company are embraced by any liens, and what are not so included, and the amounts and descriptions thereof; and that, among other things, the master be directed to ascer-

tain what portion of the capital stock has not been paid for, and the amounts due thereon; and that the receiver herein be directed to take steps to enforce the collection of any amounts due to the said company; that due and proper advertisement be given for the proof of debts, and that said master be directed to ascertain and report the names of the creditors herein and the amounts of debts due to them; that it be adjudged that the said master ascertain what net earnings have accrued, and shall hereafter accrue, from the operation of the said railway in the hands of the receiver, and that the amount thereof be adjudged and declared to be a fund to be distributed among the general and unsecured creditors of the said company; and that all such other and further proceedings be had for the sale of the assets of the said company and the distribution thereof, according to law and the rights of the parties."

On the 9th of March, 1897, its petition was denied. On the 10th of March a sale was made by the master appointed therefor, and on the same day his report thereof was filed and the sale confirmed. An appeal was taken by the Louisville Trust Company to the Court of Appeals of the Seventh Circuit, which appeal was argued on the 16th day of November, 1897. On the 5th of January, 1898, the decree of the Circuit Court was affirmed. 56 U. S. App. 208. Whereupon application was made to this court, and the proceedings were brought before it by certiorari.

Mr. Swagar Sherley and *Mr. St. John Boyle* for the Louisville Trust Company.

Mr. Adrian H. Joline for the Louisville, New Albany and Chicago Railway Company. *Mr. Herbert B. Turner*, *Mr. George W. Kretzinger* and *Mr. E. C. Field* were on his brief.

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

The questions in this case are novel and important. They

arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosures of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. Other parties, although claiming rights in antagonism to both or either mortgagor and mortgagee, may be considered outside the scope of the foreclosure, and whatever rights they may have may properly be relegated to independent suits.

But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. These conclusions, while they to a certain extent ignored the positive promises of contract and recorded obligations, were enforced in obedience to equitable and public considerations. We refer to these matters not for the sake of reviewing those decisions, but to note the fact that foreclosure proceedings of mortgages covering ex-

tensive railroad properties are not necessarily conducted with the limitations that attend the foreclosures of ordinary real estate mortgages.

We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. While exceptional cases may occur, yet this is the rule, as shown by the actual facts of foreclosure proceedings, as well as one which might be expected from the value of the property and the amount of the mortgage.

We may not shut our eyes to any facts of common knowledge. We may not rightfully say that the contract of mortgage created certain rights, and that when those rights are established they must be sustained in the courts, and no inquiry can be had beyond those technical rights. We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. We do not stop to inquire, because the question is not presented by this record, whether a court is justified in permitting a foreclosure and sale which leaves any interest in the mortgagor, to wit, the railroad company and its stockholders, and ought not always to require an extinction of all the mortgagor's interest and a full transfer to the mortgagee, representing the bondholders. Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor, (that is, bondholder and stockholder,) we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors

and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.

Now, the intervening petition of the petitioner, duly verified, directly charged that the foreclosure proceedings were for the benefit alone of bondholder and stockholder and under an agreement between the two for a sale and purchase for both, and with a view of thereby excluding from any interest in the property all unsecured creditors; that this agreement was entered into after and in consequence of the decree of the United States Court of Appeals adjudging the New Albany Company liable on its guarantee. If that fact be true would it not be, and we quote the language of the Court of Appeals, "a travesty upon equity proceedings"? Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of the mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated.

Beyond the positive and verified statement of the petition of the Louisville Trust Company are many facts appearing in the record which strongly support this allegation. That a corporation whose stock consists of $16,000,000, $7,000,000 of which is preferred stock, all of which must be expected to be wiped out if a mortgage interest of $13,800,000 is fully asserted, hastens into court and confesses judgment on an alleged un-

secured liability; on the same day responds to an application for a receiver and assents thereto; makes no effort during the receivership to prevent default in interest obligations; tacitly, at least, consents to an order made on application of the receiver for the issue of $200,000 worth of receiver's certificates, in aid of betterments on the road, when the same sum might have paid the interest and delayed the foreclosure; when foreclosure bills are filed not only makes no denial, but admits all the averments of mortgage obligation and default — in other words, seems a debtor most willing to have all its property destroyed, and this because of one short wheat crop; these matters suggest, at least, that there is probable truth in the sworn averment of the petitioner that all was done by virtue of an agreement between mortgagee and mortgagor (bondholder and stockholder) to preserve the relative interests of both, and simply extinguish unsecured indebtedness. When, in addition to this fact, it appears that these proceedings are initiated within a few days after a decree of the Circuit Court of Appeals — a decree final unless brought to this court for review in its discretion by certiorari; that a large amount of unsecured indebtedness was by that decree cast upon the mortgagor, we cannot doubt that such a condition of things was presented to the trial court that it ought, in discharge of its obligations to all parties interested in the property, to have made inquiry and ascertained that no such purpose as was alleged in the intervening petition was to be consummated by the foreclosure proceedings.

It is said by the appellee that the Louisville Trust Company was dilatory, and that by reason thereof it was not entitled to consideration in a court of equity. There is some foundation for this contention, and yet there was not such delay as justified the court in refusing to enter upon an inquiry. Indeed, it does not appear that either the Circuit Court or the Circuit Court of Appeals considered the petitioner dilatory or denied its application on the ground of delay. It must be borne in mind that the bill of complaint filed on August 24 by one who had that day become, by consent of the defendant, a judgment creditor, was affirmatively "for the purpose of enforcing the

rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities," and to "decree the rights, liens and equities of each and all of the creditors of the said Louisville, New Albany and Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to not only the said line of railroad appurtenances and equipment or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation."

Although this bill was filed in the avowed interest of himself and all other creditors, no action was taken to notify any creditors or to bring them into court to present their several claims. Any creditor might well have waited, even with knowledge of what had taken place, and after an examination of the bill thus filed, until publication or other notice. Whether this petitioner was, in fact, aware of these proceedings is not disclosed. Even if it were, its waiting a reasonable time for what in the ordinary course of procedure all creditors had a right to expect, is not a neglect which destroys its equities. It, and all other creditors, might justly assume that this proceeding was initiated in good faith to subject the property of the common debtor to the payment of all its debts; primarily it may be its secured debts, but also generally all its debts, secured or unsecured, and that whenever it was necessary due notice would be given and all creditors called upon to present their claims. It would not have been justified in treating this proceeding as solely in the interest of the mortgagee and mortgagor, the bondholder and stockholder, and for the purpose of destroying all claims of unsecured creditors.

It is true that the filing of the bills of foreclosure was notice of an intent to subject the property belonging to the mortgagor to the satisfaction of the mortgage. And for the purposes of the present inquiry it may be conceded that the intervening petition disclosed no legal defence to the claims of the mortgagees to foreclosure. In other words, for the inquiry we desire to pursue we shall assume without question that the matters referred to in the petition in respect to the prop-

erty in Illinois, the decision of the Supreme Court of that State and the effect of the attempted consolidation, and all other matters stated or suggested, separately or together, constitute no valid defence to the foreclosure bills. But this foreclosure proceeding did not either directly or by suggestion disclose any purpose to protect the mortgagor, the stockholder, at the expense of unsecured creditors. And, as heretofore stated, this unsecured creditor was not bound to presume that there was any such purpose in the minds of the two parties to the foreclosure. So that its failure to intervene at the first instant cannot be fatal delay or neglect.

It is also true that no evidence was offered by the petitioner in support of the allegations of its petition, but it is not true that in revising and reversing the final action of the Circuit Court we are acting on mere suspicion, or disturbing either settled rules or admitted rights. The allegations of this intervening petition as to the wrong intended and being consummated were specific and verified. The delay, under the circumstances, was not such as to deprive the petitioner of a right to be heard. The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner, it was the duty of the trial court to have stayed proceedings, and given time to produce evidence in support of the charges. Taking them as a whole, they are very suggestive, independent of positive allegation; so suggestive, at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it.

We cannot shut our eyes to the fact that one claiming to be a general creditor for nearly half a million of dollars commences proceedings to establish his right, which, by the consent of the debtor, result on the very day in a judgment, execution and return thereof unsatisfied, a bill for a receivership and the appointment of a receiver; and yet notwithstanding this was initiated in support of this large claim, as well as for the protection of other unsecured creditors, shortly thereafter foreclosure proceedings are instituted and carried on to completion, which absolutely ignore the rights of this alleged

unsecured creditor, and leave as the result of the sale himself, the actor who has brought on the possibility of foreclosure, stripped of all rights in and to the mortgaged property. Was he a real creditor, and did that real creditor make a generous donation of this large claim? Were arrangements made with him and the stockholders to protect both, and by virtue of such arrangements was this foreclosure hastened to its close? Questions like these which lie on the surface of these proceedings cannot be put one side on the suggestion that they present only matter of suspicion.

It is no answer to these objections to say that a bondholder may foreclose in his own separate interest, and, after acquiring title to the mortgaged property, may give what interest he pleases to any one, whether stockholder or not, and so these several mortgagees foreclosing their mortgages, if proceeding in their own interest, if acquiring title for themselves alone, may donate what interest in the property acquired by foreclosure they desire. But human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers. It is one thing for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure. The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor.

We may observe that a court, assuming in foreclosure proceedings the charge of railroad property by a receiver, can never rightfully become the mere silent registrar of the agree-

ments of mortgagee and mortgagor. It cannot say that a foreclosure is a purely technical matter between the mortgagee and mortgagor, and so enter any order or decree to which the two parties assent without further inquiry. No such receivership can be initiated and carried on unless absolutely subject to the independent judgment of the court appointing the receiver; and that court in the administration of such receivership is not limited simply to inquiry as to the rights of mortgagee and mortgagor, bondholder and stockholder, but considering the public interests in the property, the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.

While not intending any displacement of the ordinary rules or rights of mortgagor and mortgagee in a foreclosure, we believe that under the circumstances as presented by this record there was error; that the charge alleged positively, and supported by many circumstances, of collusion between the bondholder and the stockholder, to prevent any beneficial result inuring by virtue of the decree of the Circuit Court of Appeals for the Sixth Circuit in reference to the guarantee obligations of the New Albany Company, was one compelling investigation, and the order will, therefore, be that the decrees of the Circuit Court and of the Circuit Court of Appeals be reversed and the case be remanded to the Circuit Court, with instructions to set aside the confirmation of sale; to inquire whether it is true as alleged that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors; and that if it shall appear that such was the agreement between these parties, to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved, and to take such other and further proceedings as shall be in conformity to law.

Decree accordingly.

Mr. Justice Peckham dissented.

UNITED STATES *v.* RIO GRANDE DAM AND IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 215. Argued November 7, 8, 1898. — Decided May 22, 1899.

The river, Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream; but every State has the power, within its dominion, to change this rule, and permit the appropriation of the flowing waters for such purposes as it deems wise: whether a Territory has this right is not decided.

By acts of Congress referred to in the opinion, Congress recognized and assented to the appropriation of water in contravention of the common law rules; but it is not to be inferred that Congress thereby meant to confer on any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States.

The act of September 19, 1890, c. 907, on this subject, must be held controlling, at least as to any rights attempted to be created since its passage.

On May 24, 1897, the United States, by their Attorney General, filed their bill of complaint in the district court of the third judicial district of New Mexico against the Rio Grande Dam and Irrigation Company, the purpose of which was to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico, and appropriating the waters of that stream for the purposes of irrigation. A temporary injunction was issued on the filing of the bill. Thereafter, and on the 19th day of June, 1897, an amended bill was filed, making the Rio Grande Irrigation and Land Company, Limited, an additional defendant, the scope and purpose of the amended bill being similar to that of the original. The amended bill stated that the original defendant was a corporation organized under the laws of the Territory of New Mexico, and the new defendant a corpora-

tion organized under the laws of Great Britain. It was averred that the purpose of the original defendant, as set forth in its articles of incorporation and as avowed by it, was to construct dams across the Rio Grande River in the Territory of New Mexico at such points as might be necessary, and thereby "to accumulate and impound waters from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches and pipe lines." The new defendant was charged to have become interested as lessee of or contractor with the original defendant. The bill further set forth that the new defendant "has attempted to exercise and has claimed the right to exercise all the rights, privileges and franchises of the said original defendant, and has given out as its objects as said agent, lessee or assignee, as aforesaid, to construct said dams, reservoirs, ditches and pipe lines and take and impound the water of said river, and thereby to create the largest artificial lake in the world, and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power;" "that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos River, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Conchos River, throughout almost its entire course from the latter part to its mouth, flows through an exceedingly porous soil, and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico, is so dry that the evaporation proceeds with great rapidity, and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river." The bill also averred that the Rio Grande River was navigable and had been navigated by steamboats from its mouth three hundred and fifty miles up to the town of Roma, in the State of Texas; that it

was susceptible of navigation above Roma to a point about three hundred and fifty miles below El Paso, in Texas, and then, after stating that there were certain rapids or falls which there interfered with navigation, it alleged navigability from El Paso to La Joya, about one hundred miles above Elephant Butte, the place at which it was proposed to erect the principal dam, and that it had been used between those points for the floating and transportation of rafts, logs and poles. The bill further alleged "that the impounding of the waters of said river by the construction of said dam and reservoir at said point, called Elephant Butte, about one hundred and twenty-five miles above the city of El Paso, said point being in the Territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned, will so deplete and prevent the flow of water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth." Then, after denying that any authority had been given by the United States for the construction of said dam, it set forth the treaty stipulations between the United States and the Republic of Mexico in reference to the navigability of the Rio Grande, so far as it remained a boundary between the two nations.

To this amended bill the defendants filed their joint and several pleas and answer. The pleas were principally to the effect that the site of the proposed dam was wholly within the Territory of New Mexico, and within its arid region; that in pursuance of several acts of Congress the Secretary of the Interior and the officers of the Geological Survey had located and segregated from the public domain a reservoir site called "38" on the river just above Elephant Butte, and another called "39" just below that point; that subsequently, in pursuance of another act of Congress, these and all other reservoir sites were thrown open to corporate and private entry; that the original defendant had applied to enter the two sites, "38" and "39;" that it was incorporated under the laws of New Mexico and had complied with all the laws

of that Territory in reference to the construction of reservoirs and dams and the diversion of waters of public streams; that it had duly filed proof of its organization, its maps of survey of reservoir and canals, with the Secretary of the Interior, and had secured his approval thereof in accordance with the laws of the United States. The answer admitted incorporation, the purpose to construct a dam and reservoir at Elephant Butte, and then proceeded, "but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same, has long since been diverted and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights, and that neither one of the defendants is seeking or has ever sought to appropriate or divert by means of structures above referred to, or contemplated diversion by means thereof, of any of the waters of said Rio Grande usually flowing in the bed thereof during the time when the same are usually put to beneficial use by those who have heretofore diverted the same; but on the contrary these defendants state that it has been their intention, and their sole intention, by means of the structures which they contemplate and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used and owned by others, and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now unappropriated, useless and which go to waste."

The answer also denied that the river was susceptible of navigation, or had been navigated above Roma, in the State of Texas, or had been used beneficially for the purposes of navigation in the Territory of New Mexico, or was susceptible

of being so used; that the contemplated use of the waters would deplete the flow thereof through the channel so as to seriously obstruct the navigability of the river at any point below the proposed dam; that defendants were proposing to construct a dam and reservoir without due process of law, or that the contemplated dam and reservoir would be a violation of our treaties with Mexico. The United States filed a general replication. Defendants moved to dissolve the temporary injunction, while the Government moved to have the several pleas set down for argument as to their sufficiency as a defence. Several affidavits and documents were filed by the respective parties. On July 31, 1897, the matters came on for hearing, whereupon the court entered a decree, which recited that the parties appeared by their counsel "under the rule heretofore made upon the defendant, Rio Grande Dam and Irrigation Company, to show cause, if any it had, why the injunction, heretofore granted, restraining it from maintaining and erecting a dam in the Rio Grande River at a point called Elephant Butte, fully described in the original and amended bills, filed herein and in said order, should not be continued; and the said complainant, the United States of America, having filed an amended bill in said cause, making the Rio Grande Irrigation and Land Company, Limited, a party thereunder, and the said defendant, in answer to said amended bill, having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein, and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defence to said suit as a matter of law, and the court having heard the arguments of counsel and having read the affidavits, extracts from geological reports, agricultural reports, reports of engineers and of the Secretary of War, histories and other sources of information, and having had submitted to it an official map of the Territory of New Mexico and of the United States of America, showing the source, trend, course and mouth of the Rio Grande River in New Mexico and throughout the United States and being

fully advised thereby, doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill and that the same is without equity and the complainant having further declined to amend said bill: The court doth order, adjudge and decree, that the said injunction, heretofore issued herein, be dissolved and that said cause be, and the same hereby is, dismissed, and that the defendants have and recover their reasonable costs herein to be taxed against complainant."

An appeal was taken to the Supreme Court of the Territory, which, on January 5, 1898, affirmed the decree. From this affirmance the United States appealed to this court.

Mr. Attorney General for appellant.

Mr. J. H. McGowan for appellee.

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

The first question is as to the scope of the decision of the trial court and what is, therefore, presented to us for consideration. Was this a final hearing upon pleadings alone, with all the facts alleged in the answer admitted to be true, or a final hearing upon pleadings and proofs with the decree in effect finding the truth of those facts? Without stopping to inquire whether the record shows a strict compliance with the technical rules of equity procedure, we think the terms of the final order or decree, as well as the language of the opinion filed by the trial judge, clearly disclose what he decided, and what, therefore, is presented to this court for review. It appears that no depositions were taken. Certain affidavits and documents were filed, matter proper for presentation on an application for the continuance or dissolution of a temporary injunction. The final order or decree enumerates

the different motions, and adds that the court having heard the arguments of counsel and having read the affidavits, etc., "doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill, and that the same is without equity, and the complainant having further declined to amend said bill," the injunction is dissolved and the bill dismissed.

Obviously, the only matter of fact which the court attempted to determine (and that determination appears to have been based partly upon the affidavits and documents filed and partly upon judicial notice) was that the Rio Grande River was not navigable within the limits of the Territory of New Mexico, and, so determining, it adjudged and decreed that the complainant's bill was without equity. In other words, finding that the Rio Grande River was not navigable within the limits of the Territory of New Mexico, and that the averments of the bill in that respect were not true, it held that, conceding all the other averments of the bill to be true, the plaintiff was not entitled to relief.

