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# UNITED STATES REPORTS

VOLUME 176

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CASES ADJUDGED

IN

# THE SUPREME COURT

AT

OCTOBER TERM, 1899

J. C. BANCROFT DAVIS

REPORTER

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

---

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

---

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

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES,

AT

# OCTOBER TERM, 1899.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

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## LOUISIANA *v.* TEXAS.

ORIGINAL.

No. 6. Submitted October 24, 1899. — Decided January 15, 1900.

The bill of complaint on the part of Louisiana against Texas, alleged that the State of Texas had granted to its Governor and its Health Officer extensive powers over the establishment and maintenance of quarantines over infectious or contagious diseases ; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas which were rivals of New Orleans; and it prayed for a decree that "neither the State of Texas, nor her Governor, nor her Health Officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce, between the State of Louisiana, or any part thereof, and the State of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare and enforce against places infected with yellow fever or other infectious diseases in the State of Louisiana discriminative quarantine rules or regulations, affecting interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, different from and more burdensome than the quarantine rules and regulations affecting interstate or foreign commerce between the State of Texas and other States and countries infected with yellow fever and other infectious diseases;" and the bill asked for an injunction, restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. *Held :*

Statement of the Case.

(1) That in order to maintain jurisdiction of the bill it must appear that the controversy to be determined was a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in vindication of the grievances of particular individuals;

(2) That the gravamen of this bill was not a special and peculiar injury, such as would sustain an action by a private person, but that the State of Louisiana presented herself in the attitude of *parens patriæ*, trustee, guardian or representative of all her citizens;

(3) That the bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution;

(4) That the court was unable to hold that the bill could be maintained as presenting a case of controversy between a State and citizens of another State;

(5) That the bill could not be maintained as against the health officer alone, on the theory that his conduct was in violation of or in excess of a valid law of the State.

Mr. Justice White concurred in the result. Mr. Justice Harlan concurred in the result, but dissented from some of the propositions contained in the opinion of the court: as did also Mr. Justice Brown.

The State of Louisiana by her Governor applied to this court for leave to file a bill of complaint against the State of Texas, her Governor and her health officer. Argument was had on objections to granting leave, but it appearing to the court the better course in this instance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.

The bill alleged: "That the city of New Orleans, one of the great commercial cities of this republic, and the second export city of this continent, containing about two hundred and seventy-five thousand inhabitants, many of whom are largely engaged in interstate commerce with the inhabitants of the State of Texas, is situated within the territory of your orator; that said city contains nearly one fourth of all the inhabitants of your orator, and the assessed values of her property are more than one half the assessed values of the whole State, and she contributes by taxes and licenses more than five eighths of your orator's revenue.

"That two lines of railroad, the Southern Pacific and the Texas and Pacific, run directly from the city of New Orleans through the States of Louisiana and Texas, and into the States and Territories of the United States and of Mexico, beyond the State of Texas, with the inhabitants of which States and Territories the citizens of New Orleans are also engaged in interstate and foreign commerce, such commerce largely following the lines of said railroads and their many connections.

"That the State of Texas, by her Revised Civil Statutes, adopted at the regular session of the Twenty-fourth Legislature, held in the year 1895, being Title XCII thereof, has granted to her Governor and her health officer extensive powers over the establishment and maintenance of quarantines against infectious or contagious diseases, with authority to make rules and regulations for the detention of vessels, persons and property coming into the State from places infected, or deemed to be infected, with such diseases.

"That Joseph D. Sayers, a citizen of the State of Texas, is now, and has been for some time past, Governor of said State.

"That William F. Blunt, a citizen of the State of Texas, is now, and has been for some time past, the state health officer of the State of Texas.

"That the ports of said State, situated on the Gulf coast, are engaged in commerce with the ports of Mexico, Central and South America and Cuba, known to be permanently infected with yellow fever; said commerce being largely competitive with similar commerce coming to the port of New Orleans.

"That on the 1st day of March, 1899, Joseph D. Sayers, Governor of the State of Texas, under the provisions of the said laws, issued his proclamation establishing quarantine on the Gulf coast and Rio Grande border against all places, persons or things coming from places infected by yellow fever, etc., a copy of which proclamation is hereto annexed and made part of this bill and marked Exhibit 'A.'

"That the rules and regulations established in said quarantine proclamation permit trade and commerce between such infected ports and the State of Texas, and provide for the

fumigation and reasonable detention of ships and cargoes from infected ports.

"That on or about the 31st day of August, 1899, a case of yellow fever was officially declared to exist in the city of New Orleans, in a part of the city several miles away from the commercial part thereof, and from that time to this several other sporadic cases have been reported in similar parts of the city.

"That as soon as said first case was reported the said William F. Blunt, Health Officer of the State of Texas, claiming to act under the provisions of Article 4324 of the Revised Civil Statutes, under the pretence of establishing a quarantine, placed an embargo on all interstate commerce between the city of New Orleans and the State of Texas, absolutely prohibiting all common carriers entering the State of Texas from bringing into the State any freight or passengers or even the mails of the United States, coming from the city of New Orleans, and to enforce these orders he immediately placed, and now maintains, armed guards, acting under the authority of the State of Texas, on all the lines of travel from the State of Louisiana into the State of Texas, with instructions to enforce the embargo declared by him *vi et armis*, which instructions these armed guards are carrying out to the letter; that about six days later he modified his order so as to permit the Government of the United States to carry and deliver the mails; and also modified his order so as to permit persons and their baggage to enter the State of Texas, after ten days' detention at the quarantine detention camps, established by him, and after fumigation of their baggage; but that he now maintains, and announces his intention to maintain indefinitely, his absolute prohibition of all interstate commerce between the city of New Orleans and the State of Texas; that he has refused to permit the introduction of sulphuric acid in iron drums, unpacked hardware, machinery and other articles coming from localities in the city of New Orleans, far removed from the places where the sporadic cases of fever have occurred, and which by their nature are concededly incapable of conveying infection; that he had estab-

lished no system of classification or inspection of the articles of interstate commerce, coming from the city of New Orleans, to determine whether they are, or may be, infected, or whether they are capable, or not, of conveying infection, no period of detention for such articles, no place or method of disinfection thereof; his only method being absolute and unconditional prohibition of such interstate commerce; that it is a notorious fact, and well known to said Blunt, that all of the interstate commerce between New Orleans and Texas is carried on by railroads, and none by water communication between the port of New Orleans and the Texas ports, and that the effect of his orders is to destroy all such commerce, to take away the trade of the merchants and business men of the city of New Orleans, and to transfer that trade to rival business cities in the State of Texas.

"That while Joseph D. Sayers, Governor of the State of Texas, has issued no formal proclamation of quarantine, as provided by law, to wit, Art. 4324 of the Revised Civil Statutes, defining the rules and regulations of such quarantine so declared by said Blunt, your orator charges that the rules and regulations established by said Blunt have the full force of law until modified or changed by the proclamation of the Governor, and that the Governor knows all these facts and approves and adopts the same, and permits these rules and regulations to stand and to be executed in full force and effect as established by said Blunt.

"Now your orator recognizes the right and power of the State of Texas and the public officials thereof to take prudent and reasonable measures to protect the people of said State from infection, to establish quarantine and reasonable inspection laws, but your orator denies that said State, or its officials, acting under its laws, under the cover of exercising its police powers, can prohibit or so burden interstate commerce as to make such commerce impossible.

"Your orator avers that it is a recognized and acknowledged fact by all the sanitarians and health officials of the various States exposed to infection by yellow fever and by the health officials of the United States, and by all scientific

students of infection and sanitation, that commerce can be conducted between infected and non-infected points, with small inconvenience and without any danger of infection, by classifying the articles of commerce and by pursuing certain well-recognized rules and precautions with reference to the articles and vehicles of commerce.

"That after the yellow fever outbreak of 1897 a quarantine convention was held in Mobile, Ala., and, on the advice of that convention, a conference of the health officials of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Missouri and the United States Marine Hospital Service met at Atlanta, Ga., and formulated such regulations which were adopted by the Boards of Health of all said States, and, as subsequently revised, are now in full force and effect between the said States; that additional experience having been gained by the reappearance of yellow fever in the fall of 1898, a revising conference was held in the city of New Orleans on February 9, 1899, at which conference the Atlanta regulations were in some respects modified. A copy of the said regulations, original and as modified, are hereto annexed and made part of this bill and marked Exhibit 'B.'

"Your orator avers that said William F. Blunt, or his predecessor in office, was health officer of the State of Texas at the time these conferences were held, that he and his predecessor in office refused or neglected to attend them in person or by representative, and he has continually refused to adopt the Atlanta regulations, or any of them, or any regulations similar to them, and insists, as his predecessor in office insisted, upon being a law to himself, and upon using no means of dealing with yellow fever infection in the city of New Orleans, or elsewhere in the State of Louisiana, real or imaginary, except an absolute embargo upon interstate commerce to be established at his pleasure and to last as long as he chooses to maintain it.

"That in pursuance of this policy, in the year 1897, his predecessor in office established a similar embargo on interstate commerce between New Orleans and other points in Louisiana, supposed by him to be infected, and the State of

Texas, on the 10th day of September; and refused to remove or to modify said embargo until the —— day of December, 1897, during which period he even refused to permit railroad cars that had been in the city of New Orleans to enter or even pass through the State of Texas, on their way to the countries, States and Territories beyond.

"That in pursuance of the same policy, in the year 1898, the said William F. Blunt, health officer, and the Governor of the State of Texas, established a similar embargo on all interstate commerce between the State of Louisiana and the State of Texas, on the 18th day of September, and refused to remove or modify the same until the 1st day of November.

"That in pursuance of the same policy, the said William F. Blunt, because a single case of yellow fever was declared in the city of New Orleans, did on May 30, 1899, establish a similar embargo on interstate commerce between the city of New Orleans and the State of Texas, which he refused to modify or to remove until June 9, 1899, and then only under great pressure, although he was advised on June 2, 1899, by the representatives of the health authorities of the States of Alabama and Mississippi, of the United States Marine Hospital Service, and of the Louisiana state board of health, who had been for some days in the city of New Orleans, making a personal inspection of her sanitary and health conditions, that they deemed it 'unnecessary and unwise for any State or city to quarantine against New Orleans under present conditions.'

"Your orator avers that the State of Texas, her Governor and her health officer, as shown by the rules and regulations established by them in the proclamation aforesaid for the quarantine on the Gulf coast, admit the truthfulness of the claim of your orator that commerce can be carried on with infected places and ports, under reasonable rules and regulations as to inspection, fumigation and detention, and admit that there are articles of commerce incapable of conveying infection, and actually permit such commerce in all articles to be so carried on to the advantage and benefit of the commerce of the ports of Texas and her merchants engaged in commerce in said ports.

Statement of the Case.

"Your orator avers that the effect of the embargoes imposed by the State of Texas upon the commerce of the city of New Orleans with Texas is to build up and benefit the commerce of the city of Galveston, in Texas, and the commerce of other cities in Texas, all of which are commercial rivals of the city of New Orleans for the large commerce of the State of Texas and the adjoining States and Territories.

"That prior to the embargoes aforesaid of the years 1897 and 1898 the city of New Orleans was the greatest cotton exporting port of the United States, and a very large portion of the cotton grown in Texas was exported through the port of New Orleans; for instance, for the season of 1894–5 more than 31 per cent thereof; for the season 1895–6 more than 30 per cent thereof; for the season 1896–7, 25 per cent thereof.

"That as consequence of the two trade embargoes aforesaid the percentage of the Texas cotton crop exported through the port of New Orleans for the season of 1897–8 was only 19 per cent; and for the season of 1898–9 was only 15 per cent; and for the season of 1898–9, ending September 1, 1899, the city of Galveston handled more export cotton than the city of New Orleans.

"That the effect of said embargoes is all the more disastrous to the commerce of your orator, and of her cities and towns, because declared and made operative during the months of September, October, November and the early part of December, the period of the greatest activity and the largest movement of commerce among the States of the South, and between the State of Louisiana, the city of New Orleans and the State of Texas.

"Now your orator avers that in view of the unreasonable, harsh, prohibitive and discriminating character of the pretended quarantines, declared and maintained by the State of Texas and her health officer, against the city of New Orleans and other localities in the State of Louisiana, is nothing less than a commercial war declared against your orator, her ports, cities and citizens; not for the *bona fide* purpose of protecting the health of the State of Texas, but for the purpose of in-

creasing the trade and commerce of the State of Texas and of her ports, cities and citizens, to the great damage and injury of your orator and her citizens ; that such embargoes on interstate commerce injure and impoverish your orator's citizens, reduce the value of her taxable property, diminish her revenues, retard immigration, reduce the value of her public lands, and deprive her citizens of their rights and privileges as citizens of the United States.

"Your orator avers that the embargo upon interstate commerce between the city of New Orleans, in the State of Louisiana, and the State of Texas, established by said Blunt on or about the first day of September, 1899, and now maintained by him and the other officials of the State of Texas, will be continued by them for an indefinite period, to the great damage and injury of your orator's ports, commerce and revenues, and to the commerce of her citizens and to the rights of her citizens under the Constitution of the United States, unless they be enjoined and restrained by order of this court.

"Your orator avers that, from the past conduct of the State of Texas, and of her Governors and health officers, your orator is justified in averring and charging, and does aver and charge, that it is the fixed purpose and intention of the said State, and of her Governors and health officers, whenever in the future any case of yellow fever, or other infectious disease, occurs in any parish, city or town within your orator's borders, to immediately declare, set up and maintain an absolute prohibition of interstate commerce between said supposed infected parish, city or town, and the State of Texas, and to keep the same in force during the pleasure of such officials, or to make and establish discriminative rules and regulations covering quarantines on such interstate commerce, different from and more burdensome than the rules and regulations concerning quarantines on interstate commerce with other States and foreign commerce with countries also infected with yellow fever, or other infectious diseases, and thereby to injure and oppress your orator and her citizens.

"Now your orator avers that the absolute prohibition

against the movement and operation of interstate commerce between the city of New Orleans and the inhabitants thereof, and the State of Texas and the inhabitants thereof, established by said William F. Blunt, health officer of the State of Texas and now maintained and enforced by him, the Governor and the other officials of the State of Texas, is in direct contravention of the provisions of the Constitution of the United States, and particularly of that clause thereof which grants to the Congress power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, and is null, void and of no effect, and the continuance thereof ought to be restrained by the order of this honorable court.

"Your orator further avers that the various cities, counties and towns in the State of Texas have authority, under the statutes aforesaid, to establish quarantines, but all such quarantines are by statute subordinate to, subject to and regulated by the rules and regulations prescribed by the Governor and the state health officer, and that, therefore, all such quarantines are dirigible and controllable by the Governor and the health officer of Texas.

"Your orator is informed and believes and so charges that it is the intention of certain counties, cities and towns along the lines of the railroads aforesaid, in case your honors should restrain the operation of the embargo established as aforesaid by William F. Blunt, state health officer, to severally establish the same embargo on their own account, and to prevent the passage of trains on said railroads carrying interstate commerce from the city of New Orleans through them to other parts of the State of Texas and to other States, and to so hinder, obstruct and delay the transportation of said commerce along the lines of railroad running through their limits as to render its conduct impossible; that in case it should be considered that the public authorities of such counties, towns and cities are not personally bound by any order your honors may issue in this cause, and in case they should attempt to carry out any such illegal plan, your orator reserves the right hereafter to make such officials parties to this bill, so as to subject them to the control of the court."

Statement of the Case.

The bill then prayed for answers under oath; that the court decree "that neither the State of Texas, nor her Governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce, between the State of Louisiana, or any part thereof, and the State of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare and enforce against places infected with yellow fever, or other infectious diseases, in the State of Louisiana, discriminative quarantine rules and regulations affecting interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, different from and more burdensome than the quarantine rules and regulations affecting interstate or foreign commerce between the State of Texas and other States and countries infected with yellow fever, or other infectious diseases, and that the embargo and prohibition upon interstate commerce between the city of New Orleans and the State of Texas, declared by William F. Blunt, health officer of the State of Texas, on or about the 1st day of September, 1899, and now maintained and enforced by the State of Texas, under the guise of a quarantine against yellow fever, is contrary to the Constitution of the United States, null, void and of no effect and validity;" that a preliminary injunction be issued "prohibiting, enjoining and restraining the State of Texas, and all of her officers and public officials, and prohibiting, enjoining and restraining Joseph D. Sayers, Governor of the State of Texas, and William F. Blunt, health officer of the State of Texas, their successors in office, and all of their subordinates, assistants, agents and employés, from establishing, maintaining and enforcing, or attempting to establish, maintain and enforce, under the guise of a quarantine against yellow fever, any embargo or absolute prohibition upon interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, or from establishing, maintaining and enforcing, or attempting to establish, maintain and enforce against interstate commerce between the State of Louisiana, or any part thereof, and the State of Texas, discriminative and burdensome quar-

antine regulations other and different from the regulations established by such authorities against foreign and interstate commerce between the State of Texas and other countries and States infected with yellow fever, or other infectious diseases, and particularly enjoining, prohibiting and restraining them, and each of them, from maintaining or enforcing, directly or indirectly, the prohibitory embargo on interstate commerce established against the city of New Orleans on or about the first day of September, 1899, under the guise and pretence of a quarantine regulation;" and that such injunction be made perpetual on final hearing; for costs; and for general relief.

The demurrer assigned the following causes:

"First. That this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because it appears from the face of said bill that the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of Louisiana and Texas.

"Second. Because the allegations of said bill show that the only issues presented by said bill arise between the State of Texas or her officers and certain persons in the city of New Orleans, in the State of Louisiana, who are engaged in interstate commerce, and which do not in any manner concern the State of Louisiana as a corporate body or State.

"Third. Because said bill shows upon its face that this suit is in reality for and on behalf of certain individuals engaged in interstate commerce, and while the suit is attempted to be prosecuted for and in the name of the State of Louisiana, said State is in effect loaning its name to said individuals and is only a nominal party, the real parties at interest being said individuals in the said city of New Orleans who are engaged in interstate commerce.

"Fourth. Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said State possesses no such sovereignty as empowers her to bring an original suit in this court for such purpose.

"Fifth. Because it appears from the face of said bill that no property right of the State of Louisiana is in any manner affected by the quarantine complained of, nor is any such property right involved in this suit as would give this court original jurisdiction of this cause."

*Mr. Milton J. Cunningham*, *Mr. Edgar H. Farrar*, *Mr. Benjamin F. Jonas*, *Mr. Ernest B. Kruttschnitt*, and *Mr. E. Howard McCaleb* for the State of Louisiana.

*Mr. Thomas S. Smith* and *Mr. Robert H. Ward* for the State of Texas and others.

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

The ninth of the Articles of Confederation of 1778 provided that the Congress should be "the last resort on appeal in all disputes and differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction or any other cause whatever," the authority to be exercised through a tribunal to be created by the Congress as prescribed, and whose judgment should be final and conclusive; and also that "all controversies concerning the private right of soil claimed under different grants of two or more States" should be determined in the same manner.

In the Constitutional Convention, the Committee of Detail, composed of Rutledge, Randolph, Gorham, Ellsworth and Wilson, to which the resolutions arrived at by the Convention and sundry propositions had been referred, reported on the sixth of August, A.D. 1787, a draft of a Constitution, consisting of twenty-three articles.

The second section of the ninth article provided that as to "all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory," the Senate should have power to designate a special tribunal to finally determine the same by its judgment; and by the third section, "all controversies concerning lands claimed under different grants of two or more States" were to be similarly determined.

The third section of the proposed eleventh article provided, among other things, that the jurisdiction of the Supreme Court should extend "to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

On the twenty-fifth of August Mr. Rutledge said in respect to sections two and three of article nine: "This provision for deciding controversies between the States was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established;" and on his motion the sections were stricken out.

The words "between citizens of the same State claiming lands under grants of different States" were subsequently inserted in the third section of the eleventh article, and the words "except such as shall regard territory or jurisdiction" omitted. 1 Elliot, 223, 224, 261, 262, 267, 270; 5 Elliot, 471; Meigs on Growth of the Constitution, 244, 249.

Clauses 1 and 2 of the second section of Article III of the Constitution as finally adopted read:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The reference we have made to the derivation of the words "controversies between two or more States" manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over "territory or jurisdiction"; for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.

Undoubtedly, as remarked by Mr. Justice Bradley in *Hans* v. *Louisiana*, 134 U. S. 1, 15, the Constitution made some things "justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited."

By the Judiciary Act of 1789 the judicial system was organized and the powers of the different courts defined. Its thirteenth section, carried forward as § 687 of the Revised Statutes, provided "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

The language of the second clause of the second section of Article III, "in all cases in which a State shall be party," means in all the enumerated cases in which a State shall be a party, and this is stated expressly when the clause speaks

of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only. *California* v. *Southern Pacific Railroad Company*, 157 U. S. 229, 259; *United States* v. *Texas*, 143 U. S. 621. And by the Constitution and according to the statute, the original jurisdiction of this court is exclusive over suits between States, though not exclusive over those between a State and citizens of another State.

On the 8th of January, 1798, the Eleventh Amendment was ratified, as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Referring to this Amendment, Mr. Chief Justice Waite, in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U. S. 76, 91, said: "The evident purpose of the Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and in our opinion, one State cannot create a controversy with another State within the meaning of that term as used in the judicial clauses of the Constitution by assuming the prosecution of debts owing by other States to its citizens."

In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals.

By the Constitution, the States are forbidden to "enter into any treaty, alliance or confederation; grant letters of marque and reprisal;" or, without the consent of Congress, "keep troops, or ships of war in time of peace, enter into any agree-

ment or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." Art. 1, sec. 10.

Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement. As pointed out by Mr. Justice Field in *Virginia* v. *Tennessee*, 148 U. S. 503, 519, there are many matters on which the different States may agree that can in no respect concern the United States, while there are other compacts or agreements to which the prohibition of the Constitution applies. And as to this, he quotes from Mr. Justice Story as follows: "Story, in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observed that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in lands situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the National Government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'" But it was also there ruled that where the consent of Congress was requisite, it might be given subsequently or might be

implied from subsequent action of Congress itself toward the two States.

In the absence of agreement it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made; nor can it be conceded that it is within the judicial function to inquire into the motives of a state legislature in passing a law, or of the chief magistrate of a State in enforcing it in the exercise of his discretion and judgment. Public policy forbids the imputation to authorized official action of any other than legitimate motives.

As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the court has been sought in "controversies between two or more States." They are cited in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, and are chiefly controversies as to boundaries.

In *South Carolina* v. *Georgia*, 93 U. S. 4, 14, a bill was filed for an injunction against the State of Georgia, the Secretary of War and others, from "obstructing or interrupting" the navigation of the Savannah River in violation of the compact entered into between the States of South Carolina and Georgia on the 24th day of April, 1787. The bill was dismissed because no unlawful obstruction of navigation was proved, but the question was expressly reserved whether "a State, when suing in this court for the prevention of a nuisance in a navigable river of the United States, must not aver and show that it will sustain some special and peculiar injury therefrom, and such as would enable a private person to maintain a similar action in another court."

So in *Wisconsin* v. *Duluth*, 96 U. S. 379, 382, the contention that the court could "take cognizance of no question which concerns alone the rights of a State in her political or sovereign character; that to sustain the suit she must have some proprietary interest which is affected by the defendant," was not passed upon.

In *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 519, the court treated the suit as brought to protect the property of the State of Pennsylvania.

But in *Debs, Petitioner*, 158 U. S. 564, involving a case in the Circuit Court in which the United States had sought relief by injunction, it was observed: "That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian or representative of all her citizens.

She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this court as against the State of Texas cannot be maintained.

By Title XCII of the Revised Statutes of the State of Texas of 1895, "The Governor is empowered to issue his proclamation declaring quarantine on the coast, or elsewhere within this State, whenever in his judgment quarantine may become necessary, and such quarantine may continue for any length of time as in the judgment of the Governor the safety and security of the people may require." It is made the Governor's duty "to select and appoint, by and with the advice and consent of the Senate, from the most skilful physicians of the State of Texas, one physician who shall be known as health officer of the State, and shall from previous and active practice be familiar with yellow fever and pledged to the importance of both quarantine and sanitation." It was also provided that "whenever the Governor has reason to believe that the State of Texas is threatened at any point or place on the coast, border or elsewhere within the State with the introduction or dissemination of yellow fever contagion, or any other infectious and contagious disease that can and should, in the opinion of the state health officer, be guarded against by state quarantine, he shall, by proclamation, immediately declare said quarantine against any and all such places, and direct the state health officer to promptly establish and enforce the restrictions and conditions imposed and indicated by said quarantine proclamation, and when from any cause the Governor cannot act, and the exigencies of the threatened danger require immediate action, the state health officer is empowered to declare quarantine as prescribed in this article, and maintain the same until the Governor shall officially take such action as he may see proper." And further, that the laws in regard to state quarantine should remain and be in full force and operation on the coast or elsewhere in the State as the Governor or health officer might direct, and be enforced as heretofore, "with such additional changes in station and general management as the Governor may think proper." Differences and disputes in regard to local quarantine were to be determined by the Governor, and all county and municipal quarantine was made subordinate to such rules and regulations as might be prescribed by the Governor or state health officer. It

was made the duty of any county, town or city authority on the coast or elsewhere in the State, on the promulgation of the Governor's proclamation declaring quarantine, to provide suitable stations and employ competent physicians as health officers subject to the approval of the Governor, and in case of the failure of the authorities to do so, the Governor was empowered to act. Provision was made for the detention of persons, and vessels, and for the disinfection of vessels and their cargoes and passengers arriving at the ports of Texas from any infected port or district, and for rules and regulations in regard thereto, "the object of such rules and regulations being to provide safety for the public health of the State without unnecessary restriction upon commerce and travel."

It is not charged that this statute is invalid nor could it be if tested by its terms. While it is true that the power vested in Congress to regulate commerce among the States is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the States in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the Government.

In *Morgan Steamship Company* v. *Louisiana Board of Health*, 118 U. S. 455, this was so held, and Mr. Justice Miller, delivering the opinion of the court, said: "The matter is one in which the rules that should govern it may in many respects be different in different localities and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, one hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." Hence, even if Congress had remained silent on the subject, it would not have followed that the exercise of the police power of the State in this regard, although necessarily operating on inter-

state commerce, would be therefore invalid. Although from the nature and subjects of the power of regulating commerce it must be ordinarily exercised by the National Government exclusively, this has not been held to be so where in relation to the particular subject-matter different rules might be suitable in different localities. At the same time, Congress could by affirmative action displace the local laws, substitute laws of its own, and thus correct any unjustifiable and oppressive exercise of power by state legislation.

The complaint here, however, is not that the laws of Texas in respect of quarantine are invalid, but that the health officer, by rules and regulations framed and put in force by him thereunder, places an embargo in fact on all interstate commerce between the State of Louisiana and the State of Texas, and that the Governor permits these rules and regulations to stand and be enforced, although he has the power to modify or change them. The bill is not rested merely on the ground of the imposition of an embargo without regard to motive, but charges that the rules and regulations are more stringent than called for by the particular exigency, and are purposely framed with the view to benefit the State of Texas, and the city of Galveston in particular, at the expense of the State of Louisiana, and especially of the city of New Orleans.

But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. The States cannot make war, or enter into treaties, though they may, with the consent of Congress, make compacts and agreements. When there is no agreement, whose breach might create it, a controversy between States does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one State to a distinct collision with a sister State.

In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or

from which it necessarily follows that the two States are in controversy within the meaning of the Constitution.

Finally we are unable to hold that the bill may be maintained as presenting a case of controversy "between a State and citizens of another State."

Jurisdiction over controversies of that sort does not embrace the determination of political questions, and, where no controversy exists between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment. Nor can we accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would clearly lie with the state authorities, and no refusal to fulfil their duty in that regard is set up. In truth it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States, and such a controversy, as we have said, is not presented.

*Demurrer sustained and bill dismissed.*

Mr. Justice White concurred in the result.

Mr. Justice Harlan concurring.

Taking the allegations of the bill to be true — as upon demurrer must be done — this suit cannot be regarded as one relating only to local regulations that incidentally affect interstate commerce and which the State may adopt and maintain in the absence of national regulations on the subject. On the contrary, if the allegations of the bill be true, the Texas authorities have gone beyond the necessities of the situation and established a quarantine system that is absolutely subversive of all commerce between Texas and Louisiana, particularly commerce between Texas and New Orleans. This court has often declared that the States have the power to protect the health of their people by police regulations directed to that

end, and that regulations of that character are not to be disregarded because they may indirectly or incidentally affect interstate commerce. But when that principle has been announced it has always been said that the police power of a State cannot be so exerted as to obstruct foreign or interstate commerce beyond the necessity for its exercise, and that the courts must guard vigilantly against needless intrusion upon the field committed to Congress. *Railroad Co.* v. *Husen*, 95 U. S. 465, 470–473; *Hennington* v. *Georgia*, 163 U. S. 299, 313, 318; *Missouri, Kansas and Texas Railway* v. *Haber*, 169 U. S. 613, 628, 630. The present suit proceeds distinctly on the ground that the regulations established by the authorities of Texas under its statute go beyond what is necessary to protect the people of that State against the introduction of infectious diseases and destroy the possibility of any commerce between New Orleans and Texas. Now, if Texas has no right, by its officers, to establish regulations that unreasonably or unnecessarily burden commerce between that State and Louisiana, and if the State of Louisiana is entitled, under the Constitution, to have the validity of such regulations tested in a judicial tribunal, then this court should put the defendants to their answer, and the cause should proceed to a final decree upon its merits.

But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Constitution gave this court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most affect only the rights of individual citizens or corporations engaged in interstate commerce. The word "controversies" in the clauses extending the judi-

cial powers of the United States to controversies "between two or more States," and to controversies "between a State and citizens of another State," and the word "party" in the clause declaring that this court shall have original jurisdiction of all cases "in which a State shall be party" refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislation of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State, but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this court. If this be not so, we were wrong in *New Hampshire* v. *Louisiana*, 108 U. S. 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State, acquire the right to bring a suit in its name in this court against the debtor State.

I must express my inability to concur in that part of the opinion of the court relating to the clause of the Constitution extending the judicial power of the United States to controversies "between a State and citizens of another State." In reference to a controversy of that sort the court says that where none exist between States, it is not for this court to restrain the Governor of a State in the discharge of his executive functions in a matter confided to his discretion and judgment. But how can the Governor of a State be said to have an executive function to disregard the Constitution of the United States? How can his State authorize him to do that? It is one thing to compel the Governor of a State, by judicial order, to take affirmative action upon a designated subject. It is quite a different thing to say that being directly charged with the execution of a statute he may not be restrained by judicial orders from taking such action as he deems proper, even if what he is doing and proposes to do

is forbidden by the supreme law of the land. His official character gives him no immunity from judicial authority exerted for the protection of the constitutional rights of others against his illegal action. He cannot be invested by his State with any discretion or judgment to violate the Constitution of the United States.