The Supreme Court of the Territory, as appears from its opinion, held that the Rio Grande River was not navigable within the limits of the Territory of New Mexico; that, therefore, the United States had no jurisdiction over the stream, and that, assuming its non-navigability within the limits of the Territory, the plaintiff was not, under the other facts set forth in the bill, entitled to any relief. Whatever criticisms may be expressed as to the form in which the proceedings were had and the decree entered, these distinctly appear as the matters decided by the trial and Supreme Courts, and to them, therefore, our inquiry should run.

The trial court assumed to take judicial notice that the Rio Grande was not navigable within the limits of New Mexico. The right to do this was conceded by the counsel of the Government, on the hearing below, a concession which the Attorney General, on the argument before us, declined to

continue. The extent to which judicial notice will go is not, in all cases, perfectly clear. There are indisputably certain matters as to which there is a legal imputation of knowledge. In Greenleaf on Evidence, secs. 4, 5 and 6, the author enumerates many of these. Further, he adds as a general proposition: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." *Brown* v. *Piper*, 91 U. S. 37. While this will undoubtedly be accepted as an accurate statement of the law, it is obvious that there might be, and in fact there is, much difficulty in determining what ought to be generally known. So that the application of this rule has, as might be expected, led to some conflict in the authorities.

It was said in *The Apollon*, 9 Wheat. 362–374: "It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions." In *Peyroux* v. *Howard et al.*, 7 Pet. 324, the court held that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place." In *The Montello*, 11 Wall. 411–414, it was observed: "We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States." But the force of this general statement is qualified by the declaration at the close of the opinion: "As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading."

This case came again to this court, 20 Wall. 430, and the record there discloses that testimony was introduced on the second hearing for the purpose of throwing light on the question of navigability.

In *Wood* v. *Fowler*, 26 Kansas, 682–687, the Supreme Court of that State said: "Indeed, it would seem absurd to require evidence as to that which every man of common

information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet, within the limits of any State the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge and take judicial notice thereof."

It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence, and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or one that ought to be generally known? If not, it should be determined by evidence. Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the Territory of New Mexico. The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river. It was said in *The Montello*, 20 Wall. 430, 439, "that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." And again (p. 442): "It is not, however, as Chief Justice Shaw said, 21 Pickering, 344, 'every small creek in

which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

Obviously, the Rio Grande within the limits of New Mexico is not a stream over which in its ordinary condition trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream in its ordinary condition susceptible of use for general navigation purposes. We are not, therefore, disposed to question the conclusion reached by the trial court and the Supreme Court of the Territory, that the Rio Grande within the limits of New Mexico is not navigable.

Neither is it necessary to consider the treaty stipulations between this country and Mexico. It is true that the Rio Grande, for several hundred miles above its mouth, forms the boundary between this country and Mexico, and that the seventh article of the treaty between the United States and Mexico of February 2, 1848, 9 Stat. 928, stipulates that "the River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. . . . The stipulations contained in the present article shall

not impair the territorial rights of either Republic within its established limits." But by the fourth article of the Gadsden treaty of December 30, 1853, 10 Stat. 1034, it was provided that "the several provisions, stipulations and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31st degree 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe." And on December 26, 1890, a convention was concluded between the United States and Mexico, 26 Stat. 1512, which provided for an international boundary commission, to which was given, by article five, the power to inquire, upon complaint of the local authorities, whether works were being constructed in the Rio Grande prohibited by any prior treaty stipulations. There is no suggestion in the bill that any action by these commissioners was invoked, although it appears from one of the affidavits that the commission has been duly constituted. Now it is debated by counsel whether the construction of a dam at the place named in New Mexico, a place wholly within the territorial jurisdiction of the United States, is a violation of any of the treaty stipulations above referred to — they being, primarily at least, limited to that portion of the river which forms the boundary line between the two nations; and also whether the fact that the Rio Grande is partially within the limits of Mexico, would give that nation, under the rules of international law, any right to complain of the total appropriation of its waters for legitimate uses of the people of the United States. Such questions might under some circumstances be interesting and important; but here the Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being where navigable the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligations of the United States to preserve for their own citizens, the

navigability of its navigable waters, is certainly as great as any arising by treaty or international law to other nations or their citizens, and if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty to Mexico, they also constitute an equal injury and wrong to the people of the United States.

We may, therefore, properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the Government to interfere. The intended construction of the dam and impounding of the water are charged in the bill and admitted in the answer. The bill further charges that the purpose is to obtain control of the entire flow of the river, and divert and use it for irrigation and supplying waters for municipal and manufacturing uses; that, by reason of the porous soil, the dry atmosphere and consequent rapid evaporation, but little water thus taken from the river and distributed over the surface of the earth will ever be returned to the river, and that this appropriation of the waters will so deplete and prevent the flow of water through the channel of the river below the dam as to seriously obstruct the navigable capacity of the river throughout its entire course even to its mouth. The answer, while denying an intent to appropriate all the waters of the Rio Grande, states that the entire flow, during the irrigation season, at the point where defendants propose to construct reservoirs, had long since been diverted, and was owned and beneficially used by parties other than defendants, that they did not seek to disturb such appropriation, but that their sole intention was to appropriate only such waters as had not already been legally appropriated, and that the beneficial rights to be acquired in the stream by virtue of the structures would be very largely only so acquired from the excess, storm and flood waters now unappropriated, useless and going to waste. In other words, the bill charges that the defendants, at the places where they proposed to construct their dam,

intend thereby to appropriate all the waters of the Rio Grande, and defendants qualify that charge only so far as they say that most of the flow of the river is already appropriated, and they only propose to take the balance. The bill charges that such appropriation of the entire flow will seriously obstruct the navigability of the river from the place of the dam to the mouth of the stream. The defendants deny this, but as the court found that there was no equity in the bill, and dismissed the suit on that ground, we must for the purposes of this inquiry assume that it is true, that defendants are intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable. The right to do this is claimed by defendants and denied by the Government, and that, generally speaking, is the question presented for our consideration.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. § 439:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion

a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a Territory, we do not deem it necessary for the purposes of this case to inquire. We concede *arguendo* that it does.

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action. It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. See among others the following: *Willson* v. *Black Bird Creek Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

All this proceeds upon the thought that the non-action of Congress carries with it an implied assent to the action taken by the State.

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by state legislation, a different rule — a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the State, nothing is presented which calls for any consideration by the Federal courts. In 1866 Congress passed the Act of July 26, 1866, c. 262, § 9, 14 Stat. 253; Rev. Stat. § 2339:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water. In respect to this, in *Broder* v. *Water Company*, 101 U. S. 274, 276, it was said:

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

March 3, 1877, an Act, c. 107, was passed for the sale of desert lands, which contained in its first section this proviso, 19 Stat. 377:

"*Provided, however*, That the right to the use of water by the persons so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

On March 3, 1891, an Act, c. 561, was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided, 26 Stat. 1101:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its

laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts — that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation

and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890. On September 19, 1890, an Act, c. 907, was passed containing this provision, 26 Stat. 454, § 10:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offence, and each week's continuance of any such obstruction shall be deemed a separate offence. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any

waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of non-navigable streams in disregard of the old common law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the National Government. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute, as well as in the act of July 13, 1892, c. 158, 27 Stat. 88, 110, provide for the mode of asserting that control. It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity under the direction of the Attorney General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation.

Without pursuing this inquiry further we are of the opinion

that there was error in the conclusions of the lower courts; that the decree must be

Reversed and the case remanded with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.

MR. JUSTICE GRAY and MR. JUSTICE MCKENNA were not present at the argument, and took no part in the decision.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* STURM.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 236. Submitted April 5, 1899. — Decided May 22, 1899.

Sturm sued the railway company in a justices' court in Kansas for wages due, and recovered for the full amount claimed. The company appealed to the county district court. When the case was called there for trial, the company moved for a continuance on the ground that a creditor of Sturm had sued him in a court in Iowa, of which State the railway company was also a corporation, and had garnisheed the company there for the wages sought to be recovered in this suit, and had recovered a judgment there from which an appeal had been taken which was still pending. The motion for continuance was denied, the case proceeded to trial, and judgment was rendered for Sturm for the amount sued for, with costs. A new trial was moved for, on the ground, among others, that the decision was contrary to and in conflict with section 1, article IV, of the Constitution of the United States. The motion was denied, and the judgment was sustained by the Court of Appeals and by the Supreme Court of the State. The case was then brought here. *Held*, that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had in Iowa, and were consequently entitled to in Kansas, and the judgment must be reversed.

THE defendant in error brought an action against the plain-

tiff in error in a justices' court of Belleville, Republic County, Kansas, for the sum of $140, for wages due. Judgment was rendered for him in the sum of $140 and interest and costs.

The plaintiff in error appealed from the judgment to the district court of the county, to which court all the papers were transmitted, and the case docketed for trial.

On the 10th of October, 1894, the case was called for trial, when plaintiff in error filed a motion for continuance, supported by an affidavit affirming that on the 13th day of December, 1893, in the county of Pottawattomie and State of Iowa, one A. H. Willard commenced an action against E. H. Sturm in justices' court before Oride Vien, a justice of the peace for said county, to recover the sum of $78.63, with interest at the rate of ten per cent per annum, and at the same time sued out a writ of attachment and garnishment, and duly garnisheed the plaintiff in error, and at that time plaintiff in error was indebted to defendant in error in the sum of $77.17 for wages, being the same wages sought to be recovered in this action;

That plaintiff in error filed its answer, admitting such indebtedness;

That at the time of the commencement of said action in Pottawattomie County the defendant was a non-resident of the State of Iowa, and that service upon him was duly made by publication, and that afterwards judgment was rendered against him and plaintiff in error as garnishee for the sum of $76.16, and costs of suit amounting to $19, and from such judgment appealed to the district court of said county, where said action was then pending undetermined;

That the moneys sought to be recovered in this action are the same moneys sought to be recovered in the garnishment proceedings, and that under the laws of Iowa its courts had jurisdiction thereof, and that the said moneys were not at the time of the garnishment exempt from attachment, execution or garnishment; that the justice of the peace at all of the times of the proceedings was a duly qualified and acting justice, and that all the proceedings were commenced prior to the commencement of the present action, and that if the case

be continued until the next term of the court the action in Iowa will be determined and the rights of plaintiff in error protected.

The motion was denied, and the plaintiff in error pleaded in answer the same matters alleged in the affidavit for continuance, and attached to the answer a certified copy of the proceedings in the Iowa courts. It also alleged that it was a corporation duly organized under the laws of the States of Illinois and Iowa, doing business in the State of Kansas.

The defendant in error replied to the answer, and alleged that the amount due from plaintiff in error was for wages due for services rendered within three months next prior to the commencement of the action; that he was a resident, head of a family, and that the wages were exempt under the laws of Kansas, and not subject to garnishment proceedings; that plaintiff in error knew these facts, and that the Iowa court had no jurisdiction of his property or person.

Evidence was introduced in support of the issues, including certain sections of the laws of Iowa relating to service by publication, and to attachment and garnishment, and judgment was rendered for the defendant in error in the amount sued for.

A new trial was moved, on the ground, among others, that the "decision is contrary to and in conflict with section 1, article IV, of the Constitution of the United States."

The motion was denied.

On error to the Court of Appeals, and from thence to the Supreme Court, the judgment was affirmed, and the case was then brought here.

The defendant in error was notified of the suit against him in Iowa and of the proceedings in garnishment in time to have protected his rights.

The errors assigned present in various ways the contention that the Supreme Court of Kansas refused to give full faith and credit to the records and judicial proceedings of the courts of the State of Iowa, in violation of section 1, article IV, of the Constitution of the United States, and of the act of Congress entitled "An act to prescribe the mode in which the public acts, records and judicial proceedings in each State

shall be authenticated so as to take effect in every other State," approved May 26, 1790.

Mr. W. F. Evans and *Mr. M. A. Low* for plaintiff in error.

No appearance for defendant in error.

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

How proceedings in garnishment may be availed of in defence — whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution — the practice of the States of the Union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defence in some way.

In the pending suit plaintiff in error moved for a continuance, and not securing it pleaded the proceedings in garnishment in answer. Judgment, however, was rendered against it, and sustained by the Supreme Court, on the authority of *Missouri Pacific Railway Co.* v. *Sharitt*, 43 Kansas, 375, and "for the reasons stated by Mr. Justice Valentine in that case."

The facts of that case were as follows: The Missouri Pacific Railway Company was indebted to Sharitt for services performed in Kansas. Sharitt was indebted to one J. P. Stewart, a resident of Missouri. Stewart sued him in Missouri, and attached his wages in the hands of the railway company, and the latter answered in the suit in accordance with the order of garnishment on the 28th of July, 1887, admitting indebtedness, and on the 29th of September was ordered to pay its amount into court. On the 27th of July Sharitt brought an action in Kansas against the railway company to recover for his services, and the company in defence pleaded the garnishment and order of the Missouri court. The amount due Sharitt having been for wages, was exempt from attachment in Kansas. It was held that the garnishment was not a defence. The facts were similar therefore to those of the case at bar.

The ground of the opinion of Mr. Justice Valentine was

that the Missouri court had no jurisdiction because the *situs* of the debt was in Kansas. In other words, and to quote the language of the learned justice, "the *situs* of a debt is either with the owner thereof, or at his domicil; or where the debt is to be paid; and it cannot be subjected to a proceeding in garnishment anywhere else. . . . It is not the debtor who can carry or transfer or transport the property in a debt from one State or jurisdiction into another. The *situs* of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent."

The primary proposition is that the *situs* of a debt is at the domicil of a creditor, or, to state it negatively, it is not at the domicil of the debtor.

The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law in adapting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said by Mr. Justice Gray in *Wyman* v. *Halstead*, 109 U. S. 654, 656: "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicil of the debtor." And this is not because of defective title in the creditor or in his administrator, but because the policy of the State of the debtor requires it to protect home creditors. *Wilkins* v. *Ellett*, 9 Wall. 740; 108 U. S. 256. Debts cannot be assets at the domicil of the debtor if their locality is fixed at the domicil of the creditor, and if the policy of the State of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings.

For illustrations in matters of taxation, see *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Savings and Loan Society* v. *Multnomah County*, 169 U. S. 421.

Our attachment laws had their origin in the custom of

London. Drake, § 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews* v. *Clerke*, 1 Carth. 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows:

"Andrews levied a plaint in the Sheriff's Court in London and, upon the usual suggestion that one T. S. (the garnishee) was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S., which was accordingly done; and then a diletur was entered, which is in nature of an imparlance in that court.

"Afterwards T. S. (the garnishee) pleaded to the jurisdiction setting forth that the cause of debt due from him to the defendant Sir Robert Clerke, and the contract on which it was founded, did arise, and was made at H. in the county of Middlesex, *extra jurisdictionem curiæ;* and this plea being overruled, it was now moved (in behalf of T. S., the garnishee,) for a prohibition to the sheriff's court aforesaid, suggesting the said matter, (viz.) that the cause of action did arise *extra jurisdictionem*, etc., but the prohibition was denied because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange, and goldsmith's notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed, liveth within the city without any respect had to the place where the debt was contracted."

The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the

domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney* v. *Buford & George Mfg. Co.*, 72 Fed. Rep. 32; Conflict of Laws, § 549, and notes.

To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.

Besides the proposition which we have discussed there are involved in the decision of the *Sharitt case* the propositions that a debt may have a *situs* where it is payable, and that it cannot be made migratory by the debtor. The latter was probably expressed as a consequence of the primary proposition and does not require separate consideration. Besides there is no fact of change of domicil in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the State, and was such at the time the debt sued on was contracted, and we are not concerned to inquire whether the cases which decide that a debtor temporarily in a State cannot be garnisheed there, are or are not justified by principle.

The proposition that the *situs* of a debt is where it is to be paid, is indefinite. "All debts are payable everywhere, un-

less there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons on Contracts, 8th edition, 702. The debt involved in the pending case had no "special limitation or provision in respect to payment." It was payable generally and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases — the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose. *Embree* v. *Hanna*, 5 Johns. 101; *Hull* v. *Blake*, 13 Mass. 153; *Blake* v. *Williams*, 6 Pick. 286; *Harwell* v. *Sharp*, 85 Georgia, 124; *Harvey* v. *Great Northern Railway Co.*, 50 Minnesota, 405; *Mahany* v. *Kephart*, 15 W. Va. 609; *Leiber* v. *Railroad Co.*, 49 Iowa, 688; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; *Holland* v. *Mobile & Ohio Railroad*, 84 Tenn. 414; *Pomeroy* v. *Rand, McNally & Co.*, 157 Illinois, 176; *Berry Bros.* v. *Nelson, Davis & Co.*, 77 Texas, 191; *Weyth Hardware Co.* v. *Lang*, 127 Missouri, 242; *Howland* v. *Chicago, Rock Island &c. Railway*, 134 Missouri, 474.

Mr. Justice Valentine also expressed the view that "if a debt is exempt from a judicial process in the State where it is created, the exemption will follow the debt as an incident thereto into any other State or jurisdiction into which the debt may be supposed to be carried." For this he cites some cases.

It is not clear whether the learned justice considered that the doctrine affected the jurisdiction of the Iowa courts or was but an incident of the law of *situs* as expressed by him. If the latter, it has been answered by what we have already said. If the former, it cannot be sustained. It may have been error for the Iowa court to have ruled against the doctrine, but the error did not destroy jurisdiction. 134 Missouri, 474.

But we do not assent to the proposition. Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum. Freeman on Executions, sec. 209, and cases cited; also *Mineral Point Railroad* v.

Barron, 83 Illinois, 365; *Carson* v. *Railway Co.*, 88 Tennessee, 646; *Couley* v. *Chilcote*, 25 Ohio St. 320; *Albrecht* v. *Treitschke*, 17 Nebraska, 205; *O'Connor* v. *Walter*, 37 Nebraska, 267; *Chicago, Burlington &c. Railroad* v. *Moore*, 31 Nebraska, 629; *Moore* v. *Chicago, Rock Island &c. Railroad*, 43 Iowa, 385; *Broadstreet* v. *Clark, D. & C. M. & St. Paul Railroad, Garnishee*, 65 Iowa, 670; *Stevens* v. *Brown*, 5 West Virginia, 450. See also *Bank of United States* v. *Donnally*, 8 Pet. 361; *Wilcox* v. *Hunt*, 13 Pet. 378; *Townsend* v. *Jemison*, 9 How. 407; *Walworth* v. *Harris*, 129 U. S. 365; *Penfield* v. *Chesapeake, Ohio &c. Railroad*, 134 U. S. 351. As to the extent to which *lex fori* governs, see Conflict of Laws, 571 *et seq.*

There are cases for and cases against the proposition that it is the duty of a garnishee to notify the defendant, his creditor, of the pendency of the proceedings, and also to make the defence of exemption, or he will be precluded from claiming the proceedings in defence of an action against himself. We need not comment on the cases or reconcile them, as such notice was given and the defence was made. The plaintiff in error did all it could and submitted only to the demands of the law.

In *Broadstreet* v. *Clark*, 65 Iowa, 670, the Supreme Court of the State decided that exemption laws pertained to the remedy and were not a defence in that State. This ruling is repeated in *Willard* v. *Sturm*, 98 Iowa, 555, and applied to the proceedings in garnishment now under review.

It follows from these views that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had there, and were hence entitled to in Kansas.

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

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* DAVID CAMPBELL. No. 235. Error to the Supreme Court of the State of Kansas. Submitted with No. 236 on the same brief.

Syllabus.

MR. JUSTICE MCKENNA: The facts of this case are substantially the same as in No. 236, except as to the amount involved, and the court in which the proceedings in attachment were commenced, and

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

DAVIS *v.* COBLENS.

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

No. 246. Argued April 18, 19, 1899. — Decided May 22, 1899.

In this action of ejectment, the evidence of adverse possession contained in the bill of exceptions, and set forth in the opinion of this court, is sufficient to justify the action of the trial court in submitting the question to the jury.

By the terms of the statute in force in the District of Columbia, the time of limitation of this action commenced to run against Lucy T. Davis, one of the plaintiffs in error, on the death of her mother, and as her mother's death took place more than ten years after the cause of action accrued, the term against the plaintiff in error expired in ten years after it accrued, and no disability on her part arrested its running.

It is the general practice to permit tenants in common to sue jointly or separately in ejectment; but if they sue jointly it is with the risk of the failure of all, if one of them fail to make out a title or right to possession.

When a cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error.

The plaintiff requested the following instruction: "The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis *and others, and the jury would not be justified in finding to the contrary.*" The court struck out the words in italics, and inserted instead, "and the weight to be given his testimony is a proper question for the jury." *Held* that this was not error.

THE statement of the case will be found in the opinion of the court.

Mr. Franklin H. Mackey for plaintiffs in error. *Mr. W. Mosby Williams* was on his brief.

Mr. J. J. Darlington for defendants in error. *Mr. W. H. Sholes* was on his brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an action of ejectment brought by the plaintiffs in error and one Charles M. N. Latimer against the defendants in error for ninety-nine one-hundredths ($\frac{99}{100}$) undivided part of original lot ten (10), in square 1031, in the city of Washington, D. C.

The declaration was in the usual form, and defendants pleaded not guilty, on which issue was joined.

The plaintiffs derive title from Richard Young as heirs at law or grantees of heirs at law. The defendants claim by adverse possession under claim of title under an execution sale upon a judgment recovered against said Richard Young some time in the year 1826.

The case was tried by a jury. Before the case was submitted leave was granted to amend the declaration by striking out plaintiffs Charles M. N. Latimer and William W. Boarman. The verdict was for defendants. And after a motion for new trial was made and denied, judgment was entered in accordance therewith. The plaintiffs appealed to the Court of Appeals, where the judgment was affirmed, and the case was brought here.

There are eleven assignments of error in plaintiffs' brief. All but three relate to instructions given or refused or modified concerning adverse possession. The plaintiffs contended for or objected to instructions which submitted the question of adverse possession to the jury. The other assignments of error will be noted hereafter.

1. The evidence of adverse possession contained in the bill of exceptions is as follows:

"The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs, and

grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22d day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October without the consent of the defendants, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'4, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the bricks were removed when they left; that these bricks were in process of removal along during the winter of 1893–'4, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine house was located on the north part of lot 1, in said square, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to

the jury, and that the rollers and machinery were north of the machine house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"'I don't know but what the rollers might have been on lot 10. The machine house stood right in here (indicating), and the rollers might have been on lot 10.'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old bricks were left on the ground, which the witness thought Childs & Sons abandoned, but they did not charge defendants for them, which were suitable for use in building, and were still there; that defendants made no use of them, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base ball park, but did not use it for that purpose; that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool boxes and railroad iron on the square, though none was attempted to be deposited on lot 10; that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid until June, 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs & Sons left the square, which was in the winter of 1893–'4, perhaps along in November, December, January and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; that said James D. Childs did

not claim the land said bricks were on; that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, though she made no use of it herself.

"The defendants thereupon produced as a witness in their behalf Goff A. Hall, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

We think the evidence was sufficient to justify the action of the court in submitting the question to the jury, and the exceptions based on such action were not well taken.

2. Did the adverse possession apply to the title derived by the plaintiff Lucy T. Davis from her mother, Tracenia Latimer, and to the title of the plaintiff Millard P. McCormick, derived from his mother, Elizabeth McCormick?

It is one of the contentions of the plaintiffs that it did not apply to those titles, and error is based on a refusal of the court to so instruct the jury. The adverse possession began February 22, 1875; suit was brought May 17, 1895. There were therefore twenty years and a few months adverse possession. Richard Young, the common source of title, died in 1860, testate. His will in effect devised the property in controversy to Matilda, his wife, for life; remainder to Tracenia and Elizabeth and other children. Both were then married. Their mother, the life tenant, died October 7, 1874. Tracenia

died November 17, 1879, and her husband April 20, 1880. She left two children, one of whom is the plaintiff. Elizabeth died March 22, 1889. Her husband survived her, but died July 2, 1891. October 14, 1887, she and her husband conveyed their interests to their son, the plaintiff, Millard P. McCormick. From the death of Elizabeth and her husband, five and four years respectively elapsed before suit, and from the date of the conveyance to Millard over eight years. Assuming that Tracenia Latimer and Elizabeth McCormick were under disability when the adverse possession commenced, did that possession ever run against their interests, and if so, when did it commence to run?

The statute of limitations in force in the District is that of James I, c. 16. Under that statute no suit for lands can be maintained, except "within twenty years next after the cause of action first descended or fallen, and at no time after the said twenty years." Additional time is given to those under disability, as follows: "That if any person . . . who shall have such right or title of entry, be, or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or death, take benefit of, and sue forth the same, and at no time after the said ten years." (Sec. 2, p. 359, Compiled Stat. Dist. Columbia.)

More than twenty years elapsed after Tracenia's right accrued, as we have seen, before suit was commenced, and more than ten years of that time accrued after her death and that of her husband. She died under disability, but that made no difference. By the terms of the statute the time of limitation of suit commenced to run upon her death against her heir, Lucy T. Davis, and expired in ten years. No dis-

ability of Lucy T. Davis, if she was under any, arrested the running of the statute. Cumulative disabilities cannot be used to that effect. *Thorp* v. *Raymond*, 16 How. 247; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129; *Smith* v. *Burtis*, 9 Johns. 174; *Jackson* v. *Johnson*, 5 Cowen, 74; *Walden* v. *Heirs of Gratz*, 1 Wheat. 292; *Hogan* v. *Kurtz*, 94 U. S. 773; *Mercer's Lessee* v. *Selden*, 1 How. 37; *McDonald* v. *Hovey*, 110 U. S. 619.

The bar of the statute was therefore complete against her. But it was not complete against Millard McCormick. Ten years of the period of adverse possession had not run after the death of his parents or after the conveyance to him and before suit was commenced; and we are brought to the contention that a verdict should have been rendered for him. Passing on and disposing of the contention adversely, Mr. Justice Shepard, speaking for the Court of Appeals, 12 D. C. App. 51, 60, said:

"The rule is old and well established, that if one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot. *Morris* v. *Wheat*, 8 App. D. C. 379, 385. Hard as this rule may seem to be, it was followed in that case in obedience to the decision of the Supreme Court of the United States in *Marsteller* v. *McLean*, 7 Cranch, 156, 159. In that case Mr. Justice Story said: 'It seems to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported.' And again: 'When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.' See, also, *Shipp* v. *Miller*, 2 Wheat. 316, 324; *Dickey* v. *Armstrong*, 1 A. K. Marshall, 39, 40.

"There has been no legislation affecting the rule of practice in the District of Columbia, and we do not consider it within our province to make a change therein.

"The apparent hardship to this plaintiff might have been avoided by a separate suit on his own behalf.

"The original rule at common law was, that tenants in common could only sue separately because they were separately seized, and there was no privity of estate between them.

Mobley v. *Brunner*, 59 Penn. St. 481; *Corbin* v. *Cannon*, 31 Mississippi, 570, 572; *May* v. *Slade*, 24 Texas, 205, 507; 4 Kent Com. 368.

"The practice soon became general, however, in the United States to permit them to sue either jointly or severally as they might elect. 7 Enc. Pl. & Pr. 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession."

These remarks express the rule correctly.

It was urged at the argument by defendants in error, though not claimed in their brief, that neither Tracenia Latimer nor Elizabeth McCormick were under disability at any time during the period of adverse possession. The argument was that by the married woman's act of April 10, 1869, c. 23, 16 Stat. 45, they were given the same remedies in regard to their property that they would have had if unmarried.

The contention presents an interesting question, and maybe involves the further one whether their husbands ever became tenants by the curtesy. But we need not pass on them. Assuming the disability of Tracenia and Elizabeth and such tenancy, the errors assigned on the instructions given or refused were not well taken.

3. There was introduced in evidence as part of the chain of title of the plaintiff, Lucy T. Davis, a deed from her to John H. Walter and a reconveyance from him to her. From the latter was excepted "so much of all the lands and tenements above mentioned as had been conveyed by the party of the first part (Walter) to other persons prior to the filing of a bill in equity, cause 11,637 of the Supreme Court of the District of Columbia."

Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10 — the lot in controversy. Thereupon defendant's counsel cross-examined him at great length against the objection of plain-

tiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In *Rea* v. *Missouri*, 17 Wall. 532, it was said: "Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error."

It is also objected that Walter was subjected to discriminating remarks by the court. Plaintiff requested the following instruction:

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10 in controversy in this case to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis *and others, and the jury would not be justified in finding to the contrary.*"

The court struck out the words in italics and inserted instead, "and the weight to be given his testimony is a proper question for the jury."

The instruction as requested assumed the credibility of the witness; as modified, that question was submitted to the jury, who were the judges of it, and we cannot suppose that the jury misunderstood the court or believed a discrimination was intended.

To the other assignments of error special consideration is not necessary to be given.

Judgment affirmed.

Syllabus.

SPURR *v.* UNITED STATES.

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

No. 448. Argued March 13, 14, 1899. — Decided May 22, 1899.

Spurr was tried in the Circuit Court of the United States for the Middle District of Tennessee on three indictments, consolidated together, each of which charged him with having wilfully violated the provisions of Rev. Stat. § 5208, by wilfully, unlawfully and knowingly certifying certain cheques drawn on said bank by Dobbins and Dazey, well knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the cheques were certified, respectively, an amount of money equal to the respective amounts specified therein. It was not denied that the defendant certified the cheques, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the cheques were certified and his intent in the certifications. After the case had been committed to the jury, and they had had it under consideration for some hours, they returned to the court room, and asked the following question, which was written out: "We want the law as to the certification of cheques, when no money appeared to the credit of the drawer." The court read to the jury the first half of Rev. Stat. § 5208, as follows: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque." The court then inquired: "Does this answer your question?" To which the foreman replied: "Yes, sir." The court again read that part of the section, and made certain observations; among others that a false certification was "the certifying by an officer of the bank that a cheque is good when there are no funds to meet it." As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 which the court had read to them, and that the court ought to read and explain that act to the jury. That act provided that an officer, clerk or agent of a national bank wilfully violating the provisions of Rev. Stat. § 5208, etc., "should be deemed guilty of a misdemeanor, and should, on conviction," "be fined," etc. The court, after asking if the counsel referred to the act prescribing a penalty for false certification, and receiving an answer in the affirmative, said that the jury had nothing to do with that. *Held*, that the Circuit Court clearly erred in declining the request of counsel in respect of the act of 1882.

Statement of the Case.

SPURR was tried in the Circuit Court of the United States for the Middle District of Tennessee on three indictments, each containing several counts, for the violation of section 5208 of the Revised Statutes, which provides:

"It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque. Any cheque so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

By section 13 of the act of Congress approved July 12, 1882, c. 290, 22 Stat. 162, it is provided:

"That any officer, clerk or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying cheques by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

The indictments charged that Spurr, being the president of the Commercial National Bank of Nashville, Tennessee, wilfully violated the provisions of section 5208 of the Revised Statutes by wilfully, unlawfully and knowingly certifying certain cheques drawn on said bank by Dobbins and Dazey, well

knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the cheques were certified, respectively, an amount of money equal to the respective amounts specified therein. They were consolidated and tried together, and a verdict of guilty returned as follows: "Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impanelled, and upon their oaths do say that they find the defendant guilty as charged in the indictment and recommend him to the mercy of the court."

Motions for new trial and in arrest of judgment were made and overruled, and judgment entered on the verdict in these words:

"And thereupon, the United States, by its District Attorney, moved the court for sentence upon the verdict of the jury heretofore rendered, upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, counts Nos. 1 and 4 of indictment No. 7994, count No. 3 of indictment No. 8139, count No. 2 of indictment 8078 and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a cheque certified by the defendant, dated January 3, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined to the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date."

The several counts of the consolidated indictments charged the certification by defendant of four cheques drawn by Dobbins and Dazey between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial National Bank, aggregating $95,641.95. The bank was organized in 1884, and

defendant was its president and one Porterfield its cashier from its organization to its failure, March 25, 1893. Dobbins and Dazey were engaged in the purchase, sale and exportation of cotton, and their financial standing and credit were excellent. When the four cheques in question were certified by defendant the accounts of Dobbins and Dazey were overdrawn, and the evidence was that their account was continuously and largely overdrawn during the period covered by these cheques, except on one day, and that "this fact was known to Porterfield, the cashier, and all the employés of the bank under him in authority." But "there was also evidence tending to show that Porterfield misrepresented the real state of the Dobbins and Dazey account to the defendant and the committees and the directors of the bank, by statements made to them, and also in his sworn reports to the Comptroller of the Currency, wherein the overdrafts in the bank were very largely understated." There was also evidence on behalf of defendant to the effect "that he had no knowledge of the fact that the account of Dobbins and Dazey was overdrawn on the books of the bank at the time of the certification of any of the cheques upon which he is indicted, nor at any time during the period covered by the dates of the cheques;" that when he certified these cheques he inquired in every instance either of the cashier, or of the exchange clerk, and in every instance received information that sufficient funds and credits of Dobbins and Dazey were then in the bank to cover the cheques certified, and that he never at any time certified a cheque without receiving such information, and that he relied upon it as true; that if the cashier was in, he inquired of him; if not, he inquired of the exchange clerk; these being the appropriate sources of information. The evidence on this head is given in much detail in the bill of exceptions.

The bill of exceptions also stated —

"After the jury were charged and had retired from the court room to consider their verdict, and had been deliberating for some hours, they returned to the court room and asked the following question, which was written out in pencil and handed to the court:

"'We want the law as to the certification of cheques when no money appeared to the credit of the drawer.'

"The court then said: 'The jury state that they want the law as to the certification of a cheque where there is no money to the credit of the drawer.

"'I cannot better answer this question which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject.'

"(Reads from sec. 5208, Rev. Stat.:) 'It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque.'

"'Does this answer your question?'

"Foreman of the Jury: 'Yes, sir.'

"The Court: 'I read it again so that you may all understand it.' (The court read again that part of section 5208, Rev. Stat., quoted above, and added:)

"'Is that all, gentlemen? The $30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins and Dazey — the overdrafts — were in excess of the amount which Dobbins and Dazey had as a limit of line of credit.

"'I charge you in addition to the instructions I gave you this morning, that a cheque drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the cheque good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the cheque, as against the *bona fide* holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a cheque is good when there are no funds there to meet it.

"'You understand what I have said now is to be taken in connection with what I have before instructed you.'

"As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that.

"To this action of the court in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time beginning with the words 'The $30,000' and ending with the words 'to meet it,' the defendant then and there excepted."

Sentence having been pronounced as before stated, the case was taken on error to the Circuit Court of Appeals for the Sixth Circuit, and the judgment was affirmed, 59 U. S. App. 663, whereupon the cause was brought to this court on certiorari.

Mr. John A. Pitts and *Mr. Albert H. Horton* for Spurr. *Mr. Bailey P. Waggener* was on their brief.

Mr. Edward Baxter for the United States.

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

It was not denied that defendant certified the cheques, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the cheques were certified and his intent in the certifications.

Section 5208 made it unlawful for any officer, clerk or agent

of any national banking association to certify any cheque drawn upon it, unless the drawer of the check had on deposit at the time such cheque was certified an amount of money equal to the amount specified therein, and provided the consequences which should follow on a violation of the section. Then came section 13 of the act of July 12, 1882, which made a wilful violation of section 5208 criminal, and denounced a penalty thereon.

These sections were under consideration in *Potter* v. *United States*, 155 U. S. 438, 445, and the court said:

"The charge is of a wilful violation. That is the language of the statute. Section 5208 of the Revised Statutes makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall wilfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act;' 'or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word 'wilful' is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'wilful' in criminal statutes has been considered by this court. In *Felton* v. *United States*, 96 U. S. 699, 702, it was said: 'Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word 'wilfully,'' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently un-

derstood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, § 428.

"And later, in the case of *Evans* v. *United States*, 153 U. S. 584, 594, there was this reference to the words 'wilfully misapplied': 'In fact, the gravamen of the offence consists in the evil design with which the misapplication is made, and a count which should omit the words 'wilfully,' etc., and 'with intent to defraud,' would be clearly bad.' . . .

"While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offences, and subjecting them to the severe punishments which may be imposed under those statutes."

The wrongful intent is the essence of the crime. If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.

The defence was that defendant had no actual knowledge that Dobbins and Dazey had not sufficient funds in the bank to meet the cheques, nor knowledge of facts putting him on inquiry; that, on the contrary, he believed that they had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance before he certified; that he honestly relied on that information, and that he had the right to do so. Defendant was entitled to the full benefit of this defence, and in order to that, it was vital that the meaning of "wilful violation," as used in section 13 of the act of 1882, should be clearly explained to the jury.