The court also says that it cannot accept the suggestion that the bill can be maintained as against the health officer alone on the theory that his conduct is in violation or in excess of a valid law of the State, as the remedy for that would lie with the state authorities, and no refusal to fulfil their duty in that regard is set up; and that it is difficult to see how on this record there could be a controversy between the State of Louisiana and the individual defendants without involving a controversy between the States. But the important question presented in this case — if the State of Louisiana in its sovereign capacity can sue at all in respect of the matters set out in the bill — is, whether the regulations being enforced by the health officer are in violation of the Constitution of the United States. The opinion of the court will be construed as meaning that even if Louisiana be entitled, in her sovereign capacity, to complain of those regulations as repugnant to the Constitution of the United States, it could not proceed in this court against the defendant health officer, and that its only remedy is to appeal to the authorities of Texas, that is, to the Governor of that State, who has power to control his co-defendant, the health officer, and who has approved the regulations in question. I am not aware of any decision supporting this view. If the regulations in question are in violation of the Constitution of the United States, the defendant health officer, I submit, may, without any previous appeal to the Governor of Texas, be restrained from enforcing them, either at the suit of individuals injuriously affected by their being enforced, or at the suit of Louisiana in its corporate capacity, provided that State could sue at all in respect of such matters.

Although unable to assent to the grounds upon which the court rests its opinion, I concur in the judgment dismissing

the suit solely upon the ground that the State of Louisiana in its sovereign or corporate capacity cannot sue on account of the matters set out in the bill.

Mr. Justice Brown concurring in the result.

I am not prepared to say that if the State of Texas had placed an embargo upon the entire commerce between Louisiana and Texas, the State of Louisiana would not be sufficiently representative of the great body of her citizens to maintain this bill.

In view of the solicitude which from time immemorial States have manifested for the interest of their own citizens; of the fact that wars are frequently waged by States in vindication of individual rights, of which the last war with England, the opium war of 1840 between Great Britain and China, and the war which is now being carried on in South Africa between Great Britain and the Transvaal Republic, are all notable examples; of the further fact that treaties are entered into for the protection of individual rights, that international tribunals are constantly being established for the settlement of rights of private parties, it would seem a strange anomaly if a State of this Union, which is prohibited by the Constitution from levying war upon another State, could not invoke the authority of this court by suit to raise an embargo which had been established by another State against its citizens and their property.

An embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*. The case made by the bill is the extreme one of a total stoppage of all commerce between the most important city in Louisiana and the entire State of Texas; and while I fully agree that resort cannot be had to this court to vindicate the rights of individual citizens, or any particular number of individuals, where a State has assumed to prohibit all kinds of commerce with the chief city of another State, I think her motive for doing so is the proper subject of judicial inquiry.

It is true that individual citizens, whose rights are seriously affected by a system of non-intercourse, might, perhaps, maintain a bill of this kind; but to make the remedy effective it would be necessary to institute a multiplicity of suits, to carry on a litigation practically against a State in the courts of that State, and to assume the entire pecuniary burden of such litigation, when all the inhabitants of the complaining State are more or less interested in the result.

But the objection to the present bill is that it does not allege the stoppage of all commerce between the two States, but between the city of New Orleans and the State of Texas. The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant.

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## UNITED STATES *v.* OREGON AND CALIFORNIA RAILROAD COMPANY.

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

No. 9. Argued April 14, 1899. — Decided January 8, 1900.

By the act of July 2, 1864, 13 Stat. 365, c. 217, Congress granted lands to the Northern Pacific Railroad Company to aid in the construction of a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon. The grant was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the

Syllabus.

Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." In March, 1865, the president of that company filed in the Land Department a map which if of value for any purpose was only a map of "general route," not one of definite location between Wallula and Portland. That map was not accepted. By act of July 25, 1866, 14 Stat. 239, c. 242, Congress made a grant of land in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of that grant as to the part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands here in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon and California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the President, and at the time this suit was begun was being operated and had been continuously operated by that company. The Oregon Company filed its map of definite location in 1870, and it was accepted by the Land Department. By the act of September 29, 1890, 26 Stat. 496, c. 1040, all lands theretofore granted to any State or corporation to aid in the construction of a railroad opposite to or coterminous with the portion of any such railroad not then completed and in operation, for the construction of which such lands were granted, were forfeited to the United States. There never was any withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was there any definite location or construction of its road opposite to the lands in suit. *Held*,

(1) That nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad.

(2) That as the grant contained in that act did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870, — the Northern Pacific Railroad Company having done

nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightfully patented to it. Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented.

The case is stated in the opinion.

*Mr. Solicitor General* for appellant.

*Mr. L. E. Payson* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This suit involves the title to a large body of lands in the State of Oregon covered by patents issued by the United States to the Oregon and California Railroad Company, a corporation organized under the laws of Oregon. Its object is to obtain a decree cancelling those patents as well as certain conveyances made by the company.

The suit was brought by the Attorney General in 1893 under the authority of the act of March 3, 1887, c. 376, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes." By that act the Secretary of the Interior was directed to adjust, in accordance with the decisions of this court, each of the railroad land grants made by Congress to aid in the construction of railroads and theretofore unadjusted. Its second section provided that "if it shall appear, upon the completion of such adjustments respectfully, [respectively,] or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon

demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States." 24 Stat. 556, c. 376.

The defendants demurred to the bill for want of equity, but the demurrer was overruled. 57 Fed. Rep. 890. They then filed a joint and several answer and proofs were taken by the parties. By the decree of the Circuit Court patents of May 9, 1871, July 12, 1871, June 22, 1871, and June 18, 1877, purporting to convey to the Oregon and California Railroad Company the lands in dispute (which are fully described by metes and bounds in the decree) were cancelled as being null and void. By the same decree a warranty deed of February 26, 1880, to the defendant John A. Hurlburt, a deed of November 5, 1879, to Jacob Goldstrap — each of which deeds was executed by the railroad company — a deed by Goldstrap to Sylvester Evans, and a deed from the latter to Thomas L. Evans of July 13, 1883, were also cancelled as null and void. 69 Fed. Rep. 899. The case was then carried to the Circuit Court of Appeals where the decree of the Circuit Court was reversed with directions to dismiss the bill. 77 Fed. Rep. 67.

The facts necessary to a clear understanding of the questions raised by the pleadings are as follows:

By an act approved July 25, 1866, c. 242, Congress authorized the California and Oregon Railroad Company, a California corporation, and such company as the legislature of Oregon should thereafter designate, to lay out, locate, construct, finish and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California — the Oregon Company to construct that part of the line in Oregon beginning at Portland and running thence southerly through the Willamette, Umpqua and Rogue River valleys to the

southern boundary of Oregon, where it was to connect with the part constructed in California by the California corporation. 14 Stat. 239, 240, 241, c. 242.

For the purpose of aiding in the construction of such railroad and telegraph line and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of the railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of the railroad line, were granted to those companies, their successors and assigns. If the alternate sections or parts of sections so granted were found to have been "granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of," other lands, designated as aforesaid, were to be selected by the companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, nearest to and not more than ten miles beyond the limits of the first-named alternate sections. It was made the duty of the Secretary of the Interior, as soon as the companies or either of them filed in his office a map of the survey of the railroad or any portion thereof, not less than sixty continuous miles from either terminus, to withdraw from sale the lands granted on either side of the railroad as far as located and within the limits specified. § 2.

Whenever the companies or either of them had twenty or more consecutive miles of any portion of the railroad and telegraph line ready for service, it became the duty of the President to appoint three commissioners to examine the same, and when it appeared that twenty consecutive miles of railroad and telegraph had been completed and equipped in all respects as required, the commissioners were to report the fact under oath to the President, whereupon patents were to issue for the lands granted to the extent of and coterminous with the completed section of the railroad and telegraph line; and from time to time whenever twenty or more consecutive miles of road and telegraph were completed and equipped, patents were to be issued upon the report of the commissioners, and so on until the entire railroad and telegraph authorized were constructed. § 4.

The companies were required to file their assent to the act in the Department of the Interior within one year after its passage, and complete the first section of twenty miles of the railroad and telegraph within two years and at least twenty miles in each year thereafter, and the whole on or before the first day of July, 1875,—the railroad to be of the same gauge as the Central Pacific Railroad of California and connect therewith. § 6.

In case the companies failed to comply with the terms and conditions required by not filing their assent thereto as provided in section six of the act, or by not completing the same as provided in that section, the act was to be null and void, and all the lands not conveyed by patent to the company or companies, as the case might be, at the date of such failure, should revert to the United States; and if the road and telegraph line were not kept in repair and fit for use after the same were completed, Congress could pass an act to put them in repair and use and direct the income therefrom to be devoted to the United States to repay all expenditures caused by the default or neglect of the companies or either of them, or fix pecuniary responsibility not exceeding the value of the lands granted by the act. § 8.

It appears from the bill filed by the United States that, by joint resolution of October 20, 1868, the legislature of Oregon designated the Oregon Central Railroad Company to receive the privileges and franchises and to perform the duties mentioned in the act of July 25, 1866; that on the 29th day of October, 1869, that company, having previously accepted the grant contained in that act, filed with the Secretary of the Interior in its map of "definite location" opposite to the lands in suit; that this map was accepted by the Secretary on January 29, 1870; that in February, 1870, the lands in dispute were all withdrawn in pursuance of orders issued by that officer; that on or about April 4, 1870, the Oregon and California Railroad Company, a corporation of Oregon, became the successor and assignee of the Oregon Central Railroad Company; that the road of that company was duly constructed opposite the lands in dispute within the time limited

by law for the completion of that portion; and that two sections of 20 miles each were examined by commissioners appointed by the President, and their report having been accepted by him patents for the lands coterminous with those sections were ordered to be and were issued.

The bill contained these averments: "Your orator shows that all the lands hereinbefore described are *within the limits of the grant as prescribed in said act of July* 25, 1866, *whether place or indemnity.* And your orator shows that *the entire line of railroad of the said Oregon and California Railroad Company has been fully constructed and been duly accepted by the President of the United States after due reports by commissioners on the several sections thereof*, and *has been continuously, and still is operated by said company;* but a portion of said road, to wit, one hundred and sixty-three miles, was constructed after July 1, 1880."

Referring to the conveyances made by the railroad company to the individual defendants, the bill admits that the purchasers went into actual possession, made valuable and permanent improvements and remained thereafter in possession. It then alleges that "John A. Hurlburt and Thomas L. Evans each claim the title to said lands respectively in fee simple, and your orator concedes that they were severally purchased and granted from the said Oregon and California Railroad Company in good faith for value, relying on the apparent title to said lands under said patent from orator to said railroad company, and without actual notice of any defect in the title of said company to said lands, as set forth in this bill. But your orator insists that they were chargeable with constructive notice of the several acts of Congress, and that under the said acts of Congress and the acts and doings of the said railroad company no title could pass to said Hurlburt and Evans, and that said patent should be cancelled as to them as well as to the grantee therein, the said Oregon and California Railroad Company."

In view of these facts, if the case depended alone on the act of July 25, 1866, the title of the defendants to these lands, as against the United States, could not be questioned.

The Government, however, has insisted in its bill that the

issuing of the patents to the Oregon and California Railroad Company was without authority of law. This contention rests upon the assumption that the lands so patented — although within the limits of the grant contained in the act of July 25, 1866, and within the line of the Oregon Company as definitely located — were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365; in which case, it is insisted that they were forfeited to the United States by the act of September 29, 1890, c. 1040, 26 Stat. 496, and should be so adjudged.

By the last-named act it was among other things provided: "§ 1. That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; *Provided*, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted." "§ 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line." 26 Stat. 496, c. 1040.

The contention of the Government renders it necessary to

ascertain what interest, if any, was acquired by the Northern Pacific Railroad Company in these lands by virtue of the act of July 2, 1864.

By that act the Northern Pacific Railroad Company was created a corporation with authority to build a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota westerly by the most eligible route, as should be determined by the company, on a line north of the 45th degree of latitude, to some point on Puget's Sound, "with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus." The grant to that company was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, *and* whenever, on the line thereof, the United States have full title, *not* reserved, sold, *granted or otherwise appropriated*, and free from preëmption, or other claims or rights, *at the time* the line of said road is *definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;* and whenever, *prior to said time*, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By other sections of the act it was provided: "§ 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the *general route* shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed,

except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale." "§ 8. That each and every grant, right and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six." By section twenty it was declared that "Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act." 13 Stat. 365, c. 217.

On the 6th day of March, 1865, Josiah Perham, President of the Northern Pacific Railroad Company addressed to Mr. Usher, then Secretary of the Interior, the following communication: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company

may be marked and withdrawn from sale in conformity to law."

Under date of March 9, 1865, Secretary Usher wrote to the Commissioner of the General Land Office as follows: "Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from the market. In view of the provisions of the third and sixth sections of the act of Congress, approved July 2, 1864, should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the sixth section of said act of Congress."

No immediate reply seems to have been made to the letter of Secretary Usher. But on June 22, 1865, Mr. Wilson, Commissioner of the General Land Office, addressed to Mr. Harlan, then Secretary of the Interior, a communication in which he referred to the above letter of Secretary Usher, and in which he assigned many reasons why the Perham map was wholly inadequate for the purposes intended to be accomplished by it, namely, the withdrawal for the benefit of the Northern Pacific Railroad Company of all the public lands within the exterior lines indicated by that map. Among other things Mr. Wilson said in his communication: "Of course, no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced and survey

of railroad established, in like manner as indicated under first head. A general withdrawal upon conjectural or uncertain basis might result in shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawals which the survey might require to be included. Then, it is not sound policy nor is there any warrant in our land legislation for doing any act the tendency of which would give preference to satisfy a grant on such a stupendous scale as this, whilst individual claims under our general system of land laws, homestead, preëmption and sales would be unaided by any such preliminary discriminating proceeding. The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation; would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants, whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all the different acts of land legislation may be at the same time in full operation, giving precedence to no one law over another, unless where the terms of the law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law. For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connection of said portions with the lines of the public surveys, yet respectfully submits the foregoing considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office."

On the 10th day of April, 1869, Congress passed a joint resolution granting a right of way for the construction of a railroad from a point at or near Portland, Oregon, to a point west of the Cascade Mountains in Washington Territory. That resolution provided: "That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed." 16 Stat. 57. No action was taken under that resolution because it contained no grant of lands; and it is not contended that it has any material bearing on this case. It is referred to merely as part of the history of the grant to the Northern Pacific Railroad.

After the map of the definite location of the Oregon Company had been filed and accepted, namely, on the 31st of May, 1870, Congress passed a joint resolution authorizing the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road, "and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; . . . and also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main

road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of subsequent to the passage of the act of July 2, 1864. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points." 16 Stat. 378. As said by Mr. Justice Lamar, when Secretary of the Interior: "By this resolution the designation of the lines of the road was changed; that which by the granting act [July 2, 1864] was known as the branch line (via the valley of the Columbia River to a point at or near Portland, in the State of Oregon,) was changed to main road or main line, and that which had been designated as main line (crossing the Cascade Mountains to Puget Sound) was changed to branch line." 6 L. D. 400; *United States* v. *Northern Pacific Railroad Co.*, 152 U. S. 284, 299.

On the 4th day of August, 1870, two maps, constituting a map of general route of the Northern Pacific Railroad Company, were presented to the Secretary of the Interior. The bill alleged that those maps designated a route following the

Columbia River from Wallula, Washington Territory, to a point on the north side of that river opposite Portland, Oregon, and that the Secretary of the Interior on the 13th day of August, 1870, in due form accepted them and directed the withdrawal of lands opposite that line. Withdrawals were accordingly made August 13, 1870, and October 27, 1870, and they embraced the lands here in controversy. The bill referred to these maps as maps of "general route," but in an amended bill the Government reserved the right to insist, if it should be thereafter advised to do so, that the map filed August 4, 1870, and the one filed March 6, 1865, "were maps of definite location of said Northern Pacific Railroad of its line from Wallulla Junction to Portland, Oregon."

There never was any withdrawal of indemnity lands on the proposed line between Wallula and Portland, nor any *definite location or construction* of the road of the Northern Pacific Railroad Company *opposite to the lands in suit.*

Proceeding to the consideration of the case upon its merits, we observe that many questions of difficulty and importance have been discussed by learned counsel both at the bar and in their printed arguments which we do not deem it necessary to determine. In our judgment, the case is within a very narrow compass.

What was the extent of the grant of public lands made to the Northern Pacific Railroad Company by the act of July 2, 1864? That grant did not embrace all the odd-numbered sections within the exterior lines of any general route that might have been adopted by the company, nor all within the forty miles in width that might have been surveyed under the order of the President (§ 6) on each side of the entire line of the road after such general route had been designated. It was in the nature of a "float," no right or title to any particular section becoming certain until a definite location of route. *Missouri, Kansas & Texas Railway* v. *Kansas Pac. Railway*, 97 U. S. 491; *Grinnell* v. *Railroad Co.*, 103 U. S. 739, 742; *Van Wyck* v. *Knevals*, 106 U. S. 360, 366; *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 634; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *Deseret*

*Salt Co.* v. *Tarpey*, 142 U. S. 241; *Sioux City Land Co.* v. *Griffey*, 143 U. S. 32, 38; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 594; *Menotti* v. *Dillon*, 167 U. S. 703, 719; *Southern Pacific Railroad* v. *United States*, 168 U. S. 1.

In *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 71, 72, this court, speaking by Mr. Justice Field, referred to the act of 1864 and said that it contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the grant to such alternate odd sections as have not, *at that time*, been reserved, sold, granted or otherwise appropriated, and free from preëmption, grant or other claims or rights. . . . Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant *operative only* upon such odd sections as have *not* been reserved, sold, granted or otherwise appropriated, and to which preëmption and other rights and claims have not attached, *when a map of the definite location has been filed*."

In *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, 296, it was held that "the act of 1864 granted to the Northern Pacific Railroad Company *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights *at the time* its line of road was *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office." Subsequently in *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 629, it was said that "the act of July 2, 1864, under which the railroad company claims title *excluded* from the grant made by it all lands that were *not, at the time the line of the road was definitely fixed*, free from preëmption or other claims or rights."

If therefore the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of "general route" — and nothing more can possibly be claimed for it — these lands could not be regarded as hav-

ing been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line.

There are some general expressions in *Buttz* v. *Northern Pacific Railroad*, above cited, which, counsel insists, indicate a different view. In that case Mr. Justice Field said that when the general route of the Northern Pacific Railroad was fixed and information thereof given to the Land Department by filing the map of such route, "*the law* withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a "general route," are "appropriated" from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route. In *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 634, 635, 636, this court, referring to the act of July 2, 1864, said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper. Provision for indemnification of the company in such an emergency was made by a clause in the act of 1864, providing that wherever, prior to the date of definite location, 'any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, other lands shall

be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of such alternate sections.' 13 Stat. 368. Hence it was said in *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, 320, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite lines of the road, and was a right reserved and excepted out of the grant at that time." In the same case it was also observed: "Much was said at the bar as to the decision of this court in *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. On one side it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of *any* right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side it is contended that the only point necessary to be determined and the only one judicially determined in that case was that the defendant could not initiate a preëmption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the *Buttz case* involved no inquiry as to the respective rights of the railroad company under the act of 1864 and of parties making applications in due form prior to the definite location of its road to purchase lands as mineral lands that were within the exterior lines of its general route. Mr. Justice Field delivered the opinion in the *Buttz case*, and, speaking for the court in *Barden* v. *Northern Pacific Railroad Company*, above cited, stated that the grant in that act excepted the privilege of exploring for mineral lands. For the reasons stated we adjudge that the lands in question were excluded from the grant of 1864 by reason of the pendency of record, at the time of the definite location of the plaintiff's road, of application to purchase them as mineral lands, such applications being in the form prescribed by the acts of Congress that related to such lands, and undetermined when the company filed its map of definite location."

We take it then to be indisputable that even if the Perham map of 1865 were regarded as a sufficient map of the "general route" of the Northern Pacific Railroad, and not, to use the language of Judge Ross in this case, a mere sketch or diagram unauthenticated by any engineer or officer charged with the duty of designating such a route, nothing stood in the way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such map was filed in the Land Department and before a definite location of the Northern Pacific Railroad. Such a statute was that of July 25, 1866, granting lands to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon. That the lands here in dispute — even if within the general route of the Northern Pacific Railroad as defined by the Perham map of 1865 — are within the exterior limits of the grant to the Oregon Company contained in the subsequent act of 1866, is expressly averred in the bill filed by the United States.

Upon the question whether it was within the power of Congress to have granted to the Oregon Company in 1866 lands embraced within the exterior lines of the general route as defined by the Perham map of 1865, reference need only be made to *United States* v. *Union Pacific Railway*, 160 U. S. 1, 33, and *Menotti* v. *Dillon*, 167 U. S. 703, 719–720.

In *Menotti* v. *Dillon*, the principal question was as to the rights acquired by a railroad company in virtue of its having filed its map of general route and the withdrawal by executive order of certain lands within the exterior lines of that route from preëmption, private entry and sale — all before the passage of a subsequent act under which one of the parties claimed title to the land in dispute, the other claiming under the railroad company. This court said: "It is said that the railroad company filed its map of general route on the 8th of December, 1864, and that these lands having been withdrawn from preëmption, private entry and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the first section distinctly indicates

certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the State, 'in all cases,' lands which the State had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of the passage of the act, were withdrawn from preëmption, private entry and sale pursuant to the filing by the railroad company of its map of *general* route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the State lands which, at the time, were simply withdrawn from preëmption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a 'float,' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 639, 644; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 593. In *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620, 634, we said: 'The company acquired, by fixing its general route, only an inchoate right to the odd-

numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.'"

Again in the same case: "It is true, as said in many cases, that the object of an executive order withdrawing from preemption, private entry and sale lands within the general route of a railroad is to preserve the lands unincumbered until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, '*not* sold, reserved or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true where the grant is made subject to the reserved power of Congress to add to, alter, amend or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired in virtue of the act making the grant and of the accepted map of its general route was to earn such of the lands within the exterior lines of that route as were *not* sold, reserved or disposed of, or to which no preëmption or homestead claim had attached, at the time of the definite location of its road. The act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress, at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes stated in its provisions, and to

that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard* v. *Des Moines & Fort Dodge Railroad*, 122 U. S. 167, 174. That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road. We cannot doubt that the act of 1866 was a legal exertion of the power of Congress over the public domain."

As the grant contained in the act of July 2, 1864, did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870 — the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightly patented to it. Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented.

In opposition to the views we have expressed it may be said that the clause in the act of July 25, 1866, providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon Company in lieu of any that should "be found to have been granted, sold, reserved, occupied by

homestead sellers, preëmpted or otherwise disposed of," shows that Congress did not intend to include in but intended to exclude from the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25, 1866, and had not, *at that time*, or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed. It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific Railroad not having been definitely located prior to the passage of the forfeiture act of 1890) the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location.

Touching the joint resolution of May 31, 1870, it is clear that whatever may be its scope, no previously vested right of the Oregon Company was affected or was intended to be affected by that resolution. On the contrary, the resolution on its face indicates that some of the lands which the Northern Pacific Railroad Company may have been entitled to earn had been or might have been granted or otherwise disposed of "subsequent to the passage of the act of July 2, 1864," and in lieu thereof that company was authorized under the direction

of the Secretary of the Interior to receive other lands. The only effect therefore of the joint resolution, as between the Northern Pacific Railroad Company and the Oregon Company, was to confer upon the former company the right to receive other lands in lieu of those appropriated by the latter company under the authority of the act of 1866.

Passing by as unnecessary to be determined other questions discussed by counsel, we adjudge that the Circuit Court erred in cancelling the patents referred to in the bill, and that the reversal by the Circuit Court of Appeals of the decree of the Circuit Court and the remanding of the cause with directions to dismiss the bill was right.

The decree of the Circuit Court of Appeals is

*Affirmed.*

MR. JUSTICE MCKENNA did not participate in the decision of this case.

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## WILCOX *v.* EASTERN OREGON LAND COMPANY.

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

No. 23. Submitted November 15, 1897. — Decided January 8, 1900.

The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company.*

THE facts are stated in the opinion. The case was submitted November 15, 1897, and was, on the 29th of the same month, postponed until *The United States* v. *Oregon & California Railroad Co.*, *ante*, 28, should be heard.

*Mr. John M. Geavin* for appellant.

*Mr. James K. Kelly* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case depends in part upon the construction of the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, in aid of the

construction of the Northern Pacific Railroad. The provisions of that act, so far as they are material to the present controversy, are fully set forth in the opinion in *United States* v. *Oregon & California Railroad Company*, just decided.

By an act of February 25, 1867, Congress, in aid of the construction of a military wagon road in Oregon from Dalles City on the Columbia River, by way of Camp Watson, Canyon City and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise in Idaho Territory, granted to the State of Oregon "alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road: *Provided*, That . . . any and all lands heretofore reserved to the United States or otherwise appropriated by act of Congress or other competent authority, be and the same are hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further*, That the grant hereby made shall not embrace any mineral lands of the United States." 14 Stat. 409, c. 77.

Other sections of that act are as follows: "§ 2. That the lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon transportation of any property, troops or mails of the United States." "§ 4. That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act. § 5. That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the

land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States. § 6. That the United States surveyor general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect."

Subsequently, by an act approved October 20, 1868, the State of Oregon granted to the Dalles Military Road Company all the lands, right of way, rights, privileges and immunities granted or pledged by the above act of February 25, 1867, "for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed." The State also, by the same act, granted and pledged to that company "all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road," and authorized it to locate the lands mentioned in the fourth section of the act of Congress, subject to the approval of the Governor. Sess. Laws 1868, p. 3.

The material facts out of which the present suit arises are alleged in the bill, and are substantially admitted in the answer. They are as follows:

Prior to June 23, 1869, the Dalles Military Road Company had duly surveyed and *definitely located* its line of road between the points designated by Congress and the State; had fully constructed and completed its road, and had filed in the office of the governor a plat or map upon which was traced and shown the definite location of the road from Dallas City to its terminus on Snake River, as well as the limits of the place and indemnity lands embraced by the act of Congress.

On the 23d day of June, 1869, the Governor certified that

such plat or map had been duly filed in his office, and that it showed the route upon which the road was constructed in accordance with the above acts of Congress and of the legislature of Oregon; also, that he had made a careful examination of the road since its completion, and that the same had been built in all respects as required by those acts and had been accepted.

The above map and the certificate of the Governor were filed by the company in the office of the Secretary of the Interior, and on December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company the odd-numbered sections within three miles from each side of the wagon road as delineated and shown on the maps so filed.

By an act of Congress approved June 18, 1874, it was provided that "in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Orgeon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled." 18 Stat. 80, c. 305.

On the 31st day of May, 1876, Edward Martin, in good faith and for a valuable consideration, $125,000, purchased from the Military Road Company all the lands embraced in the grant to it, except such as it had previously sold, and received a conveyance thereof. Bad faith is not imputed to Martin, and it is only claimed that when he purchased those lands he was chargeable with constructive notice of the acts of Congress, and that no title could pass to the Military Road Company

consistently with the above act of July 2, 1864, granting lands to the Northern Pacific Railroad Company.

By different mesne conveyances, beginning with a deed from Edward Martin dated January 31, 1877, and ending with a conveyance to it of date August 11, 1884, the Eastern Oregon Land Company, a California corporation, became the owner — if the original sale by the Military Road Company passed any title — of all the lands purchased by Martin in 1876.

Among the lands in place that had been selected by the Military Road Company were the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian, which was situated in Sherman County, and within the limits of the grant of land in place to the State by the above act of February 25, 1867. That particular body of land was on the south side of the line of "general route" of the Northern Pacific Railroad as delineated on a map filed by that company on the 13th day of August, 1870, and more than twenty and less than forty miles from that line. There never was any definite location of the line of that road opposite this land.

The above tract of land was opened for settlement and sale by the Secretary of the Interior — that officer, the bill alleged, being of opinion that it was excepted from the grant to the State of Oregon in the act of February 25, 1867, and was embraced by the act of July 2, 1864, and by the map of general route filed by the Northern Pacific Railroad Company on the 13th day of August, 1870. In opening this land to settlement and sale the Secretary proceeded, as he supposed, by authority of the forfeiture act of September 29, 1890, by which the United States resumed title to and restored to the public domain all lands theretofore granted in aid of the construction of railroads and which were opposite to and coterminous with the portion of the railroad not then completed and in operation, for the construction or benefit of which such lands were granted. 26 Stat. 496, c. 1040.

Thereupon John D. Wilcox settled upon the particular land above described, and made application to purchase the same under the act of Congress of April 24, 1820, making further

provision for the sale of public lands. 3 Stat. 566, c. 51. Such proceedings were thereafter had on his application that the President on the 28th of September, 1884, issued a patent to him for that tract. Of the application of Wilcox for the purchase of the land, the Eastern Oregon Land Company had no notice, and therefore, even if its title were not good, it could not have availed itself of the privilege given by the act of Congress of March 3, 1887, 24 Stat. 556, c. 376, to purchase the land.

The present suit was brought against Wilcox by the Eastern Oregon Land Company in the Circuit Court of the United States for the District of Oregon. The bill alleged that a patent having been issued to Wilcox, the Interior Department had no longer jurisdiction to give to it a patent as required by the above act of June 18, 1874, until the patent to the defendant has been cancelled and set aside. As the patent to Wilcox was therefore a cloud upon its title, the plaintiff sought a decree setting it aside, declaring the company to be the owner of the land in Wilcox's possession, and ordering the defendant to convey the land to it. The Circuit Court dismissed the bill. Upon appeal to the Circuit Court of Appeals that decree was reversed, and a decree ordered to be entered in favor of the Land Company. Thereupon Wilcox appealed to this court.

We adjudge, as in *United States* v. *Oregon & California Railroad Company*, just decided, that the act of July 2, 1864, relating to the construction of the Northern Pacific Railroad, only granted lands that were *not* reserved, sold, granted or otherwise *appropriated*, and free from preëmption or other claim, or rights, at *the time the line of that road* was *definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of the *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of "definite location," and that such lands, if not otherwise identified at the date of the passage of the later act than by a plat or map of "general

route," were not excluded from the operation of such an act as lands previously "reserved, sold, granted or otherwise appropriated" by the act of 1864.

As the lands here in dispute are embraced by the granting clause of the act of February 25, 1867, giving lands to the State of Oregon, and are within the lines of the definite location of the Dalles Military Road as shown by its map filed in the Land Department and approved by that department December 18, 1869, and as the route of the Northern Pacific Railroad Company was not then and was not thereafter definitely fixed opposite the lands in dispute, they were earned and appropriated by the Military Road Company under the act of February 25, 1867, and cannot be regarded as embraced by the act of July 2, 1864, for the benefit of the Northern Pacific Railroad Company, which could take under its grant *only* such lands as had *not* been appropriated under the authority of Congress when its line was definitely fixed.

This conclusion is inevitable, unless it be adjudged that it was beyond the power of Congress to appropriate for the Dalles Military Road lands within the general route but not within any line of definite location established by the Northern Pacific Railroad. For the reasons stated in *United States* v. *Oregon & California Railroad*, we cannot so adjudge.

Upon the authority of that case the decree of the Circuit Court of Appeals in this case, reversing the decree of the Circuit Court with instructions to enter a decree in favor of the plaintiff, the Eastern Oregon Land Company, is

*Affirmed.*

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

# MESSINGER *v.* THE EASTERN OREGON LAND COMPANY.

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

No. 24. Submitted November 15, 1897. — Decided January 8, 1900.