It appears from this record that after the case had been committed to the jury, and they had had it under consideration for some hours, they returned to the court room, and asked the following question, which was written out: "We want the law as to the certification of cheques when no money appeared to the credit of the drawer." The court then read to the jury the first part of section 5208 of the Revised Statutes, and inquired: "Does this answer your question?" To which the foreman replied: "Yes, sir." The court again read that part of the section, and made certain observations, among other things, that a false certification "is the certifying by an officer of a bank that a cheque is good when there are no funds to meet it."

The record shows that then "as the jury were retiring, counsel for the defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that." Exception was taken to the reading twice of the part of section 5208, and the failure to read and explain the act of 1882, and to the additional instructions given by the court.

We think that the learned Circuit Judge clearly erred in declining the request of counsel in respect of section 13.

It is true that it was not part of the function of the jury to fix the penalty, and the remark of the court, "that the jury had nothing to do with that," undoubtedly referred to the penalty only, though, as the matter appears in the record, the jury may well enough have understood it differently. But it was the act of 1882 that made the certification of cheques, if in "wilful violation" of section 5208, a criminal offence, and the word "wilful" "implies on the part of the officer knowledge and a purpose to do wrong," and plainly it was in relation to the point of "wilful violation" that counsel wished the court to read and expound that section. It seems to us that it

was the duty of the court to do so, if the question put by the jury was answered at all, since "the law as to the certification of cheques when no money appeared to the credit of the drawer" involves civil consequences under section 5208, and criminal consequences under section 13, unless it is to be held that every certification where funds are lacking constitutes a wilful violation of section 5208. We cannot accept the view that because when the court asked the jury whether the first part of section 5208 answered their question, the foreman replied in the affirmative, therefore there was no error in the failure to call their attention to section 13. If the court was satisfied that the law applicable to the case was embodied in the first part of section 5208, the jury were bound to be satisfied also; but we are of opinion that that was an insufficient definition, and was therefore erroneous. However the court went further, and said:

"I charge you, in addition to the instructions I gave you this morning, that a cheque drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the cheque good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the cheque, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certified it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a cheque is good when there are no funds there to meet it.

"You understand what I have said now is to be taken in connection with what I have before instructed you."

We fear that these instructions, following in direct connection with what had passed in reference to section 5208, may have led the jury to understand the law of the case to be that the false certification thus defined constituted a criminal offence under the statute, and that that impression was not rendered harmless by the admonition that what was then said was to be taken with what had been said before.

At all events, we think it would be going too far to hold

that that caution operated to obviate the error in failing to explain section 13 at this particular juncture. The jury had been considering their verdict for several hours, and had then in effect requested a more complete definition of the offence. This the court assumed to give, but it was incomplete, and what was omitted cannot properly be held to have been supplied, under the circumstances, by the reference to prior instructions. The court had indeed, in the original charge, used the words "wilfully" and "wilful" in the following instructions:

"If you find from the proof that the account of Dobbins and Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the cheques certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several cheques mentioned in the indictment believing at the time that the exchange deposited by Dobbins and Dazey on the days upon which said cheques were certified, was sufficient or more than sufficient to cover the amount of said cheques, besides the overdraft already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions. In this connection, you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins and Dazey, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins and Dazey to respond to the cheques."

"If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the cheques mentioned in the indictment that Dobbins and Dazey did not have on deposit in the bank sufficient funds and credits to meet the cheques so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly and in bad faith — these words mean substantially the same thing — shut his eyes to the fact and purposely refrained

from inquiry or investigation for the purpose of avoiding knowledge."

The court had also said that "in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins and Dazey justified it, he is not guilty of the offence charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty." And other passages of similar purport might be quoted.

But the jury desired further advice as to what constituted criminal certification, or wilful violation of section 5208, and preferred a request which required a comprehensive answer. The response was in the nature of a separate charge, and we are unable to conclude that the error in declining at that time to call attention to section 13 was cured by the bare reference to the original charge.

Many other errors were assigned and pressed in argument, but, as the particular points may not arise in the same way on another trial, we prefer to refrain from expressing any opinion upon them.

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

Mr. Justice Brown and Mr. Justice McKenna dissented.

SAN DIEGO LAND AND TOWN COMPANY *v.* NATIONAL CITY.

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

No. 25. Submitted October 11, 1898. — Decided May 22, 1899.

Under the provisions of the act of the legislature of California of March 7, 1881, c. 52, making it the official duty of the board of supervisors, town council, board of aldermen or other legislative body of any city

Statement of the Case.

and county, city or town, in the State, to annually fix the rates that shall be charged and collected for water furnished, one who furnishes water is not entitled to formal notice as to the precise day upon which the water rates will be fixed, as provision for hearing is made by statute in an appropriate way.

There is no ground in the facts in this case for saying that the appellant did not have or was denied an opportunity to be heard upon the question of rates.

It was competent for the State of California to declare that the use of all water appropriated for sale, rental or distribution, should be a public use, subject to public regulation and control; but this power could not be exercised arbitrarily and without reference to what was just and reasonable between the public and those who appropriated water, and supplied it for general use.

The judiciary ought not to interfere with the collection of such rates, established under legislative sanction, unless they are so plainly and palpably unreasonable, as to make their enforcement equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public.

In this case it is not necessary to decide whether the city ordinance should have expressly allowed the appellant to charge for what is called a water right.

On careful scrutiny of the testimony, this court is of opinion that no case is made which will authorize a decree declaring that the rates fixed by the defendant's ordinance are such as amount to a taking of property without just compensation; and that the case is not one for judicial interference with the action of the local authorities.

This appeal brings up for review a decree of the Circuit Court of the United States for the Southern District of California dismissing a bill filed in that court by the San Diego Land and Town Company, a Kansas corporation, against the city of National City, a municipal corporation of California, and John G. Routsan and others, trustees of that city and citizens of California. 74 Fed. Rep. 79.

The nature of the cause of action set out in the bill is indicated by the following statement:

The constitution of California declares —

That "no corporation organized outside the limits of the State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." Art. 12, § 15;

Statement of the Case.

That "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel such action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use." Art. 14, § 1; and,

That "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law." Art. 14, § 2.

By an act of the legislature of California, passed March 7, 1881, c. 52, it was provided:

"§ 1. The board of supervisors, town council, board of aldermen or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association or

corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in force and effect for the term of one year and no longer.

"§ 2. The board of supervisors, town council, board of aldermen or other legislative body of any city and county, city or town, are hereby authorized, and it is made their duty, at least thirty days prior to the 15th day of January of each year, to require, by ordinance or otherwise, any corporation, company or person supplying water to such county, city or town, or to the inhabitants, thereof, to furnish to such board or other governing body in the month of January of each year, a detailed statement, verified by the oath of the president and secretary of such corporation or company or of such person, as the case may be, showing the name of each water-rate payer, his or her place of residence, and the amount paid for water by each of such water payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time." Stats. of Cal. 1881, p. 54.

By an ordinance of the board of trustees of the defendant city approved February 21, 1895, certain rates of compensation to be collected by persons, companies or corporations for the use of water supplied to that city or its inhabitants, or to corporations, companies or persons doing business or using water therein, were fixed for the year beginning July 1, 1895.

For the purposes of that ordinance the uses of water were divided into four classes, namely, domestic purposes, public purposes, mechanical and manufacturing purposes and purposes of irrigation; the rates for each class were prescribed; and it was provided that no person, company or corporation should charge, collect or receive water rates in the city except as thus established.

Statement of the Case.

The bill in this case questioned the validity of the above ordinance upon the following grounds:

That no notice of the fixing of the water rates was given, nor opportunity presented for a hearing upon the matter of rates; that no provision in the constitution or laws of California, under and by virtue of which the board of trustees assumed to act, required or authorized such notice; that water rates were fixed by the Board arbitrarily, without notice or evidence, and were unreasonable and unjust, in that under them the plaintiff could not realize therefrom and from all other sources within and outside of the limits of the defendant city, a sufficient sum to pay its ordinary and necessary operating expenses, or any dividends whatever to stockholders, or any interest or profit on its investment; that so long as the ordinance remained in force the plaintiff would be required by the laws of California to supply water to all consumers within the city at the rates so fixed, which could only be done at a loss to the plaintiff; and that to compel the plaintiff to furnish water at those rates would be a practical confiscation and a taking of its property without due process of law.

The bill also alleged that the defendant city was composed in large part of a territory of farming lands devoted to the raising of fruits and other products, only a small part thereof being occupied by residences or business houses;

That prior to the adoption of the ordinance above set forth, the plaintiff, in order to meet in part the large outlay it had been compelled to make in and about its water system, had established a rate of one hundred dollars per acre for a perpetual water right for the purposes of irrigation, and required the purchase and payment for such water right before extending its distributing system to lands not yet supplied with water or furnishing such lands with water, which rate was made uniform and applicable alike to all lands to be furnished with water within and outside of the city, and such payment for a water right had ever since been charged as a condition upon which alone water would be supplied to consumers for the purposes of irrigation, and many consumers prior to the

adoption of the ordinance had purchased such water right and paid therefor;

That the rate charged for such water right was reasonable and just and was necessary to enable the plaintiff to keep up and extend its water system so as to supply water to consumers requiring and needing the same, and without which it could not operate and extend its plant so as to render it available and beneficial to all water consumers that could with the necessary expenditure be supplied from the system;

That the lands covered by plaintiff's system were arid and of but little value without water, and a water right such as it granted to consumers increased the land in value more than three times the amount charged for such right and was of great value to the land owner;

That the above ordinance fixed the total charge that might be made by the plaintiff for water furnished for purposes of irrigation at four dollars per acre per annum, and as construed by the city and consumers deprived the plaintiff of all right to make any charge for water rights, and the rate was fixed without taking into account or allowing in any way for such water right;

That the amount of four dollars per acre per annum was unreasonably low and required the plaintiff to furnish water to consumers within the limits of the city for purposes of irrigation for less than it furnished the same to consumers outside of the city for the same purpose, and so low that it could not furnish the same without positive loss to itself;

That large numbers of persons residing within the city owning land therein and desiring to irrigate the same were demanding that their lands be connected with the plaintiff's system and supplied with water at the rate of four dollars per acre per annum and without any payment for a water right, and under the laws of the State of California if water was once furnished to such parties they thereby obtained a perpetual right to the use of water on their lands without payment for such water rights; and,

That until the questions as to the validity of the ordinance and of the right of the plaintiff to charge for a water right

as a condition upon which it would furnish water for purposes of irrigation were determined, the plaintiff could not safely charge for such water rights or collect fair and reasonable rates for water furnished, by reason of which it would be damaged in the sum of twenty thousand dollars.

The relief asked was a decree adjudging that the rates fixed by the defendant city were void; that the constitution and laws of California and the proceedings of the defendant's board of trustees under them were in violation of the Constitution of the United States, and particularly of the first section of the Fourteenth Amendment; and that the taking of the plaintiff's water, without payment for the water right or the right to the use thereof, was in violation of the Bill of Rights of the constitution of California.

The plaintiff also prayed that if the court determined that the state constitution and laws relating to compensation for the use of water for public purposes were valid, then that it be declared by decree that the rates fixed in the ordinance were arbitrary, unreasonable, unjust and void; that the board of trustees be ordered and required to adopt a new and reasonable rate of charges; and that the enforcement of the present ordinance be enjoined.

The plaintiff asked that it be further decreed that it was entitled to charge and collect for water rights at reasonable rates as a condition upon which it would furnish water for the purposes of irrigation, notwithstanding the rates fixed by the trustees for water sold and furnished.

It was denied that the rates fixed by the ordinance in question were unreasonable or unjust, or that the plaintiff could not realize within the city sufficient to pay the just proportion that the city and its inhabitants ought to contribute to the expenses of the plaintiff's system, and as much more as the city and its inhabitants should justly and reasonably pay toward interest and profit on plaintiff's investment as the same existed when the ordinance was enacted. It was alleged that under the annual rates fixed by the ordinance the income of the plaintiff in the city would be about the same as that derived and being derived by it under the ordinance previously in force;

that it was not true that plaintiff could only supply consumers within the city at the rates so fixed at a loss; and that to compel the plaintiff to furnish water at said rates was not a practical confiscation of its property or a taking of it without due process of law.

The defendants admitted that the city was composed in considerable part of a territory of farming lands devoted to the raising of fruits and other products, and that a part thereof was occupied by residences and business houses. But it was averred that the population of the city when the ordinance was adopted was about 1300 persons; that the area within its boundaries laid out in town lots was about 800 acres, divided into 6644 lots, of which the plaintiff in January, 1887, owned 4200; that the land within the boundaries of the city not laid off into town lots comprised about 3500 acres, of which the plaintiff in January, 1888, owned 1289¾ acres; that when the ordinance was passed plaintiff continued to own about 3688 of said lots and about 1184 acres of land; and that the number of acres of farming land not under irrigation in the city at the time when the ordinance was passed was about 610.

It was further stated that since the plaintiff established the rate of $100 per acre for such "perpetual right for the purpose of irrigation" it had in no instance supplied water to any land not already under irrigation except on purchase of said "water right" and payment therefor; and that the rate charged for said "water right" was not reasonable or just, nor necessary to enable plaintiff to keep up and extend its water system, so as to supply water to consumers who required and needed the same.

The defendants insisted that the laws of California did not confer upon the city or its board of trustees the power to prescribe by ordinance or otherwise that the purchase and payment of such "water rights" should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation as already stated, or any water supply affected with the public use; that $4 per acre per annum was not unreasonably low; and that such rate did not require the plaintiff to furnish water to consumers within the city for purposes

of irrigation for less than it furnished the same to consumers outside of the city for the same purposes, or that it could not furnish the same without positive loss to itself.

It was further averred that up to December, 1892, plaintiff by its public representations and continuous practice voluntarily conferred and annexed such perpetual rights to the use of the water on the lands of all persons who requested the same without the payment of any consideration therefor except the annual rate of $3.50 per acre adopted by it under its entire system within and without the city, in addition to charges made for tap connections with its pipe, ranging from $12 to $50 for each such connection; that in December, 1892, it changed its rule and practice, and from that time on until February, 1895, charged and exacted the payment as and for a so-called water right of $50 per acre, and from the latter date $100 per acre, for the privilege of connecting with its system any lands not then already under irrigation from it; and that since December, 1892, it had at all times declined and refused to connect and had not in fact connected any lands with its irrigating system except upon payment made to it of such rates of $50 and $100 per acre respectively for the "water right;" and that whether plaintiff could or could not safely charge for such water rights had been in no way by law committed to said board of trustees to determine.

The cause having been heard upon the pleadings and proofs, the bill was dismissed. 74 Fed. Rep. 79.

Mr. Charles D. Lanning, *Mr. John D. Works*, *Mr. G. Wiley Wells*, *Mr. Bradner W. Lee*, and *Mr. Lewis R. Works* for appellant.

Mr. Daniel M. Hammack and *Mr. Irvine Dungan* for appellees.

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

While admitting that the power to limit charges for water sold by a corporation like itself has been too often upheld to

be now questioned, the appellant contends that the constitution and statutes of California relating to rates or compensation to be collected for the use of water supplied to a municipality or its inhabitants are inconsistent with the Constitution of the United States. It is said that the state constitution and laws authorized rates to be established without previous notice to the corporation or person immediately interested in the matter, and without hearing in any form, and therefore were repugnant to the clause of the Federal Constitution declaring that no State shall deprive any person of property without due process of law.

Upon the point just stated we are referred to the decision of this court in *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418, 452, 456, 457. That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The Supreme Court of the State held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. This court said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, *so construed*, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." "By the second section of the statute in question it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision the carrier has a right to make equal and reasonable charges for such transportation.

In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that State.

What this court said about the Minnesota statute can have no application to the present case unless it be made to appear that the constitution and laws of California invest the municipal authorities of that State with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the constitution of the State. We are not at liberty so to interpret that instrument. What the Supreme Court of California said in *Spring Valley Water Works* v. *San Francisco*, 82 California, 286, 306, 307, 309, 315, upon this subject would seem to be a sufficient answer to the views expressed by the appellant. In that case it was contended that a board of supervisors had fixed rates arbitrarily, without investigating, without any exercise of judgment or discretion, without any reference to what they should

be, and without reference either to the expense incurred in furnishing water or to what was fair compensation therefor. The court said: "The constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just, is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." "The fact that the right to store and dispose of water is a public use subject to the control of the State, and that its regulation is provided for by the constitution of this State, does not affect the question. Regulation of this State as provided for in the constitution does not mean confiscation or taking without just compensation. If it does, then our constitution is clearly in violation of the Constitution of the United States, which provides that this shall not be done. The ground taken by the appellant is, that the fixing of rates is a *legislative* act; that by the terms of the constitution, the board of supervisors are made a part of the legislative department of the state government and exclusive power given them which cannot be encroached upon by the courts. . . . This court has held that the fixing of water rates is a *legislative* act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling *judicial* action. *Spring Valley Water Works* v. *Bryant*, 52 California, 132; *Spring Valley Water Works* v. *City and County of San Francisco*, 52 California, 111; *Spring Valley Water Works* v. *Bartlett*, 63 Cali-

fornia, 245. There are other cases holding the act to be legislative, but whether it is judicial, legislative or administrative is immaterial. Let it be which it may, it is not above the control of the courts in proper cases. . . . We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government and beyond judicial control. In the case of *Davis* v. *Mayor etc. of New York*, 4 Duer, 451, 497, it is further said: '. . . The doctrine, exactly as stated, may be true when applied to the legislature of the State, which, as a coördinate branch of the government representing and exercising in its sphere the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not nor is any portion of it true when applied to a subordinate municipal body, which, although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint and legal correction, as any other body or person, natural or artificial.'" Again: "On the part of the respondent it is contended, in support of the decision of the court below, that notice to the plaintiff of an intention to fix the rates was necessary, and that without such notice being given, the action of the board was a taking of its property without due process of law. But the constitution is self-executing, and as it does not require notice, we think no notice was necessary. It does not follow, however, that because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligibly and fairly in fixing the rates. This is its plain duty, and a failure to make the proper effort to procure all necessary information from whatever source may defeat its action."

In the more recent case of *San Diego Water Co.* v. *San Diego*, 118 California, 556, 566, the state court, referring to

section 1 of the constitution of California, said that the meaning of that section was that "the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works* v. *San Francisco*, 82 California, 285, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations that perhaps require modification, we are satisfied with the correctness of the conclusion [construction] there given to this section of the constitution."

Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the first day of July thereafter. It was made by statute the duty of the appellee at least thirty days prior to the 15th day of January in each year to obtain from the appellant a detailed statement, showing the names of water rate payers, the amount paid by each during the preceding year, and "all revenue derived from all sources," and the "expenditures made for supplying water during said time." It was the right and duty of appellant in January of each month to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance. Act of March 7, 1881, § 2, above cited. Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to receive the statement referred to in the statute, or to have duly considered it and given it proper weight in determining rates. If the State by its constitution

or laws had forbidden the city or its board to receive and consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen. But no such case is now presented. In *Kentucky Railroad Tax cases*, 115 U. S. 321, 333, it was said: "This return made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September of each year at the office of the auditor at the seat of government. . . . These meetings are public and not secret. The time and place for holding them are fixed by law."

There is no ground to say that the appellant did not in fact have or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. Those officers may not have been present at the final meeting of the city board when the ordinance complained of was passed. They were not entitled, of right, to be present at that particular meeting. They were heard, and there is nothing to justify the conclusion that the case of the appellant was not fully considered before the ordinance was passed.

That it was competent for the State of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for

general use; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Smyth* v. *Ames*, 169 U. S. 466, 524. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339, 344; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 399; *Smyth* v. *Ames*, above cited. See also *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614, 615.

In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

What elements are involved in the general inquiry as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in *Smyth* v. *Ames*, above cited. That case, it is

true, related to rates established by a statute of Nebraska for railroad companies doing business in that State. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws. After observing that this broad proposition involved a misconception of the relations between the public and a railroad corporation, that such a corporation was created for public purposes and performed a function of the State, and that its right to exercise the power of eminent domain and to charge tolls was given primarily for the benefit of the public, this court said: "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged." 169 U. S. 544. In the same case it was also said that "the

basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." 169 U. S. 466, 546.

This court had previously held in *Covington & Lexington Turnpike Road Company* v. *Sandford*, 164 U. S. 578, 597, 598 — which case involved the reasonableness of rates established by legislative enactment for a turnpike company — that a corporation performing public services was not entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered; and that the rights of the public were not to be ignored. The court in that case further said: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other

circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

These principles are recognized in recent decisions of the Supreme Court of California. *San Diego Water Co.* v. *San Diego*, (1897) 118 California, 556; *Redlands' Domestic Water Co.* v. *Redlands*, (1898) 53 Pac. Rep. 843, 844.

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that

it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.

One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers *outside of the city* are to be considered in fixing the rates for consumers within the city. In our judgment the Circuit Court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point.

One of the questions pressed upon our consideration is whether the ordinance of the city should have expressly allowed the appellant to charge for what is called a "water right." That right, as defined by appellant's counsel, is one "to the continued and perpetual use of the water upon the land to which it has been once supplied upon payment of rates therefor established by the company." In the opinion of the Circuit Court it is said that "no authority can anywhere be found for any charge for the so-called water right." This view is controverted by appellant, and cases are cited which, it is contended, show that the broad declaration of the Circuit Court cannot be sustained. *Fresno Canal & Irrigation Co.* v. *Rowell*, 80 California, 114; *Same* v. *Dunbar*, 80 California, 530; *San Diego Flume Co.* v. *Chase*, 87 California, 561; *Clyne* v. *Benicia Water Co.*, 100 California, 310; *San Diego Flume Co.* v. *Souther*, 90 Fed. Rep. 164.

We are of opinion that it is not necessary to the determination of the present case that this question should be decided. We are dealing here with an ordinance fixing rates or compensation to be collected within a given year for the use of water supplied to a city and its inhabitants or to any corporation, company or person doing business or using water within the limits of that city. In our judgment, the defendant correctly says in its answer that the laws of the State

have not conferred upon it or its board of trustees the power to prescribe by ordinance or otherwise that the purchase and payment for so-called "water rights" should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation or affected with a public use.

The only issue properly to be determined by a final decree in this cause is whether the ordinance in question, fixing rates for water supplied for use within the city, is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the Constitution of the United States. If the ordinance, considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case, so far as any rights of the appellant may be affected by the action of the defendant. The appellant asks, among other things, that it be decreed to be entitled to charge and collect for "water rights" at reasonable rates *as a condition* upon which it will furnish water for the purposes of irrigation, notwithstanding the rates fixed by the defendant's board of trustees for water sold and furnished within the city. That is a question wholly apart from the inquiry as to the validity under the Constitution of the United States of the ordinance of the defendant fixing annual rates in performance of the duty enjoined upon it by the constitution and laws of the State. Counsel for appellant, while insisting that the Circuit Court erred in saying that there was no such thing as a "water right," says: "The constitution of the State has nothing whatever to do with a water right or the price that shall be paid for it. It simply provides for fixing the *annual rental* to be paid for the water furnished and used. When one obtains his water right by purchase or otherwise, he has a right to demand that the water shall be furnished to his lands at the price fixed, as provided by law, and that the company shall exact no more. But he must first acquire the right to have the water on such terms. Whether in fixing the annual rates to be charged, the body authorized to fix them can take into account the amount that has been received by the company for water rights, is another question, and one that is not presented in this case. Nor is any question raised

as to what would be a reasonable amount to exact for a water right, or whether the courts can interfere to determine what is a reasonable amount to charge therefor."

These reasons are sufficient to sustain the conclusion already announced, namely, that the present case does not require or admit of a decree declaring that the appellant may, in addition to the rates established by the ordinance, charge for what is called a "water right" as defined by it. It will be time enough to decide such a point when a case actually arises between the appellant and some person or corporation involving the question whether the former may require, as a condition of its furnishing water within the limits of the city on the terms prescribed by the defendant's ordinance, that it be also paid for what is called a "water right."

We will not extend this opinion by an analysis of all the evidence. It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety — and we cannot properly look at them in any other light — are such as amount to a taking of property without just compensation, and therefore to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. The case is not one for judicial interference with the action of the local authorities to whom the question of rates was committed by the State.

The decree dismissing the bill is

Affirmed.

RICHMOND v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 264. Argued April 24, 25, 1899. — Decided May 22, 1899.

The provisions in the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and Rev. Stat. §§ 5263 to 5268, in which those provisions are preserved, have no application to telephone companies, whose business is that of electrically transmitting articulate speech between different points.

THE statement of the case is made in the opinion of the court.

Mr. C. V. Meredith and *Mr. Henry R. Pollard* for the city of Richmond.

Mr. Hill Carter and *Mr. Addison L. Holladay* for the Southern Bell Telegraph and Telephone Company. *Mr. George H. Fearons* was on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal question in this case is whether the Circuit Court and the Circuit Court of Appeals erred in holding that the appellee was entitled to claim the benefit of the provisions of the act of Congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230.

By that act — the provisions of which are preserved in sections 5263 to 5268, inclusive, Title LXV, of the Revised Statutes of the United States — it was provided:

"§ 1. That any *telegraph* company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and

operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands subject to preëmption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"§ 2. That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"§ 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: *Provided*, *however*, That the United States may at any time after the expiration of five years from date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"§ 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster

General, of the restrictions and obligations required by this act." 14 Stat. 221, c. 230.

Subsequently, by an act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by Congress to be "post roads." 17 Stat. 308, c. 335. These provisions are preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1, 1884, "all public roads and highways, while kept up and maintained as such" were declared to be "post routes." 23 Stat. 3, c. 9.

Proceeding under an act of the legislature of New York of April 12, 1848, and acts amendatory thereof, certain persons associated themselves on the 11th day of December, 1879, under the name of the Southern Bell Telephone and Telegraph Company. The articles of association stated that the general route of the line or lines of the company should be from its office in the city of New York, "by some convenient route through or across the States of New Jersey, Pennsylvania, Delaware, Maryland and Virginia, or otherwise, to the city of Wheeling or some other convenient point in the State of West Virginia, and thence to and between and throughout various cities, towns, points and places within that part of the State of West Virginia lying south of the Baltimore and Ohio Railroad, and within the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling."

By an ordinance passed by the city of Richmond on the 26th day of June, 1884, it was provided: "1. Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city

of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station. 4. No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control. 5. The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law."

The Code of Virginia adopted in 1887, § 1287, provided that "every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain and operate its line along any of the state or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof."

Under date of February 13, 1889, the Southern Bell Telephone and Telegraph Company filed with the Postmaster General its written acceptance of the restrictions and obligations of the above act of July 24, 1866.

The present suit was brought by that company in the Circuit Court of the United States against the city of Richmond.

The bill alleged that the plaintiff was engaged in the business of a "telephone" company, and of constructing, maintaining and operating "telephone" lines in, through and between the States of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida; that it had been so engaged for a period of about fifteen years, during which time it had continuously maintained at various places in said States and in Richmond, Virginia, an exchange, poles, wires, instruments and all other apparatus and property necessary for the maintenance and operation of "telephones and telephone lines," and had erected and maintained through and along the certain streets and alleys of that city numerous poles and wires for conducting its business; that it had so conducted its business and erected and maintained its lines, wires and poles under and by authority of the common council and board of aldermen of the city of Richmond, the legislature of Virginia and acts of the Congress of the United States; that its "telephone" wires and poles were used by its subscribers in connection with the Western Union Telegraph Company under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages; that its business was in part interstate commerce by reason of its connections with the above telegraph company; and that its status was that of a telegraph company under the laws of the United States and of the State of Virginia and of other States of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York.

The plaintiff also alleged that it had accepted the act of Congress of July 24, 1866; that by virtue of such acceptance it became entitled to construct, maintain and operate lines of telephones over and along any of the military roads and post roads of the United States, which had then been or might thereafter be declared such by law; that the streets, alleys and highways of the city of Richmond are post roads of the United States; that the several departments of the

Government of the United States located in Richmond have used in that city the plaintiff's electrical conductors, and other facilities for the transmission of instructions, orders and information to officers and persons in the administration of governmental affairs and on other business throughout the several States and the District of Columbia and in foreign countries; that under and by virtue of the Virginia Code, section 1287, the plaintiff was authorized and empowered to construct, maintain and operate its lines of poles and wires, with necessary facilities, along and over the streets of any city or town in Virginia with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given by the above act of Congress, it maintained and operated its lines in the streets of the city of Richmond, and had in all respects complied with the legal obligations and requirements imposed; that relying upon its right to erect, maintain and operate its lines along and over the streets and alleys of Richmond, it entered upon said streets and alleys and had conducted its business and executed its contracts, of which a large number were in force, to furnish and afford "telephonic" facilities to the residents of Richmond and to persons outside of the city of Richmond, and with the officers and agents of the Federal Government; and that under the act of Congress of 1866 it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, "*without regard to the consent of the said city*, and it did in fact locate many of its poles and wires and begin the operation of its business *without applying to the said city for permission to do so.*"

The bill then referred to an ordinance of the city approved July 18, 1891, and alleged that it was in conflict with the plaintiff's rights and void. It referred also to a subsequent ordinance of December 14, 1894, repealing the ordinance of June 26, 1884, granting the right of way through the city to the plaintiff, and providing "that in accordance with the fifth section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined at the expiration

of twelve months from the approval of this ordinance by the mayor."

Reference was also made in the bill to two ordinances passed September 10, 1895, by one of which it was provided, among other things: "1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. 2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the police justice of the city; each day's failure to be a separate offence."

By the other ordinance of September 10, 1895, it was among other things provided: "The city council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduit under the surface of said streets of the city; any such individual, partnership, corporation or company desiring such permission shall petition to the council therefor; such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans and details thereof to accompany such petition."

The bill contains additional allegations to the effect —

That the fifth section of the ordinance of 1884 was null

and void; that the ordinances referred to were unreasonable, *ultra vires*, and unconstitutional; that the plaintiff was entitled, "*independent of and superior to the consent of the city of Richmond*," to "construct, maintain and operate" its lines "over and along" the streets of that city; that telephone companies and their business were embraced by the terms of the act of Congress, and that, in fact, telephone and telegraph companies were, for the purposes embraced by that act, one and the same; that the post roads spoken of in the act were not limited to routes on the public domain, but embraced all post roads of the United States that had been or might hereafter be declared such by Congress; that the streets and alleys of the defendant being post roads, the plaintiff had the right under the act of Congress "to occupy the streets and alleys of the city of Richmond for its purposes, guaranteed to it by the Constitution and laws of the United States, *superior to any power in the said city to prevent it from so doing;*" and that it "claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys as its business and the business interests of the country and its patrons may require."

The city demurred to the bill of complaint, but the demurrer was overruled. 78 Fed. Rep. 858.

An answer was then filed which met the material allegations of the bill and the cause was heard upon the merits.

In the Circuit Court a final decree was entered in accordance with the prayer of the bill, as follows: "The court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion and doth adjudge, order and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States approved July 24, 1866 (which is an authority paramount and superior to any state law or city ordinance in conflict therewith), the right 'to construct, maintain and operate its lines over and along' the streets and alleys of the city of Richmond, both those now

occupied by the complainant company and those not now so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. And the court doth adjudge, order and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

The city asked that the decree be modified by inserting therein after the words "construct and operate the same," the following words: "so far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond the said limits;" and by inserting therein after the words, "interfering with the exercise of the aforesaid rights by the complainant company," the following words: "so far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits." But counsel for complainant objected, and the court (using the language of its order) "intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character," refused to so modify the decree.

Upon appeal to the Circuit Court of Appeals it was held

that the plaintiff came within the protection and was entitled to the privileges of the act of Congress of July 24, 1866; and that under that act it had the right to construct, maintain and operate lines of telegraph over and along any of the post roads of the United States, and "when an effort is made, or threatened, to deal with it as a trespasser, it can refer to that act."

The Circuit Court of Appeals also held that the privileges so granted were to be enjoyed in subordination to public and private rights, and that the municipality could establish lawful provisions regulating the use of the highways mentioned in the act of Congress. "This being so," that court said, "the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power." 42 U. S. App. 686, 697, 698.

The decree of the Circuit Court was reversed, and the cause was remanded to that court with instructions to modify the terms of the injunction therein granted so as to conform to the principles declared in the opinion of the Circuit Court of Appeals. Judge Brawley concurred in the result, but was not inclined to assent to so much of the opinion as held that a telephone company, such as was described in this case, and whose business was local in character, was within the purview of the act of Congress of July 14, 1866, relating to telegraph companies.

The case is now before this court upon writ of certiorari.

The plaintiff's bill, as we have seen, proceeded upon the broad ground that it is entitled, in virtue of the act of Congress of 1866, to occupy the streets of Richmond with its lines without the consent, indeed against the will, of the municipal authorities of that city. That, it would seem, is the ground upon which the decree of the Circuit Court rests;

for it was declared by that court that the plaintiff had the right, under the provisions and protection of that act, to construct, maintain and operate its lines over and along the streets and alleys of Richmond, both those then occupied by the plaintiff company and those not then so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along such streets and alleys, and to maintain, construct and operate the same, as well as to connect its lines with the new subscribers along the streets and alleys of the city.

The Circuit Court of Appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866 — a question to be presently considered — adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the State or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866.

In *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530, 548, it was held that the act of 1866 was a "permissive" statute, and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 100, which involved the question whether a corporation proceeding under the act of 1866 could occupy the public streets of a city without making such compensation as was reasonably required, it was said to be a misconception to suppose that the franchise or privilege granted by the act of 1866 carried "with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights.

While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal Government to a corporation, state or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of franchise from the National Government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive a citizen of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another State, or a corporation of the National Government, it is within the competency of the State, representing the sovereignty of that local public, to

exact for its benefit compensation for this exclusive appropriation. It matters not for what the exclusive appropriation is taken, whether for steam railroads or for street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

But independently of any question as to the extent of the authority granted to "telegraph" companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the Federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company, in 1879, as "an instrument for electrically transmitting or receiving *articulate speech*."

Our attention is called to several adjudged cases in some of which it was said that communication by telephone was communication by telegraph. *Attorney General* v. *Edison Telephone Co.*, L. R. 6 Q. B. D. 244, 255; *Chesapeake & Potomac Telephone Co.* v. *B. & O. Telegraph Co.*, 66 Maryland, 399; *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wisconsin, 32; *Duke* v. *Central New Jersey Telephone Co.*, 53 N. J. L. 341; *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. Rep. 273. Upon the authority of those cases it is contended that the act of Congress should be construed as embracing both telephone and telegraph companies.

The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the Postmaster General by certain acts of Parliament as to the transmission of "telegrams." The court held that the Post-

master General was entitled, looking at the manifest objects of those acts and under a reasonable interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether telephone companies, although not specifically mentioned in a certain general law of that State, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in any way, "or for any lawful business or purpose whatever." The New Jersey case involved the question whether a company organized under the act of that State to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate and maintain such telegraph, telephone and other lines necessary for the speedy transmission of intelligence along and over the public ways and streets of the cities and towns of that State. It was held in that case that a telephone company under its right to construct and operate a telegraph was empowered by statute to establish a telephone service. None of those cases involved a construction of the act of Congress; and the general language employed in some of them cannot be regarded as decisive in respect of the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to

telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887 the Postmaster General submitted to the Attorney General the question whether a telephone company or line, offering to accept the conditions prescribed in Title LXV of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Attorney General Garland replied: "The subject of Title LXV of Revised Statutes is telegraphs. In all its sections the words 'telegraph,' 'telegraph company' and 'telegram' define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the Postmaster Gen-

eral, who has charge of the mail service. Under the several sections embraced in the Title, in consideration of the right of way and the grant of the right to preëmpt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the Government. Governmental communications to all distant points are almost all, if not all, in writing. The useful Government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the Title was passed. Telephone companies therefore are not within the 'category of the grantees of the privileges conferred by the statute.' If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." 19 Opinions Attorney General, 37.

It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the States, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as

the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the act of Congress, relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State. But even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of Congress relating in terms only to "telegraph" companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and alleys within their respective jurisdictions. If Congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech — that is, to companies popularly known as telephone companies, and never otherwise designated in common speech — let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

Something was said in argument as to the power of Congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary to express any opinion. We now adjudge only that the act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no applica-

tion to telephone companies whose business is that of electrically transmitting articulate speech between different points.

What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction.

The decree of the Circuit Court of Appeals so far as it reverses the decree of the Circuit Court is affirmed, and the cause is remanded with directions for such further proceedings in the Circuit Court as may be in conformity with the principles of this opinion and consistent with law. It is so ordered.

OAKES *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 19. Argued April 20, 1898. — Decided May 22, 1899.