The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company* and *Wilcox* v. *The Eastern Oregon Land Co.*

THE case is stated in the opinion. This case was submitted with *Wilcox* v. *Eastern Oregon Land Co.*, *ante*, 51, and a like disposition was made of it.

*Mr. John M. Gearin* for appellant.

*Mr. James K. Kelly* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The parties in this case and in *Wilcox* v. *Eastern Oregon Land Company* stipulated that the bills, answers, decrees, assignments of error, and all other papers and proceedings in both causes, were exactly alike, with the exception that in this case it is alleged that the land patented to the defendant Messinger was patented under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," 12 Stat. 392, c. 75, and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south, of range sixteen east of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road as designated on its map of August 17, 1870, and that the patent was dated the 17th day of August, 1894.

It is also stipulated by the parties to the two suits, by their

Counsel for Parties.

respective attorneys, that, unless this court otherwise ordered, only the record in the Wilcox suit should be printed, and that the appeal in this case might be heard and submitted without printing the record thereof.

Upon the authority of *United States* v. *Oregon & California Railroad Company* and *Wilcox* v. *Eastern Oregon Land Company*, just decided, the decree of the Circuit Court of Appeals, reversing the judgment of the Circuit Court and directing a decree in favor of the plaintiff, the Eastern Oregon Land Company, is

*Affirmed.*

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

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## BLAKE *v.* McCLUNG.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 466. Submitted December 18, 1899.—Decided January 8, 1900.

The decision in *Blake* v. *McClung*, 172 U. S. 239, referred to; and it is held that the judgment now under review was not in conformity with the opinion and mandate in that case — the court adjudging, as it had adjudged in the previous case, that when the general property and assets of a private corporation, lawfully doing business in a State, are in the course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand *in all respects* upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union.

The case is stated in the opinion of the court.

*Mr. Tully R. Cornick* and *Mr. Heber J. May* for plaintiffs in error.

*Mr. S. C. Williams* and *Mr. John W. Green* for defendants in error.

Opinion of the Court.

Mr. Justice Harlan delivered the opinion of the court.

This case has been heretofore in this court upon writ of error brought to review a final decree of the Supreme Court of Tennessee. *Blake* v. *McClung*, 172 U. S. 239.

That decree was rendered in a suit instituted by C. M. McClung & Co. for the administration of the property and affairs of the Embreeville Freehold, Land, Iron and Railway Company, Limited — an insolvent British mining and manufacturing company doing business in Tennessee. Among the creditors who filed intervening petitions in the suit were C. G. Blake, a citizen of Ohio; Rogers, Brown & Company, the members of which firm were also citizens of Ohio; and the Hull Coal & Coke Company, a corporation of Virginia.

It was adjudged by the Supreme Court of Tennessee that all the creditors of the British corporation who resided in Tennessee were entitled to priority of payment out of its assets, real and personal, over all other creditors who did not reside in Tennessee, whether they were residents of other States of the United States or of the Kingdom of Great Britain; and that all creditors residing out of Tennessee, whether in other States of the Union or in the Kingdom of Great Britain, had the right and must share equally and ratably in the distribution of the assets of the company after the residents of Tennessee should have been first paid in full.

The decree so rendered was in conformity with a statute of Tennessee passed March 19, 1877, the fifth section of which provided: "That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be *residents of this State* shall have *a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment* of *debts over all simple contract creditors, being residents of any other country or countries*, and also over mortgage or judgment creditors, for all debts,

engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this State, and the property of its citizens is or may be liable to taxation, but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may hereafter be granted to citizens or corporations for the purpose of encouraging manufacturers in this State, or otherwise." Acts of Tennessee 1877, c. 31, p. 44.

The validity of that statute was drawn in question by Blake and Rogers, Brown & Company as well as the Hull Coal & Coke Company, who specially claimed that the judgment based upon the statute had denied to them respectively rights secured by the second section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as well as by the first section of the Fourteenth Amendment, declaring that no State shall "deprive any person of life, liberty or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the State sustained the constitutionality of the statute, and from its final judgment Blake and Rogers, Brown & Company, and the Hull Coal & Coke Company, prosecuted a writ of error to this court.

The general question presented for determination by this court was thus stated in its opinion: "Beyond question, a State may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude

citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the State in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other States, and not citizens of the State in which such administration occurs?"

Upon a review of prior decisions this court said: "The foundation upon which the above cases rest cannot however stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for this statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should

first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was 'to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements and contracts.' But, clearly the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?"

Referring to the established rule that the property of a corporation was a trust fund for the payments of its debts in the sense that when it is lawfully dissolved and its affairs closed, 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 stockholders, this court further said: "These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them.* Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State. We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the State has the power to pre-

scribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

Again: "The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the State a fixed amount to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other States. It permitted that corporation to contract with citizens of other States, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other States should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid — not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the State, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but out of whatever assets of any kind the corporation might have in that State when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other States, those citizens cannot share in its general assets upon terms of equality with citizens of that State. If such legislation does not deny to citizens of other States, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result. We adjudge that when the general property and assets of a private

corporation, lawfully doing business in a State, are in the course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that State; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

In relation to the Hull Coal & Coke Company this court held that it was not a citizen of the United States within the meaning of the second section of the Fourth Article of the Constitution; and although a "person" within the meaning of the Fourteenth Amendment that company was not deprived of its property without the due process of law guaranteed by that amendment, and not being within the jurisdiction of Tennessee it could not invoke the protection of the clause forbidding the denial by a State of the equal protection of the laws to persons within its jurisdiction.

By the final order of this court the judgment of the state court was affirmed as to the Hull Coal & Coke Company, upon the ground that no right, privilege or immunity secured to it by the Constitution of the United States had been denied. As the other plaintiffs in error — Blake and Rogers, Brown & Company — the judgment was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

After the decision here, the cause was again heard in the Supreme Court of Tennessee on the motion of Blake and Rogers, Brown & Company for a decree in conformity with the opinion and mandate of this court.

That court adjudged: "1. That the effect and purpose of

the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron and Railway Company, Limited, upon the basis of a broad distribution of the assets of said corporation among all of its creditors, without preference or priority, as though the act of 1877, chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class, wherever residing, and that there shall be paid to the said C. G. Blake, and the said Rogers, Brown & Company, the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained. 2. It is further adjudged and decreed, that after thus setting apart to the said C. G. Blake, and Rogers, Brown & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron and Railway Company, Limited, is applicable *first* to the payment of the indebtedness due to the creditors of said corporation *residing within the State of Tennessee*, as provided in section 5 of chapter 31 of the acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied *pro rata* to the payment of the debts of the alien and non-resident creditors of said corporation, other than the said C. G. Blake, and Rogers, Brown & Company." The cause was remanded to the court of original jurisdiction for the collection and distribution of the fund then in that court, and for the making of such further orders as might be found necessary to the final settlement of the cause. Mr. Justice Beard dissented upon grounds stated in his opinion which is published in 52 S. W. Rep. 1001.

Blake and Rogers, Brown & Company excepted to the action of the state court "in determining that creditors residing in Tennessee were entitled under the act of 1877, c. 31, § 5, to any priority or preference, by way of increased

percentages in distribution" over them, on the ground that such priority and preference was in violation of section 2 of Article IV of the Constitution of the United States, and was not consistent with the opinion and mandate of this court. The present writ of error was brought to review the last judgment.

We are constrained to hold that the judgment of the Supreme Court of Tennessee is not in conformity with the opinion and mandate of this court. The thought expressed in our former opinion was that Blake and Rogers, Brown & Company, citizens of Ohio and general creditors of the Embreeville Freehold, Land, Iron and Railway Company, were entitled in the distribution in Tennessee of the assets of that insolvent corporation, to stand upon the same plane with citizens of Tennessee who were also general creditors of the same corporation; and that the judgment of the state court heretofore under review, 172 U. S. 539, so far as it gave priority to citizens of Tennessee over citizens of other States, was inconsistent with the second section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By the judgment now under review certain creditors, solely because of their being citizens of Tennessee, are accorded advantages in the distribution of the assets in question which are denied to other creditors solely because of their being citizens of another State than Tennessee. That judgment gives to the plaintiffs in error respectively their percentage of the entire assets of the insolvent corporation upon the basis of equality among *all* the creditors, *wherever residing*, and that being done, the court in effect directs the idea of equality among all creditors to be abandoned, and "all the rest and residue of the estate" of the insolvent corporation to be applied *first* to the payment of the debts due to citizens of Tennessee. Thus the decree gave a decided advantage to Tennessee creditors over Ohio creditors, when, as Mr. Justice Beard correctly said, the cause was remanded by this court substantially with direction that the state court should see

to it that no advantage accrued to Tennessee creditors over the Ohio creditors.

It is not within the province of this court to prescribe the form of a decree to be entered for the distribution of the assets in question. But it is both its province and duty to adjudge, in accordance with the supreme law of the land, as we now do, that the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee. No decree giving to the latter privileges or advantages that are denied to the former is, as we have heretofore adjudged, consistent with the Constitution of the United States. In the distribution of what is called in the decree "all the rest and residue of the estate of the Embreeville Freehold, Land, Iron and Railway Company," or in the proceeds thereof, the plaintiffs in error should be placed upon the same plane of equality with Tennessee creditors. The plaintiffs in error cannot be denied participation in any of the assets of the insolvent corporation that are taken into account when ascertaining the rights of the Tennessee creditors and the amounts to be paid to them on their respective demands. Whatever rule is applied for the benefit of the latter must be applied in behalf of the Ohio creditors.

*The judgment is reversed, and the cause remanded for such further proceedings as may be consistent with this opinion.*

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## HOLT *v.* INDIANA MANUFACTURING COMPANY.

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

No. 30. Argued December 19, 20, 1899. — Decided January 15, 1900.

The reasons for refusing, at October Term 1898, to dismiss this case on the ground that the appeal to this court was not taken in time, are the same as those set forth in *Allen* v. *Southern Pacific Railroad*, 173 U. S. 479.

Statement of the Case.

The complaint of the Manufacturing Company that the assessment upon it of the taxes complained of was illegal, because in effect levied on patents or patent rights, did not involve the construction, or the validity, or the infringement of the patents referred to, or any other question under the patent laws, and was not therefore a suit arising under the patent laws, and the Circuit Court had no jurisdiction of it on that ground.

The provisions in Rev. Stat. § 629, clauses 9 and 16, § 563, and § 1979, brought forward from the act of April 20, 1871, c. 22, refer to civil rights only, and are inapplicable here.

Following *United States* v. *Sayward*, 160 U. S. 493, and *Fishback* v. *Western Union Tel. Co.*, 161 U. S. 96, the court holds that the sum of $2000 named in § 1 of the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, was jurisdictional, and following *The Paquete Habana*, 175 U. S. 677, it holds that this is not affected by the fact that the operation of the act of March 3, 1891, c. 517, was to do away with any pecuniary limitation on appeals directly from the Circuit Court to this court.

This suit was brought in the Circuit Court of the United States for the District of Indiana by the Indiana Manufacturing Company, a corporation organized and existing under the laws of the State of Indiana, against Sterling R. Holt and others, taxing officers of Marion County, Indiana, and of a township in said county, and some others, constituting the board of review of that county, all of whom were citizens of Indiana, to enjoin the collection of certain personal taxes for the years 1892, 1893, 1894 and 1895, assessed upon the capital stock and tangible property of the company. The bill alleged that the larger part of the assessment made by the taxing authorities was for the supposed value of certain rights under letters patent from the United States owned by the company, and which the company insisted were not subject to taxation by the state authorities; that the capital stock, aside from the tangible property, represented solely the supposed value of the letters patent; and that the taxes in respect of the tangible property had been paid by the company. Complainant charged that the assessment was illegal, unconstitutional and void, and averred that the suit was instituted "to redress the deprivation, under color of a law of the State of Indiana, of a right secured by the laws of the United States, and further, that it is a suit arising under the patent laws of the United States."

Opinion of the Court.

The Circuit Court entered a decree, in accordance with the prayer of the bill, perpetually enjoining the collection of the taxes claimed to be due in respect of the capital stock in so far as the value thereof was derived from patent rights or letters patent owned by complainant. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit and dismissed by that court for want of jurisdiction. 46 U. S. App. 717.

The Circuit Court of Appeals held that the suit was not one arising under the patent laws of the United States, and that as the jurisdiction of the Circuit Court could rest only on the ground that the constitutional rights of complainant were infringed by the laws of the State of Indiana which were repugnant to and in contravention of the Constitution of the United States, an appeal would not lie to that court, and could only be taken directly to this court under section five of the Judiciary Act of March 3, 1891.

Thereupon this appeal was taken.

*Mr. William L. Taylor* and *Mr. John K. Richards* for appellants. *Mr. Merrill Moores* and *Mr. Cassius C. Hadley* were on their brief.

*Mr. Chester Bradford* for appellee.

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

The decree of the Circuit Court was entered in March, 1896, and the appeal to this court was not taken until somewhat over one year and six months, though within two years, thereafter. In January, 1898, a motion to dismiss was made on the ground that section 1008 of the Revised Statutes, giving two years for the bringing of a writ of error, or the taking of an appeal, to review the judgments or decrees of the Circuit or District Courts, was repealed by the Judiciary Act of March 3, 1891. We did not concur in that view, and the motion was denied, though without an opinion. But in *Allen* v. *Southern Pacific Railroad Company*, 173 U. S. 479, the

reasons will be found for our conclusion that the limit of two years remained unchanged.

In this, as in all cases, if it appears that the Circuit Court had no jurisdiction, it is the duty of this court to so declare and enter judgment accordingly.

Complainant rested the jurisdiction on clauses nine and sixteen of section 629 of the Revised Statutes.

(1.) Section six hundred and twenty-nine provides that "the Circuit Courts shall have original jurisdiction as follows: . . . Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States."

The complaint that the assessment of these taxes was illegal because in effect levied on patents or patent rights, did not involve the construction, or the validity, or the infringement of the patents referred to, or any other question under the patent laws. This was not, therefore, a suit "arising under the patent laws," and the Circuit Court had no jurisdiction on that ground. *Dale Tile Manufacturing Company* v. *Hyatt*, 125 U. S. 46; *Wood Mowing Machine Company* v. *Skinner*, 139 U. S. 293; *Wade* v. *Lawder*, 165 U. S. 624.

(2.) The sixteenth clause of § 629 reads thus: "Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of any right, privilege or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Similar jurisdiction is conferred upon District Courts by the twelfth clause of § 563 of the Revised Statutes.

Section 1979 of the Revised Statutes provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

All these provisions were brought forward from the act of April 20, 1871, entitled "An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." 17 Stat. 13, c. 22.

Assuming that they are still in force, it is sufficient to say that they refer to civil rights only and are inapplicable here.

If state legislation impairs the obligations of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, as asserted by counsel in respect of the statutes of Indiana, remedies are found in the first section of the act of August 13, 1888, 25 Stat. 433, c. 866, giving to the Circuit Courts jurisdiction of all cases arising under the Constitution and laws of the United States; and in § 709 of the Revised Statutes, which gives a review on writ of error to the judgments of the state courts whenever they sustain the validity of a state statute or of an authority exercised under a State, alleged to be repugnant to the Constitution or laws of the United States. *Carter* v. *Greenhow*, 114 U. S. 317; *Pleasants* v. *Greenhow*, 114 U. S. 323.

(3.) Treating this bill as setting up a case arising under the Constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over two thousand dollars applied, and the taxes in question did not reach that amount. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute. *New England Mortgage Company* v. *Gay*, 145 U. S. 123; *Clay Center* v. *Farmers' Loan & Trust Company*, 145 U. S. 224; *Citizens' Bank* v. *Cannon*, 164 U. S. 319.

The language of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888, is: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States,

Syllabus.

of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . ." This was carefully considered in *United States* v. *Sayward*, 160 U. S. 493, and it was held that the sum or value named was jurisdictional, and that the Circuit Court could not, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded two thousand dollars. That decision was reaffirmed in *Fishback* v. *Western Union Telegraph Company*, 161 U. S. 96, 99. And the conclusion reached is not affected by the fact that the operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the Circuit Courts to this court. *The Paquete Habana*, 175 U. S. 677.

We are therefore constrained to hold that the Circuit Court had no jurisdiction.

*Decree reversed, with costs, and cause remanded to the Circuit Court with a direction to dismiss the bill.*

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## CRUICKSHANK *v.* BIDWELL.

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

No. 232. Argued November 10, 13, 1899. — Decided January 15, 1900.

The mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction; and in this case the averments of the complainants' bill did not justify such an interference with executive action.

The seizure of importations of teas purchased after the approval of the act of March 2, 1897, c. 358, entitled "An act to prevent the importation

of impure and unwholesome tea," and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law.

THIS is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing, on demurrer, a bill in equity brought by Cruickshank and others, copartners doing business in the city of New York, against George R. Bidwell, collector of customs for the port of New York.

The bill averred that complainants were engaged in importing teas from Japan into the United States; that during the month of November, 1897, they imported into the United States and entered at the custom house in the port of New York, several invoices of tea of the aggregate value of something over $4100; that they applied to defendant as collector of customs for permission to take possession of the goods, and the collector refused to permit them to do so, but retained the same in his own possession, claiming that he was thereunto authorized by the provisions of an act of Congress, approved March 2, 1897, c. 328, 29 Stat. 604, entitled "An act to prevent the importation of impure and unwholesome tea." This act is printed in the margin.[1]

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[1] That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the person so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation or any other

Statement of the Case.

That defendant pretends that he is entitled "so to refuse to permit your orators to take possession of said teas and to dispose of the same, on the ground that samples of said teas, of

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cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports during the same at cost. All teas, or merchandise described as tea, of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this act.

each of said several invoices hereinafter set forth, have been taken by examiners appointed under the alleged authority of the said act of Congress, and compared with certain other samples of other teas selected by the Secretary of the Treas-

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SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality and fitness for consumption to the standards hereinbefore provided, and no reëxamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom house, unless on a reëxamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reëxamination by such board the tea shall be found to be inferior in purity, quality and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reëxamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reëxamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality and fitness for consumption of the same shall be tested according to the usages and cus-

ury of the United States, and set up as standard samples of teas under the alleged authority of the said act of Congress, and that the samples so taken from the said teas hereinafter set forth, were inferior in some or all of the respects designated in said act of Congress, either as to purity, quality or fitness for consumption, to the standards so prescribed by said Secretary of the Treasury of the United States."

That defendant claims the right to retain the teas for six months, and then cause them to be destroyed, and demands that complainants shall give security satisfactory to him that

toms of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reëxamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this act shall not be subject to the prohibition hereof, but the provisions of the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the act entitled "An act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this act goes into effect. 29 Stat. 604, c. 358.

if said teas shall be released to them, they will forthwith export said teas out of the limits of the United States, and will submit the invoices and various papers relating to said teas to be marked by defendant as teas "condemned under the laws of the United States."

The bill then specifically enumerated the entries of the teas, the warehouses in which they were, and their value respectively, and charged that said act of Congress was in all respects null and void and of no effect, because contrary to the provisions of the Constitution of the United States, in that the act "purports to delegate to the Secretary of the Treasury power and authority to legislate as to the quality, purity and fitness for consumption of the teas imported by your orators, and to authorize the defendant to seize, hold and destroy said teas, and deprive your orators of their property in the same without due process of law, and that in this suit the matter in dispute, to wit, the value of the said teas, and the right to import teas, exclusive of interest and costs, exceeds the sum or value of two thousand dollars, and the suit arises under the Constitution and laws of the United States."

It was further alleged that by reason of the matters set forth and the insistence of defendant that he is entitled to hold possession and control of the goods under authority of the act of Congress, "for the reason that the said examiners, after examination made pursuant to said statute, have declared the said teas to be inferior in the respects set forth in the said act of Congress, or some of them, to the standards fixed and selected by the Secretary of the Treasury, your orators will suffer irreparable damage; that the insistence of the defendant of his right to stamp the invoices and papers relating to the importation of said teas as condemned under the laws of the United States, renders the said teas worthless for export, and entry or sale in the markets of other countries, and that the said claim of the defendant that the said teas cannot be lawfully taken from the said warehouses, renders the said teas unsalable and worthless in the market, for the reason that dealers will not purchase or handle the said goods under the cloud or threat of illegality regarding the same

created by such insistence and claim on the part of the defendant."

The bill continued: "Your orators further show that your orators purpose and intend to import from time to time other invoices of teas into the United States, and that the said defendant threatens and intends to seize and hold such teas, and take possession and control of the same, and refuse your orators possession of the same, in the same manner and under the same claim of authority of said act of Congress, as the said defendant has heretofore made and set up with regard to the teas hereinbefore set forth, and that your orators' right to import and deal in teas is thereby destroyed and taken away."

That complainants "do not set up or allege as ground for denying the right of the defendant so to hold and deal with said teas, as hereinbefore set forth, any defect, omission or irregularity in the proceedings by the examiners and appraisers with regard to said teas, but solely on the ground that the act of Congress hereinbefore referred to . . . is unconstitutional and void, and confers no authority upon the defendant, and creates no right in the defendant to refuse to permit your orators to take possession of the said teas and introduce them into, and sell them in, the United States." And further, that complainants had complied in all respects with the requirements of law as to the entry of the teas in the custom house at the port of New York; that there was no further act required by law of complainants to entitle them to take possession and dispose of the same; and that complainants "are without any adequate remedy at law."

The bill prayed for injunction restraining defendant "from continuing to hold possession of the said teas, as hereinbefore set forth, and from refusing to permit your orators to take possession of the same and withdraw the same from the said warehouses, and from marking or stamping the invoices and papers relating to the importation thereof with the words, 'condemned under the laws of the United States,' or any words to that effect, and from destroying the said teas, and from exercising any alleged right, possession or authority

relating to or concerning the said teas, purporting to be conferred or created or authorized by the said act of Congress;" and for general relief.

*Mr. John S. Davenport* for appellants.

*Mr. Edward B. Whitney* for appellee. *Mr. Solicitor General* was on his brief.

*Mr. James L. Bishop* by leave of court filed a brief on behalf of William J. Butterfield and others.

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

Complainants sought by this bill to enjoin an officer of the United States from the discharge of duties expressly imposed upon him by an act of Congress on the ground of its unconstitutionality. We are clear that its averments did not justify such an interference with executive action.

In *Noble* v. *Union River Logging Railroad Company*, 147 U. S. 165, the jurisdiction was sustained, but the Government raised no point as to the form of the remedy, and deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was there threatened. And it appeared that the only remedy was through equity interposition. *New Orleans* v. *Paine*, 147 U. S. 261, 264. But we are unwilling to extend that precedent.

It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction. *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Pullman's Palace Car Company*, 139 U. S. 658; *Pacific Express Company* v. *Seibert*, 142 U. S. 339; *Pittsburg &c. Railway Company* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269. As

remarked by Mr. Justice Bradley in *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214, the sixteenth section of the Judiciary Act of 1789, now section 723 of the Revised Statutes, declaring "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law" "certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the courts."

Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury. The one head is well illustrated by *Union Pacific Railway Company* v. *Cheyenne*, 113 U. S. 516, and *Smyth* v. *Ames*, 169 U. S. 466, 517; and the other by *Watson* v. *Sutherland*, 5 Wall. 74; cited by counsel.

But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.

The sole ground of equity jurisdiction put forward is the inadequacy of remedy at law in that the injury threatened is not susceptible of complete compensation in damages. The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective.

The matter in dispute was averred to be "the value of the said teas and the right to import teas."

Confessedly the value of these teas was known, and their destruction capable of being compensated by recovery at law. The official character of the collector, the provisions of the act, and the regulations of the Secretary of the Treasury in execution thereof would not constitute a defence, if the act were unconstitutional. There was no intimation that the collector would be unable to respond in judgment, and, moreover, section 989 of the Revised Statutes provides that when a recovery is had in any suit or proceeding against a collector

for any act done by him, probable cause being certified, "the amount recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." *The Conqueror*, 166 U. S. 110, 124.

Nor was there any averment of injury by reason of the condemnation of these teas other than the loss of the teas themselves.

The allegations in respect of apprehended deprivation of the right to import and deal in teas were that complainants intended to import from time to time other invoices of teas and that the collector threatened to take possession of and hold them in the exercise of authority under the act of Congress in the same manner as the particular teas in question. This was in effect to assert a vested right to import and deal in teas which might be impure and unwholesome, and which were at all events, inferior to the uniform standards "of purity, quality and fitness for consumption" fixed by the Secretary. The law does not prohibit the importation of teas coming up to the standards, and it is difficult to perceive the elements of irreparable injury in the denial of permission to import inferior teas.

Manifestly the seizure of importations of teas purchased after the approval of the act and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law.

As no tenable basis for equity interposition was shown, the decree of the Circuit Court dismissing the bill was rightly entered. *Decree affirmed.*

# BOLLN v. NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 393. Argued December 4, 5, 1899. — Decided January 15, 1900.

A law of Nebraska permitting the prosecution of felonies by information is not in violation of the Constitution of the United States.

Whatever be the limitations upon the power of a territorial government, it becomes entitled, upon the admission of such Territory as a State, to all the rights of dominion and sovereignty belonging to the original States, and stands upon an equal footing with them in all respects.

An objection that a defendant was denied due process of law in being refused a jury trial upon a plea in abatement, cannot be raised here, when no violation of the Fourteenth Amendment was set up until after the cause had been decided by the Supreme Court of the State.

This is a writ of error to review a judgment of the Supreme Court of Nebraska, affirming a conviction of the plaintiff in error by the district court of Douglas County, for the crime of embezzlement.

The proceedings in the case, so far as they are disclosed by the record before us, which was agreed upon under subdivision nine of rule ten of this court, are as follows:

On April 2, 1896, an information was filed by the county attorney for the county of Douglas against the plaintiff in error, both as city treasurer of the city of Omaha and as treasurer of the board of education, for embezzling moneys belonging to the city as well as moneys belonging to the school district.

On April 4, a motion to quash was filed upon four grounds: (1) That there was no authority of law to file an information for a felony; (2 and 3) because the prosecution was in contravention of the constitution of the State; and (4) because it was in contravention of article fourteen of the Constitution of the United States, and was without due process of law.

On the same day a paper was filed, entitled a plea in abatement, which prayed judgment that the information might be quashed for the same reasons, and in precisely the words of the motion to quash.

On the same day, a demurrer was filed to the "*eighteen* paragraphs" of the plea in abatement, upon the ground that these paragraphs did not state facts sufficient to constitute a defence, or to raise an issue upon the plea.

Upon the same day, an order was entered overruling the motion to quash, to which the defendant excepted.

On April 6, another order was entered sustaining the demurrer as to the eighteen "reasons therein set forth," except the ninth; and "the court doth overrule the said demurrer as to the ninth reason therein set forth, with leave to the State to reply instanter." The State duly excepted to the ruling as to the ninth reason.

On the same day, a "reply to the ninth paragraph of the defendant's plea in abatement" was filed by the State, admitting that the defendant had had "no preliminary examination for said crime referred to in said ninth paragraph," but alleging that he waived such preliminary examination and his right thereto, as shown by the records of the court.

On April 8, 1896, a demurrer was filed to the information, and upon the same day both parties appeared in court, and announced their readiness to proceed to trial upon the ninth paragraph in defendant's plea in abatement. Thereupon the defendant demanded a trial by jury, and the court, on consideration, overruled the demand, to which ruling the defendant duly excepted. After introduction of evidence, pro and con, and upon due consideration, the court found that the defendant had waived a preliminary examination, and therefore found against him, and overruled the ninth paragraph of the plea in abatement. By the same order the demurrer was also overruled. The defendant being arraigned, refused to plead, whereupon the court entered a plea of not guilty, and the trial proceeded, and resulted in a verdict finding the defendant guilty upon the fourth count of embezzling $2500; upon the ninth count of embezzling $3000, and upon the eleventh count of embezzling $100,000.

Motion for a new trial being overruled, defendant was sentenced to fine and imprisonment upon the fourth, ninth and eleventh counts.

The case was carried to the Supreme Court of Nebraska and the judgment affirmed. The court delivered an opinion, in which it stated that "a plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea, and sustained as to the other seventeen grounds therein set forth." The petition in error, it was stated, contained 279 assignments, the only ones of which could be said to involve a Federal question being, first, that the State had no authority to prosecute by information, and, second, the refusal of the court to call a jury to pass upon the issue tendered by the ninth paragraph of the plea in abatement, that the defendant waived a preliminary examination before the magistrate. This opinion was filed May 18, 1897. 51 Nebraska, 581.

On September 20, 1897, plaintiff in error filed in the Supreme Court of the State assignments of error which appear to have been intended for this court, and on September 18, 1899, served upon the attorney general a petition to this court for the allowance of a writ of error upon the ground, first, that the plaintiff was convicted upon an information, and, second, because he had been denied a jury trial upon the issue tendered by special plea, that he had had no preliminary examination and had not waived the same.

*Mr. Joel W. West* for plaintiff in error.

*Mr. Constantine J. Smyth* for defendant in error.

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

Two questions were raised in the briefs and argument of the plaintiff in error: First, that a proceeding by information for a felony was not, so far as the State of Nebraska is concerned, due process of law, under the Fourteenth Amendment to the Constitution of the United States. Second, that the trial by the court, without a jury, of the issue raised by the ninth plea in abatement, whether the defendant had waived a preliminary examination, was not due process of law.

1. The first question, so far as it applies to States in general, was settled adversely to the insistence of the plaintiff in error in *Hurtado* v. *California*, 110 U. S. 516, in which it was held that a prosecution for murder did not necessarily require an indictment by a grand jury, where the constitution of the State authorized prosecutions for felonies by information. Subsequent cases have done nothing to weaken or qualify the force of this decision. Its principle was applied in *In re Kemmler*, 136 U. S. 436, to a law of New York providing for the punishment of death by electricity; in *Dent* v. *West Virginia*, 129 U. S. 114, to a statute subjecting physicians to punishment who practised medicine without a certificate as to their competency; in *Caldwell* v. *Texas*, 137 U. S. 692, to a statutory indictment for murder under the laws of Texas; and in *Hallinger* v. *Davis*, 146 U. S. 314, to a state statute conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court. It was also cited with approval in *Baldwin* v. *Kansas*, 129 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462; *McNulty* v. *California*, 149 U. S. 645; *Holden* v. *Harvey*, 169 U. S. 383, and in *Hagar* v. *Reclamation District*, 111 U. S. 701.

It is insisted, however, that under the act of Congress of April 19, 1864, 13 Stat. 47, enabling the people of Nebraska to form a constitution and state government for admission into the Union, the power given to that State is restricted in that particular. After authorizing the inhabitants to form for themselves a constitution and state government, and providing for a constitutional convention, the fourth section of the act required "that the members of the convention . . . shall declare, on behalf of the people of said Territory, *that they adopt the Constitution of the United States;* whereupon the state convention shall be, and it is hereby, authorized to form a constitution and state government." We are informed, however, as a matter of history, in *Brittle* v. *The People*, 2 Nebraska, 198, that, the people of the Territory being at that time opposed to becoming a State, the convention adjourned *sine die* without taking action beyond its own organization.