Under the act of July 28, 1892, c. 313, conferring jurisdiction on the Court of Claims "to hear and determine what are the just rights in law" of the daughter and heir of Hugh Worthington to compensation for his interest in a steamboat taken and converted into a gunboat by the United States during the war of the rebellion, and, if it "shall find that said claim is just," to render judgment in her favor for the sum found due, the issue to be determined depends upon the question what had been his legal right to such compensation, embracing all questions, of law or of fact, affecting the merits of the claim.

Whether the capture of a steamboat on the western waters within the lines of the Confederate forces in February, 1862, by part of the naval forces of the United States on those waters, commanded by officers of the Navy, and under the general control of the War Department, but no land forces being near the scene of the capture or taking any active part therein, was a capture by the Army — *quære.*

A libel for the condemnation, under the act of August 6, 1861, c. 60, of a steamboat captured and taken into firm possession by naval forces of the United States on the western waters during the war of the rebellion, was filed by the district attorney in the District Court of the United States for a district into which she had been brought; the libel alleged that she

Statement of the Case.

had been seized by a quartermaster, for the reason that she was used with her owners' knowledge and consent in aiding the rebellion, contrary to that act; she was taken into the custody of the marshal under a writ of attachment from the court; notice was published to all persons to appear and show cause against her condemnation, and no one appeared or interposed a claim. *It seems*, that a decree thereupon rendered for her condemnation and sale was valid against her former owners and all other persons.

The act of March 3, 1800, c. 14, § 1, providing that vessels or goods of a person resident within or under the protection of the United States, taken by an enemy and recaptured by a vessel of the United States, shall be restored to the owner on payment of a certain sum as salvage, has no application to property captured by the United States, which had come into the enemy's possession by purchase or otherwise, with the consent of the owner or of his agent, and not by capture or by other forcible and compulsory appropriation.

Communications between high civil and military officers of the so-called Confederate States, preserved in the Confederate Archives Office of the War Department of the United States, or duly certified copies thereof from that office, are competent evidence upon the question whether possession of a steamboat belonging to a citizen of the United States was obtained by the Confederate States by capture or by purchase.

A petition under the act of July 28, 1892, c. 313, for compensation for an interest in a steamboat, which alleges that she was captured by the insurgents and recaptured by the United States during the war of the rebellion, is not sustained by evidence that she was captured by the United States from the Confederate forces after they had obtained possession of her by purchase.

THIS was a petition under the act of Congress of July 28, 1892, c. 313, (copied in the margin,[1]) filed in the Court of

[1] An act to confer jurisdiction on the Court of Claims to hear and determine the claim of the heir of Hugh Worthington for his interest in the steamer Eastport.

Whereas it is claimed the steamer Eastport was taken by the United States Anno Domini eighteen hundred and sixty-two, and converted into a gunboat; and

Whereas it is claimed at the time of such taking one Hugh Worthington, then of Metropolis, Massac County, Illinois, but since deceased, was the owner of three fifths interest in said steamer, and no compensation has been paid to said Hugh Worthington or his heirs; and

Whereas his daughter, Mrs. Sarah A. Oakes, of Metropolis, Illinois, claims that Hugh Worthington was a loyal citizen, that she is his only heir at law, and is justly entitled to receive from the United States compensation for the value of her father's interest in said steamer: Therefore

Be it enacted by the Senate and House of Representatives of the United

Claims, January 9, 1895, by Sarah A. Oakes, the heir at law and next of kin of Hugh Worthington, to recover compensation for his interest in the steamboat Eastport, alleged in the petition to have been captured by the insurgents, and recaptured by the United States, during the war of the rebellion.

The facts of the case, as found by the Court of Claims, were in substance as follows:

At the outbreak of the war of the rebellion, the steamboat Eastport, of $570\frac{3}{5}\frac{4}{9}$ tons burthen, duly enrolled at Paducah, Kentucky, and commanded by Captain Elijah Wood, was plying between the ports of Nashville, Tennessee, and New Orleans, Louisiana, engaged in the cotton trade. After the beginning of the war, she continued, under Wood's command, to ply between points on the Ohio River until May, 1861, when, in consequence of the blockade of the Mississippi River by the United States forces at Cairo, Illinois, she was tied up at Paducah, and there remained until August, 1861, undergoing extensive repairs under the orders of Captain Wood, and of Hugh Worthington, who was the owner of three fifths of her, the remaining two fifths being owned by two other persons.

About the last of August, or early in September, 1861, when

States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims to hear and determine what are the just rights in law of the said Sarah A. Oakes, as heir of Hugh Worthington, deceased, and that from any judgment so entered by said Court of Claims either party may appeal to the Supreme Court of the United States, for compensation for the value of said Worthington's interest in said steamer Eastport. That upon proper petition being presented by said Sarah A. Oakes, her heirs, executors or administrators, to said court, said court is authorized and directed to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just, the court shall enter judgment in favor of the claimant and against the United States for whatever sum shall be found to be due.

SEC. 2. That in case judgment shall be rendered against the United States, the Secretary of the Treasury shall be, and he is hereby, authorized and directed to pay the claimant, her heirs, executors or administrators, whatever sum shall be adjudged by the court to be due out of any money in the Treasury not otherwise appropriated. 27 Stat. 320.

the United States forces were about to take possession of Paducah, and while the Eastport was in the possession and under the control of Captain Wood, he took her, with a small crew, without Worthington's knowledge or consent, from Paducah up the Tennessee River to a place near the mouth of the Sandy River, a few miles above Fort Henry, within the lines of the Confederate forces. Captain Wood returned to Paducah a few months afterwards, and continued to reside there until his death, about the close of the war. What disposition he made of the Eastport does not appear, although papers in the Confederate Archives Office show what is stated in the certificate copied in the margin.[1] Nor does it appear whether the sum of money stated therein was paid to Captain Wood, nor whether he ever rendered an account thereof to the other owners, nor whether they received any part of that sum, nor where they are, nor what has become of their interests in the Eastport, nor why they are not seeking payment for the value thereof.

Some time between September, 1861, and February, 7, 1862,

---

[1] Under date of October 31, 1861, General L. Polk, C. S. Army, telegraphed from Columbus, Kentucky, to the Secretary of the Navy, C. S., that "the price of the steamer Eastport is $12,000;" and on the same date J. P. Benjamin, acting Secretary of War, C. S., telegraphed to General L. Polk directions to "buy the steamer Eastport if thought worth $12,000 demanded."

Under date of November 28, 1861, General L. Polk, in a letter from Columbus, Kentucky, addressed to General A. S. Johnston, C. S. A., stated that he bought the steamer Eastport by authority of the Secretary of the Navy.

Under date of January 5, 1862, General L. Polk wrote to J. P. Benjamin, Secretary of War, C. S., as follows: "By virtue of the authority from the War Department of October 31, I bought the steamer Eastport, and she is now undergoing the necessary alterations to convert her into a gunboat."

Under date of January 16, 1862, J. P. Benjamin, Secretary of War, C. S., wrote to General L. Polk as follows: "I shall order the necessary funds forwarded at once for the Eastport."

Under date of February 2, 1863, General Polk, in a statement to the C. S. Secretary of War of the disbursement of certain moneys, gives as one item, "Am't expended in purchase of steamer Eastport as per receipt of Major Peters, A. Q. M., $9688.92."

No further information on the subject of the within inquiry has been found in said archives.

By authority of the Secretary of War: F. C. AINSWORTH,
Colonel U. S. Army, Chief of Office.

the Eastport was in the possession of the Confederate forces, but whether by reason of capture, or of purchase from Captain Wood, does not appear; and before the latter date she was taken by those forces to Cerro Gordo, Tennessee, and work was there begun to transform her into a gunboat for use in the Confederate service.

On February 7, 1862, while she was lying under the bank of the Tennessee River near Cerro Gordo, and being converted into a gunboat for use in the Confederate service, with the iron and other materials therefor on board, and having been dismantled, and her upper works, cabin and pilot-house cut away, but before she had been completed, or had been used, or was in condition for use, in any hostile demonstration against the United States, she was boarded under the fire of the enemy (whether that fire was from the vessel or from the land does not appear) and captured by detachments of men in small boats from three United States gunboats, commanded by a lieutenant in the Navy, and part of the naval forces on the western waters, then under the control of the War Department, and commanded by Captain Andrew H. Foote, who was serving under a commission from the President of August 5, 1861, appointing him a captain in the Navy, and under an order from the Secretary of the Navy of August 30, 1861, directing him "to take command of the naval operations upon the western waters, now organizing under the direction of the War Department," and to proceed at once to St. Louis, to place himself in communication with Major General Fremont, commanding the army of the West, and to coöperate fully and freely with him as to his own movements, and to make requisitions upon the War Department through him. Immediately after the capture, Captain Foote reported his operations, together with the report of the lieutenant commanding the gunboats, to the Secretary of the Navy, who communicated them to Congress. At the time of the capture, no land forces were near the scene thereof, or took any active part therein.

The Eastport was brought by her captors to Mound City, Illinois, on the Ohio River, arriving there about February 26, 1862; and was there, on the recommendation of Captain

Foote, converted by the United States into a gunboat; and about August, 1862, went into commission as such with a full complement of officers and men of the navy; and continued in the service as part of the Mississippi squadron until April, 1864, when she was sunk by running upon a torpedo, and was blown up by her commander to prevent her capture by the Confederate forces. The Eastport and all other vessels of the Navy performing services on the western waters were under the control of the War Department until October 1, 1862, when they were turned over to the Navy Department, pursuant to the act of Congress of July 16, 1862, c. 185. 12 Stat. 587.

On July 17, 1862, in the District Court of the United States for the Southern District of Illinois, the district attorney of the United States filed a libel in admiralty against the Eastport, alleging "that on or about the 20th day of June, A.D. 1862, in the Mississippi River near Columbus, Kentucky, there was seized by George D. Wise, captain and assistant quartermaster, with gunboat flotilla, (and which he hereby reports for condemnation) the steamer Eastport, and which was brought into said district. Said seizure was made for the reason that said steamer was used by and with the knowledge and consent of the owner in aiding the present rebellion against the United States, contrary to the act of August 6, 1861. The said attorney therefore asks that process of attachment may issue against said steamer, and the monition of this honorable court, and that all persons having an interest in the same may be made parties herein, and that on a final hearing of this case your honor will adjudge and decree condemnation of said boat and order that the same may be sold." Thereupon the court issued a monition, reciting that the libel had been filed by the district attorney and Captain Wise; and commanding the marshal to attach the Eastport and detain her in his custody until the further order of the court; and to give notice, by publication in a certain newspaper published at Springfield in that district for fourteen days before the day of trial, "and by notice posted up in the most public manner for the space of fourteen days at or near the place of trial, of such seizure and libel, to all persons claiming the said steamer

Eastport, boats, tackle, apparel and furniture, or knowing or having anything to say why this court should not pronounce against the same, according to the prayer of the said libel," to appear before the court at Springfield on September 2, 1862. The marshal's return on the monition stated that by virtue thereof he had "attached the within named boat, and made proclamation of the same;" and notice was published as ordered. And on that day the court entered a decree, reciting the attachment and notice, and that, notwithstanding proclamation made, no one had appeared or interposed a claim; and adjudging "that the default of all persons be, and the same are, accordingly hereby entered, and that the allegations of the libel in this cause be taken as true against said property, and that the same be condemned as forfeited to the United States," and be sold by the marshal. Pursuant to that decree the Eastport was sold October 4, 1862, by the marshal to the United States for the sum of $10,000, which, after deducting allowances to the clerk, to the marshal and to the district attorney, was ordered by the court to be "equally divided between the United States and George D. Wise, the informer herein."

Of those proceedings, Hugh Worthington had no notice or knowledge until after the sale of the vessel under them; but whether her other owners or Captain Wood had any does not appear.

Before and throughout the war, Worthington was a citizen and resident of Metropolis, Illinois, about ten miles above Paducah, and was loyal to the United States, and gave no aid or comfort to the rebellion. He died in March, 1876, intestate and without property, and having received no compensation from the United States for the use or value of the Eastport. The claimant, Sarah A. Oakes, is his daughter, and his sole surviving heir at law and next of kin.

When Captain Wood ran the Eastport up the Tennessee River, she was worth $40,000. When she was captured by the United States forces, she was worth $30,000. During the time she was used by the United States, a fair and reasonable rental for her was $150 a day.

The Court of Claims decided that the claimant was not entitled to recover against the United States, and dismissed the petition. 30 C. Cl. 378. The claimant appealed to this court.

Mr. John C. Fay for appellant.

Mr. Assistant Attorney General Pradt for appellees. *Mr. Assistant Attorney John G. Capens* was on his brief.

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

The special act of Congress of July 28, 1892, c. 313, under which the petition in this case was filed, confers jurisdiction upon the Court of Claims "to hear and determine what are the just rights in law" of the claimant, as the daughter and heir at law of Hugh Worthington, to compensation for the value of his interest in the steamboat Eastport, alleged to have been taken by the United States in 1862, and converted into a gunboat; and authorizes and directs that court, upon her petition, "to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just," to render judgment in her favor and against the United States for whatever sum shall be found due. 27 Stat. 320.

Under this act, the question whether "said claim is just" is the same as the question "what are the just rights in law" of the claimant as Worthington's daughter and heir; and this necessarily depends upon the question what had been his legal right to compensation from the United States for the value of his interest in the vessel.

The act neither recognizes the claim as a valid one, nor undertakes to pass upon its validity; but simply empowers the Court of Claims to hear and determine whether the claim is valid or invalid; and the determination of that issue embraces not only the questions whether the claimant was the daughter and heir at law of Worthington, whether he was a loyal citizen of the United States, whether he was the

owner of three fifths of the Eastport, and whether the vessel was taken and applied to the use of the United States, but all other questions, of law or of fact, affecting the merits of the claim. *United States* v. *Cumming*, 130 U. S. 452.

The leading facts of the case, as found by the Court of Claims, are as follows: Worthington was a loyal citizen of the United States, residing at Metropolis in the State of Illinois; and the claimant was his daughter and only heir at law. Early in the war of the rebellion, in consequence of the blockade of the Mississippi River by the forces of the United States, the Eastport was tied up at Paducah in the State of Kentucky, her home port, undergoing extensive repairs under the orders of her master, Captain Wood, and of Worthington, who owned three fifths of her. She was afterwards taken by Wood, without Worthington's knowledge or consent, up the Tennessee River within the lines of the Confederate forces, and came into their possession; and while in their possession, and being transformed into a gunboat for use in the Confederate service, having on board the iron and other materials therefor, and having been dismantled, and her upper works, cabin and pilot-house cut away, but before she had been completed or used, or was in condition for use, in any hostile demonstration against the United States, she was captured by part of the naval forces of the United States on the western waters, then under the control of the War Department. No land forces took part in the capture, or were in the neighborhood at the time. The Eastport was immediately brought by her captors to Mound City, Illinois, and was afterwards converted by the United States into a gunboat, and put in commission in the Navy as such.

The questions of law presented by the record are not free from difficulty.

By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial

decree of condemnation is usually necessary to complete the title of the captors. 1 Kent. Com. 102, 110; Halleck's International Law, c. 19, § 7; c. 30, § 4; *Kirk* v. *Lynd*, 106 U. S. 315, 317.

The Eastport, at the time of her capture by the forces of the United States, was in the hands of the Confederate forces, and was being transformed into a gunboat for use in the Confederate service, with the iron and other materials therefor on board. Although not yet in condition for hostile use, she was clearly intended for that use. Consequently if, as the Court of Claims held, her capture was made by the Army of the United States, it cannot be doubted that the capture was at once complete upon her being taken into the possession of the national forces, and brought by them to Mound City, Illinois, in February, 1862.

The grounds on which the decision of the Court of Claims proceeded were that by the Army Appropriation Act of July 17, 1861, 12 Stat. 263, there was appropriated for "gunboats on the western rivers, one million dollars;" that, at the time of the capture of the Eastport, the gunboats and the naval forces of the United States on those rivers were under the control of the War Department; that she was on inland waters, and could not be regarded as maritime prize; that she was lying dismantled by the bank of a river, where the seizure might as well have been made by a detachment from the Army, as by one from the Navy; and that, in view of these facts, the Eastport must be considered as having been captured by the Army.

In support of that conclusion, reference was made to *United States* v. 269½ *Bales of Cotton*, Woolworth, 236. But that case was wholly different from the case at bar. In that case, a battalion of cavalry, commanded by an officer of the Army of the United States, went in vessels in the service of the United States up the Mississippi River, and landed in the State of Mississippi, and penetrated into country in the control of the Confederate forces, and, after a conflict with them, took from their possession a quantity of cotton, and brought it by the river to the State of Arkansas; and Mr. Justice

Miller, sitting in the Circuit Court, held that the cotton so captured was not within the jurisdiction of a prize court. The grounds of his decision are sufficiently shown by the following extract from his opinion:

"It is not supposed or alleged that any of these vessels were officered by government officers. They were not even armed vessels, and could not take part in any action, or contribute in any manner by belligerent force to the capture. It is not shown that they remained after they landed the forces; and the fair inference is that they did not. It is averred that the cotton was conveyed by the soldiers to the river, and that it was taken thence to the State of Arkansas; but it is not alleged that it was so taken by the vessels. In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the War Department, and were used merely as transports to carry the troops; and it is consistent with no other supposition. It is also evident that the capture was not made on the banks of the river, but some distance inland, where the vessels could render no other assistance than to land the forces, and receive them again. I cannot conceive that the employment by the Government of unarmed steamboats, for the mere purpose of transporting troops from one point to another on the Mississippi River, can render every capture made by the troops or detachments so transported prize of war, and let in the crews and officers of those vessels to a share of the prize money. Such vessels are in no sense war vessels, and are neither expected nor fitted to take part in engagements." Woolworth, 256, 257.

In the case at bar, on the other hand, it appears, by the facts found by the Court of Claims, that the Eastport, while waterborne, was boarded and taken by detachments of men in small boats from three United States gunboats, armed vessels, commanded by a lieutenant in the Navy, and part of the naval forces on the western waters, commanded by a captain in the Navy, who reported the capture to the Secretary of the Navy; and that, at the time of the capture, no land forces were near the scene thereof, or took any active part therein. Under these circumstances, we are not pre-

pared to hold that the capture was made by the Army, and not by the naval forces of the United States, although the latter, at the time and place, were under the general control of the War Department.