Subsequently, however, the territorial legislature, without

calling a convention, framed a constitution which was submitted to and adopted by the people at an election held June 21, 1866. This constitution contained the following provision (schedule, sec. 6): "This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States, on the condition and faith of the terms and proposition stated and specified in an act of Congress, approved April nineteenth, 1864, authorizing the people of the Territory to form a constitution and state government; the people of the State of Nebraska hereby accepting the conditions in said act specified."

At its following session and on February 9, 1867, 14 Stat. 391, c. 36, Congress passed another act admitting the State of Nebraska into the Union "upon an equal footing with the original States, in all respects whatsoever," though the second section of this act declared "that the State of Nebraska shall be, and is hereby, declared to be entitled to all the rights, privileges, grants and immunities, and to be subject to all the conditions and restrictions of an act entitled 'An act to enable the people of Nebraska to form a constitution and state government, and for the admission of such State into the Union on an equal footing with the original States.'"

The argument of the plaintiff in error in this connection is that, by these acts, the people of Nebraska *adopted the Constitution of the United States*, and thereby the first eight amendments containing the bill of rights became incorporated in the constitution of the State, and that the right to proceed for felonies, other than by an indictment of a grand jury, (as required by the Fifth Amendment,) was taken away from such State.

But conceding all that can be claimed in this connection, and that the State of Nebraska did enter the Union under the condition of the enabling act, and that it adopted the Constitution of the United States as its fundamental law, all that was meant by these words was that the State acknowledged, as every other State has done, the supremacy of the Federal Constitution. The first section of the act of 1867, admitting the State into the Union, declared: "that it is hereby admitted

into the Union upon an equal footing with the original States in all respects whatsoever." It is impossible to suppose that, by such indefinite language as was used in the enabling act, Congress intended to differentiate Nebraska from her sister States, even if it had the power to do so, and attempt to impose more onerous conditions upon her than upon them, or that in cases arising in Nebraska a different construction should be given to her constitution from that given to the constitutions of other States. But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands "upon an equal footing with the original States in all respects whatsoever." *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Racehorse*, 163 U. S. 504. Indeed, the legislation of Congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of *Boyd* v. *Thayer*, 143 U. S. 135, and the conclusion reached that upon its admission into the Union the citizens of what had been the Territory became the citizens of the United States and of the State.

This court has also repeatedly held that the first eight amendments to the constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the bill of rights of the Federal Constitution, and which this court has held to be applicable only to Federal courts. As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to

changed views of administration, or to the exigencies of their social life. It may be readily supposed that the inhabitants of each State understand perfectly their own local needs and interests, and, with the facilities with which the constitutions of the several States may be amended, it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed. Not only did Congress in the act of 1867 declare that Nebraska was admitted upon an equal footing with the original States, but the whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution. The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained even if Congress had power to make such discrimination. We are, therefore, of opinion that the provision of the constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States.

2. We do not find it necessary to consider the question, whether the court denied to the defendant due process of law, in refusing a jury trial upon the question whether he had waived a preliminary examination before the magistrate. The statute of Nebraska, providing for the prosecution of offences by information, requires that "no information shall be filed against any person for any offence until such person shall have had a preliminary examination therefor, . . . unless such person shall waive his right to such examination." A plea in abatement is said to have been filed upon that ground; but the only plea in abatement which appears in the transcript of the record before us sets forth but four grounds: First, that there was no authority of law for the filing of an information charging the defendant with a felony; second, because the defendant, under the state constitution, was granted immunity from answering to a criminal charge, except upon presentment or indictment by a grand jury; third, because this prosecution is in contravention of the state constitution,

guaranteeing that no person shall be deprived of life or liberty without due process of law; fourth, because this prosecution is in contravention of the Fourteenth Amendment of the Constitution of the United States. It is true that, in the demurrer to this plea, and in the order sustaining such demurrer, it would appear that there were eighteen grounds for the plea in abatement; and that as to the ninth ground, the demurrer was overruled, with leave to the State to reply instanter. From the reply to the plea in abatement it would appear that the ninth paragraph of the plea set up the fact that the defendant did not have a preliminary examination as required by law, the reply alleging that he waived it; but nowhere in the plea in abatement does it appear what this ninth paragraph was, although the judgment of the court was "that the defendant waived a preliminary examination before the examining magistrate, and therefore finds against the defendant, and overrules the said ninth paragraph of the said plea in abatement." As the opinion of the Supreme Court also discusses the ruling of the court below denying to the defendant a jury trial upon this ninth paragraph, we may, perhaps, be at liberty to take notice of it; although in subdivision nine of rule ten, under which this record was printed, it is said that the court will consider nothing but those parts of the record designated by the parties, and the errors so stated.

But, without expressing a decided opinion upon this point, we are confronted by another difficulty in the fact that it is nowhere alleged in the record that a denial to the defendant of a jury trial of this issue was violative of the Constitution of the United States. It is true that in the fourth paragraph of the plea in abatement it is said that "this prosecution is in the contravention" of the Fourteenth Amendment, but this evidently refers to the prior paragraphs, which deal only with a prosecution by indictment. In the opinion of the court discussing this question, no allusion is made to the denial of this jury trial being in conflict with the Fourteenth Amendment, and it is only in the assignments of error, filed in the Supreme Court of the State four months after its judgment of affirmance, that the defendant sets it up as the denial

of a Federal right. Indeed, it nowhere appears in the record or in the opinion of the Supreme Court that the denial of a jury trial of this issue was claimed to be in contravention even of the state constitution. The question is discussed by the court as one of general law, and it is only the prosecution by information that the court discusses as a constitutional question.

On November 10, 1899, the Chief Justice of the Supreme Court of Nebraska certifies that the only reference made by the plaintiff in error to the Constitution of the United States is set forth in certain language quoted from his brief. From this brief it would appear that the denial of the right of trial by jury upon the question of waiver of preliminary examination was set up as a violation of the constitutional provision of Nebraska, that "the right of a trial by jury shall remain inviolate;" but it nowhere appears that it was claimed to be in violation of any other provision of the Constitution, or of the Fourteenth Amendment to the Constitution of the United State.

Upon this state of the record we are unable to say that the decision of the court below was against a title, right, privilege or immunity, specially set up or claimed by either party, under the Constitution of the United States.

We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the Constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. It is true that this court has sometimes held that, if a Federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the first or second clauses of section 709, and have involved the validity of a treaty, statute or authority exercised under the United States, or the validity of a statute or authority exercised under a State,

where such statute or authority is alleged to be repugnant to the Constitution or the laws of the United States. *Columbia Water Power Co.* v. *Columbia Street Railway &c. Co.*, 172 U. S. 475. In the case under consideration the right to a trial by jury is claimed under the Constitution of the United States; but as it was never set up or claimed prior to the decision of the Supreme Court of the State, it is too late to raise the question here.

The fact that the defendant did set up in his plea in abatement his immunity from prosecution upon an information of the county attorney, clearly appears, but we are not at liberty to consider other constitutional questions which might have been involved, if they had been properly set up and claimed. The observations of this court in *Dewey* v. *Des Moines*, 173 U. S. 193, are conclusive against our consideration of this question.

The judgment of the Supreme Court of the State of Nebraska is therefore

*Affirmed.*

Mr. Justice Harlan dissented.

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## NEW ORLEANS *v.* WARNER.

PETITION FOR LIMITED REHEARING OF THE CASE REPORTED IN 175 U. S. AT PAGE 120.

No. 172. Distributed November 29, 1899. — Decided January 15, 1900.

The decree heretofore entered in this case is vacated, and a new decree is entered *nunc pro tunc* as of March 13, 1899, affirming the decree of the Circuit Court of Appeals in all respects.

This case was argued March 13, 1899, was decided November 13, 1899, and is reported in Volume 175 U. S., beginning on page 120. The judgment of the court was expressed as follows:

Our conclusion is that the decree of the Court of Appeals be modified in respect of the date from which interest is to

be calculated, and as so modified affirmed, with costs of this court equally divided, and that the case be remanded to the Circuit Court for the Eastern District of Louisiana with a direction to comply with the decree of the Court of Appeals as modified, and it is so ordered.

The petition for a rehearing was as follows:

*To the Honorable, the Supreme Court of the United States:*

The undersigned, with respect, desire to make the following suggestion in the nature of a petition for a limited rehearing herein, with a view to the correction of what we think is an error as to the date from which interest is allowed by the court in this suit.

In the court's opinion it is declared, and it is the fact, that both the statutes and the warrants provide that said warrants shall bear interest at the rate of 8 per cent per annum "until paid," and that it was the opinion of the court that complainant was entitled to that rate of interest from November 26, 1894 — the date of filing the bill and issuance of the subpœna. This date from which interest is to begin we think is an error, because the contract — both the said drainage warrants and the statute under which they were issued — fix in unmistakable terms the date on which the interest is to begin to run, to wit, from the date of the presentation of the warrant to the administrator of finance, June 6, 1876, of which presentation full proof was made.

*First.* The statute under which the sale and purchase was made, act of the Legislature No. 16 of the sessions of 1876, approved February 24, 1876, provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of the said company under Act No. 30 of Acts of 1871, for work done."

And Act No. 30 of 1871, in the 8th section thereof, after providing for the measurement of the work to be done, by an engineer to be appointed, and the certification of the amount thereof, further provided:

Statement of the Case.

"It shall be the duty of the administrator of accounts, on the presentation to him of the said certificate of the city surveyor or other engineer appointed by the board of administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the administrator of finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for protection levee, the said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the administrator of finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the administrator of finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent per annum until paid, which condition shall be set forth in the form of the said warrant or warrants."

*Second.* And the warrants in suit provide as follows:

No. 379. DEPARTMENT OF PUBLIC ACCOUNTS.
$2000.00 NEW ORLEANS, June 6, 1876.
*To the Administrator of Finance, City of New Orleans.*
ORDINANCE 3539, A. S.

Pay to the order of W. Van Norden, transferee of Mississippi and Mexican Gulf Ship Canal Company, two thousand dollars out of any funds in the city treasury to the credit of said company.

This warrant is issued in accordance with the provisions of Act 30 of the session of the General Assembly of the State of Louisiana, held in the year 1871, and the administrator of finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the administrator of finance is required

to indorse upon the same the date of presentation, and this warrant shall bear interest at the rate of eight per cent per annum from and after the date of such presentation and indorsement until paid.

Charge Mississippi and Mexican Gulf Ship Canal Company.

(Signed) J. G. Brown,
*Administrator of Accounts.*

Presented for payment June 6, 1876.

(Signed) E. Pilsburry,
*Administrator of Finance.*

(Indorsed) W. Van Norden, *Transferee.*

See Record, p. 109.

And this warrant (a specimen copy of the others sued on, see agreement, page 213 of Record), together with the acknowledgment of presentation by said administrator of finance on the 6th day of June, 1876, was duly offered in evidence in the Circuit Court, as will fully and conclusively appear from complainant's note of evidence taken down by the clerk of said Circuit Court, in open court, to be found on page 205 of this record, item 2d, at the bottom of said page, which reads as follows:

2d. Complainants offer in evidence the drainage warrants sued in this case Nos. ——, together with the presentation of said warrant at the bottom of each.

And thus interest at 8 per cent per annum from June 6, 1876 (date of presentation), until paid, was specially set up and prayed for in an amendment to the bill of complaint, duly allowed by the court. See Record, pp. 184 and 185.

We therefore submit, that it is perfectly clear that interest, under the contract of the parties, is to be computed from the date of presentation of the warrants on June 6, 1876, and that such presentation for payment was made on that date, is *proved* by the warrant itself and the indorsement of presentation thereon, and there is not even an intimation of any proof to the contrary, or any absence of the proof here contended for.

And that the holders of drainage warrants are entitled to interest at 8 per cent per annum from June 6, 1876, has been decided as follows:

The suit of *Peake* v. *New Orleans*, 139 U. S., p. 342, was based on a judgment at law rendered on warrants issued under the same statute, where interest was allowed at 8 per cent per annum from the date of presentation, and this court, at page 349 of said report, said this judgment was undoubtedly correct.

A like judgment at law was rendered on warrants of James Jackson, where interest was allowed from June 6, 1876 (date of presentation for payment to said administrator of finance). See the record of this case, pages 360 to 363.

And like judgments at law have been rendered on warrants of the same class here sued on allowing interest from the date of said presentation until paid.

And in the efforts of holders of drainage warrants to collect the same, they have always been diligent. Record, pp. 114, 122, 126 (still pending and undisposed of by agreement of counsel), 142, in addition to protracted litigations in the state courts.

The matter of the date from which interest was to be computed was not specially considered in our brief, because appellant (petitioner) made no complaint as to this part of the decree, the assignment of error merely setting up want of power in the city to make any contract for interest. We perhaps should have noted the date of demand of presentation with more particularity in our brief. We submit, however, that the decree should be amended so as to allow the interest complainant is entitled to, and he prays that a limited rehearing be granted and that the decree entered may be amended so as to allow interest from June 6, 1876.

Respectfully submitted,

Richard De Gray,
J. D. Rouse,
William Grant.

*Solicitors for Complainant and Respondent.*

Syllabus.

We certify the foregoing petition is in our opinion well founded and is not made for the purpose of delay.

RICHARD DE GRAY,
WILLIAM GRANT.

*Mr. Richard De Gray*, *Mr. William Grant* and *Mr. J. D. Rouse* filed a brief supporting the petition.

*Mr. Samuel L. Gilmore* and *Mr. Branch K. Miller*, solicitors for the city of New Orleans, filed an opposing statement.

MR. JUSTICE BROWN delivered the opinion of the court.

On motion for a rehearing upon briefs filed, and upon an affidavit of the death of the petitioner, John G. Warner, on March 21, 1899, it appearing in this case that the court overlooked the fact that the drainage warrants, which formed the basis of this suit, were duly presented for payment on June 6, 1876, it is

*Ordered that the decree heretofore entered in this case be, and is hereby, vacated and set aside, and that a new decree be entered* nunc pro tunc *as of March* 13, 1899, *affirming the decree of the Circuit Court of Appeals in all respects.*

## THE NEWFOUNDLAND.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 156. Argued November 3, 6, 1899. — Decided January 15, 1900.

The question in this case is as to the adequacy of the proof offered on behalf of the Government and the captors to show that the Newfoundland was trying to violate the blockade of Havana, and the court is of opinion that it does not attain to that degree which affords a reasonable assurance of the justice of the sentence of forfeiture in the court below — that it raises doubts and suspicions and makes probable cause for the capture of the ship and justification of her captors, but not forfeiture.

THE case is stated in the opinion of the court.

*W. Theodore G. Barker* for appellants. *Mr. G. A. R. Rowlings* was on his brief.

*Mr. Assistant Attorney General Hoyt* for appellee. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, for the naval captors, were on his brief.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Newfoundland, a British steamship, was seized off the coast of Cuba on 19th July, 1898, by the United States ship of war Mayflower, on the ground that she was trying to violate the blockade of Havana. She was sent to Charleston, South Carolina, and there libelled with her cargo as prize of war. Testimony was taken *in preparatorio*, and the court determined it to be insufficient for condemnation, and on motion of the attorney for the United States ordered further proof.

Upon that proof a decree was entered condemning and forfeiting the ship and cargo, and they were ordered to be sold. From the decree this appeal is prosecuted. The assignments of error may be reduced to two contentions:

1. That the court erred in making an order for further proof because the testimony taken *in preparatorio* afforded no legal foundation for doubt, or proof of any overt act to justify the condemnation of the ship.

2. That the additional testimony taken still left the evidence insufficient for condemnation.

(1.) Of the testimony taken *in preparatorio* the court said:

"Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the Newfoundland, at the time of capture or at any other time, was heading for the port of Havana or any other port."

And further:

"So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far

short the cases cited fall in showing cause for condemnation, the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence.

"There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in and is being carried into execution.

"As this court has in a recent case had occasion to remark, the testimony *in preparatorio* rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information, through a letter from the American consul at Halifax, that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof; it furnishes ground for ordering further evidence."

It is urged by counsel for appellants that the court, therefore, based its order for further proof upon Commander Mackenzie's opinion, which, even if otherwise competent, was not in evidence. We, however, do not so interpret the remarks of the court. It is explicitly stated that the circumstances created a suspicion of an intention on the part of the ship to enter a Cuban port, but that the suspicion was insufficient for condemnation without some proof in addition showing an overt act, which, as testimony *in preparatorio* rarely afforded, further proof was ordered.

This was not an abuse of discretion, and is clearly within the ruling of *The Sir William Peel*, 5 Wall. 517, 534. In that case the court said the preparatory proof, which con-

sisted of the depositions of the master of the ship, the mate and one seamen, "clearly required restitution" of the ship, and, declaring the rule, said, through Chief Justice Chase, that "Regularly in cases of prize no evidence is admissible on the first hearing, except that which comes from the ship, either in the papers or the testimony of persons found on board.

"If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

(2.) For a statement of the case we may quote from the opinions of the District Court. They clearly marshal and review all inculpating and exculpating circumstances, and give the impressions of the court of the character of witnesses the most important of whom testified in its presence. From the first opinion rendered on the testimony taken *in preparatorio* as follows: The Newfoundland "cleared from Halifax, Nova Scotia, July 8, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat and canned goods shipped by David Robertson & Co. Bills of lading were issued to them for 4386 packages for Kingston, and 3747 for Vera Cruz. These bills of lading are indorsed by them in blank. The charter party was for a voyage of three months to ports of the United States, West Indies, Central and South America, etc., in the customary printed form, and written therein was 'including open Cuban ports, no contraband of war to be shipped,' and was to terminate at Halifax. Musgrave & Co. were the charterers.

"It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua la Grande or Caibairien, but on no account to enter any

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blockaded port, and if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston and wire for instructions. It seems clear from this testimony that it was the intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots, and that Kingston and Vera Cruz were 'contingent' or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the President's proclamations notifying a blockade.

"The Newfoundland sailed from Halifax on July 9. Her speed is about eight knots; her registered tonnage, 567 tons. She steered for the 'Crooked Inland Passage' in the Bahamas. Passing thence into the 'Old Bahama Channel' and going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Neuvitas, on the north coast of Cuba, where she was stopped by the United States ship of war Badger at 12.45 A.M. on Monday, July 18. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course.

"The island of Jamaica lies almost due south from Neuvitas, which, being about two hundred miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have changed her course and proceeded eastward around Cape Maysi and thence to Kingston. This, undoubtedly, would have been the shortest course, and if Kingston was the destination the sailing westward from Neuvitas would have carried the ship many hundreds of miles out of her course. It may be here observed that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is 'Journal from Halifax, N. S., towards Kingston and Vera Cruz.' On Tuesday, 19th July, the head line is 'Journal from Halifax, N. S., towards Vera Cruz and Kingston.' If after reaching Neuvitas there was an intention to go to Vera Cruz, the westwardly course would be the most direct."

From the second opinion on final hearing, as follows:

"Lieutenant Evans, in command of the U. S. S. Tecumseh,

testifies that about 5 o'clock in the afternoon of July 19, while on his station in the first blockading squadron, six or eight miles to the north and eastward of Havana light and about three and a half miles from the nearest shore, he sighted the Newfoundland moving towards him on a westerly course; that he immediately stood towards her at full speed, about ten knots, and overhauled her, sending his mate aboard to examine her papers. He estimates his position at the time as being latitude 23.15 north; longitude 82.13, and on a diagram prepared by the navigating officer of the Mayflower, and offered in evidence, he fixes her position as being unquestionably within a dotted circle; thinks that it was about the centre of the circle, but having taken no measurements at the time would not undertake to fix it closer than within three miles. He fixes the hour of boarding at 5.35, and says that he left her 'in the vicinity of 6 o'clock,' she bearing off on a course about west by half north. Mate Nickerson, of the Tecumseh, fixes her position at the time of sighting the Newfoundland at six to eight miles from Morro light and about three and a half to four miles from the nearest shore, the Newfoundland being at that time about nine miles to the northward and eastward, sailing west, the Tecumseh sailing about four miles to overhaul her. He fixes the hour of boarding at 5.35 exactly, and says that he returned aboard his ship about 5.50. He failed to enter upon the log of the Newfoundland the hour of boarding, as is usually and always should be done. He locates the point of boarding upon the diagram as does Lieutenant Evans; saw the Newfoundland for about ten minutes after she stood off one or two points to the north of west, and says 'it began to settle down dusk then.'

"Ensign Pratt, of the Mayflower, whose watch began at 8 o'clock, testifies that about 8.20 he picked up a small light bearing north by west from him; reported the same to the commanding officer, who ordered the ship headed for it north by west and the engines rung ahead full speed. Shortly after heading for it the light was lost, but, standing on the same course about twenty minutes and putting on forced draft, the light was picked up again a little to the westward. Altering

his course and heading north-northwest, the light shortly disappeared again. He gradually changed his course to the westward until he headed about northwest, standing on that course about thirty minutes, still not seeing the light, when, about 9.10, he sighted it again, bearing southwest on his port beam and inshore; headed for it again and stood on until about 9.30, when the light was seen outshore of him on his starboard beam, and headed for it again and came up with her at 10 o'clock. From subsequent developments it is clear that the light thus described was that of a lantern hanging on the wall of the companionway in the after deck-house of the Newfoundland, visible only when nearly abeam through the doors on either side. It would be open only to about three fourths of a point of the compass, and the Mayflower at full speed, making at times sixteen miles an hour, would pass the point of visibility, until by changing her course it would again become visible and be picked up, first on one quarter, then on the other. When the light was first seen the Mayflower was heading east-northeast and the light was bearing north by west from her, a point forward of the port beam, and estimated to be from two to three miles distant. No other lights were seen on the Newfoundland until she was overhauled. At that time all of the regulation lights were found to be burning brightly.

"Lieutenant Culver, navigating officer of the Mayflower, describes the chase substantially as above, and exhibits a tracing made on July 20, showing the estimated positions of the respective vessels at the time when the light was first discovered and at the time of the capture and the course sailed by each.

"Commander Mackenzie, of the Mayflower, was the senior officer of the blockade off Havana. The Mayflower covered about five points of the compass on the bearing from Morro light, and had been on that station during the month of July. He says that about 8.30 a faint light was reported about north by west of him, which he thought was a plain lantern. He describes the chase and locates the positions of the two vessels on the tracing prepared by Lieutenant Culver. From this

testimony and upon this diagram it would appear that the Newfoundland when boarded by the Tecumseh was at a point within a circle whose centre is ten and three fourths miles from Morro light, whose bearing was southwest one half west.

"The testimony from the Newfoundland relating to the same matter will now be stated.

"Captain Malcolm, the master, says that he was boarded by the mate of the Tecumseh fourteen miles off shore — off the nearest land — while sailing on a westward course; that the boarding officer, after examining his papers, advised him not to go any nearer the land lest he should get a shell into him, and left him at 6.30; that thereafter he stood on a course one point north of west until 8 o'clock, when the Havana light bore about south by west, and from that time he put his ship back on a course due west, which he followed until boarded by the Mayflower. He exhibits a chart, on which he has marked his course, and says that at 8.30 he passed Havana light, being seventeen and one half miles from it; that at 10 o'clock, when boarded by the Mayflower, he was twenty-one miles from Havana light, which bore then southeast by south half south.

"Salkus, the mate of the Newfoundland, testifies to the boarding by the Tecumseh at 6.10, and that the Havana light-house and Morro Castle were not visible; that they started on their course at 6.30, and at 8.30 were abreast of Havana light, which bore south about sixteen or seventeen miles. In explanation of the entry in his log he says that he took no bearings at the time of the entry, and knew that the ship was farther off than ten miles. He says that at the time of the capture Morro light was not visible from the bridge, but that he saw it from the compass pole, fifteen feet above the bridge.

"Payne, the engineer, testified to the boarding by the Tecumseh at 6.10, and his log contains an entry showing that the engines stopped at 6.10 and started again at 6.30.

"It thus appears that there is a wide divergence in the testimony as to the point at which the Newfoundland was when boarded by the Tecumseh, and some divergence as to the time of such boarding.

"Lieutenant Evans and his mate fixed this location within

a circle whose radius is three miles. They say that they are certain as to her location within three miles, and believe that she was about the centre of that circle, which is ten and a half miles from Morro light. Captain Malcolm and his mate fix the location at a point twenty-four miles from Morro light, thirteen and a half miles from the centre of the circle above referred to, and ten and a half miles from that point of the circle nearest to the Newfoundland.

"There is a marked discrepancy, and the first point to be decided is which is correct. Applying the usual tests by which testimony is weighed — the intelligence of the witnesses, their opportunities for knowing the truth, the likelihood of error arising from considerations of interest, and other influences which commonly sway men's minds — there can be no doubt that there is a preponderance of probability in favor of that side which, having no interest in the controversy, has the greater opportunity of knowledge.

"Lieutenant Evans and his mate were on cruising grounds with which they were familiar. There could be no difficulty in ascertaining their position from the bearing of Morro, which was in plain sight day and night. They were within three or four miles of the shore, with well-defined objects from which bearings could be had. It was their manifest duty to know where they were, for they had to keep within certain prescribed limits. They are men of education, character and intelligence, and their testimony cannot be discredited without imputing to them a reckless carelessness for which there is no warrant.

"Neither Captain Malcolm nor his mate were familiar with the locality; the former had once before been to Havana; the latter, never. Their interest is obvious. I have no difficulty in coming to the conclusion that the preponderance of evidence fixes the position of the Newfoundland within the described circle when boarded by the Tecumseh. I am not so clear as to the time. The mate Nickerson fixes it at 5.35 precisely, and says that he returned to the Tecumseh at 5.50, but he says that he watched the Newfoundland for about ten minutes after she left, when 'it began to settle down dusk.'

"The sun set in that latitute on that day about 6.30, and there is little twilight.

"The officers of the Newfoundland fix the hour of boarding at 6.10 and the time of departure at 6.30, and these figures are entered upon the engineer's log. This log has been in possession of the claimant since the capture, and some erasures appear in another part which may hereafter call for comment, and it therefore cannot be accepted as absolute verity; but giving the ship the benefit of the reasonable doubt which the testimony warrants, assuming that she sailed at 6.30, she is next seen by Ensign Pratt about 8.20, when he sighted a small light bearing north by west from the Mayflower, whose station on the cruising ground lay next west of the Tecumseh, and whose position at that time was about six miles north by west from Morro light. This small light was estimated to be about two or three miles from the Mayflower. The mate of the Newfoundland made this entry upon her log: '8.30, Havana light bearing south ten miles.' If this testimony is taken as true, this would place the Newfoundland at a point seven miles from the centre of the circle adopted as the point of departure, and ten miles from the extreme western circumference of it, and it would follow that she had consumed two hours in making that distance. As her speed during her voyage was on an average nearly eight knots an hour, there is a considerable margin of time to be accounted for, which she endeavors to do by fixing her location at 8.30 at a point seventeen miles from Havana. This is the testimony of her master, and the mate concurs in it, saying that the entry in his log was not an accurate statement of the ship's position at that time; that it was only intended to show that she was at least ten miles from Havana light. It is not necessary to discuss nor decide now how far a ship is concluded by the entries in her log. If the party making such entry is shown to have been drunk at the time or habitually careless, or if made in a perfunctory way, without observations or the opportunity of observation, little weight might be given it; but the log being intended to be a correct record of the facts contained therein, an entry made with full knowledge and opportunity of ascer-

taining the truth must be accepted as the truth if it tells against the party making it, and can be denied no more than a deed. If it is the result of a mistake, there must be conclusive evidence of the mistake. It is sufficient to say that such evidence has not been adduced here, and the entry upon the log, confirmed as it is by the testimony from the Mayflower, fixes the position of the Newfoundland at 8.30 at a point about ten miles from the Havana light. From that point to the point of seizure her course can be marked with sufficient accuracy. That she sailed on a straight course from 8.30 to 10 o'clock, and that such course led her away from the entrance into the port of Havana, is entirely clear, whether the point was seventeen miles from Morro light, as claimed by the Mayflower, or twenty-one miles, as claimed by the Newfoundland, or eighteen miles, as agreed upon by her master and Ensign Pratt as the point from which they took their departure after the seizure, when they started upon their voyage to Charleston.

"The next incriminating charge is that the Newfoundland was sailing without lights. Ensign Pratt, who first sighted her, says he picked up a small light. All the witnesses from the Mayflower describe this light as that from an ordinary lantern, and not the masthead light. None of these witnesses saw any of the regulation lights until they came up with her, about 10 o'clock, when they were all brightly burning. After the chase began these regulation running lights, being visible only two points abaft the beam, would naturally not be seen.

"Coming westward from the point where she left the Tecumseh to the point where the faint light was sighted, her masthead light, whose visibility by the regulations is at least five miles, should certainly have been seen if there was proper vigilance aboard the Mayflower. That Ensign Pratt was vigilant is demonstrated by the fact that he picked up the dim light two or three miles off at 8.20. He went on duty at 8 o'clock. The officer who had the watch before that hour was not examined, nor were the lookouts, who are described by Commander Mackenzie as uncommonly efficient men. As it is, the testimony leaves this question open to reasonable

doubt. While it is probable that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of visibility.

"The witnesses from the Newfoundland, including the sailor who lit them, all testify that the lights were lit at the usual hour and they were all burning when she was overhauled.

"Commander Mackenzie and other witnesses from the Mayflower all testify that the small light already described was the only one seen; that there were no stray lights, such as are commonly seen aboard a steamer in the night time.

"Taking the point of departure to be somewhere within the circle already described and the time of departure at 6.30 and the rate of speed at nearly eight knots, and following the courses described — west by north until 8 o'clock, and then due west until 10 o'clock — and plotting it upon the chart, I must conclude that she would have been some miles farther west than either the point claimed by her or the point testified to by the officers of the Mayflower as the point of capture at 10 o'clock, unless she had loitered somewhere upon her route.

"Outside the domain of the exact sciences, absolute certainty is rarely attainable, and there must always be an element of doubt as to every transaction the proof of which rests upon fallible human testimony, nowhere more fallible than in estimates of location and distances upon water.

* * * * *

"We will now look into the character and conduct of the Newfoundland to see whether her presence off Havana is consistent with innocent intent.

"She is a small steamship, lately employed in the sealing business. She sailed from Halifax, July 9, loaded with a cargo of provisions, under command of Captain Malcolm, who was employed for that voyage. She had two clearances, one for Kingston and one for Vera Cruz. Commander Mackenzie testifies that it is not the practice of any American custom house to give two clearances. Captain Malcolm says that this

is not unusual in Halifax, and that he has generally had separate clearances for separate ports, sometimes five or six, whenever he had cargo for each. We have no statute prescribing any regulation on this subject, and wherever a ship has separate cargo for separate ports I can see no reason why she should not have a clearance for each, and I am informed that it is the custom at this port to give such separate clearances. While I cannot hold that separate clearances for Kingston and Vera Cruz were in themselves suspicious, it is a cause of grave and just suspicion that her real and primary destination was to neither of those ports, as subsequent events proved. Captain Malcolm, in his testimony *in preparatorio*, said that his verbal instructions were to sail for Caibairien or Sagua la Grande, and if those ports were blockaded to go to Kingston and cable for orders. For reasons, into which it is not the province of this court to inquire, neither Sagua nor Caibairien were included among the ports blockaded under the proclamation of the President, and he had the right to go to either. Whether in so doing without proper clearances he would have incurred penalties under the municipal regulations of Great Britain or of Spain is not within the scope of this inquiry, certain it is that he would have committed no offence cognizable here.

"Taking his course to the southward, he next appears off Neuvitas, where he is boarded by Lieutenant Titus, of the U. S. S. Badger, and is informed by him that the whole coast of Cuba is blockaded. The case is not presented in an aspect which requires any determination of the question whether that sort of a blockade was effective or legal, as he did not go to either Sagua or Caibairien for the purpose of testing its validity, which he might well have done. According to his testimony *in preparatorio*, and it is repeated on this hearing, he abandoned all thought of entering either of those ports upon hearing that they were blockaded. His course, then, should have been around the eastern end of the island of Cuba to Kingston, by way of Cape Maysi, for the course around the western end, by Cape Antonio, was nearly a thousand miles further. In these days of sharp competition intelligent

men do not make such long detours in the prosecution of legitimate business. The explanation given is that he wanted to satisfy his charterers by showing them that he had passed by the port to which he was directed to go, and, further, that he apprehended that he would subject himself to suspicion by changing his course at that time. The answer to this is obvious. His charterers did not instruct him to go by the ports of Sagua and Caibairien, but to go to them, and if he did not intend to do that his proceeding in that direction was such a futile, time-consuming and coal-consuming venture that it staggers credulity to accept it as the true reason; nor does the other reason given seem much more satisfactory. There was nothing unlawful in his setting out for Sagua or any other open port in Cuba, and if, after information of the blockade, it became necessary to change his course in order to go by the shortest route to Kingston, his contingent destination, there would have been no risk in disclosing the truth. In this, as in most of the affairs of life, the straightforward course would have been the wisest course. That it was not taken suggests the conclusion that neither Sagua nor Caibairien was the real destination. It appears from the testimony that neither at the time of capture nor afterwards was anything ever heard about Sagua or Caibairien until it came out in the examination of Captain Malcolm before the prize commissioners. None of the other officers of the ship appear to have known about it. The mate seems to have thought that they were going to Vera Cruz. In the engineer's log there appears every day from July 9th to July 18th, inclusive, a line at the top of the page containing the words, 'from Halifax to Vera Cruz and —— Cuba.' The word 'Kingston' is written over and partially obliterates the word 'Cuba.' There is a blank space before the word 'Cuba,' evidently intended to be filled in. 'Havana' would about fill it. The engineer appeared to be the most intelligent man on the ship after the master. From the entry on his log it is plain that he knew that the ship's destination was Cuba, and there would seem to be no good reason why the name of the port should have been left blank if it was Sagua or any other open port. In the

absence of any testimony confirming the master's statement that his instructions were to go to Sagua or Caibairien, and there being nothing in his conduct showing that that was his real destination, I must hold it to have been a pretensive destination, and his appearance before Havana is therefore not satisfactorily explained.

"Lieutenant Culver, of the Mayflower, who boarded her, says that when he asked Captain Malcolm where he was bound he was very vague in his replies, sometimes saying Kingston and sometimes saying Vera Cruz, and when asked whether he was shaping his course by way of Cape San Antonio he replied that he hadn't made up his mind. In the same conversation he said that he had been making eight knots an hour from the time he was boarded by the Tecumseh to time of overhauling. To Commander Mackenzie, on the Mayflower, he said he was making for Vera Cruz, if he had coal enough, and then to Kingston. If he did not have enough coal, he was going to Kingston in order to take on coal. To Lieutenant Pratt, the prize master on the voyage up to Charleston, he said that he was bound for Vera Cruz.

"Captain Malcolm says, in his testimony, that his instructions were to go to Kingston if he found the ports of Sagua and Caibairien blockaded, and from there he was to cable for instructions, and that Kingston was his destination; that he had plenty of coal to get to Kingston, but not enough to go to Vera Cruz and then Kingston.

"It must be conceded that there is no proof of any attempt to enter the port of Havana — that is to say, no witness has testified to seeing her heading that way. It must also be admitted that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartung, the cases relied on by the government."

The application of a more stringent rule to the Newfoundland than was applied in those cases was justified by the court on the ground that steam vessels have greater power of eluding blockades than sailing vessels possess.

The conclusion of the court was that the evidence estab-

lished that the ship was loitering about the coast seeking an opportunity to violate the blockade. Conceding, *arguendo*, that this was enough for her condemnation, we think the fact is very disputable. It is based upon the ship's nearness to the coast, the slowness of her movements deduced from her position when the Tecumseh boarded her and when the Mayflower captured her, and the taking of a longer route to Kingston than might have been selected.

These circumstances may be explained consistently with innocence. Against them the fact remains that she made no attempt to enter any Cuban port. She sailed by Caibairien. She sailed by Sagua, although a railroad connected it with Havana, and made it inviting to contraband enterprise. And she had sailed beyond Havana when she was captured. But it is argued she must have loitered, and with guilty intention because she ran only twelve miles in three hours, when she ought to have run twenty-four miles.

In this conclusion there are disputes of fact as well as disputes of inference. It depends upon the time it was and where she was when the Tecumseh boarded her — the time it was and where she was when the Mayflower seized her; and granting a decision of these as contended for by the Government, there are the elements of a varying course in the night and the retarding influence of the current to account for the time.

The fact of going around Cuba to Kingston instead of turning back after she was boarded by the Tecumseh, is from our present view not completely accounted for. But our situation, it must be remembered, was not Captain Malcolm's situation. It was his view, he testified, of his duty to his employers. It was his way to avoid exciting the suspicion of the officers of the Tecumseh; and, in another place, without peril or responsibility for that or some other decision, we are not prepared to say that it is necessarily proof of guilt. After experience it is often easy to see that something else should have been done than that which was done, but judging Captain Malcolm in his situation, was there not presented to him a fair conflict of reasons? It is very certain, if doubt came to him what

to do, he would avoid the hazard of the seizure of his ship at the comparatively small sacrifice of the coal and time which would be consumed by going to Kingston the longer way.

It is further urged that when the Newfoundland was seen and pursued by the Mayflower she had not her usual lights displayed. This, the District Court said, the testimony left in reasonable doubt. "While it is probable," it was said, "that the masthead light, if burning and not screened, would have been visible to Ensign Pratt at the time he descried the small light, he does not say with certainty that it would have been, there being but a narrow limit of possibility." The limit was as narrow to all other officers of the pursuing vessel and the possibilities it afforded must be considered as at least balanced by the positive testimony of all on board of the Newfoundland, including the sailor who lit them at the usual hour, and the fact that they were all burning when she was overhauled.

But it may be said that the ship has too many suspicious circumstances to account for, and that we overlook the probative strength arising from their number and their concurrence; that if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument, but cannot carry it so far. And yet we have no desire to impair the effectiveness of blockades by declaring a more indulgent rule than that of prior cases nor permit experiment with opportunities to break into blockaded ports. But there should be some tangible proof of such intention — a more definite demonstration than this record exhibits. As we have already seen, the learned trial judge was constrained to say "that the testimony as to loitering falls very far short of the proof offered in the Neutralitet, the Apollo, the Charlotte Christine, the Gute Erwartwig, the cases relied on by the government. Their application, however, to the case at bar, whose facts "fall far short" of their facts, is insisted on because of the difference between the power of steam vessels and the power of sailing vessels. Undoubtedly there is a difference, but if steam has increased the power of blockade runners, it has increased in greater degree

when conjoined with the range of modern ordnance, the power of blockade defenders. We recently had occasion to consider their power, and decide that a single modern cruiser might make a blockade effective. *The Olinde Rodriguez*, 174 U. S. 510.

The question in this case, then, is as to the adequacy of the proof, and we do not think it attains that degree which affords a reasonable assurance of the justice of the sentence of forfeiture. It raises doubts and suspicions — makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Olinde Rodriguez, supra.*

*It follows, therefore, that the decree of the District Court must be reversed and the cause remanded, with directions to enter a decree restoring the vessel and cargo, or if they have been sold, the proceeds of the sale, but without damages or costs, and it is so ordered.*

## CLARK *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 268. Argued November 13, 1899. — Decided January 15, 1900.

The provision in section 1 of chapter 74 of the Laws of Kansas of 1891, authorizing certain first-class cities to take in described tracts of land in territory adjoining or touching the city limits and make them a part of the city by ordinance, and providing that "nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation" does not conflict with any provision of the Constitution of the United States, when exercised by such a city to take in lands belonging to a railroad company which are not used for agricultural purposes, but are occupied by the company for railroad purposes.

This case was here once before on writ of error to review a judgment of the Supreme Court of Kansas reversing a judgment of the *nisi prius* court, sustaining a demurrer to the petition of plaintiffs. *Clark* v. *Kansas City*, 172 U. S. 334.

Statement of the Case.

The writ was dismissed on the ground that the judgment was not final. On the return of the case to the Supreme Court of the State such proceedings were had there and by its direction in the trial court that a final judgment was entered, denying the relief prayed for, which judgment the Supreme Court affirmed, and the case was then brought here.

The question presented is the constitutionality of a statute of the State and the validity of an ordinance passed by Kansas City under the statute. Kansas Laws of 1891, 133, c. 74; act of March 10, 1891. The statute is as follows:

"Cities of the First Class.

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory.

"*Be it enacted by the Legislature of the State of Kansas:* SEC. 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.*"

* * * * *

The following is the ordinance:

Statement of the Case.

"Ordinance No. 2163.

"An ordinance adding certain lands therein described, known as the Union Pacific lands, to and making the same a part of the city of Kansas City, Kansas.

"Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens: Now, therefore,

"*Be it ordained by the Mayor and Councilmen of the City of Kansas City, Kansas:* SEC. 1. That the following described territory, to wit: . . . Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, be and hereby is added to and made a part of the city of Kansas City, Kansas.

"SEC. 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette."

After passage of the ordinance the city levied taxes on the lands, and this suit was brought to restrain their collection. The petition presented the facts, and contained the following allegations:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

"And plaintiffs are advised and so charge the fact to be that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United

States, which reads as follows: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.'

"Plaintiffs further allege upon information and belief that there was not at the time of the passage of said chapter 74 of the Session Laws of Kansas for 1891 any city of thirty thousand (30,000) inhabitants or more in the State of Kansas where the conditions referred to in the first part of the said act permitting the adding of additional territory to a city by the passage of an ordinance merely existed; and plaintiffs are advised, and so charge the fact to be, that said act of the legislature, while purporting to be a general act, was intended solely to apply to the lands attempted to be taken within the limits of said Kansas City, Kansas, by said ordinance, 'Exhibit A.'"

The property over which the extension was made was actually used in part for railroad purposes, and consisted of road bed and right of way, main and side tracks, buildings and improvements. The portions not actually used for railroad purposes, the petition alleged, were vacant and unoccupied lands, which were held and possessed by the railroad company for railroad purposes.

*Mr. N. H. Loomis* for plaintiffs in error. *Mr. Winslow S. Pierce* and *Mr. A. L. Williams* were on his brief.

*Mr. T. A. Pollock* and *Mr. F. D. Hutchings* for defendants in error.

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

The statute excepts from its operation lands used for agricultural purposes if owned by individuals. It includes such lands if owned by corporations. It is hence contended by plaintiff in error that the statute discriminates between the owners of agricultural lands, and between them again and the

owners of all other lands, and infringes thereby the provisions of the Constitution of the United States which guarantees to all persons the equal protection of the laws.

Of the discrimination between owners of agricultural lands the Supreme Court of Kansas said the defendants in error [plaintiffs here] cannot be heard to complain. "Their lands are not agricultural lands; at least, they do not allege them to be such lands, but, on the contrary, allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot therefore be heard to complain on that score. 'A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.' Cooley's Constitutional Limitations, 6th ed., 196." *Supervisors* v. *Stanley*, 105 U. S. 305.

We concur in this view, and it would be difficult to add anything to its expression. The discrimination occurs only in a particular use of the lands, and it would seem obvious that such use must be shown to make a cause of action — a right infringed and to be redressed. If the lands of the plaintiff belonged to an individual they would be subject to the statute. Where, then, is the discrimination? In that, it is claimed, if the lands were used for agriculture, being owned by a corporation, they would be subject to the statute, but would not be if owned by an individual. But that is not a discrimination immediate and actual against plaintiff in error. It does not now, and there is nothing in the record to show that it ever will exist. Not a law alone, but a law and its incidence are necessary to a justiciable right or injury; and it therefore follows if plaintiff has a grievance under the statute which this court can redress, it comes from the discrimination between agricultural lands and other lands — a cause of action, not because the plaintiff is a corporation, but because it is an owner of such lands, and one which it would have even if it were an individual.

The answer to that charge depends upon the power of the State to classify objects of legislation; necessarily a broad power, and one which this court has so many times decided exists, and so many times has defined and illustrated the limits upon it of the provision of the Constitution of the United States invoked by plaintiff in error, that farther definition would seem impossible, and any new instance of its application not without exact or analogous example in some decided case.

The reasoning of the cases we need not repeat. It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. It is not a substitute for municipal law; it does not invest power in this court to correct the impolicy and injustice of state laws, and the equality it prescribes is not for persons merely as such, but according to their relations. "In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And it matters not of taxation if A be a different kind of corporation than B it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; to a different measure of damages than B, *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; and it permits special legislation in all its varieties. *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Duncan* v. *Missouri*, 152 U. S. 377." *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

And these principles have been affirmed in later cases, and a classification based on the difference between fire insurance and other insurance has been sustained; also on a difference between railroad and other corporations and of persons. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348, decided at the present term.

In *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96, the majority of the court decided that in consequence of the great peril and possibility of fires being communicated by

the locomotives of railroad corporations, it was in the power of the State of Kansas to impose on them, in a suit successful against them, an attorney's fee, and not impose it on an unsuccessful plaintiff. It was said by Mr. Justice Brewer, after a review of the cases that —

"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 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." 174 U. S. 106.

In the case at bar the distinction is between tracts of agricultural lands in a certain relation to cities and lands used for other purposes in such relation.

We think the distinction is justified by the principle of the cases we have cited. That principle leaves to the State the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural State that they should find a limit in the lands actually used for agriculture. Such use it could be taken for granted would be only temporary. Other uses, certainly those to which the plaintiff puts its lands, can receive all the benefits of the growth of a city and not be

moved to submit to the burdens. Besides, such uses or manufacturing uses adjacent to a city may, for its order and health, need control. Affecting it differently from what farming uses do may justify if not require their inclusion within the municipal jurisdiction.

We think, therefore, that within the latitude which local government must be allowed the distinction is not arbitrary, and infringes no provision of the Constitution of the United States.

*Judgment affirmed.*

## RAE v. HOMESTEAD LOAN AND GUARANTY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 261. Submitted December 18, 1899. — Decided January 22, 1900.

The plaintiff in error executed and delivered to the defendant in error a bond for $4900 (with a mortgage of real estate in Illinois to secure it), payable "in gold coin of the United States of America of the present standard weight and fineness." Default being made, the defendant in error brought suit to foreclose the mortgage, praying judgment according to the bond and mortgage. The plaintiff in error demurred, alleging that the matters and things set out in the bill were contrary to public policy and void, because it was not lawful for the parties to make any money but gold and silver a money tender in payment of the debt, and for other reasons set forth in the statement of the case, below. This was overruled, and, as no further answer was made, the trial court held that the debt and interest, etc., were due amounting to the sum of $5350.76 and decreed that if the sum due was not paid within five days, the mortgaged real estate should be sold. This decree was sustained by the Appellate Court, whose judgment was sustained by the Supreme Court of the State. *Held*, that the state Circuit Court, having simply held plaintiffs in error to respond in lawful money, and entered its decree accordingly, and the Supreme Court having decided that plaintiffs in error could not complain of that decree, because not prejudiced thereby, this was not a decision against any right secured by the Constitution or laws of the United States specially set up or claimed by plaintiffs in error in those courts.

The Homestead Loan and Guaranty Company filed its bill in chancery, in the Circuit Court of Cook County, Illinois,

against Robert Rae, Jr., and his wife for the foreclosure of a certain mortgage or trust deed on real estate in that county, given by them to secure a bond whereby Rae acknowledged that he was bound to the company "in the sum of ninety-eight hundred dollars ($9800.00) in gold coin of the United States of America, of the present standard weight and fineness," and which recited that the company had advanced to him "the principal sum of forty-nine hundred dollars ($4900), which said sum, together with interest thereon, costs, charges and expenses, amounting in the aggregate to the sum of seventy-eight hundred sixty-seven dollars and twenty cents ($7867.20) is to be repaid within ten years from date in gold coin as aforesaid, in monthly instalments of sixty-five dollars and fifty-six cents ($65.56) each, payable on the first day of each calendar month during the said term of ten years. . . ."

The bill alleged default in the payment of certain monthly instalments, and that, in pursuance of the terms of the bond and trust deed, the company had declared the entire amount of the loan due and payable, and prayed "that upon the hearing hereof the court will ascertain upon an accounting how much is due to the complainant under the terms of said bond and trust deed, and will decree the payment of any amount so found due, by a short day, in gold coin of the United States of the present standard weight and fineness;" and for sale and foreclosure, if the amounts decreed were not paid.

Defendants demurred to the bill, and set forth the following causes of demurrer:

"(1) The matters and things set out in the complainants' bill are contrary to public policy and void. (2) Because it is not lawful for the complainants and the defendants to make any money but gold and silver money a money tender in payment of any debt contracted in the United States to be paid in the United States. (3) That so much of the act of Congress of February 28, 1878, entitled 'An act to authorize the coinage of the standard silver dollar, and to restore its legal tender character,' which provides that gold and silver money of the United States shall be a legal tender for payment and discharge of debts and obligations is valid, but the proviso per-

mitting parties to make such special contracts as they please as to the payment of debts and obligations in money other than gold and silver is void. (4) That the contract or mortgage set forth in said bill and the relief prayed therein is void, as against public policy. (5) That by virtue of article I, section 8, paragraph 5, of the Constitution of the United States, Congress alone has 'power to coin money and regulate the value thereof,' and that by article I, section 10, paragraph 1, of said Constitution it is provided that 'no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender' in payment of debts, in contracts made in the United States to be performed in the United States. Said defendants claim, jointly and severally, the benefits of said constitutional provisions. (6) That said bill should be dismissed for want of equity."

The demurrer was overruled, defendants excepted, elected to abide by it, and refused to answer over. The bill was thereupon taken as confessed, and the Circuit Court on the evidence entered a decree of foreclosure, finding that the defendant Rae, Jr., "being indebted to the complainant in the sum of $4900 for a loan made by the complainant to said defendant, executed and delivered to the complainant his bond, bearing date the 1st day of August, 1895, which bond is correctly set out at length in complainant's bill;" that to secure the bond said trust deed was duly given and recorded, and was a valid and first lien on the premises therein described; that default had been made in the payment of instalments as alleged, and that the whole amount had been declared due; and that there was due from defendant to complainant, for principal and accrued interest, the sum of $5350.76, together with some other items; and decreed that if the sums due were not paid within five days the real estate mortgaged should be sold in satisfaction.

Defendants appealed to the Appellate Court of the State of Illinois for the First District, and assigned for error the action of the Circuit Court in overruling the demurrer, etc., and in not dismissing the bill because it claimed there was due the sum found to be due in gold coin of the United States of the

present standard in weight and fineness. The decree was affirmed by the Appellate Court. *Rae* v. *Homestead Loan & Guaranty Company*, 76 Ill. App. 548.

From that decree, defendants appealed to the Supreme Court of Illinois, by which it was affirmed. *Rae* v. *Guaranty Loan & Trust Company*, 178 Illinois, 369, 371. The opinion of the Supreme Court was as follows: "The elaborate and able argument for appellants cannot be considered on what appears from this record, as the decree does not find or require judgment in any particular kind of money, but finds a sum due in dollars and cents. Even if it were assumed that contracts of this character could not be sustained, still, by the final decree the appellants are not prejudiced, — they cannot be heard to complain in an appellate tribunal. If the character of money in which payment is contracted to be made be rejected from the contract, still the liability for payment in some kind of legal tender would exist, hence by the decree no prejudice resulted to appellants in overruling their demurrer."

The present writ of error was then brought and defendants in error moved to dismiss or affirm.

*Mr. John P. Wilson*, *Mr. William B. McIlvaine* and *Mr. Frederic D. McKenney* for the motion.

*Mr. Robert Rae* opposing.

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

The Circuit Court of Cook County did not find the sums due as due, nor decree their payment, in gold coin of the United States. The record does not show that when the instalments matured any demand was made for their payment in gold, nor that a tender of money other than gold was made, or, if made, that such tender would not have been accepted. The presumptions are entirely to the contrary. The Circuit Court decreed that the liability be discharged in any lawful money of the United States, and the Supreme Court held that

defendants below could not be heard to complain of a decree by which they were not prejudiced. This was a ground broad enough to sustain the judgment without reference to any Federal question supposed to be involved.

According to the terms of section 709 of the Revised Statutes, we exercise jurisdiction over the final judgments and decrees of state courts, where the validity of a treaty or statute of, or authority exercised under, the United States, is drawn in question and the decision is against their validity; or where the validity of a statute of, or an authority exercised under, any State, is drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority.

The decision of the Supreme Court of Illinois was not against the validity of a treaty or statute of, or authority exercised under, the United States; nor was it in favor of the validity of any statute of, or authority exercised under, the State of Illinois, asserted to be repugnant to the Constitution or laws of the United States; nor was it against any title, right, privilege or immunity specially set up or claimed by plaintiffs in error.

The validity of part of the act of Congress of February 28, 1878, c. 20, 20 Stat. 25, was questioned, but plaintiffs in error cannot bring the case here on the objection that that contention was not sustained.

The benefit of clause five, section eight, of article one, of the Constitution, empowering Congress to coin money and regulate the value thereof, and of clause one, section ten, of article one, providing that no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender for the payment of debts, was claimed; but the state courts did not deny to Congress any power granted, nor assert

in respect of the State any power prohibited, and it did not appear that plaintiffs in error were deprived of any benefit secured by either of those provisions.

Plaintiffs in error pointed out no provision of the Constitution, or of any law of the United States, forbidding the making of contracts payable in gold coin of the United States, but contended that contracts so made payable were void because opposed to public policy. The state Circuit Court, however, simply held plaintiffs in error to respond in lawful money, and entered its decree accordingly, and the Supreme Court decided that plaintiffs in error could not complain of that decree, because not prejudiced thereby. This was not a decision against any right secured by the Constitution or laws of the United States specially set up or claimed by plaintiffs in error in those courts.

*Writ of error dismissed.*

## LINDSAY AND PHELPS COMPANY *v.* MULLEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 44. Argued April 6, 7, 1899. — Decided January 15, 1900.

The provision in § 2400 of the statutes of Minnesota of 1894, requiring each surveyor general to survey all logs and timbers running out of any boom now chartered or which may hereafter be chartered by law in his district, refers to corporations organized under a general law, as well as to those whose organization is provided for by special act.

The business of booming logs on the waters of streams running through the forests of the West is a lawful business, and the Minnesota Boom Company was a lawfully organized corporation for the purpose of doing such lawful business.

The statute of Minnesota requiring all logs running out of a boom to be surveyed, inspected and scaled is compulsory, and such legislation was within the power of the State.

The scale bills in this case were certified as required by the laws of the State, and, being so certified, were competent evidence; and, when taken in connection with other evidence, supported the finding of the court that the work was done as alleged.

A record in the books of the surveyor general is not preliminary to a right to a lien for such work.

Statement of the Case.

The logs of one party passing the boom can be subjected to a lien for surveying and scaling not only his own logs, but also for surveying and scaling the logs of other parties, as any log owner may send his logs down the river without the use of the boom, taking proper care of them, and if he uses the boom he takes it subject to the conditions prescribed by the legislature.

The improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce.

On August 1, 1893, the plaintiff in error commenced its action of replevin against one of the defendants in error, John H. Mullen, to recover possession of a quantity of logs said to be of the value of $15,000. Mullen answered, alleging that he was the surveyor general of logs and lumber for the fourth district of Minnesota; that as such surveyor general he had scaled and surveyed a large number of logs in a boom belonging to the Minnesota Boom Company, for which service he was entitled to fees amounting to the sum of $11,088.92, and had seized these logs, under the statute giving him a lien, to enforce payment thereof, and praying for a return of the property, or, if that could not be had, for judgment for the sum of $11,088.92, together with ten per cent, $1108.89, costs of collection as provided by law, and interest. To this answer the plaintiff filed a reply, challenging on several grounds the validity of the claim for fees and lien. Thereafter the State of Minnesota was, on its application, made a party defendant, and answered setting forth in substance that since the filing of the pleadings the defendant Mullen had received from the State of Minnesota the full amount of his fees, and had transferred his claim to the State, and adopting the answer of Mullen, so far as it was applicable. On these pleadings the case went to trial before the court without a jury. No special findings of fact were made, but only a general finding for defendants. A bill of exceptions was preserved, reciting the testimony, showing that at the close the plaintiff requested of the court the following declarations:

"First. That it has not been shown that the logs for which

defendants claim fees for scaling in this case ever ran into or through any boom chartered by law, and therefore the defendants have no right to the fees claimed or to any lien on the plaintiff's logs therefor; but the court refused to make such declaration; to which ruling and order the plaintiff then and there duly excepted.

"Second. That the defendants have not shown themselves entitled to any lien upon the plaintiff's logs:

"*a.* Because the scale bills, Defendants' Exhibits 3 and 4, are not evidence of the scaling of the logs therein described.

"*b.* Because it appears affirmatively that the said scale bills were not, nor were either of them, recorded in any book in the office of the surveyor general of that district.

"*c.* Because it appears that a very great proportion of the logs mentioned in these scale bills, defendants' exhibits 3 and 4, were not the plaintiff's logs, and that the work done was not done at the request of the plaintiff or anybody else.

"*d.* Because the pretended records of said scale bills were not in fact any record whatever.

"*e.* Because it does not appear that any of the log marks shown on defendants' scale bills, Exhibits 3 and 4, were ever recorded in the office of the surveyor general of logs and lumber of the fourth lumber district of the State of Minnesota, in accordance with the provisions of title 3, of chapter 32, General Statutes of the State of Minnesota.

"But the court refused to make such declaration; to which ruling and order the plaintiff duly excepted.

"Third. That the statute under which the defendants claim a right to scale these logs and recover fees therefor, and to a lien on the plaintiff's logs therefor, is, as applied to the place and business where this scaling was done, an attempted regulation by the State of interstate commerce and is unconstitutional and void, being in contravention of subdivision 4, of section 8, of article 1, of the Constitution of the United States."

Upon the general finding the court entered a judgment for the defendants for a return of the property or the payment of the fees, costs and interest. Thereupon the plain-

tiff brought the case directly to this court by writ of error on the ground that the laws of Minnesota, under which these fees and lien were claimed, were in contravention of the Constitution of the United States.

The facts developed on the trial, and upon which the questions of law arise, are these: The State of Minnesota was by law divided into five districts for the inspection of logs and lumber. The fourth district was defined as follows: "The Mississippi River and its tributaries below the outlet of Lake Pepin to the southern line of Wabasha County." The defendant Mullen was the duly appointed and qualified surveyor general of logs and lumber for this district, and as such performed the services for which the fees and lien were claimed. The Minnesota Boom Company was a corporation organized under the general laws of the State of Minnesota in April, 1889. The purposes for which the corporation was organized are stated in article 1 of its charter:

"The general nature of the corporate business shall be the construction, maintenance and use of booms, dams and all other structures of any kind necessary or advantageous for the performance of the logging and lumbering business hereinafter described, upon the Mississippi River, or either bank thereof, between the mouth of the Chippewa River, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi River or a point opposite thereto, and also upon, or on any side or bank of, any slough, bayou, branch or part of the Mississippi River between or connecting with said river at any point between the extreme limits aforesaid. The business of the corporation beside the construction, maintenance and operation of said structures shall be gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling any and all logs, lumber and timber of any kind, between the limits and upon the waters and territory above stated, for any and all persons having any logs, lumber or timber upon any of said waters or within said territory and this corporation shall have the right to charge and receive, and shall charge and receive, from any and all persons upon or in connection with

those logs, lumber or timber for any work or services done by this corporation, a proper sum and compensation by it to be fixed for such work or services, and this corporation shall also do any other business incident to any part of the general business aforesaid."

It constructed a boom on West Newton Slough, within the limits of the fourth inspection district, above defined. This slough is an arm or minor channel of the Mississippi River, bounded on its southwestern side by the main land, constituting the State of Minnesota, and on the other side by an island, extending up and down the river about three miles, and dividing this slough from the main channel of the river. The works of the boom were in this slough, but at the upper end of the island, extending diagonally across the river to the Wisconsin shore, was a structure called a shear boom, so arranged that when closed it turned all the logs coming down the river into the upper end of the boom. When one end of it was released it floated down the stream and thus allowed free passage up and down the main channel. Above the head of this boom the Chippewa River empties into the Mississippi. The Chippewa River is wholly within the limits of the State of Wisconsin, and the logs, which this boom was constructed to secure, and which in fact it did secure, were mainly logs coming out of that river and which had been cut within the limits of the State of Wisconsin.

The statutes of Minnesota, so far as they are pertinent to this inquiry, in reference to booms, scaling and surveying, are the following:

"Any corporation formed under this title, in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein, which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side, rolling, sluicing

and flooding dams, or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation. Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber, driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber reasonable charges and expenses for such services. And such corporation shall for all such tolls, costs and expenses have a lien on the logs for which same was incurred, and may seize, in whosever possession found, and hold a sufficient amount thereof to pay the same, and make sale thereof upon giving ten (10) days' notice in the manner provided for notifying sales on execution upon the judgment of justices of the peace, or may enforce such liens as other liens are enforced by proper proceedings for that purpose, or may ask, demand, sue for, collect and receive from the owner or owners of such logs the amount due for any such tolls. No injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto unless such corporation shall fail for sixty (60) days after judgment, from which no appeal has been taken, to pay any damages recovered for any injury done by or in consequence of its works. Any corporation formed for the improvement of a stream, which is in whole or in part a boundary between this and an adjoining State,

and authorized to drive logs or maintain booms or dams in such stream, shall have authority to purchase and hold stock in corporation or corporations in such adjoining State created for similar purposes upon the same stream, or to consolidate or otherwise unite with such corporation or corporations in such adjoining State, whenever the purposes for which the corporation in this State is organized can be better effected thereby. Provided, that no such purchase or consolidation or other union shall be made without the assent of holders of two thirds ($\frac{2}{3}$) of the capital stock of such first (1st) named company. Provided, that all dams and other works erected under the authority given by this act shall be so constructed, used and operated as to facilitate and expedite the driving and handling logs and lumber upon the stream upon which the same may be erected, and the corporation making such improvements hereunder shall have no right to stop logs destined for points below its works on said stream except where dams have been constructed to accumulate water for sluicing logs and flushing the river below the same, and in such case shall not detain logs in any part of the river so as to form a jam or prevent the prompt delivery of logs destined for points below the works constructed under authority of this act." (Section 2 of chapter 221 of the laws of the State of Minnesota for the year 1889. Act of April 24, 1889.)