If it was not a capture by the Army, it was clearly a capture by the naval forces; and the United States rely upon the proceedings for the condemnation and sale of the Eastport in the District Court of the United States for the Southern District of Illinois, which are stated in the record.

Those proceedings, as appears on the face of the libel, were instituted under the act of Congress of August 6, 1861, c. 60, the material provisions of which are as follows:

Section 1 enacts that, if the owner of any property, of whatsoever kind or description, "shall purchase or acquire, sell or give," with "intent to use or employ the same, or suffer the same to be used or employed," or "shall knowingly use or employ, or consent to the use and employment of the same," in aiding, abetting or promoting the then existing insurrection, "all such property is hereby declared to be lawful subject of prize and capture, wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned."

Section 2 gives jurisdiction of the proceedings for condemnation of such property to "the District or Circuit Court of the United States having jurisdiction of the amount, or in admiralty, in any district in which the same may be seized, or into which they may be taken and proceedings first instituted."

Section 3 provides that "the Attorney General, or any district attorney of the United States [in the district] in which said property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts." 12 Stat. 319.

In the proceedings for the condemnation of the Eastport, the libel alleged that she had been seized, in June, 1862, by

an assistant quartermaster, "with gunboat flotilla," and that "said seizure was made for the reason that said steamer was used by and with the knowledge and consent of the owner in aiding the present rebellion against the United States, contrary to the act of August 6, 1861." This is a sufficient allegation that she was so used with the knowledge and consent of her owner, as well as that she was seized for that reason, and brings the case within the first section of that act. The proceedings were in conformity with the practice in admiralty, and were not governed by the strict rules that prevail in regard to indictments or criminal informations at common law. *Union Ins. Co.* v. *United States*, 6 Wall. 759, 763; *Confiscation cases*, 20 Wall. 92, 104–107.

The libel was filed, as required by the second and third sections of that act, by the district attorney of the United States, in the District Court of the United States, in a district into which the Eastport had been brought. The libel seems to have been filed by the district attorney on the information of the assistant quartermaster; but this was unimportant for any purpose, except for the distribution of the proceeds of the sale after condemnation.

The expressions in the opinions in *The Confiscation cases*, 20 Wall. 92, 109, and in *United States* v. *Winchester*, 99 U. S. 372, 376, cited by the appellant as tending to show that the proceedings for condemnation were void, for want of a preliminary order of the President of the United States directing the seizure of the Eastport and the institution of the proceedings, were delivered in cases in which proceedings for the confiscation of land, or of cotton captured on land, were sought to be maintained under the act of July 17, 1862, c. 195, (12 Stat. 589,) and are not easily to be reconciled with earlier judgments of this court under the same act. See *Pelham* v. *Rose*, 9 Wall. 103; *Miller* v. *United States*, 11 Wall. 268.

But the act of 1861 differed materially, in its object, and in its provisions, from the act of 1862. As was observed by Chief Justice Waite, speaking for the court, in *Kirk* v. *Lynd*, 106 U. S. 315, the act of 1861 was passed by Congress in the exercise of its power under the Constitution "to make rules

concerning captures on land and water," and was aimed exclusively at the seizure and confiscation of property used in aid of the rebellion, "not to punish the owner for any crime, but to weaken the insurrection;" but the act of 1862 proceeded upon the entirely different principle of confiscating property, without regard to its use, by way of punishing the owner for being engaged in rebellion and not returning to his allegiance. The act of 1861 did not require (as the act of 1862 did) that proceedings for condemnation of the property in question should be instituted "after the same shall have been seized;" and the act of 1861 expressly authorized (as the act of 1862 did not) such proceedings to be instituted by "the Attorney General or any district attorney of the United States [in the district] in which said property may at the time be." The case at bar presents no question of the construction of the act of 1862.

The Eastport having been captured by the United States forces, and taken into the firm possession of the United States, before the institution of the proceedings for condemnation; those proceedings having been instituted by the district attorney, under the authority expressly given him by the act of 1861, in a proper court of the United States in a district into which she had been taken; and thereupon, according to the usual course of proceedings *in rem* in admiralty, the vessel having been taken into the custody of the marshal under a writ of attachment from the court, and notice published to all persons interested to appear and show cause against her condemnation, and no one having appeared or interposed a claim at the time and place appointed for the hearing; we find it difficult to resist the conclusion that the decree of condemnation thereupon entered was valid, as against her former owners and all other persons, under the act of 1861; that the proceedings cannot be collaterally impeached; and that the sale under that decree passed an absolute title to the United States.

But, apart from the question whether the record shows a complete title in the Eastport to have vested in the United States, the claimant has wholly failed to show that Worth-

ington had any legal right to compensation from the United States for his interest in the vessel.

The counsel for the claimant contends that, the capture having been made on navigable waters by vessels of the United States, the claimant is entitled to compensation for the value of Worthington's interest in the Eastport, under the act of Congress of March 3, 1800, c. 14, § 1, which was as follows:

"When any vessel other than a vessel of war or privateer, or when any goods, which shall hereafter be taken as prize by any vessel acting under authority from the Government of the United States, shall appear to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretence of authority, from any prince, government or State against which the United States have authorized, or shall authorize, defence or reprisals, such vessel or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying, for and in lieu of salvage, if retaken by a public vessel of the United States, one eighth part, and if retaken by a private vessel of the United States, one sixth part, of the true value of the vessel or goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay, for and in lieu of salvage, one moiety of the true value of such vessel of war as privateer." 2 Stat. 16.

That act was a regulation of the *jus postliminii*, by which things taken by the enemy were restored to their former owner upon coming again under the power of the nation of which he was a citizen or subject. The *jus postliminii*, derived from the Roman law, and regulated in modern times by statute or treaty, or by the usage of civilized nations, has been

rested by eminent jurists upon the duty of the sovereign to protect his citizens and subjects and their property against warlike or violent acts of the enemy. Vattel's Law of Nations, lib. 3, c. 14, § 204; Halleck's International Law, c. 35, §§ 1, 2. He is under no such obligation to protect them against unwise bargains, or against sales made for inadequate consideration, or by an agent or custodian in excess of his real authority. The *jus postliminii* attaches to property taken by the enemy with the strong hand against the will of its owner or custodian, and not to property obtained by the enemy by negotiation or purchase.

The act of 1800 is entitled "An act providing for salvage in cases of recapture," and applies only to recaptures from an enemy. In order to come within its purpose, and its very words, the property in question must "have been taken by an enemy of the United States," and "retaken" by a public or private vessel of the United States. Where there has been no capture, there can be no recapture. That enactment has been substantially embodied in later statutes. Act of June 30, 1864, c. 174, § 29; 13 Stat. 314; Rev. Stat. § 4652. The similar provision of the English Prize Acts was held by Sir William Scott to be inapplicable to a British ship captured from the French during a war between the two countries which before the war had been seized, condemned and sold under the revenue laws of France, although the French seizure was alleged to have been violent and unjust. *The Jeune Voyageur*, 5 C. Rob. 1. Neither the English statutes nor our own have ever been held to apply to property which had come into the enemy's possession, by purchase or otherwise, with the consent of the owner or of his agent.

In the present case, the only facts found by the Court of Claims (other than may be ascertained from the papers in the Confederate Archives Office) which can be supposed to have any bearing on the question whether the Eastport came into the possession of the Confederate forces by capture, or by purchase, are these: Before and throughout the war of the rebellion, Worthington, being the owner of three fifths of the Eastport, was a citizen and resident of Illinois, was loyal to

the United States, and gave no aid or comfort to the rebellion, and neither knew of, nor consented to, the Eastport being taken by her captain, Wood, within the lines of the Confederate forces. This precludes any inference that Worthington himself participated in, or consented to, a transfer of the Eastport to the Confederate authorities; but it does not negative the supposition that she was sold to those authorities by Wood, or by the owners of the other two fifths of her. That Wood's possession and control of her was by Worthington's authority and consent is evident from the facts that Worthington owned more than one half of her, and that she was being extensively repaired, under the orders of both Wood and Worthington, shortly before Wood took her within the Confederate lines. At that time she was an unarmed vessel, and fit for commercial purposes only.

It is stated in the finding of facts that it did not appear what disposition Wood made of the Eastport, nor whether he was paid purchase money for her, nor whether he ever accounted for such money to the other owners, nor whether they had received any part of it, nor whether she came into the possession of the Confederate forces by capture, or by purchase from Wood.

If the matter rested here, there would be nothing to warrant the court in concluding that the Eastport came into the possession of the Confederate forces by capture or other forcible appropriation. But it does not rest here.

Upon the question whether the so-called Confederate States acquired possession of the Eastport by capture or by purchase, the extracts from the Confederate archives, made part of the facts found by the Court of Claims, appear to this court to have an important bearing, and to be competent, though not conclusive, evidence.

The government of the Confederate States, although in no sense a government *de jure*, and never recognized by the United States as in all respects a government *de facto*, yet was an organized and actual government, maintained by military power, throughout the limits of the States that adhered to it, except in those portions of them protected

from its control by the presence of the armed forces of the United States; and the United States, from motives of humanity and expediency, had conceded to that government some of the rights and obligations of a belligerent. *Prize cases*, 2 Black, 635, 673, 674; *Thorington* v. *Smith*, 8 Wall. 1, 7, 9, 10; *Ford* v. *Surget*, 97 U. S. 594, 604, 605; *The Lilla*, 2 Sprague, 177, and 2 Clifford, 169.

No better evidence of the doings of that organization assuming to act as a government can be found than in papers contemporaneously drawn up by its officers in the performance of their supposed duties to that government.

For the collection and preservation of such papers, a bureau, office or division in the War Department (now known as the Confederate Archives Office) was created by the Executive authority of the United States soon after the close of the war of the rebellion, and has been maintained ever since, and has been recognized by many acts of Congress.

For instance, Congress, beginning in 1872, has made frequent appropriations "to enable the Secretary of War to have the rebel archives examined and copies furnished from time to time for the use of the Government." Acts of May 8, 1872, c. 140, and March 3, 1873, c. 226; 17 Stat. 79, 500; August 15, 1876, c. 287; March 3, 1877, c. 102; 19 Stat. 160, 310; June 19, 1878, c. 329; 20 Stat. 195; June 21, 1879, c. 34; June 15, 1880, c. 225; March 3, 1881, c. 130; 21 Stat. 23, 226, 402. And the appropriations for the War Department in 1882 included one "for travelling expenses in connection with the collection of Confederate records placed by gift or loan at the disposal of the Government." Act of August 5, 1882, c. 389; 22 Stat. 241. Congress has also occasionally made appropriations "to enable the Secretary of the Treasury to have the rebel archives and records of captured property examined, and information furnished therefrom for the use of the Government." Acts of March 3, 1875, c. 130; 18 Stat. 376; March 3, 1879, c. 182; 20 Stat. 384; June 16, 1880, c. 235; 21 Stat. 266. It has once, at least, made an appropriation "for collecting, compiling and arranging the naval records of the war of the rebellion, including Confederate

naval records." Act of July 7, 1884, c. 331; 23 Stat. 185. And it has made appropriations "for the preparation of a general card index of the books, muster rolls, orders and other official papers preserved in the Confederate Archives Office." Acts of May 13, 1892, c. 72, and March 3, 1893, c. 208; 27 Stat. 36, 600.

It would be an anomalous condition of things if records of this kind, collected and preserved by the Government of the United States in a public office at great expense, were wholly inadmissible in a court of justice to show facts of which they afford the most distinct and appropriate evidence, and which, in the nature of things, can hardly be satisfactorily proved in any other manner.

The act of March 3, 1871, c. 116, § 2, provided for the appointment of a board of commissioners, "to receive, examine and consider the justice and validity of such claims as shall be brought before them, of those citizens who remained loyal adherents to the cause and the Government of the United States during the war, for stores or supplies taken or furnished during the rebellion for the use of the Army of the United States in States proclaimed as in insurrection against the United States, including the use and loss of vessels or boats while employed in the military service of the United States." 16 Stat. 524. By the act of April 20, 1871, c. 21, § 1, it was enacted that "all books, records, papers and documents relative to transactions of or with the late so-called government of the Confederate States, or the government of any State lately in insurrection, now in the possession, or which may at any time come into the possession, of the Government of the United States, or of any department thereof, may be resorted to for information by the board of commissioners of claims created by act approved March 3, 1871; and copies thereof, duly certified by the officer having custody of the same, shall be treated with like force and effect as the original." 17 Stat. 6. The latter act thus not only allowed a particular board of commissioners, appointed to pass upon certain claims against the United States for property taken for the use of the Army during the war of the rebellion,

to have access to such archives for information as to transactions of or with the so-called government of the Confederate States; but it declared the records and papers in such archives, or duly certified copies thereof, to be competent evidence of such transactions.

Section 882 of the Revised Statutes, also, reënacting earlier acts of Congress, provides that "copies of any books, records, papers or documents in any of the Executive Departments, authenticated under the seals of such Departments respectively, shall be admitted in evidence equally with the originals thereof." And, by section 1076, the Court of Claims has "power to call upon any of the Departments for any information or papers it may deem necessary;" "but the head of any Department may refuse and omit to comply with any call for information or papers, when, in his opinion, such compliance would be injurious to the public interest."

The certificate of the officer of the United States in charge of the Confederate Archives Office, embodied in the findings of fact, would appear to have been furnished upon a call from the Court of Claims; and it is not open, at this stage of the case, to objection for not being under the seal of the War Department, since that court has found that the papers in that office show the facts stated in that certificate. Those facts consist of official communications, between high civil and military officers of the Confederate States, including a dispatch from one of their generals in Kentucky, October 31, 1861, to the secretary of the navy, that the price of the Eastport was $12,000; a reply of the secretary of war of the same date, giving authority to the general to buy her if thought worth that sum; a letter of January 5, 1862, from the general to the secretary of war, informing him that, by virtue of that authority, he had bought her, and she was being converted into a gunboat; a letter of January 16, 1862, from the secretary of war to the general, saying that he would at once order to be forwarded the necessary funds for the Eastport; and a statement of disbursements, dated February 2, 1863, by the general to the secretary of war, in which one item was a sum of $9688.92, "expended in purchase of Steamer Eastport."

Not going beyond what is required for the purposes of this case, we are of opinion that the originals of these communications, and consequently the certified copies thereof from the Confederate Archives Office, are competent and persuasive evidence that the Confederate authorities did not obtain possession of the Eastport by capture or by other forcible and compulsory appropriation.

The claimant therefore wholly fails to support the allegation of her petition that the Eastport was captured by the insurgents.

Judgment affirmed.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 261. BOARD OF COUNTY COMMISSIONERS OF SCOTT COUNTY, KANSAS, *v.* STATE OF KANSAS. Error to the Supreme Court of the State of Kansas. Argued and submitted April 24, 1899. Decided May 1, 1899. *Per Curiam.* Dismissed on the authority of *Union Mutual Life Insurance Company* v. *Kirchoff*, 160 U. S. 374. *Mr. S. S. Ashbaugh* for plaintiff in error. *Mr. A. A. Godard* for defendant in error.

No. 356. STONE *v.* BANK OF KENTUCKY. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued February 28 and March 2 and 3, 1899. Decided May 15, 1899. Decree affirmed with costs by a divided court. *Mr. H. L. Stone*, *Mr. W. S. Taylor* and *Mr. Ira Julian* for appellants. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for appellees.

No. 357. CITY OF LOUISVILLE *v.* BANK OF KENTUCKY. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued February 28 and March 2 and 3, 1899. Decided May 15, 1899. Decree affirmed with costs by a divided court. *Mr. H. L. Stone* for appellant. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for appellee.

No. 360. STONE *v.* LOUISVILLE BANKING COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued February 28 and March 2 and 3, 1899. Decided May 15, 1899. Decree affirmed with costs by a divided court. *Mr. H. L. Stone* and *Mr. W. S. Taylor* for appellants. *Mr. James P. Helm* and *Mr. Helm Bruce* for appellee.

Decisions announced without Opinions.

No. 361. CITY OF LOUISVILLE *v.* LOUISVILLE BANKING COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued February 28 and March 2 and 3, 1899. Decided May 15, 1899. Decree affirmed with costs by a divided court. *Mr. H. L. Stone* for appellant. *Mr. James P. Helm* and *Mr. Helm Bruce* for appellee.

No. 387. STONE *v.* DEPOSIT BANK OF FRANKFORT. Appeal from the Circuit Court of the United States for the District of Kentucky. Argued February 28 and March 2 and 3, 1899. Decided May 15, 1899. Decree affirmed with costs by a divided court. *Mr. H. L. Stone*, *Mr. W. S. Taylor* and *Mr. Ira Julian* for appellants. *Mr. Frank Chinn* for appellee.

No. 113. ADAMS ET AL., ADMINISTRATORS, *v.* COWEN ET AL., TRUSTEES. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. Argued January 9 and 10, 1899. Decided May 22, 1899. Decree affirmed with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the District of Kentucky. *Mr. Lawrence Maxwell Jr.*, *Mr. John F. Hager* and *Mr. J. L. Anderson* for petitioners. *Mr. Judson Harmon*, *Mr. John J. Glidden* and *Mr. John Little* for respondents.

Decisions on Petitions for Writs of Certiorari.

No. 761. STORROW *v.* TEXAS CONSOLIDATED COMPRESS AND MANUFACTURING COMPANY. Fifth Circuit. Denied April 24, 1899. *Mr. W. S. Herndon* for petitioner. *Mr. J. M. McCormick* opposing.

No. 773. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* CLARK. Second Circuit. Granted April 24, 1899. *Mr. Charles W. Bangs*, *Mr. George R. Peck* and *Mr. Burton Hanson* for petitioner. *Mr. Abram J. Rose* opposing.

Decisions announced without Opinions.

No. 777. BOARD OF COUNTY COMMISSIONERS OF PRATT COUNTY, KANSAS, *v.* SOCIETY FOR SAVINGS. Eighth Circuit. Denied April 24, 1899. *Mr. S. S. Ashbaugh* for petitioner.

No. 786. FLORIDA MORTGAGE AND INVESTMENT COMPANY, LIMITED, *v.* FINLAYSON. Fifth Circuit. Denied April 24, 1899. *Mr. N. B. K. Pettingill* and *Mr. T. M. Shackleford* for petitioner. *Mr. W. B. Lamar* opposing.

No. 781. TRAVIS COUNTY *v.* KING IRON BRIDGE AND MANUFACTURING COMPANY. Fifth Circuit. Denied May 1, 1899. *Mr. Clarence H. Miller* for petitioner. *Mr. M. W. Garnett* opposing.