"Each surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered, or which may hereafter be chartered by law in his district, and at the end of each month, when he has surveyed any such logs or timber, make out and deliver to the owner of such boom, or the managing agent thereof, a true and correct scale bill, stating the date of such survey, the number of logs and pieces of timber, the marks thereon respectively, and the number of feet of each mark so surveyed during the month, and shall sign the same; and he shall immediately record such bill in the books of his office, and, upon being paid his fees for such services, shall deliver the original bill to the owner or managing agent of such boom; and all boomage or fees of such boom on any logs or timber shall be collected

in accordance with such survey. And all scale bills heretofore made and signed by any such surveyor general, or the record thereof in the respective offices of such surveyor general, or copies of such records duly certified, shall, in all courts of this State, be *prima facie* evidence of the matters stated in such scale bill, record or copy." (Section 14 of chapter 32, title 3, of the General Statutes of Minnesota for 1866, being now section 2400 of the Statutes of Minnesota of 1894.)

"The fees of surveyor generals shall be: For surveying, scale marking, making scale bills and recording the same and posting in the ledger, five cents per thousand feet for all logs and timber required to be surveyed; for surveying lumber, twenty-five cents per thousand feet; for travelling to perform any service more than two miles from their respective offices, five cents per mile going and returning; for recording any log mark, fifty cents; for making and certifying a copy of any matter which may be of record in his office, or for making any duplicate scale bill, ten cents per folio; for recording any instrument in writing authorized to be recorded in his office, other than scale bills, ten cents per folio, payable when such instrument is presented for record and before it is recorded, and no such instrument shall be deemed to be recorded until it is entered upon the index to the record. And for the purpose of securing to the surveyor general the payment of his fees, whether the same are for travelling, surveying, making scale bills, or recording the same, or for any or all of such services, such surveyor general shall have a lien upon all such logs, timber or lumber surveyed and marked by him, for the amount due for his services thereon, and may retain such lien by affixing to the scale bill of such logs, timber or lumber, before the delivery thereof, a true statement of the amount due him thereon, and that he scaled such logs, timber or lumber, relying upon such lien, and that he claims a lien thereon for such amount, and costs of collection; and thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him thereon, and such logs, timber or lumber shall not be removed or

taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days' notice of such sale, by posting up five written notices thereof, one in his office, and one in each of the four most public places in the town or city where the sale is to be made; and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent on the amount due, for taking care of the property and, to the officer making the sale, ten per cent on the amount payable to the surveyor general." (Section 16 of chapter 32 of the General Statutes of 1866, being section 2402 of the Statutes of 1894.)

"The books of record in the surveyor general's office in each district shall be:

"First. A book in which shall be recorded the log mark of any person desiring to have the same recorded.

"Second. A book in which shall be recorded all bills of sale, mortgages and orders, and other instruments in writing for the sale, transfer, incumbrance or other delivery of any logs or timber in the same district.

"Third. A book in which shall be recorded the scale bills of all the logs, timber and lumber surveyed by the surveyor general.

"Fourth. A book, to be kept in ledger form, in which shall be posted and recorded, as soon as any logs or timber is surveyed, separately and under their respective marks, all the logs and timber of each particular mark surveyed, together with the date of scale, the number of logs and the number of pieces of timber, to whom scaled, if to any one, and the number of feet, which book shall be kept posted up so that it will show the matter above stated concerning each mark of logs scaled during each month. And the surveyor general shall make and deliver to any person authorized to demand the same, a certified transcript of said record, as to any mark or

marks of logs or timber, upon being paid the fees prescribed in section sixteen of this chapter, and the sum of twenty-five cents for his certificate of the same; and an index of the names and marks contained in each of said books shall also be kept. Any books of the description before named, which have been kept in the office of any such surveyor general and which belong to said office, are hereby declared to be the records of said office, and to have and be of the same validity, force and effect as if the same had been kept by express authority of law. All the books of record hereinbefore mentioned and authorized to be kept in the office of any surveyor general are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this State, be taken and held to be *prima facie* evidence of the matters therein stated; and such books shall not be removed from the surveyor general's office, but any paper purporting to be a copy of any matter or thing of record in such office, certified under the hand of the surveyor general or his deputy to be a correct transcript from the records in such office, shall, in all the courts of this State, be received and read as *prima facie* evidence of the matters and things in such record contained, and of the matters therein stated." (General Statutes 1866, chap. 32, title 3, sec. 17. As amended 1877, chap. 18, sec. 3, being now sec. 2403 of the Statutes of Minnesota of 1894.)

In addition to these statutes must be noticed chap. 401, Laws of Minnesota, 1895, which is entitled "An act for the relief of John H. Mullen, and to appropriate money therefor," the first two sections of which are as follows:

"SEC. 1. That the sum of fifteen thousand eight hundred (15,800) dollars be, and the same is hereby appropriated out of any money in the state treasury not otherwise appropriated for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the fourth district of the State of Minnesota, in accordance with the instruction of the Governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same

to said Mullen, and the state treasurer is hereby directed to pay the same.

"SEC. 2. Before said payment is made said Mullen shall assign to the State of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the State of Minnesota shall proceed to collect the same in the name of said Mullen or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the State of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act."

Under the authority of this statute the defendant Mullen received payment of the amount charged for fees, etc., and assigned his claim to the State, and under and by virtue of this assignment the State became a party to this litigation, as heretofore stated.

*Mr. Newell H. Clapp* for plaintiff in error. *Mr. Moses E. Clapp* filed a brief for same.

*Mr. Wallace B. Douglas* for defendants in error. *Mr. H. W. Childs* was on his brief.

Mr. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Upon the foregoing facts the plaintiff contends: First. That the boom at the West Newton Slough, through which the logs scaled by the defendant Mullen passed was not "any boom . . . chartered by law" within the scope of section 2400 of the Statutes of 1894. This contention cannot be sustained. The words "chartered by law" are not to be understood as referring simply to corporations incorporated under special acts. A corporation which is organized under a general law is as much "chartered by law" as one whose organization is provided for by special act. So that on the face of this

statute, and giving to its words their natural meaning, it includes every corporation, whether incorporated under general or special law, with authority to maintain a boom. The mere fact that in early times four special charters were granted to boom companies cannot work any limitation upon the meaning of the words used in this statute. If the legislature of Minnesota had purposed any such distinction, its language would have been more apt. It would not have used words broad enough to have included any corporation of the kind described.

As a matter of fact, this corporation was organized some eighteen days before chapter 221 of the Laws of 1889 was passed. Prior to that time there was an act (General Statute Minnesota, 1866, chap. 34, sec. 1, as amended by chap. 13, Laws Minnesota, 1873) which authorized the formation of corporations for various purposes named, and also "other lawful business." Under that statute this corporation was formed. That the business of booming logs on the waters of streams running through the forests of the West is a lawful business cannot be doubted.

In *City of Erie* v. *Canfield*, 27 Michigan, 479, 482, the Supreme Court of Michigan said:

"It is clear that on a river like the Manistee, which is navigable by steamers for a long distance, but down which logs by the million are floated and gathered in booms every season — where in fact the principal industry consists in cutting, floating and manufacturing into lumber the forests in its vicinity, and where the river is more valuable for this floatage than for any other navigation; the necessity and convenience of this floatage must be considered in any rules laid down for the public use of the stream, and the need of booming facilities to render the floatage of value. Indeed, to take away the privilege of booming would be to strike a fatal blow at the principal commerce on the stream; for the vessels which ply between Manistee and other ports are loaded principally with the lumber which the mills along the shores of Manistee lake and river are enabled, by means of the privilege of floating and booming logs upon these waters, to manufacture and place

upon the market. It is just and reasonable, therefore, and conducive to the best interests of commerce, that the right of navigating the river should be exercised with due regard to the necessity for booming facilities, and the former is not so far paramount as to render the latter a nuisance whenever and wherever it encroaches upon waters navigable by the large vessels which enter this stream."

And in *Pound* v. *Turck*, 95 U. S. 459, 464, is a clear recognition of the lawfulness of this booming industry, as appears from the following quotation:

"There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to sawed logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter."

Indeed, it would strike a serious blow at the legislation of many of the Northwestern States and an immense volume of business that has been carried on under the authority of that legislation, to hold that the booming of logs was not a lawful business.

That those words, "other lawful business," as found in the statute are not to be narrowly construed, but are broad enough to include an incorporation for this purpose, is made clear by the decision of the Supreme Court of Minnesota in *Brown* v. *Corbin*, 40 Minnesota, 508, 509, in which the court said:

"Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated,

and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense, in which defendants seek to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by *quasi* public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

The corporation then having a legal existence at the time the act of 1889 was passed, section 3 of the act expressly provided that it should apply to corporations previously organized for the purposes specified in section 2. In other words, all the rights, privileges and powers conferred by the act of 1889 were by this section given to existing corporations. So that we have the case of a corporation, organized under the general law of the State, given by subsequent statute full powers in reference to the maintenance of a boom, and in fact maintaining a boom; and the case therefore comes within the specific description in section 2400 of a boom chartered by law.

Further than that, the legislature of Minnesota accepted the claim of the surveyor Mullen as valid under its laws, and thus impliedly recognized the boom company, involved in this controversy, as one chartered by law within the scope of the statutes providing for inspection, scaling and charges therefor.

The second contention is that the statutes of Minnesota were not intended to and do not in fact give the surveyor general any lien upon the logs of private parties for inspecting and scaling logs run through chartered booms. Reference is made by counsel to several statutes in which there is provision for the action of the surveyor general in surveying and scaling lumber at the instance of parties interested. We deem it

unnecessary to investigate those statutes, for the sections quoted plainly indicate that the survey and scaling in case of a chartered boom is not solely at the instance of the owner or owners of the logs, but is compulsory. Section 2400 declares that "the surveyor general, by himself or deputy, shall survey all logs and timber running out of any boom now chartered or which may hereafter be chartered by law in his district." To those unfamiliar with the logging business as carried on in the timber regions of the North and Northwest this compulsory surveying and scaling may seem unnecessary, but all legislation may rightfully be adjusted to the actual operations of business, being intended to facilitate those operations and protect all who are engaged therein. Many are engaged in the cutting of logs in these lumber districts. That business is facilitated by any system which permits those parties to turn their logs into an adjacent stream and let them float down to some place where they can be collected and brailed. In that way each individual cutter is saved the necessity of brailing his logs at every place where he may bring them to the water. The several States in which these lumber districts are situated have assumed the power of taking charge of these logs thus put singly into a stream, collecting them at one place, separating them to their respective owners, and thus facilitating the forwarding in raft to market. Of course, such work entails expense, and the expense is rightfully charged upon the property thus separated and marked. The thought in this respect is well expressed by the Supreme Court of Minnesota in *Osborne* v. *Knife Falls Boom Corp.*, 32 Minnesota, 412, 419:

"Now it appears that there is a large number of persons . . . owning standing timber upon the upper waters of the St. Louis and upon its tributaries, who must float their logs to market down the St. Louis, some to Fond du Lac, Duluth or Superior, and some to Cloquet, or other points above and near Knife River Falls. The interest of the latter requires that their logs should be stopped before passing Knife River Falls; the interest of the former that their logs should be allowed to run over them without interruption. In

this conflict who is to determine how the right of floatage upon this common highway shall be enjoyed? Who is to fix upon the just and proper compromise of these conflicting interests? Obviously, the legislature — that department of government which, in the exercise of a lawmaking and a police power, prescribes the rules by which the use of public highways in general is regulated, *Pound* v. *Turck*, 95 U. S. 459; *Watts* v. *Tittabawassee Boom Co.*, 52 Michigan, 203, and save as controlled by paramount law — that is to say, in this instance, by our state constitution or enabling act — the discretion of the legislature in the premises is practically unlimited. It may enact laws prescribing the manner in which the common right of floatage shall be enjoyed. It may determine what means shall be adopted, and by what agency, to secure results which, in its judgment, are the best and fairest practical compromise of conflicting interests — the best attainable good of all concerned. *Pound* v. *Turck*, *supra; Duluth Lumber Co.* v. *St. Louis Boom Co.*, 17 Fed. Rep. 419. In the exercise of its legislative discretion it may authorize suitable means and instrumentalities to secure this end to be provided and employed by a private person or by a corporation, and it may prescribe what these means and instrumentalities may be, as booms, dams, piers, sluiceways, and what use may be made of them, and, in general, in what manner the business shall be conducted. . . . On the whole, this is an improvement of the river for the benefit of all concerned in its use, and one for which it is therefore competent for the legislature to require those using the river to make compensation."

In furtherance of the thought thus expressed the legislature of Minnesota has given the right to boom companies duly incorporated to take possession of the great mass of floating logs coming down a stream, and requires that those logs thus taken possession of shall be inspected and scaled under the supervision of some state official. In that way each individual owner and cutter has a guarantee of safety in respect to his logs, and the general interests are so manifestly subserved that there can be no reasonable doubt of the legislative power

of supervision, inspection and scaling. And the language of the statute being mandatory, we are of the opinion that such was the intent of the legislature, and that such legislation is within its power.

A third proposition is, that it is not shown that the defendant, Mullen, complied with the statutes of the State of Minnesota which give a lien on logs so as to be entitled to any lien on these logs, or any right of possession thereof, and it is with reference to this matter that the second declaration of law was asked by the plaintiff. The contentions of the plaintiff in this respect seem to be, first, that the scale bills were not of themselves competent evidence, and that without them there was no clear and satisfactory evidence of the number of feet surveyed and scaled; second, that because they were not recorded in the books of the surveyor general the right to a lien had not arisen; and, third, that the testimony shows that the logs in fact surveyed and scaled and for which these fees and lien were claimed were not all the property of this plaintiff.

With reference to the general proposition that the defendant, Mullen, by himself and deputies, was busy in scaling logs in that boom during the months named, there is abundant testimony, and when the question is only as to the sufficiency of testimony to establish a given fact, it is enough to say that this court does not inquire into the mere matter of sufficiency. Matters of fact are settled by a verdict of a jury or the general finding of a court, and if there be testimony fairly tending to support the finding, it is conclusive in this court.

But we are not disposed to question the competency of the scale bills as evidence. Section 2403 provides that the books of the surveyor general's office "are hereby declared to be public records, and of as high degree of evidence as the original instrument therein recorded, and shall, in all courts and places in this State, be taken and held to be *prima facie* evidence of the matters therein stated." In other words, the records, like the original instrument, are *prima facie* evidence of the matters stated in them. *Clark* v. *C. N. Nelson Lumber Company*, 34 Minnesota, 289; *Glaspie* v. *Keator*, 12 U. S. App. 281, 290. In both of those cases scale bills some-

what defective in form were declared under the statute competent evidence. Attached to the scale bills herein was a certificate of the surveyor general stating, as required by section 2402, the amount due him thereon, and that he scaled the logs, timber or lumber relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection. The scale bills, thus certified, were delivered to the managing agent of the boom company. Now, whatever suggestions may be made as to the incompleteness of these scale bills, they were, as thus certified, competent evidence, and, when taken in connection with the other evidence of work actually done by the surveyor general and his deputies, was testimony fairly tending to support the general finding of the court, and we are not at liberty to ignore the effect of that finding.

With regard to the second contention, we do not understand that a record in the books of the surveyor general is preliminary to a right to any lien. By section 2402 he is given a lien for certain services; and while it is true that by section 2400 he is required to record the scale bills in the books of his office, and upon being paid his fees therefor to deliver the original bill to the owner or managing agent of the boom, yet for any services other than the mere making of the record we are of the opinion that under the two sections referred to he establishes his lien by the rendering of the services and affixing to the scale bill the prescribed certificate.

With respect to the final contention under this head, that the logs of the plaintiff, seized by the surveyor general, were so seized under a claim of lien for services rendered in inspecting and scaling logs other than those of the plaintiff as well as its own, the fact is as claimed. An important question is thus presented whether the logs of one party can be subjected to a lien for surveying and scaling, not only his own logs, but also for surveying and scaling logs belonging to other parties. The statement naturally suggests a negative answer, and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property. And yet, under the circumstances of the case, we

are constrained to hold that the lien was good, and must be enforced for the entire amount claimed. And this upon the proposition that for the purposes of a lien the boom company must be considered in a qualified sense the owner of all logs that it takes into its possession. The legislature in providing for a lien recognizes only the boom company. By section 2 of chapter 221 it gives the company authority to establish a boom, construct all the works necessary for its successful operation; then empowers it to take possession of all logs floating down the stream (with certain exceptions not necessary to be noted in this connection), and in and by the conveniences of said boom to sort and brail all logs which it takes possession of; to "charge and collect reasonable and uniform tolls," and have a lien for the tolls, and all costs and expenses; hold a sufficient amount of the logs received to pay the same, and to make sale thereof in default of payment upon ten days' notice. Involved in the costs and expenses is the fee for inspection and scaling, as provided by the laws of the State, and the inspector is required to give at the end of each month to the owner or managing agent of the boom a true and correct scale bill for all the services he has rendered. So, while the owner of the logs may obtain from the surveyor general a certified copy of the inspection and scaling, yet the inspector deals in the first instance with the boom company. To it he gives his scale bill, properly certified, and by virtue thereof he is given a lien upon the logs in the custody of the boom company. The boom company, for its protection, is given a lien on the logs of each owner. Obviously there was seen to be a practical difficulty in limiting the lien of the surveyor general for his services in inspecting and scaling to the logs separately upon which the services were rendered. The logs are turned into the custody of the boom company. It arranges for their separation and brailing, and delivers them, when thus brailed, to the owner as demanded. The fees for the surveyor general's services were therefore made chargeable to the boom company, and under its charter it had authority to collect from each log owner all charges and expenses, including therein the fees due the surveyor

general. The log owner dealt with the boom company, and had a right to call from that company for a delivery of his logs duly brailed or rafted whenever he saw fit. To require the surveyor general to stand watch at the exit of the boom to demand of each log owner his fees, or in default of payment to seize the logs thus ready for their future transit down the river, would cast upon the surveyor general not merely the duty of inspecting and scaling, but also, for his own protection, the duty of keeping an additional watch to secure the payment of his fees. It was not unreasonable on the part of the legislature, when it gave the boom company a lien upon all logs turned into the boom, to require that it should be responsible to the surveyor general for his fees, and that he, looking to the boom company for payment thereof, should have a right to enforce a lien upon any logs turned into the boom. It cannot be said that there is, in the nature of things, such an inseparable connection between services rendered and the thing upon which the services are rendered that a lien for the former can only be enforced upon the latter, or even that such lien must be limited to the owner of the latter, for it is within the discretion of the legislature to determine whether, considering all the circumstances, the use of a given instrumentality shall not subject the party seeking that use to a lien upon his property for all the services rendered by the State to the instrumentality. Take the ordinary case of a warehouse for the receipt and discharge of grain. Can it be that the lien for the services of a state inspector must necessarily attach separately, and only separately, to each bushel of grain delivered to and received therefrom? Is it not within the competency of the legislative power to declare that the owner of the elevator, like the owner of a boom, stands, as to all property received into it, as *pro tanto* an owner, and to give to any official charged with the duty of inspection a lien upon any and all of the property thus received for his services in the matter of inspection, especially when it gives to the owner of the elevator or the boom a lien upon the property placed in his possession for all services, charges and expenses?

We are of opinion that it was within the power of the legislature to so provide. It is not for the courts to inquire whether any other provision would have been wiser. The only question for us to consider is whether that which has been made was within the power of the legislature. It must be borne in mind that while the lien is given for the services rendered, the use of the facilties of the boom is not compulsory. We do not mean to say that a log cutter may throw his logs loosely and separately into the river and let them float down, trusting to luck that they will do no injury. Doubtless any one may make his own raft and send it down the stream, provided he places in charge of it a sufficient number of men to suitably protect it from doing injury or interfering with others in their use of the stream. A main purpose of the boom is to stop and collect the floating logs, and the State having control over the river as a highway of navigation may make such provisions for the use of that highway by the different parties seeking to use it as will prevent any injury by one upon the other. Just as the ordinary land highways are free to the use of the public, yet it is within the competency of the legislature to make such provisions as will prevent the use by one working injury to others; and if a party wishes to use a highway in a manner which may tend to work injury to others he cannot complain if the legislature interferes and provides some means for preventing such injury. In that way it may be said that any log owner may send his logs down the river without the use of the boom, and when he decides to avail himself of the boom it cannot be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions which the legislature prescribes for the use of such boom.

A final objection is that even this boom was one chartered by law, within the meaning of section 2400, and although the defendant, Mullen, had performed all that was required of him by the statute to secure a lien, still the law as applied to this boom, and in so far as the logs in question are concerned, is a regulation of interstate commerce which the State of Minnesota has no authority to make. It appears that these

logs, and indeed the bulk of the logs passing into this boom, came out of the Chippewa River, a stream wholly within the limits of the State of Wisconsin. The boom company was chartered by the State of Minnesota, and its principal works were within the limits of that State. Counsel for plaintiff refer to many decisions of this court in which the general power of Congress over interstate commerce and the inability of the State to burden in any direct way such commerce have been affirmed. Passing by most we may notice these quotations, as illustrating the scope of our decisions. Thus in *County of Mobile* v. *Kimball*, 102 U. S. 691, it is held that "commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property;" and in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose;" and from *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 571, this paragraph is quoted: "But we think it may safely be said, that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position; it does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent, in the management of his business throughout his entire voyage. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to

regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."

Upon these authorities it is contended that the navigation of these logs from the place of cutting in Wisconsin along the navigable waters of Minnesota, to their market, wherever it may be in the lower waters of the Mississippi, must be free. If Minnesota can burden the transit with the expense of booming, inspection or scaling, why may not Iowa, Illinois, Missouri and any other State along whose borders the logs may pass before reaching their destination? Even if a State may (as would seem to be indicated by the decisions heretofore referred to), for logs cut within its borders, provide booms, compel their use and enforce payment for the expenses thereof, because for those logs no interstate commerce has commenced, yet here Minnesota is directly regulating the transit of logs cut in another State and passing through its borders on their way to market. This is undoubtedly the most significant if not perhaps the only distinctive Federal question presented in this record.

We are not disposed to limit in the slightest degree the scope and effect of the decisions referred to. But we are of opinion that these authorities are not pertinent, and that the matter is governed by another line of decisions equally clear and as frequently recognized. The State has a right to improve the waterways within its limits and to make reasonable charges for the use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal. This parallel line of decisions runs back to the early history of this court. In *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 245, it was held that, inasmuch as Congress had passed no act bearing upon the case, the State of Delaware might authorize the building of a dam across the Blackbird Marsh Creek, although thereby a navigable waterway was obstructed. In *Pound* v. *Turck*, 95 U. S. 459, the right of a State to make dams, booms and other instrumentalities to be used in the navigation of logs and lumber was adjudged. Other decisions affirmed the power

of the State to build bridges, even toll bridges, over navigable streams, to construct wharves and charge wharfage. In *Huse* v. *Glover*, 119 U. S. 543, 548, the right of the State of Illinois to collect tolls for the passage of vessels through locks in the Illinois River was sustained, the court saying:

"The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. The provision of the clause that the navigable streams should be highways without any tax, impost or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays caused by such works the State may exact reasonable tolls. They are like charges for the use of wharves and docks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels."

In *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288, 295, a corporation had been authorized by the State of Michigan to improve the Manistee River, and to charge tolls for the use of the improvement. An action to collect tolls was resisted on the ground that the imposition was a taking of property without due process of law, which contention was overruled, and in the course of the opinion it was said:

"The Manistee River is wholly within the limits of Michigan. The State, therefore, can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the State to another. The internal commerce of a State — that is, the commerce which is wholly confined within its limits — is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of

those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. (*Huse* v. *Glover*, 119 U. S. 543, 548.) Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State."

Many other cases of similar import might be cited, but these are enough to disclose the principle which is clearly recognized.

The principal works of the boom company are wholly within the State of Minnesota. The centre of the main channel of the Mississippi River is northeast of the island. The State of Minnesota had therefore the undoubted right to improve this portion of the Mississippi River lying southwest of the island for the purpose of facilitating the navigation of logs. It could do the work itself, or could authorize a corporation to do the work, and it could prescribe any reasonable fees for the use of the improvement. The power of the State to authorize the construction of these works did not depend at all upon the question whence all or most of the logs likely to be run into the boom should come. It is enough that the State authorized this improvement and prescribed the conditions upon which it might be used by any owner of logs. These conditions are not shown to be unreasonable. It is a legitimate exercise of power on the part of a State to provide state supervision of what is done in works of such a character, and to require payment of reasonable charges for such supervision. It does not appear that the plaintiff was compelled to avail itself of this boom; that its logs were forcibly seized by the boom company, and against its will passed through the boom. On the contrary, it would seem not improbable from the testimony that the persons who organized and owned the boom company were engaged in the

business of cutting logs on the Chippewa River, and that this litigation sprang from their desire to get all the benefits of the boom without submission to the inspection laws of the State, which gave authority for the works. At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the State which authorized the construction of the works.

It is true that that which is called a "shear boom" extended across the navigable channel of the Mississippi and to near the Wisconsin shore; but if neither the State of Wisconsin nor the United States complained of this as an obstruction of the navigation of the Mississippi, it does not lie in the mouth of the plaintiff to complain. Indeed, its complaint is not that the shear boom interfered with its rights of navigation in any way, but that after its logs had been passed into the works constructed under the authority and within the limits of the State of Minnesota it was not permitted to avail itself of the advantages furnished thereby and repudiate the charges prescribed by the State.

Before passing from a consideration of the right of this boom company under its charter to place the shear boom across the main channel of the Mississippi it may not be inappropriate to notice a decision of the Supreme Court of Wisconsin upon a like question. In *J. S. Keator Lumber Company* v. *St. Croix Boom Corporation*, 72 Wisconsin, 62, 88, it appeared that the St. Croix Boom Company was a corporation created by the State of Minnesota, and that it had constructed its boom on the St. Croix River at a place where the river was the boundary line between Minnesota and Wisconsin, and wholly occupied the river with its works. An action was brought to recover damages on account of the way in which the boom was constructed and operated. The opinion of the Supreme Court, by Mr. Justice Cassoday, is a very elaborate discussion of the rights of parties. In it it is said:

"The obstructions here complained of were in that part of the St. Croix River constituting the boundary line between

this State and Minnesota. The defendant justifies under corporate authority derived solely from Minnesota. We are here confronted with the question whether such authority, so granted by that State alone and without the concurrence of this, is of any validity. Our constitution declares that 'the State shall have concurrent jurisdiction on all rivers and lakes bordering on this State, so far as such rivers or lakes shall form a common boundary to the State and any other State or Territory now or hereafter to be formed and bounded by the same.' (Sec. 1, Art. IX, Const. Wis.) This provision is substantially the same as the third section of the act of Congress of August 6, 1846, enabling the organization of this State preparatory to its admission into the Union. Substantially the same provision, as applied to Minnesota, is found in sec. 2 of art. II of the constitution of that State, which is in substance the same as section 2 of the enabling act for the organization of that State passed by Congress in 1857. Such 'concurrent jurisdiction,' therefore, is fairly established by the combined action of the general government and each of these two States. Its significance is the important inquiry presented. No one will deny that the one State has as much jurisdiction over the commerce of the river as the other, nor that the jurisdiction of each and both must be and remain subordinate to any action of Congress under the commercial clause of our national Constitution. The question recurs whether one of these States, without the concurrence of the other, can legally grant the booming privileges and rights authorized by the defendant's charter."

Without attempting fully to define the rights which either State might grant, it was held that a private party could not maintain an action for damages on the ground that Minnesota had exceeded its jurisdiction in granting rights upon waters within the limits of Wisconsin. Referring to *Rundle* v. *Delaware & Raritan Canal Co.*, 14 How. 80, the court stated the facts and the rulings in that case, and summed up its own views in these words (pages 98, 99):

"The plaintiffs owned certain mills in Pennsylvania, opposite Trenton, New Jersey, supplied with water from a dam in the

Delaware River, by a title running back prior to 1771. In that year the two provinces, which subsequently became the States of Pennsylvania and New Jersey, respectively passed acts declaring the river a common highway for the purposes of navigation, and appointed commissioners with full power to improve such navigation and remove any obstructions. By compact in 1783, it was agreed by the two States that the river should continue to be and remain a common highway in its whole length and breadth, equally free and open for the use, benefit and advantage of each of the two States. The defendant company was incorporated under the laws of New Jersey in 1830, and was thereby authorized to and did construct a canal in that State, with a feeder from a dam in that river above the plaintiffs. The action was brought by reason of the diversion of such water, to the damage of the plaintiffs. The court held, in effect, that the plaintiffs had no grant of the usufruct of the waters of the river, but only a license to draw from their dam; that such license was revocable and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly or by a corporation created for that purpose; that the plaintiffs, being but tenants at sufferance in the usufruct of the water of the two States, who owned the river as tenants in common, were not in a condition to question the relative rights of either State to use its waters without the consent of the other; that as, by the laws of their own State, the plaintiffs could have had no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so they could not sustain a suit against a corporation created by New Jersey for the same purpose, which had taken a part of the waters. The principle of that decision seems to be that a mere private party should not be heard to complain that one of two States, divided by such river, had invaded the rightful jurisdiction of the other by diverting more than its share of the waters. So here, we think, the plaintiffs are not entitled to be heard as to whether Minnesota has infringed the rightful jurisdiction of Wisconsin. This State is not a party to this suit, and her comparative rights in

and upon the waters of the river at the points in question cannot be adjudicated in this action."

Without pursuing this subject further, we are of opinion that the improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for inspecting and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce. It is nothing more than action upon the part of a State in furnishing additional facilities for the navigation of the waterway, and for such additional facilities reasonable charges may be exacted. The "shear boom," even though it extends across the main channel of the Mississippi River and into the territory of Wisconsin, was not complained of by that State, and the plaintiff cannot be heard to raise any question in that respect. Indeed, its only purpose was to enable the boom company the more easily to collect the logs of plaintiff and others floating down the stream. The work of separation and brailing was done wholly within the limits of the State of Minnesota in works constructed therein. For these reasons we are of opinion that the judgment of the court below was right, and it is

*Affirmed.*

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

I dissent from that portion of the opinion of the court which determines the validity of a lien upon the logs of one owner in order to secure payment of the fees for the inspection and scaling of logs owned by another.

The situation in which the log owner is placed practically compels him to make use of the boom for the purpose of having his logs inspected and scaled as required by the law, and under such circumstances he cannot be properly or fairly held, by the use of the boom, to consent that his property should be taken for the debt of another person. The mere inconvenience, however great or small, to the inspector, of having

some one watch at the exit of the boom to demand of each log owner the fees for inspecting and scaling his particular logs, furnishes no answer to the objection of the log owner to the taking of his property for the debt of another. This act accomplishes that result in its plainest and baldest form. It reduces to actual practice and in the form of a legislative enactment, sanctioned by judicial approval, the illustration that is generally made for the purpose of showing that there are some things so contrary to justice as to admit of no doubt of their utter illegality; such as the arbitrary taking, under the form of a legislative enactment, of the property of one man and bestowing it upon another.