No. 746. LEOVY *v.* UNITED STATES. Fifth Circuit. Granted May 1, 1899. *Mr. Alexander Porter Morse, Mr. H. J. Leovy* and *Mr. Victor Leovy* for petitioner.

No. 747. COEUR D'ALENE RAILWAY AND NAVIGATION COMPANY *v.* SPALDING. Ninth Circuit. Denied May 1, 1899. *Mr. C. W. Bunn, Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioner. *Mr. John Goode* and *Mr. Willis Sweet* opposing.

No. 779. SIOUX CITY, O'NEILL AND WESTERN RAILWAY COMPANY *v.* MANHATTAN TRUST COMPANY. Eighth Circuit. Denied May 1, 1899. *Mr. Henry J. Taylor* and *Mr. John C. Coombs* for petitioner. *Mr. John L. Webster* and *Mr. G. W. Wickersham* opposing.

No. 793. STEINWENDER *v.* STEAMSHIP MEXICAN PRINCE. Second Circuit. Denied May 1, 1889. *Mr. Laurence Kneeland, Mr. Harrington Putnam* and *Mr. Lewis Cass Ledyard* for petitioner. *Mr. J. Parker Kirlin* opposing.

Decisions announced without Opinions.

No. 795. JAKOBSEN *v.* SPRINGER. Fifth Circuit. Granted May 1, 1899. *Mr. John W. Warner*, *Mr. J. D. Rouse*, *Mr. William Grant* and *Mr. John S. Blair* for petitioner. *Mr. Richard De Gray* opposing.

No. 734. WHITTIER *v.* PACKER. First Circuit. Denied May 15, 1899. *Mr. Arthur D. Hill* and *Mr. Chapin Brown* for petitioner. *Mr. James J. Storrow* opposing.

No. 796. OVERWEIGHT COUNTERBALANCE ELEVATOR COMPANY *v.* IMPROVED ORDER OF RED MEN'S HALL ASSOCIATION. Ninth Circuit. Denied May 15, 1899. *Mr. Frederic D. McKenney* and *Mr. W. H. H. Hart* for petitioner. *Mr. M. A. Wheaton* opposing.

No. 799. GOULD *v.* HUGHES. Third Circuit. Granted May 15, 1899. *Mr. Eugene P. Carver* and *Mr. Henry R. Edmunds* for petitioners.

No. 805. MITCHELL *v.* FIRST NATIONAL BANK OF CHICAGO. Second Circuit. Granted May 15, 1899. *Mr. Theodore M. Maltbie* for petitioner. *Mr. William C. Case* opposing.

No. 806. CITY OF NEW ORLEANS *v.* FISHER. Fifth Circuit. Granted May 15, 1899. *Mr. James J. McLoughlin*, *Mr. Samuel L. Gilmore*, *Mr. Branch K. Miller* and *Mr. H. Generes Dufour* for petitioner. *Mr. Charles Louque* and *Mr. E. Howard McCaleb* opposing.

No. 804. CITY OF MILWAUKEE *v.* SHAILER AND SCHNIGLAU COMPANY. Seventh Circuit. Denied May 22, 1899. *Mr. C. H. Hamilton* for petitioner. *Mr. James G. Flanders* opposing.

Decisions announced without Opinions.

No. 820. CENTRAL TRUST COMPANY OF NEW YORK, TRUSTEE, *v.* STATE OF MINNESOTA. Eighth Circuit. Denied May 22, 1899. *Mr. Louis Marshall* and *Mr. J. L. Washburn* for petitioner. *Mr. J. B. Richards* opposing.

No. 821. ATLANTIC LUMBER COMPANY *v.* L. BUCKI AND SOUTHERN LUMBER COMPANY. Fifth Circuit. Denied May 22, 1899. *Mr. T. F. McGarry* and *Mr. R. H. Liggett* for petitioner. *Mr. H. Bisbee* opposing.

No. 823. INSURANCE COMPANY OF NORTH AMERICA *v.* STEAMSHIP PRUSSIA. Second Circuit. Denied May 22, 1899. *Mr. Laurence Kneeland* for petitioner. *Mr. Everett P. Wheeler* opposing.

No. 824. UNITED STATES *v.* H. BACHARACH AND CO. Second Circuit. Denied May 22, 1899. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. *Mr. Stephen G. Clarke* opposing.

No. 782. COLUMBUS CONSTRUCTION COMPANY *v.* CRANE COMPANY. Seventh Circuit. Denied May 22, 1899. *Mr. S. S. Gregory* and *Mr. J. R. Custer* for petitioner. *Mr. Charles S. Holt* opposing.

APPENDIX.

Summary Statement of Business of the Supreme Court of the United States for October Term, 1898.

Original Docket.

Number of cases	6
Number of cases disposed of	2
Leaving undisposed of	4

Appellate Docket.

Number of cases on appellate docket at close of October Term, 1897	313
Number of cases docketed at October Term, 1898	520
Total	833
Number of cases disposed of at October Term, 1898	529
Number of cases remaining undisposed of, showing a reduction of 9 cases	304

INDEX.

ACTION AT LAW.

The water works company contracted with the municipal corporation of Raton to construct and maintain water works for it, and the corporation contracted to pay an agreed rental for the use of hydrants for twenty-five years. The works were constructed, and the corporation issued to the company, in pursuance of ordinances, warrants for such payments falling due one in every six months. Subsequently the corporation repealed the ordinances authorizing payment of the warrants, and passed other ordinances in conflict with them, whereupon the corporation refused to pay the warrants which had accrued and others as they became due. Thereupon the company filed this bill to enforce the payments of the amounts of rental already accrued, and as it should become due thereafter. *Held*, That the remedy of the company upon the warrants was at law, and not in equity, and that the court below should have dismissed the bill, without prejudice to the right of the company to bring an action at law. *Raton Water Works Co.* v. *Raton*, 360.

ADMIRALTY.

See BLOCKADE.

ATTORNEY AT LAW.

1. *Stone* v. *Bank of Commerce*, 174 U. S. 412, affirmed and applied to the point that the agreement of the commissioners of the sinking fund of Louisville and the attorney of the city with certain banks, trust companies, etc., including the Bank of Louisville, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record. *Louisville* v. *Bank of Louisville*, 439.
2. *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, also affirmed and applied. *Ib.*
3. When a defendant, who has been duly served with process, causes an appearance to be entered on his behalf by a qualified attorney, and the

BANKRUPTCY.

BLOCKADE.

CAPTURES DURING THE WAR OF THE REBELLION.

CASES AFFIRMED OR FOLLOWED.

1. The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court; and, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, is affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636. *Stone* v. *Farmers' Bank of Kentucky*, 409.
2. On the authority of *Citizens' Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636, and *Stone* v. *Bank of Commerce*, *ante*, 412, the decrees below are affirmed. *Fidelity Trust and Safety Vault Co.* v. *Louisville*, 429.
3. *Third National Bank of Louisville* v. *Stone*, *Auditor*, *ante*, 432, and *Louisville* v. *Third National Bank*, *ante*, 435, followed. *Louisville* v. *Citizens' National Bank*, 436.

See Attorney at Law, 1, 2; Municipal Bonds; Jurisdiction, A, 3; Tax and Taxation, 2, 8.

CASES DISTINGUISHED.

See Contract, 2.

CONSTITUTIONAL LAW.

A. Constitution of the United States.

1. The provision in § 2 of c. 155 of the acts of Kansas of 1885, entitled "An act relating to the liability of railroads for damages by fire," that, "in all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment," must, for reasons stated in the opinion of the court, be sustained as legislation authorized by the Constitution of the United States. *Atchison, Topeka & Santa Fé Railroad Co.* v. *Matthews*, 96.
2. Section 944 of the Revised Statutes of Missouri of 1889, provided that, "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this State, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or trans-

portation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage or injury it may be required to pay to the owner of such property, from the common carrier, railroad or transportation company, through whose negligence the loss, damage or injury may be sustained." In commenting on this statute the Supreme Court of Missouri said: "The provision of the statute is that 'wherever property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier. There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route." *Held*, That the statute as thus interpreted could not be held to be repugnant to the Constitution of the United States. *Missouri, Kansas and Texas Railway* v. *McCann*, 580.

3. Sturm sued the railway company in a justices' court in Kansas for wages due, and recovered for the full amount claimed. The company appealed to the county district court. When the case was called there for trial, the company moved for a continuance on the ground that a creditor of Sturm had sued him in a court in Iowa, of which State the railway company was also a corporation, and had garnisheed the company there for the wages sought to be recovered in this suit, and had recovered a judgment there from which an appeal had been taken which was still pending. The motion for continuance was denied, the case proceeded to trial, and judgment was rendered for Sturm for the amount sued for, with costs. A new trial was moved for, on the ground, among others, that the decision was contrary to and in conflict with section 1, article IV of the Constitution of the United States. The motion was denied, and the judgment was sustained by the Court of Appeals and by the Supreme Court of the State. The case was then brought here. *Held*, that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had in Iowa, and were consequently entitled to in Kansas, and the judgment must be reversed. *Chicago, Rock Island and Pacific Railway Co.* v. *Sturm*, 710.

CONTRACT.

1. The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe line, Hoffman of Portland and McMullen of San Francisco entered into a contract in writing as follows: "This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth:

CONTRIBUTORY NEGLIGENCE.

heard a whistle if it had been blown, testified that they did not hear it. When Freeman became conscious of the approaching train, he tried to avoid it; but it was too late, and he was struck by the train and was killed. So far as there was any oral testimony on the subject, it tended to show that Freeman neither stopped, looked, nor listened before attempting to cross the track. *Held*, That the testimony tending to show contributory negligence on the part of Freeman was conclusive, and that nothing remained for the jury, and that the company was entitled to an instruction to return a verdict in its favor. *Northern Pacific Railroad Co.* v. *Freeman*, 379.

COPYRIGHT.

The serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, c. 16, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety. *Holmes* v. *Hurst*, 82.

COURT AND JURY.

1. In this case the trial court at the close of the testimony, which is detailed in the opinion of this court, instructed a verdict in plaintiff's favor, which was affirmed by the Court of Appeals. This court affirms the judgment of the Court of Appeals. *Israel* v. *Gale*, 391.
2. Spurr was tried in the Circuit Court of the United States for the Middle District of Tennessee on three indictments, consolidated together, each of which charged him with having wilfully violated the provisions of Rev. Stat. § 5208, by wilfully, unlawfully and knowingly certifying certain cheques drawn on said bank by Dobbins and Dazey, well knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the cheques were certified, respectively, an amount of money equal to the respective amounts specified therein. It was not denied that the defendant certified the cheques, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the cheques were certified and his intent in the certifications. After the case had been committed to the jury, and they had had it under consideration for some hours, they returned to the court room, and asked the following question, which was written out: "We want the law as to the certification of cheques, when no money appeared to the credit of the drawer." The court read to the jury the first half of Rev. Stat. § 5208, as follows: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time

CRIMINAL LAW.

CUSTOMS DUTIES.

Sawed boards and plank, planed on one side and grooved, or tongued and grooved, should be classified under the tariff act of August 28, 1894, 28 Stat. 508, as dressed lumber, and admitted free of duty. *United States* v. *Dudley*, 670.

EJECTMENT.

1. In this action of ejectment, the evidence of adverse possession contained in the bill of exceptions, and set forth in the opinion of this court, is sufficient to justify the action of the trial court in submitting the question to the jury. *Davis* v. *Coblens*, 719.
2. By the terms of the statute in force in the District of Columbia, the time of limitation of this action commenced to run against Lucy T. Davis, one of the plaintiffs in error, on the death of her mother, and as her mother's death took place more than ten years after the cause of action accrued, the term against the plaintiff in error expired in ten years after it accrued, and no disability on her part arrested its running. *Ib.*
3. It is the general practice to permit tenants in common to sue jointly or separately in ejectment; but if they sue jointly it is with the risk of the failure of all, if one of them fail to make out a title or right to possession. *Ib.*
4. When a cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error. *Ib.*
5. The plaintiff requested the following instruction: "The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis *and others, and the jury would not be justified in finding to the contrary.*" The court struck out the words in italics, and inserted instead, "and the weight to be given his testimony is a proper question for the jury." *Held*, that this was not error. *Ib.*

EQUITY.

A court of equity has jurisdiction of a bill by a corporation praying that its guaranty on a great number of negotiable bonds may be cancelled, and suits upon it restrained, because of facts not appearing on its face. *Louisville, New Albany & Chicago Railway Co.* v. *Louisville Trust Co.*, 552.

See ACTION AT LAW.

ESTOPPEL.

See NATIONAL BANK, 3;
TAX AND TAXATION, 5.

EXTRADITION.

The appellant, a Canadian, was extradited from Canada under the extradition treaty between Great Britain and the United States, and, being brought before a police court of Detroit was charged with larceny, gave bail for his appearance at the trial, and returned to Canada. Returning from Canada to Detroit voluntarily before the time fixed for trial, he was arrested on a capias issued from the District Court of the United States for the Eastern District of Michigan before his extradition, charging him with an offence for which he was not extraditable, and was taken into custody by the marshal of that district. He applied to the District Court of the United States for a writ of *habeas corpus*, which was allowed. After hearing and argument his application for a discharge was refused by the District Court. On appeal to this court it is *Held*, That under the circumstances the appellant retained the right to have the offence for which he was extradited disposed of, and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained. *Cosgrove* v. *Winney*, 64.

FRAUD.

See CONTRACT, 1;
RAILROAD.

GUARANTY.

Under a statute authorizing the board of directors of a railroad corporation, upon the petition of a majority of its stockholders, to direct the execution by the corporation of a guaranty of negotiable bonds of another corporation, a negotiable guaranty executed by order of the directors, and signed by the president and secretary and under the seal of the first corporation upon each of such bonds, without the authority or assent of the majority of its stockholders, is void as to a purchaser of such bonds with notice of the want of such authority or assent; but is valid as to a purchaser in good faith and without such notice. *Louisville, New Albany & Chicago Railway Co.* v. *Louisville Trust Co.*, 552.

INSOLVENCY.

See NATIONAL BANK, 6, 7.

INTERNAL REVENUE.

There was no proof in this case to overcome the denials in the original answer, and to show that the property seized by the Collector of Internal Revenue had been forfeited to the United States. *United States* v. *One Distillery*, 149.

INTERSTATE COMMERCE.

See TAX AND TAXATION, 1.

JURISDICTION.

GENERALLY.

Congress may provide for a review of the action of commissioners and boards created by it and exercising only *quasi* judicial powers, by a transfer of their proceedings and decisions to judicial tribunals for examination and determination *de novo*. *Stephens* v. *Cherokee Nation*, 445.

A. JURISDICTION OF THE SUPREME COURT.

1. From the statement of this case made by the Supreme Court of Louisiana in its opinion, quoted in the opinion of this court, it is manifest that no Federal question was passed upon by that court, but that its decision was put upon an independent ground, involving no Federal question, and of itself sufficient to support the judgment below; and this court therefore dismisses the writ of error. *White* v. *Leovy*, 91.
2. If the petition of a woman, claiming to be the widow of a man supposed to have died intestate, for the revocation of letters of administration previously granted to his next of kin, and for the grant of such letters to her, is dismissed by the surrogate's court upon the ground that a decree of divorce obtained by her in another State from a former husband is void; and she appeals from the judgment of dismissal to the highest court of the State, which affirms that judgment, and, pending a writ of error from this court, it is shown that a will of the deceased was proved in the surrogate's court after its judgment dismissing her petition, and before her appeal from that judgment; the writ of error must be dismissed. *Kimball* v. *Kimball*, 158.
3. O'Brien being arrested in the State of New York for larceny, Nelson induced Moloney to join him in becoming O'Brien's bondsman, and gave Moloney a mortgage on his (Nelson's) real estate in New York to the amount of $10,000, to indemnify him. O'Brien having defaulted in his appearance for trial, Moloney was sued upon the bond, and a judgment was recovered against him, which was wholly paid by him. Before paying it he brought suit against Nelson to recover the amount for which he was so liable, and obtained a judgment in his favor in

JURY.

LIMITATION, STATUTES OF.

MEXICAN GRANT.

A petition for the rehearing of this case, which was decided May 23, 1898, and is reported 170 U. S. 681, is denied, on the ground that, after a careful reëxamination of the record, the court adheres to the judgment heretofore rendered, remaining of the opinion that from and after the adoption of the Mexican constitution of 1836, no power existed in the separate States to make such a grant as the one in this case. *United States* v. *Coe*, 578.

MUNICIPAL BONDS.

Mitchell County v. *Bank of Paducah*, 91 Texas, 361, which was an action upon interest coupons on bonds issued by the county for the purpose of building a court house and jail, and for constructing and purchasing bridges, in which it was held that as the constitution and laws of Texas authorizing the creation of a debt for such purposes require that provision should be made for the interest and for a sinking fund for the redemption of the debt, it was the duty of the court, in an action brought by a *bona fide* holder of bonds issued under the law to so construe it as to make them valid and give effect to them, is followed by this court, even if it should be found to differ from previous decisions of the Supreme Court of Texas, in force when the decision of the court below in this case was made. *Wade* v. *Travis County*, 499.

NATIONAL BANK.

1. In June, 1892, the United States National Bank of New York, by letter, solicited the business of the First National Bank of Little Rock, Arkansas. The latter, through its president, accepted the proposition, and opened business, by enclosing for discount, notes to a large amount. This business continued for some months, the discounted notes being taken up as maturing, until the Arkansas bank suspended payment, and went into the hands of a receiver. At that time the New York bank held notes to a large amount, which it had acquired by discounting them from the Arkansas bank. These notes have been duly protested for non-payment, and the payment of the fees of protest, made by the New York bank, have been charged to the Arkansas bank in account. The receiver refused to pay or allow them. At the time of the failure of the Arkansas bank there was a slight balance due it from the New York bank, which the latter credited to it on account of the sum which was claimed to be due on the notes after the refusal of the receiver to allow them. The New York bank commenced this suit against the receiver, to recover the balance which it claimed was due to it. The receiver denied all liability and asked judgment in his favor for the small balance in the hands of the New York bank. It was also set up that the notes dis-

RAILROAD.

RECEIVER.

See NATIONAL BANK, 1.

RIPARIAN OWNER.

TELEPHONE COMPANIES.

TRIAL BY JURY.

VERDICT.

See JURY.

WASHINGTON CITY.

WATER RATES.