If an owner is practically compelled, in order to conform to a statute, to use a warehouse for the receipt of his grain, I think it plain that it would be utterly illegal to permit a lien on the grain of such owner to attach, for the purpose of obtaining payment for the services of a state inspector in inspecting the grain of another. Whilst as now decided by the court, a state regulation which substantially compels the sending of logs into the boom to be there inspected and scaled, may not be a regulation of interstate commerce, I think a state regulation which confiscates the logs of one person to pay the debt of another clearly constitutes such a direct burden upon that commerce as to cause the statute making the regulation, at least to that extent, to be repugnant to the Constitution of the United States.

Without enlarging upon what seems to me a very great inroad made upon the rights of individual property by the opinion of the court herein, I am content merely to record my dissent from the doctrine therein announced.

I am authorized to say that Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice White concur in this dissent.

# CHEW HING LUNG *v.* WISE, COLLECTOR.

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

No. 36. Argued December 11, 12, 1899. — Decided January 22, 1900.

Tapioca flour is not a preparation fit for use as starch, and under the tariff act of October 1, 1890, c. 1244, paragraph 720, is entitled to free entry.

The designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description which might otherwise include the article specially designated.

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

*Mr. A. B. Browne* and *Mr. Albert Comstock* for Chew Hing Lung. *Mr. Charles Page* was on their brief.

*Mr. Assistant Attorney General Hoyt* for Wise and the United States.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The question in this case, which comes before us on certiorari, is whether certain merchandise imported into this country is entitled to free entry or is subject to duty. The merchandise is claimed to be tapioca, and the question arises under the tariff act of October 1, 1890, c. 1244, 26 Stat. 567.

Paragraph 323 (page 588) of the statute reads as follows:

"323. Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound."

Paragraph 730 (page 610) of the "free list," reads as follows:

"730. Tapioca, cassava or cassady."

The government claims that the merchandise is a preparation fit for use as starch, and is therefore dutiable at two cents per pound under paragraph 323.

The importers contend that the substance imported by them

is tapioca, in the form of tapioca flour, which is one of the three forms of tapioca known to commerce, and is therefore entitled to free entry under paragraph 730.

The merchandise was imported in November, 1893, at the port of San Francisco, and the collector of that port imposed a duty of two cents per pound upon it. The importers, claiming that it was entitled to free entry, appealed to the board of general appraisers, and that board decided that the imported article was free of duty, and judgment to that effect was entered. Upon appeal by the collector to the Circuit Court of the United States, in the Ninth Circuit, Northern District of California, that court affirmed the decision of the board, 77 Fed. Rep. 734, and the collector then appealed to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was reversed, 48 U. S. App. 517, and the cause remanded with directions to affirm the decision of the collector. Upon application by the importers this court granted a writ of certiorari, it being alleged that there were inconsistent decisions in the Circuit Courts of Appeals on this question.

Upon the trial of the case before the Circuit Court the parties agreed upon certain facts, and evidence was given in regard to the character of the substance imported and its fitness for use as starch, and the court found that the merchandise, though entered at the custom house at San Francisco by the importers under various names, such as tapioca, sago and root flour, is all the same substance, viz., the starch grains contained in and derived from the root botanically known as jatropha manihot. In the West Indies the root is known as cassava or manioc; in Brazil as mandioc; but all these names indicate the same thing, without change of condition or character.

There are two varieties of the root, one of which is very poisonous, and both varieties contain a large proportion of starch. The starchy substance constituting the importations involved in this controversy consists of the starch grains obtained from the manihot root by washing, scraping and grating, or disintegrating it into pulp, which in the poisonous

variety is submitted to pressure so as to separate therefrom the deleterious juices. The starch grains settle and the juice is subsequently decanted, leaving as a deposit a powder, which, after repeated washings with cold water and after being dried, is nearly pure starch, and is insoluble in cold water. This is the substance in controversy. If sufficient heat and motion are afterwards applied to this substance a mechanical change takes place, the grains become fractured and thereby agglutinated. The latter substance is partly soluble in cold water, and is the granulated tapioca known as "pearl" and "flake" tapioca of commerce.

The importations in question are from China, and are made chiefly for the purpose of supplying Chinese laundrymen, who use the flour as a starch and to a slight extent for food purposes. Its use for starch purposes in the laundry is, however, limited to the Chinese, except that in some instances in San Francisco it is so used in their business by white laundrymen by mixing it with wheat or corn starch. Wheat and corn and potato starch are the starches commonly used in the United States. Tapioca flour is also used in the Eastern States by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic and other gums. It is also sometimes used for sizing cotton goods, and in addition as an adulterant in the manufacture of candy and other articles.

Among the white people dealing with the Chinese on the Pacific coast the substance in question is commonly known as "Chinese starch." In the general importing markets of the United States it is commercially known as tapioca flour, and in those markets the term "tapioca" includes that article in three forms, viz., flake tapioca, pearl tapioca and tapioca flour. The substance in question is not imported into San Francisco by others than Chinese.

The Circuit Judge also found that the article in question is fit for use as starch in laundry work in the sense that by its use clothes can be starched, but it is not commonly used in such work as starch, throughout the United States, and is not known to be so used except on the Pacific coast. Judgment was therefore ordered for the importers.

Opinion of the Court.

These findings of facts were assumed by the Circuit Court of Appeals, and upon them that court based its judgment, reversing the Circuit Court and affirming the action of the collector.

Upon these facts we are to determine which paragraph in the tariff act is to govern. The findings of the courts below that the substance in question is included in the article of commerce known as tapioca, and is tapioca in one of its forms, would entitle it to free entry under paragraph 730, unless some other provision of the act nullifies that language. Paragraph 323 is relied on for that purpose. We think it does not have such effect. That paragraph is general in its nature, and provides for a duty upon starch, including in that name all preparations from whatever substance produced, fit for use as starch. Any preparation, therefore, which is fit for that use would come within that general designation. What is a preparation "fit for use as starch" is another question, but assuming tapioca flour to be thus fit, it would be subject to duty under that paragraph, if there were not another and different provision in the statute relative to that same substance.

When we come to look at the free list in the same statute we find that tapioca is to be admitted free, and the finding of the court is that tapioca flour is one of the three forms of what is commercially known as tapioca, and under that provision the substance involved in this case would be entitled to free admission. Attempting, as is our duty, to give effect to the statute in all its parts, we think the proper construction of these provisions is that under paragraph 323 a duty is laid upon starch, including all preparations, from whatever substance produced, fit for use as starch; and assuming that tapioca flour is, within that general description, fit for such use, yet by virtue of paragraph 730, tapioca is placed on the free list, and the substance tapioca flour, being tapioca in one of its forms, is excepted from the general language of paragraph 323, and is entitled to free entry.

It is so excepted, because although assuming it to be fit for use as starch, it is nevertheless tapioca, and tapioca is in so many words put on the free list. Effect is thus given to the general language of the paragraph concerning starch and all

preparations fit for use as such, excepting therefrom the one article specially named in paragraph 730, to which effect is given by allowing the exception.

This construction is in strict accordance with the rule that the designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description which might otherwise include the article specially designated. *Homer* v. *The Collector*, 1 Wall. 486; *Reiche* v. *Smythe*, 13 Wall. 162; *Movius* v. *Arthur*, 95 U. S. 144; *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Rheims*, 96 U. S. 143; *Chung Yune* v. *Kelly*, 14 Fed. Rep. 639, 643. The last case involves this particular substance.

It is urged, however, that the provision relating to the free list is that the articles named therein shall be exempt from duty "unless otherwise specially provided for in this act," (page 602, "free list,") and that tapioca flour is otherwise specially provided for in the act by paragraph 323. We cannot concur in this view. Tapioca flour is not otherwise specially provided for in paragraph 323. It is not mentioned specially nor is it named at all in that paragraph, which uses only general language relating to starch and all preparations from whatever substance produced, fit for use as starch. If tapioca flour be such a preparation it would be included in that general description if not otherwise exempted. But there is no special provision for tapioca flour, making that substance, in terms, dutiable under that paragraph, while in the free list there is a special designation of tapioca, and tapioca flour is tapioca, just as much as either of its other forms, "flake" or "pearl," is tapioca.

It would seem that the language at the beginning of the provision for the free list, that the following articles shall be exempt from duty, "unless otherwise specially provided for in this act," strengthened the argument that tapioca flour, being in fact tapioca in one of its well-known forms, was exempt from duty, because in order not to be exempt the article must be otherwise specially made dutiable. It is not so made dutiable, and is therefore by the clear provision of the act made free of duty. Being in truth tapioca, and com-

mercially known as such, it does not come under the description of starch, although in great part composed of that substance. The commercial designation of an article is the first and most important thing to be ascertained, and governs in the construction of the tariff law when that article is mentioned, unless there is something else in the law which restrains the operation of this rule. *Arthur* v. *Morrison*, 96 U. S. 108; *Arthur* v. *Lahey*, 96 U. S. 112; *Arthur* v. *Rheims* Id. 143; *Robertson* v. *Salomon*, 130 U. S. 412; *Bogle* v. *Magone*, 152 U. S. 623.

The case is not within the principle decided in *Magone* v. *Heller*, 150 U. S. 70. There the contest was between a clause of the tariff act of 1883, providing for a duty upon sulphate of potash, *eo nomine*, and a clause exempting from duty "all substances expressly used for manure." It was held that a kind of sulphate of potash, the only common use of which, either by itself or in combination with other materials, was for manure or in the manufacture thereof, was entitled to free entry, and was not subjected to duty as sulphate of potash. Whether the imported article was at the time of importation "expressly used for manure" in the sense defined in the opinion, was held to be a question of fact, and that the court below erred in denying the collector's request to submit the case to the jury and in directing a verdict for the importer. The term "expressly used for manure," it was said, was equivalent to "used expressly" or "particularly" or "especially" for manure, and if it were found as a fact that the article was so used, it was exempt from duty.

If the statute in this case had said that starch was dutiable, including all preparations from whatever substance produced, expressly intended and fit for use as starch, then tapioca flour, if fit and intended for such use, might be dutiable under the paragraph in question, and not be exempt as a form of tapioca. But when the language is, fit for use as starch, it is so much more general, that it is properly qualified by the subsequent paragraph which exempts tapioca, and consequently tapioca flour, one of its commercially known forms.

Thus far we have proceeded upon the assumption that tapi-

oca flour was a preparation fit for use as starch, and, therefore, dutiable under paragraph 323, unless excepted therefrom by paragraph 730; but we are of opinion that tapioca flour is not a preparation fit for such use within the meaning of the statute. The substance in question is not commercially known as starch, nor as any preparation fit for use as such. In the markets of the United States it is commercially known as tapioca flour, while the term "tapioca" includes precisely the same substance. Its use as starch for laundry purposes is limited to the Chinese on the Pacific coast.

It is not imported into San Francisco by any other than Chinese, nor is it manufactured in this country into the article commonly known as starch, nor is it to any extent used as a substitute therefor, although it is chemically a starch because a large part of it consists of a starchy substance.

Upon the finding and the proofs in this case we are of opinion that this article does not come within paragraph 323. We think the language of that paragraph means any preparation which is so far fit for use as starch as to be commonly used or known as such or as a substitute therefor. This substance does not come within that language as thus construed. The use of the article by the Chinese on the Pacific coast for laundry purposes is so infinitesimally small that it wholly fails to show that it is fit for that use within the meaning of the statute. The evidence in this case is that the attempt to use it for laundry purposes by white laundrymen in California gave such poor results that it was abandoned as a failure.

There is one finding by the Circuit Judge in this case in which it is said that the substance is used in the Eastern States *for starch purposes* by calico printers and carpet manufacturers to thicken colors; also for book binding and in the manufacture of paper; also for filling in painting, and in the manufacture of a substitute for gum arabic and other gums, sometimes for sizing cotton goods, and also as an adulterant in the manufacture of candy in some cases and in other articles. The expression in that finding, that the substance is used in the Eastern States *for starch purposes*, is an inadvertence, because the finding, although it rests upon the evi-

dence as well as upon the agreed statement of facts stipulated between the parties, yet there is nothing in the evidence or in the stipulation to show that the enumerated purposes were starch purposes. In the stipulation it is said that the substance in controversy *is used in the Eastern States by calico printers, etc.* The expression "for starch purposes" does not appear in the agreed statement of facts, and in naming the uses for which the substance is used it would appear that most of them are not what would be ordinarily understood as a starch purpose.

Sizing cotton goods might perhaps be regarded as somewhat of a starch purpose, as starch is sometimes used in that way. The evidence does not show that this use is general, and the expression, fit for use as starch, would not in our judgment include that use. We think it would not in the ordinary acceptation of the term be called a starch purpose. Glue would accomplish much the same purpose and might be used therefor. The use by calico printers and carpet manufacturers to thicken colors is not the ordinary use of starch, nor is it a starch purpose. Nor would its use as an adulterant in the manufacture of candy and other articles be properly described as such a purpose.

Assuming, as counsel for the government claims, and as is undoubtedly entirely true, that the policy shown in the tariff act is protection to American industries, yet the article here in controversy does not and cannot compete with American starch, for any of the purposes for which starch is commonly and ordinarily used in this country. The evidence to that effect, we think, is conclusive.

In *Chung Yune* v. *Kelly*, 14 Fed. Rep. 639, the Circuit Court for the District of Oregon submitted to the jury whether "the article in question," (which was in fact tapioca flour, though imported as sago flour,) "imported and entered by the defendant, is a starch known to commerce as such, and made and intended to be used primarily by laundrymen in the stiffening and polishing of clothes." The jury returned a negative answer, and the court said: "This answer is undoubtedly according to the law and the fact." The

substance was held to be exempt from duty under the tariff act, Rev. Stat. p. 488, as root flour, but the plaintiff was not allowed to recover back the duty which he had paid, because having claimed in his protest that the article was *sago* flour, the court felt compelled to confine him to his specific ground of protest, and consequently the government kept his money, although the importer had in fact imported an article entitled to free entry under the law.

The case of *Townsend* v. *United States*, 14 U. S. App. 413, holds that paragraph 323 of the tariff act of 1890 includes only those preparations which are actually and not theoretically fit for use as starch, and which can be practically used as such, and not those which can be made, by manufacture, fit for such use. Counsel for the government criticises that case as not decided upon the same amount of evidence that has been given in this case upon the question whether the article is or is not fit for use as starch. But in the opinion delivered in the case it is seen that, while not precisely identical, the facts are substantially the same as in the case at bar. The court says the article is used mostly by calico printers and carpet manufacturers to thicken colors and in the manufacture of a substance for gum arabic or other gums; also for the sizing of cotton goods, a purpose for which starch is also used to a certain extent, but the weight of the testimony was in the opinion of the court that it was not used for laundry purposes. We think the same facts appear in the case before us, the use for laundry purposes by a few Chinese on the Pacific coast not being sufficient in extent to enable us to say that it is so used in any but the most minute quantities. It seems to us clear from the finding and from the evidence that the substance is not commercially known by the people in this country as starch nor as adapted to the ordinary purposes of that article, and it has not been manufactured into commercial starch, and is not known and is not fit for use as such.

The Treasury Department has heretofore announced decisions which are entitled to much weight upon the question herein presented. Prior to the tariff act of July 14, 1870,

c. 255, 16 Stat. 256, 268, both starch and tapioca had been made dutiable, sometimes at the same and sometimes at different rates of duty. By the latter act "tapioca, cassava or cassady" were placed in the free list, while "root flour" was placed in the free list in 1872. (17 Stat. 236.) The Treasury Department held tapioca flour entitled to free entry as tapioca. The Secretary said: "It appears, upon investigation, that tapioca is prepared in three forms, namely, flake, pearl and flour, and that these terms do not indicate any substantial difference in the character or quality of the article, but merely indicate its form or appearance." Decisions, Treasury Department, 1887–1890, No. 3161, March 23, 1877.

Under the act of 1883, (22 Stat. 488, 521,) tapioca was continued in the free list, as was also root flour, (page 520,) while starch was made dutiable as potato or corn starch at a certain rate, "other starch two and one half cents per pound." Page 503. The Treasury Department held, July 7, 1883, that tapioca flour was to be admitted free of duty, without regard to the use for which it was ultimately intended, and that the provision in that act for a duty upon "other starch" than potato or corn starch did not cover tapioca flour. Decisions, Treasury Department, No. 5802.

Subsequently to that time various importations had been made of this article, upon which duties had been assessed at the rate of two and one-half cents per pound, as starch, although imported under various names as "sago, sago crude, sago flour, tapioca," etc.

Exemption had been claimed for these articles as coming under the provisions of the free list as "root flour, sago crude and sago flour," and "tapioca, cassava or cassady." The article had been classified by the collector under the tariff act as "other starch," for the reason that it was, as claimed, imported and was actually used as starch by the Chinese laundries throughout the States and Territories. The department, under date of January 11, 1887, again held that "flour made from tapioca, cassava or cassady root may be admitted free of duties, without regard to the use for which it is ultimately intended." Samples of the flour had been submitted to the

United States chemist, who reported that it was "chemically a starch, obtained from the root of Janipha manihut or Jatropha manihot," yet it was considered in its commercial character to be tapioca; it was so returned by the appraiser, and it was directed that the merchandise should be admitted free of duty. Decisions, Treasury Department, 1887–1890, No. 7971, January 11, 1887.

On September 21, 1888, certain so-called flour was imported which the importers claimed to be free of duty, and upon which the collector assessed a duty of two and one half cents per pound under the provisions of the act already mentioned, providing for such a duty on "other starch," etc. Samples of the merchandise in question were submitted to the United States chemist at the port of New York, who found the article to be tapioca starch, and under the department's decisions of July 7, 1883, and January 11, 1887, it was held that flour made from tapioca, although chemically a starch, was to be admitted free of duty under the provisions for tapioca, without regard to the use for which it was ultimately intended. The appeal was allowed, and the collector directed to reliquidate the entry and to take measures for refunding the duties exacted. Treasury Department Decisions, *supra*, No. 9031.

These decisions were principally based upon the provisions of the acts which related to tapioca, (one decision being exclusively upon the tapioca provision,) and although in some cases in which the question as to tapioca arose, the act also provided for the free entry of root flour, the decisions that tapioca flour was entitled to free entry were substantially founded upon the tapioca provision in the act and not upon the root flour item.

Subsequently, when Congress by the act of 1890 omitted root flour from the free list and imposed a duty upon starch and all preparations, from whatever substance produced, fit for use as starch, we do not think that any argument can be drawn therefrom in favor of the construction which would impose a duty on tapioca flour as a preparation fit for use as starch, while at the same time there is a clause in the act providing for free entry of tapioca, the substance tapioca flour being one of its forms. Many other flours might come under

the denomination of root flour which were not specially declared in the act to be free from duty, and the dropping of the root flour from the free list might relegate such flour to the dutiable list. Not so as to tapioca flour which is still found in the free list. The omission of root flour from the free list, therefore, had no effect upon tapioca flour, and if there had been an intention to include it in the dutiable list, especially after these repeated decisions of the Treasury that it was entitled to free admission as tapioca, we cannot but believe that Congress would have expressed that intention with reasonable clearness.

*The judgment of the Circuit Court of Appeals of the Ninth Circuit should be reversed, and that of the Circuit Court for the Northern District of California affirmed, and the case remanded to that court with such directions, and it is so ordered.*

## CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* TOMPKINS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 131. Argued October 31, November 1, 1899. — Decided January 22, 1900.

The State of South Dakota having passed an act providing for the appointment of a board of railroad commissioners, and authorizing that board to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight and cars on the railroads within the State, provided that the maximum charge for the carriage of passengers on roads of the standard gauge should not be greater than three cents per mile; and that board having acted in accordance with the statute, and having published its schedule of maximum charges, the Chicago, Milwaukee and St. Paul Railway Company filed the bill in this case in the Circuit Court of the United States for the District of South Dakota, seeking to restrain the enforcement of the schedule. The railroad commissioners answered fully, and testimony was taken before an examiner upon the issues made by the pleadings. This testimony was reported without findings of fact or conclusion of law. The case went

to hearing. The Judge, without the aid of a master, examined the pleadings and the mass of proof. He made findings of fact and conclusions of law; delivered an opinion; and rendered a decree dismissing the bill. This court is of opinion:

(1) That neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and that the process by which the court came to its conclusion is not one which can be relied upon;

(2) That there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined;

(3) That the better practice would be to refer the testimony, when taken, to the most competent and reliable master, general or special, that can be found, to make all needed computations, and find fully the facts; so that this court, if it should be called upon to examine the testimony, may have the benefit of the services of such master.

On February 3, 1897, the legislature of South Dakota passed an act relating to common carriers. Laws of 1897, c. 110. The act provided for the appointment of a board of railroad commissioners, and by section 20 this board was authorized to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight and cars on the railroads within the State. There was a proviso in the section that the maximum charge for the carriage of passengers on roads of standard gauge should not be greater than three cents per mile. On August 26, 1897, the board of railroad commissioners, having taken the preliminary steps required by the statute in respect to notice, etc., made and published its schedule of maximum charges for the control of all local railroads. On the next day the Chicago, Milwaukee and St. Paul Railroad Company, plaintiff and appellant, filed its bill in the Circuit Court of the United States for the District of South Dakota, seeking to restrain the enforcement of such schedule. The bill alleged generally that the existing rates were fair and reasonable; that those established by the railroad commissioners were unjust and unreasonable; would not only fail to afford the plaintiff adequate compensation for

the services to be performed, but also would operate to deprive it of its property without just compensation. The railroad commissioners filed their answer on October 4, 1897, in which they alleged that the existing rates were extortionate and unreasonably high — in many instances so high as to prohibit the shipment of ordinary products; that the freight rates were much higher than those charged by the complainant company for similar services upon its lines of railway in other and adjoining States, being about ninety per cent higher than the rates charged in the State of Iowa; that the passenger rates were at least twenty-five per cent higher than those charged by the plaintiff over its lines of railway in other States, and much higher than those charged by other railway companies for like transportation in other States. In addition to these matters the answer averred that the plaintiff and the Chicago and Northwestern Railway Company were owners of competing lines of railway, running westerly from Chicago and traversing the States of Illinois, Wisconsin, Minnesota and Iowa; that during the years from 1880 to 1883 as competing companies they constructed their lines of railway into and through that part of the then Territory of Dakota, now the State of South Dakota; that at that time there were no people, business or industry to be accommodated or served by the construction of said lines of railway, and that the construction was not in response to any existing demand for the same, but was for the purpose of preëmpting and occupying the Territory in anticipation of its settlement and development; that a rapid occupation followed such extension of railroad lines, and a large immigration flowed into the Territory; that this rapid immigration ceased in 1884, and that many of the settlers disappeared in the years following, so that in certain portions of the Territory there was almost a depopulation; that going in thus early the plaintiff acquired its right of way, depots and terminal grounds at a substantially nominal cost; that the capitalization of the railroad, in stocks and bonds, was fixed during this period of excitement and rapid immigration, had never been changed, and was extravagantly high. The answer also contrasted the value of

the property as shown by such capitalization in stocks and bonds and that returned by the railroad company to the State for the purposes of taxation. It also averred that the Dakota lines were of much greater earning value to complainant than the mere *pro rata* mileage of the lines in that State would indicate, and that no account had been taken or allowance made for the value to the plaintiff of the long haul business done on other parts of its lines afforded by the interstate business running into Dakota. Upon the issue thus presented by these pleadings testimony was taken before an examiner. This testimony is preserved in the record, and amounts to several hundred printed pages. The examiner simply reported the testimony, without any findings of fact or conclusions of law. The case went to hearing before the District Judge, who, without the aid of a master, examined the pleadings and this volume of testimony, and, on July 20, 1898, rendered a decree dismissing plaintiff's bill. 90 Fed. Rep. 363. Besides delivering an opinion, the court made the following findings of facts and conclusion of law:

"This cause came on to be heard upon the pleadings and proofs at this term and was argued by counsel; and thereupon, upon consideration thereof, the court finds the following facts:

"I. That the value of complainant's property in the State of South Dakota is ten million dollars.

"II. That the fair value of the proportion of complainant's said property assignable to local traffic was, for the year ending June 30, 1894, $2,200,000, and for the year ending June 30, 1895, $2,600,000, and for the year ending June 30, 1896, $2,100,000, and for the year ending June 30, 1897, $1,900,000.

"III. That the gross local earnings of complainant in the State of South Dakota for the fiscal year ending June 30, 1894, was $407,606.35, and for the year ending June 30, 1895, was $330,642.85, and for the year ending June 30, 1896, was $328,105.95, and for the year ending June 30, 1897, was $311,085.42.

"IV. That the local earnings on the complainant's lines under existing tariffs, on the same proportion of the total

value of the roads in South Dakota as the local earnings bear to the gross earnings from all sources in South Dakota, were: For the year 1894, 18.5 per cent; for the year 1895, 12.7 per cent; for the year 1896, 15.6 per cent; for the year 1897, 16.3 per cent.

"V. That applying the schedule of rates sought to be enjoined in this action to the local traffic during the years above mentioned, on the same method of calculation, the value of complainant's property assignable to local traffic would be for the years ending June 30, 1894, $1,900,000; June 30, 1895, $2,300,000; June 30, 1896, $1,800,000; June 30, 1897, $1,600,000.

"VI. Under the commissioners' schedule the gross earnings from local traffic would have amounted to the sum of $342,381.98 for the year ending June 30, 1894, and $277,518.40 for the year ending June 30, 1895, and $275,607.79 for the year ending June 30, 1896, and $261,295.21 for the year ending June 30, 1897.

"VII. That these earnings for the fiscal year 1894 would equal 18% of the value thus ascertained, and for the year 1895 would equal 12.1%, and for the year 1896 would equal 15.3%, and for the year 1897 would equal 16.2%.

"VIII. That owing to the small difference between the percentage earned under the complainant's schedule of rates and fares and the commissioners' schedule of rates and fares for the four years prior to the commencement of this suit, and owing further to the amount of the percentages which would have been earned during said four years under the commissioners' schedule, the court is unable to find beyond a reasonable doubt that the local earnings under said commissioners' schedule would not during the years aforesaid have earned the reasonable cost of earning said local earnings and some reward to the owner of the property over and above said cost of operation.

"IX. That the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was.

"X. As a conclusion of law the court finds that the enforcement of the proposed schedule of reasonable maximum rates

and fares will not deprive the complainant of its property without due process of law or deprive it of the equal protection of the laws, or operate to take the property of complainant for public use without just compensation."

From the decree thus entered the plaintiff took its appeal to this court.

*Mr. A. B. Kittredge* and *Mr. George R. Peck* for appellant.

*Mr. T. H. Null* and *Mr. John L. Pyle* for appellees. *Mr. W. O. Temple* was on their brief.

Mr. Justice Brewer delivered the opinion of the court.

Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. *Railroad Commission cases*, 116 U. S. 307;

*Dow* v. *Beidelman*, 125 U. S. 680; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Chicago, Milwaukee & St Paul Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649; *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466.

It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates.

In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld.

Such being unquestionably the law, it is obviously of the

utmost importance that the facts shall be clearly and accurately found and distinctly stated by the trial court, and that those facts shall sustain the conclusion reached.

We are of opinion that neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and we are also of opinion that the process by which the court came to its conclusion is not one which can be relied upon. The court proceeded upon the theory that a comparison of the actual gross receipts of the company from its South Dakota local business with those which it would have received if the rates prescribed by the defendants had been in force was sufficient to determine the question of the reasonableness of these latter rates, and instituted such comparison with respect to the four years preceding the commencement of this suit. Now, it is obvious that the amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable. The gross receipts may be large, but if the expenses are larger surely the business is not profitable. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its receipts.

In the light of these general and obvious propositions we proceed to examine the computations and reasoning of the court. For reasons which will be apparent hereafter we do not stop to inquire whether its findings are correct deductions from the testimony, but take them as they are stated. It may be premised that the books of the plaintiff, showing its business for the four years, were examined, and so much as was deemed necessary admitted in evidence. From those books was disclosed with mathematical accuracy the gross receipts of the company on all its business in all the States during each of the four years and the actual cost of doing that business

during each of those years; also the gross receipts from the business done in South Dakota, and separately the amount which was received in that State from interstate business and that from local. If the schedule of rates prescribed by the defendants had been in force during the four years, and the same amount of business had been done by the company, the reduction in gross receipts from the passenger business would have been fifteen per cent, and from the freight business seventeen per cent. Of course, the cost of doing the business would be substantially the same. The court found the value of the plaintiff's property in South Dakota to be $10,000,000, although, according to the testimony, it was bonded for over $19,000,000. It held that it was not fair to consider that sum, $10,000,000, the value of the property employed in doing local business, for it was also used in doing interstate business; and that the true way to determine the value of the property which could be regarded as employed in local business was by dividing the total value of $10,000,000 in the same proportion that existed between the amount of gross receipts from interstate business and that from local business, each of which amounts was, as we have seen, accurately shown by the testimony. Upon that basis of division it found that the value of the company's property employed in local business was for the first year, $2,200,000; the second year, $2,600,000; the third year, $2,100,000; and the last year, $1,900,000, and also that the gross receipts from local business were for the first year, 18.5 per cent of the valuation; for the second year, 12.7 per cent; for the third year, 15.6 per cent, and for the last year, 16.3 per cent. In other words, for these several years the company received as compensation for doing its local business the per cent named of the real value of the property used in doing that business. Then, proceeding on the supposition that the defendants' schedule had been in force and the rates reduced as therein prescribed during these four years, it divided the valuation of $10,000,000 on the like proportion of the receipts from interstate business to the receipts from local business as thus diminished, and upon such division found that the valuation of the plaintiff's property engaged in local

business would have been, for the first year, $1,900,000; for the second year, $2,300,000; for the third year, $1,800,000; and the last year, $1,600,000; and upon such basis that the gross receipts from local business would have amounted to 18 per cent of the value of the property for the first year, 12.1 for the second, 15.3 for the third, and 16.2 for the last. Upon this it held that the difference between the per cent of receipts in the two cases was slight, and that there was no change in what may rightfully be called the earning capacity of the property sufficient to justify a declaration that the reduced rates prescribed were unreasonable. In other words, it was of the opinion that the earning capacity was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

But that there was some fallacy in this reasoning would seem to be suggested by the fact that although the defendants' schedule would have reduced the actual receipts 15 per cent on the passenger and 17 per cent on the freight business, the earning capacity for the last year was diminished only one tenth of one per cent. Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one fifth of what they had been, so that instead of receiving $500,000 the company only receives $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth

of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one fifth of what they were, the earning capacity is three fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that employed in local business — six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced.

Again, in another way, the error of the court's computation is manifested. The testimony discloses that the operating expenses of the entire system during each of the four years were over 60 per cent of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts. Reduce the gross receipts 15 per cent — and the reduction by the defendants' rates was 15 per cent on passengers and 17 per cent on freight business — it would leave only 25 per cent of the gross receipts as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But the testimony shows that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent of the gross receipts (and there was testimony tending to show that it was as much if not more) then a reduction of 15 per cent in the gross receipts would leave the property earning nothing more than expenses of operation. These computations show that the method which the court pursued was erroneous, and that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by the defendants were unreasonable or not.

But here we are confronted by the ninth statement in the findings of fact, to wit, "that the court is unable to find from

the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was." If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by court and jury in respect to which mathematical accuracy is not possible. Take the ordinary case of condemnation of real estate, the value is to be determined by the trial tribunal, whether jury or court, and yet no one is able to state the exact value. In this very case the court fixed the value of the company's property in South Dakota at $10,000,000, and yet it is impossible from the testimony to say that this conclusion was absolutely accurate, that there was testimony tending to show to a dollar such value. Beyond the figures given from the books of the company of the actual cost of doing the total business of the company there was the testimony of several experts as to the relative cost of doing local and through business. Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy. Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same, but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from main to side tracks

is greater; there are the wages of the employés at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true when there are two separate trains, it is more so when the same train carries both local and through freight. It is impossible to distribute between the two the relative cost of carriage. Yet that there is a difference is manifest, and upon such difference the opinions of experts familiar with railroad business is competent testimony, and cannot be disregarded.

We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined.

The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts, deduce the proper conclusion?

It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth* v. *Ames*, *supra*, a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony,

making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests.

We are aware that the findings made by the master may be challenged when presented to the trial court for consideration, and it may become its duty to examine the testimony to see whether those findings are sustained, as likewise if sustained by the trial court it may become our duty to examine the testimony for the same purpose. But before we are called upon to make such examination we think we are entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court. As we have said, those findings may not be challenged by either party, and if so a large burden will be taken from the appellate court.

*For these reasons we not merely reverse the decree of the trial court but also remand the case to that court with instructions to refer the case to some competent master to report fully the facts, and to proceed upon such report as equity shall require.*

# DICKERMAN *v.* NORTHERN TRUST COMPANY

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

No. 33. Argued April 5, 6, 1899. — Decided January 22, 1900.

A mortgage, given to secure a large number of bonds, provided that the bonds should become payable if any execution should be sued out against the property of the company, and such company should not forthwith pay the same. A bondholder brought suit before a justice of the peace upon six coupons. The defendant company consented to a judgment and to the issue of an execution; and upon the same day the trustees gave notice that, by reason of such execution having been unpaid, they declared the principal and interest upon all the bonds to be immediately payable; and at once took possession of the property. *Held:* That, while these proceedings were taken by connivance and consent of the parties, they were not collusive in a legal sense, as the debt was honestly due and the plaintiff entitled to the judgment. *Held, also:* That while the judgment was obtained for the obvious purpose of enabling the trustees to declare the mortgage to be due, the court would not inquire into the motives of the parties.

Where a bill is filed to foreclose a mortgage, and the answer admits the bonds secured by such mortgage to have been issued, it is not necessary that the bonds should be put in evidence before a decree of foreclosure and sale.

Bonds payable "to the bearer, or, when registered, to the registered owner thereof," and declared to be due on or before a certain date, are negotiable, though redeemable by instalments determined by annual drawings.

The fact that the mortgagor corporation may have been organized for the purpose of creating a trust or unlawful combination in restraint of trade, is no defence to the mortgage.

The fact that such corporation was organized in pursuance of a fraudulent scheme to defraud certain stockholders who had contributed their properties to the capital stock of the corporation, is no defence to a foreclosure of the mortgage, so far, at least, as the bonds were held by parties innocent of the fraud.

Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders.

THIS was a bill in equity filed in the Circuit Court for the Northern District of Illinois by the Northern Trust Company,

a corporation organized under the laws of Illinois having its principal office in Chicago, and Ovid B. Jameson, a citizen of the State of Indiana, as trustees, against the Columbia Straw Paper Company, a corporation organized under the laws of the State of New Jersey, to foreclose a trust deed of some thirty-nine paper mill properties, leaseholds and water powers, situated in thirty-two different counties and in nine different States. This deed, which was dated December 31, 1892, was given to secure the payment of one thousand bonds of the paper company of one thousand dollars each, with coupons bearing interest at six per cent per annum, payable half yearly. These bonds were issued and delivered to one Emanuel Stein, in part payment for the properties acquired by it from him.

The bill, which was in the ordinary form of a foreclosure bill, averred that by the terms of the bonds it was agreed by the paper company that it would redeem, on the first day of December, 1893, one hundred of such bonds, and annually thereafter until December 1, 1901, a similar number, and that the principal of such bonds should become due, if the paper company should make default for a period of three months in the payment of any interest, and an election so to do were given in writing; that by the terms of the mortgage or deed of trust, it should become enforceable, provided default were made in the payment of any one of the bonds which had become due and payable for one month thereafter; or, if default should be made in the payment of interest on any of such bonds, or in the performance of any of the covenants or conditions in the bonds or mortgage, and such default should continue for three months after written demand for payment or performance by the Trust Company, or if a judgment or order should be made, or any effective resolution adopted by the paper company for the winding up of such company, "or if a distress, attachment, garnishment or execution be respectively levied or sued out against any of the chattels or property of either company, and such company shall not forthwith upon such distress, attachment, garnishment or execution being levied or sued out, remove, discharge or pay such distress, attachment, garnishment or execution."

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The bill alleged as the only grounds for enforcing the security of the mortgage, (1) that the mortgagor had made default in redeeming or discharging the several amounts of bonds designated in the mortgage and bonds for redemption; (2) in failing to pay certain instalments of interest; and (3) in failing to pay a certain execution sued out on January 22, 1895, against the property of the company upon a judgment obtained against it by one James Flanagan before a justice of the peace of Cook County, Illinois. That by reason of such default complainants had declared the principal and interest of the bonds to be immediately due and payable.

The bill contained the usual prayer for foreclosure and sale, and for a receiver and an injunction against disposing of any of the mortgaged property. The trustees having taken possession of the property, a receiver was appointed by consent of the company upon the same day the bill was filed.

The answer of the paper company admitted the material allegations of the bill, averred its inability to pay its debts, and asserted that the property covered by the mortgage was worth much more than the amount of the bonds and the indebtedness of the company.

A few days thereafter Dickerman, together with others, filed a petition setting forth that they, with other stockholders of the defendant company, had been injured by the wrongful and fraudulent manner in which its securities had been issued; that the defendant and its defence were under the control and direction of the bondholders and their trustees; that the directors were not fitted to conduct the suit by reason of their adverse interests, and prayed to be made defendants and be allowed to plead, answer or demur to the bill, and to file a cross-bill. This was allowed.

Thereupon petitioners filed their answer admitting the execution of the bonds and mortgage, but denying that the bondholders were entitled to the benefit of the trust created by the mortgage; denied that all of the one thousand bonds were duly issued, negotiated and sold, or that they were outstanding and valid obligations of the mortgagor; and also denied that all of such bonds and coupons had come into the posses-

sion of, or were held by, persons who had become the owners thereof in good faith and for a valuable consideration.

They further set forth in great detail the manner in which the combination had been formed in the summer of 1892, to purchase seventy paper mills with their plants, appliances and good will, by means of securing from their respective owners option contracts whereby each owner agreed to sell his property to the combination for a stated sum in cash, and the residue in the capital stock of the corporation to be organized, to which the seventy paper mills, with their properties, etc., were to be conveyed; that the corporation so to be formed was to be capitalized at $3,000,000 of common and $1,000,000 of preferred stock, to be issued at par, in part payment for the mills at the option prices so obtained, until the whole amount was exhausted, and that in such contingency the corporation so to be organized was to have the power to issue $1,000,000 of its bonds to complete the payment for said mills; that after options had been obtained upon thirty-nine mills, the total purchase price of which was $2,788,000 in cash, stock and notes the parties met to consider them, and decided that it would be necessary to provide $1,000,000 to purchase the property and furnish the running capital; that the combination thereupon caused the option contracts to be transferred to one Emanuel Stein, and then arranged to divide up and to fraudulently appropriate to themselves $2,113,000 of the capital stock of the proposed corporation, which would not be required to pay for the thirty-one mills which were left out of the combination.

That after having arranged how many of the one thousand mortgage bonds of the new corporation each member of the combination was to receive for an equal amount in cash, and how many shares of preferred and common stock each was to receive gratuitously with bonds, they caused articles of incorporation to be filed December 6, 1892, in the State of New Jersey, to organize the paper company with a capital stock of $4,000,000, with themselves and their agents as directors. That on December 14, 1892, they procured Stein, who held the option contracts for the purchase of the thirty-nine mills,

Statement of the Case.

to present to the stockholders a proposition to secure the titles to the thirty-nine mills, and to convey the same to the new corporation for $5,000,000, as follows: $1800 in cash; $1,000,000 in first mortgage bonds; $1,000,000 in preferred and $2,998,200 in the common stock of the new company; that this proposition was accepted by the stockholders and also by the directors, and the property conveyed to the company; the bonds and capital stock divided among the members of the combination, as had been previously arranged, and that such persons still owned and were still liable for their capital stock in a much larger amount than the bonds of the company; and that the latter were owned by the same persons, who were liable on their stock. That the Columbia Straw Paper Company having been organized for the purpose of taking such conveyances, and thus consolidating said mill plants, their contention was, that by reason of fraudulent overvaluation of the various mill plants and properties upon which options of purchase had been taken, a defence in the nature of a set-off existed in favor of the company against such bondholders as were also stockholders to the extent of the unpaid part of the stock held by them.

The answer also contained an averment that the judgment and execution in favor of Flanagan before a justice of the peace was a fraudulent and collusive act on the part of the managers of the defendant company, in order to give the trustees the right to begin this foreclosure proceeding; that in pursuance of this the directors had fraudulently neglected and refused to pay six interest coupons on the bonds owned by Flanagan, in order that a suit might be instituted thereon; that the defendant corporation appeared upon the return of the summons, consented to an immediate trial, made no defence, but allowed judgment to be entered and an execution to issue on the same day, and that the firm of lawyers who had devised this proceeding acted as solicitors for the trustees in filing the bill of foreclosure. It was denied that the Straw Paper Company was insolvent, and was averred that the complainants and others had combined to wreck the company and defraud the defendant stockholders by withdrawing from

the treasury of the company bonds and stock to the value of $3,000,000, which the complainants held in trust for the company, and that the same are assets and not liabilities, as in the bill of complaint alleged.

Defendants also filed a cross-bill for an accounting in respect of the transactions complained of, especially in reference to the issue of the alleged mortgage bonds and the preferred and common stock; and if, on such accounting, anything should appear to be due from any of the defendants to the Straw Paper Company, a decree might be entered for the payment of the same, and that the receiver theretofore appointed might be removed and a proper and practical person be appointed receiver in his stead, with power to take possession of the property, as well as of the books, papers and writings of the Columbia Straw Paper Company, and that an injunction issue restraining the officers and directors of the company from interfering with his possession. The cross-bill was subsequently stricken from the files.

Defendants later amended their answer, alleging that the bonds and mortgage were part of an illegal scheme to create a monopoly, regulate prices and prevent competition among the mills purchased, who had, prior to the consolidation, been in active competition with each other.

The case was referred to a master to take proofs and report the testimony. He reported that the material allegations of the bill were sustained by the proofs; that all of the one thousand bonds, set up in the bill, were negotiated and sold and were outstanding and valid obligations of the company; that the company made default in redeeming the first one hundred bonds, maturing December 1, 1893, as well as one hundred and five bonds maturing December 1, 1894; that the company also made default in the payment of interest upon its bonds due June 1, and December 1, 1894, though the same was duly demanded; that by reason thereof, and of the execution obtained by Flanagan, the complainants declared the principal and interest of the entire issue to be immediately due and payable; that they had been requested in writing by the holders of more than one third of the bonds to enforce the provisions of

the deed of trust; that the company had been for some time and was still insolvent; that at the date of the report there was due upon the bonds, principal and interest, $1,249,632.86; that the contention of the defendants, that the bonds were not issued and outstanding, was not supported by the testimony; that the contention, that the stock of the company, which passed into the hands of Emanuel Stein by virtue of his contract with the company, was not fully paid-up stock, was also not supported; that as a matter of fact such stock was received by Stein as fully paid stock, and that as a matter of law no question in regard to it between the stockholders of the company could be inquired into in this proceeding. He further found that there were no creditors of the company except those represented in this suit.

The defendant stockholders, who were complainants in the cross-bill, filed exceptions to this report, which, upon a hearing by the court, were overruled, and a decree of sale *nisi* entered in favor of the original complainants. *Northern Trust Co.* v. *Columbia Straw Paper Co.*, 75 Fed. Rep. 936. On appeal to the Circuit Court of Appeals for the Seventh Circuit the decree of the Circuit Court was affirmed. 53 U. S. App. 270. Whereupon the appellants applied for and were granted a writ of certiorari from this court.

*Mr. Otto Gresham* and *Mr. John S. Cooper* for Dickerman.

*Mr. Louis Marshall* for the Trust Company. *Mr. Charles A. Dupee* and *Mr. Monroe L. Willard* were on his brief.

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

This case presents primarily the question whether a minority of the stockholders of a corporation have a right to intervene in the foreclosure of a mortgage upon the corporate property for the purpose of showing that the property was sold to the corporation by the connivance of the mortgagees at a gross overvaluation, and to compel the bonds held by them to be

subjected to a set-off of their indebtedness to the corporation for unpaid stock.

It should be borne in mind in connection with the several defences set up by the intervenors that they do not appear here in the capacity of creditors, but as stockholders; that their rights are the rights of the corporation and must be asserted and enforced through the corporation, and upon the theory that the latter has or threatens, by collusion or otherwise, to neglect the proper defence of the foreclosure suit. *Dodge* v. *Woolsey*, 18 How. 331, 341, 343; *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715; *Bronson* v. *La Crosse &c. Railroad*, 2 Wall. 283; *Davenport* v. *Dows*, 18 Wall. 626; *Dewing* v. *Perdicaries*, 96 U. S. 193; *Hawes* v. *Oakland*, 104 U. S. 450, 460; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Detroit* v. *Dean*, 106 U. S. 537; Cook on Stockholders, §§ 645, 659, 750.

There are several preliminary objections made by the intervenors to this foreclosure which require to be disposed of before entering upon the proper merits of the case. They are —

1. That the bonds were not due. This in a certain sense is true. The bonds were peculiar in this respect: There was no date fixed for their maturity, but there was a provision that on the first day of December, 1893, and upon the same date in every succeeding year, the company would redeem a certain number of bonds to be ascertained by drawings made under the direction of the Northern Trust Company in the month of November in each year. That immediately after such drawing the company should cause the numbers of the bonds drawn for redemption to be published in New York and Chicago newspapers, and that every bond so drawn should become redeemable on the first day of December next thereafter. There was no evidence that any such drawing was ever made, and the Trust Company did not institute their foreclosure proceedings upon the theory that any of the bonds, by their terms, had matured.

There was, however, a provision that the mortgage should become enforcible, if the trustees should declare the princi-

pal and interest upon the bonds to be immediately payable, after any execution should be levied or sued out against the chattels or property of the company, and such company should not forthwith, upon such execution being levied or sued out, remove, discharge or pay the same.

It appears that one James Flanagan, who was a bondholder, brought suit against the company on January 22, 1895, upon six coupons. The action appears to have been brought directly or indirectly through the legal firm who were also counsel of the defendant company. Summons was issued, returnable January 28, 1895, and served upon the president of the company at five o'clock P.M. on the day it was issued (22d). On the same afternoon, the president appeared before the justice of the peace and consented to an immediate trial, which resulted in a judgment for $180. Execution being sworn out, it was issued and placed in the hands of the constable at about half-past five o'clock of the same day. Later on the same day the trustees gave notice to the company that by reason of such execution having been unpaid, they declared the principal and interest upon the one thousand bonds named and described in the trust deed to be immediately payable, and upon the same night the trustees took possession of the property of the company in the vicinity of Chicago, the officers and agents of the company making no resistance. It also appeared that the president of the company had been in consultation with the attorneys of the trustees about foreclosing the mortgage and taking possession of the property, for several days prior to January 22.

Upon this state of facts the master, to whom the case was referred, reported that the contention of the defendants, that the procurement of the Flanagan judgment was the result of a collusion of the company, was not supported by the testimony. This was also the opinion both of the Circuit Court and of the Court of Appeals.

We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the principal and interest of

the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is defined by Bouvier as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law," and in similar terms by other legal dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one. In *Morris* v. *Tuthill*, 72 N. Y. 575, which was also a suit to foreclose a mortgage, the court observed: "The facts that the assignor of a mortgage and his assignee acted in concert with a view unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defence to an action to foreclose a mortgage. So, also, the the facts that the assignee took title from motives of malice, and solely with the view to bring an action, and that the assignor assigned from a like motive, and without due consideration, furnish no defence, and do not impeach plaintiff's title. It is sufficient to sustain the action that the mortgage debt is due, has been transferred to and is owned by plaintiff; and the mortgagor can only arrest the action by paying or tendering the amount due."

If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defence to a foreclosure that the mortgagee was animated by hostility or other bad motive. *Davis* v. *Flagg*, 35 N. J. Eq. 491; *Dering* v. *Earl of Winchelsea*, 1 Cox Ch. 318; *McMullen* v. *Ritchie*, 64 Fed. Rep. 253, 261; *Toler* v. *East Tenn. &c. Railway*, 67 Fed. Rep. 168.

Now, in this case there is no doubt that Flanagan's claim was an honest one; that the coupons upon which he brought the suit were due and unpaid, and there is nothing to show that he would not have been entitled to a judgment upon them if the defendant had made a contest. The company was notoriously insolvent. Its coupons for 1894 and 1895 were unpaid. All its property was subject to the mortgage given to secure its bonds. It could no longer continue its business. Flanagan had a perfect right to bring suit, and under these circumstances the president of the company was guilty of no wrong in consenting to a judgment and to the immediate issue of an execution. The company was not bound to defend if there were no defence. The forms of law were complied with. It would doubtless have been more seemly if judgment had not been entered until the return day of the summons, if the execution had not issued until the expiration of the twenty days allowed by law, and if the trustees had not been so alert in seizing upon the non-payment of the judgment as an excuse for declaring the principal and interest of the bonds to be due. But this haste did not render the judgment or execution void. If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of stockholders cannot question their right to do so. The fact that the Flanagan action was undertaken for the purpose of enabling the trustee to declare the principal and interest due does not invalidate the proceeding so long as there was a debt due, an action properly conducted to recover it, and the object to be gained was not an illegal one.

The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the

question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. *McDonald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, 7 How. 198; *Barney* v. *Baltimore*, 6 Wall. 280; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Crawford* v. *Neal*, 144 U. S. 585.

The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in the Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the court was held. *Cheever* v. *Wilson*, 9 Wall. 108, 123; *Briggs* v. *French*, 2 Sumn. 251; *Catlett* v. *Pacific Ins. Co.*, 1 Paine, 594; *Cooper* v. *Galbraith*, 3 Wash. 546; *Johnson* v. *Monell*, Wool. 390. So, also, in cases where a surety attacks a judgment against his principal upon the ground that it was obtained for the purpose of defrauding him, it must be made to appear either that no debt existed against the principal, or that the amount was grossly exaggerated for the purpose of defrauding the surety. *Parkhurst* v. *Sumner*, 23 Vermont, 538; *Annett* v. *Terry*, 35 N. Y. 256; *Dougherty's Estate*, 9 Watts & S. 189; *Thompson's Appeal*, 57 Penn. St. 175; *Willard* v. *Whitney*, 49 Maine, 235; *Pierce* v. *Jackson*, 6 Mass. 242; *Great Falls Mfg. Co.* v. *Worster*, 45 N. H. 110; *Berger* v. *Williams*, 4 McLean, 577; *Feaster* v. *Woodfill*, 23 Indiana, 493. So, too, it has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. *Bloxam* v. *Met. Railway*, L. R. 3 Ch. App. 337; *Seaton* v. *Grant*, L. R. 2 Ch. App. 459; *Elkins* v. *Camden & Atlantic Railroad*, 36 N. J. Eq. 5.

In this connection it is claimed that the Trust Company was premature in declaring the principal and interest of the mortgage to be due, although the mortgage provided that such declaration might be made if the company should not "forthwith," upon execution being sued out, discharge or pay it. It is insisted that the company was entitled to a reasonable time in analogy to certain cases which hold that in insurance companies the word "forthwith" carries this signifi-

cance. But "forthwith" is defined by Bouvier as indicating that "as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term. It varies, of course, with every particular case." In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours. Anderson (Law Dict.) says of the word that it "has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done." There are many cases which turn upon the question whether a person was not too late in complying with a requirement that a thing must be done forthwith, but we can recall none where he has been held in default for doing such act too speedily, and as the corporation in this case made no objection to an instant declaration by the trustees that they would treat the principal and interest of the mortgage as due, it was not within the power of the appellants to set up the fact that they acted with too great haste. It is one of those matters within the discretion of the directors, and we do not think the appellants are in a position to impugn their judgment. *Railway Co.* v. *Alling*, 99 U. S. 463, 472; Cook on Stockholders, § 750. Possibly the mortgagor or the unsecured creditors of the mortgagor might have had some reason to complain, but, so far as the mortgagees are concerned, the action seems to have been taken in their interest and to have redounded to their benefit.

2. That the bonds were not put in evidence prior to the decree of foreclosure and sale. This objection is unsound. The foreclosure suit was by mortgagees in possession. The bill averred and the answer of the company admitted the issue of one thousand bonds of one thousand dollars each, with the accompanying interest coupons, and the answer of the intervenors admitted that these bonds were issued and certified by the Trust Company, and only denied that *all* of them were duly issued, negotiated and sold, and that they were valid and outstanding obligations. The testimony for both parties showed that the entire number were certified and issued by the company, and the master also made a finding to the same effect. He also found that they were valid

obligations of the company, and that there was due thereon $1,249,632.86. Given the number of bonds and coupons, the amount due was a simple matter of mathematical computation. No further proof was required to justify a decree of foreclosure and sale. Nothing could be gained by an order to produce the bonds before the master prior to such decree. The complainants were trustees under the mortgage, and had no personal interest in the bonds, but held the legal title to the mortgage, which they were foreclosing for the benefit of others. This power was expressly given them by the mortgage. It was sufficient to prove that the bonds were valid and were outstanding obligations of the company, and it was not necessary to show in whose hands they were or to require their production. Indeed, an order to that effect could only result in delaying a decree indefinitely, since in cases of corporate mortgages the bonds are often widely scattered, owned in foreign countries, or by persons totally ignorant that a suit for foreclosure is in progress. Months and even years might be required to produce them all. The practice has been to order a decree for foreclosure and sale without their production. *Guarantee Trust Co.* v. *Green Cove Railroad*, 139 U. S. 137, 150; *Toler* v. *East Tenn. &c. Railway Co.*, 67 Fed. Rep. 168, 180.

When, after a sale, the case is referred to a master for proof of claims against the proceeds of sale, they must of course be brought into court for payment and cancellation, and the title of each holder must then be proved.

3. That the bonds were not negotiable. This objection is also unsound. The bonds were payable "to the bearer, or, when registered, to the registered owner thereof;" were declared to be due on or before December 1, 1901, and were redeemable by annual drawings conducted under the supervision of the Trust Company. It was not known which bonds it would redeem in any one year, as this was to be determined by drawings; but its promise was to redeem all of them before December 1, 1901. Considering the nature of corporate bonds, and the difficulty of redeeming so large a number and amount upon any one day, we do not think the fact that they were

redeemable by instalments, determined by drawings, impaired their negotiability. Promissory notes much more indefinite as to their time and payment have been held to be negotiable, *Stevens* v. *Blunt*, 7 Mass. 240; *Goodloe* v. *Taylor*, 3 Hawks, 458; *Cota* v. *Buck*, 7 Metc. 588; and in *Goshen &c. Turnpike Road* v. *Hurtin*, 9 Johns. 217, it was held directly "that a promise in writing to pay a certain sum" in such manner and proportion, and at such time and place, as he shall from time to time require, is a promissory note.

It is at least doubtful whether the fact that these bonds were or were not negotiable is a material one; but assuming it to be such, we think they were negotiable within the meaning of the law.

4. That the Circuit Court should have allowed the answer to be amended for the purpose of showing that the organization of the defendant company, and the execution of the bonds and mortgage, were parts of a scheme to form a trust or unlawful combination in restraint of trade. After the answer of the defendant company and the original answer of the appellants — who had been admitted as defendants by leave of court — were filed, and all the proofs had been taken, appellants filed an amendment to their answer, setting up that the bonds and mortgage were parts of a combination or trust in restraint of trade, and in direct violation of the act of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," and also in violation of the act of the general assembly of Illinois "to provide for the punishment of persons, partnerships or corporations forming trusts, pools and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891. The answer set out the facts at length, averring that there were seventy mills engaged in the manufacture of straw paper, all in competition with each other, and that the company obtained control of forty of the mills and operated sixteen. This amended answer was filed without objection from court or counsel, and still remains as part of the pleadings in the case.

Prior, however, to this amendment being filed, and on January 10, 1896, Charles A. Miller filed his petition to be

made a party defendant and to set up the trust or monopoly defence. His petition, which sets out with great particularity his theory of a trust, was with its affidavits and all the testimony in the case submitted to the court, carefully examined and finally denied.

But admitting everything that can be claimed for the combination in this connection, we do not see how it can affect materially the foreclosure of this mortgage. If this were a proceeding in *quo warranto* to attack the organization of the corporation, or an indictment under the statute of Illinois, or an action against a member of the combination to enforce any of the provisions of the original contract, the validity of such contract would become an important question. But in a suit to foreclose a mortgage upon the property of the concern, it is difficult to see how the purpose for which the corporation was originally organized can become a material inquiry. So long as the corporation existed, it had the power to create a mortgage, and when that mortgage became due the trustee had a right to foreclose. This trustee was no party to the alleged combination, and the fraud, if any existed, was wholly extrinsic to the mortgage. It would seem a curious defence if a mortgagor could set up against the mortgage that the property covered by it was used for an illegal purpose unknown to the mortgagee, as, for instance, gambling, and therefore that the mortgage was invalid.

5. That the court erred in holding that the evidence did not support the contention of the petitioners, that there is a liability, enforcible in this cause, against the bondholders holding stock that is not paid for, to the Columbia Straw Paper Company, amounting to $2,113,000, and which indebtedness should be set off against the indebtedness on each bond. This proposition involves the real merits of the case. The gravamen of the petitioners' contention is that the bondholders should be held for the difference between the amount paid by Stein for the thirty-nine mill properties, namely, $1,887,000 of stock, and the amount for which he subsequently turned them over to the paper company, namely, four millions of dollars in stock, the difference being $2,113,000.

In support of this contention petitioners introduced evidence of the following facts:

In October, 1892, there were about seventy straw paper mills doing business in the Northwestern States, and having a practical monopoly of the manufacture of straw paper.

Some efforts had been made to combine them in a single corporation, but they had proven unsuccessful, when, in February, 1892, the scheme was revived by one Stein, who represented a firm of New York capitalists; certain other capitalists in Buffalo, who were represented by one Beard, and still others in Chicago.

As the result of certain conferences between Stein and some others who had previously endeavored to obtain options, Philo D. Beard and Thomas T. Ramsdell undertook to obtain options for the purchase of these mills, to be turned over to a corporation to be organized by Beard and Ramsdell with a capital stock of $4,000,000. The options did not specify the number of mills that were to join, although it seems to have been understood that the entire seventy were to be gotten in if possible, but as a matter of fact Beard and Ramsdell obtained options upon only thirty-nine. The options show clearly that it was intended to turn the properties over to the new corporation. For these properties they agreed to pay $2,788,000, part in cash ($766,000), part in preferred stock ($629,000), part in common stock ($1,258,000) and part in notes ($135,000) of the new company. The stock payments thus aggregated $1,887,000.

Instead of calling the mill owners together and organizing a new corporation, Beard and Ramsdell turned over the options to Stein; and articles of incorporation were drawn by a member of the New York firm under the laws of New Jersey, which were executed by Beard, one Taylor, a clerk in the office of the New York firm, and one Heppenheimer, a New York lawyer residing in New Jersey, each of these subscribing for four shares, aggregating twelve shares out of a total issue of 40,000 shares. These articles of incorporation were filed in the office of the Secretary of State on December 6, 1892. The three incorporators met immediately in Hoboken as stockholders, and elected themselves as directors with six

others, two of whom were members of the New York firm, and the others clerks in their office. Not a single mill owner who expected to become a stockholder was placed on the board at this time, although representations had been made by the syndicate that a majority of the stockholders would be mill owners. Philo D. Beard was elected president and Samuel H. Guggenheimer secretary.

Immediately thereafter, and on December 10, 1892, Stein, who held all the options, assuming to act as an independent owner, though he had obtained the options for the benefit of the company, and had promised to pay for them in the stock of the company, made a proposition in writing drawn by a member of the New York firm to this board of directors to sell the thirty-nine mills to the paper company for $5,000,000, being an advance of $2,113,000 over what he had agreed to pay for them. This proposition was drafted by the New York firm, and the stockholders upon the day the proposition was received had another meeting and instructed themselves as directors to accept. They authorized Beard as president to enter into a contract with Stein, which was accordingly done. Stein and wife acknowledged it before a clerk in the office of the Chicago firm.

This board of directors served for only two weeks, when they were succeeded by another board composed of Beard, Stein, Heppenheimer and others mostly in their interest.

For the next month the members of the Chicago firm were busy in getting the mill owners to deposit their title deeds and abstracts, but nothing appears to have been said to them of what had occurred in New York. The New York firm engaged itself in raising money to pay for the bonds, and deposited over $800,000 with the Trust Company, to be disbursed to the mill owners, which money should be checked out by its personal agent, who proceeded to make settlements with the mill owners and take over their properties by giving cheques payable to Stein, who indorsed them over. Stein testified that he did not understand the plan, but left everything to an agent to attend to, though it involved Stein paying out one million in cash and four millions in stock. The

principal parties in interest did not seem to trust Stein, and attended to the payment of the purchase price themselves.

It appears that 957 shares of preferred and 4441 shares of common stock went directly into the hands of Beard; 859 shares of the preferred and 4357 shares of common stock to the New York firm; to the friends of this firm 420 shares of preferred and 840 shares of common stock; to the Chicago firm, 172 shares of preferred and 515 shares of common; to a trustee, 1110 shares of preferred and 2232 shares of common; to Stein, himself, 270 shares of preferred and 2377 shares of common. No money consideration passed from Stein or from any of these parties to the company for any of this stock.

It thus appears that the syndicate received 3788 shares of preferred and 14,751 shares of common stock from the treasury of the company, aggregating 18,459 shares of the par value of $1,854,900. As it took but $1,887,000 of the stock at par to acquire the mills, this leaves $258,100 unaccounted for. This is explained in the testimony of Sherwood, where he says that this stock went to the promoters and their friends. Add this $258,100 to the $1,854,900 above stated, and it amounts to $2,113,000, which is the total capitalization of $4,000,000, less the $1,887,000 that went to the mill owners.

As thus organized the corporation began business. It raised the price of paper six dollars a ton, which invited competition, and a new corporation was organized by the New York firm under the laws of New Jersey, called the Paper Commission Company. The sole function of this company was to sell the product of the Straw Paper Company, and the other paper mills which had not given options, the Straw Paper Company paying the new company a commission of twenty-five per cent for selling all its paper, reducing the net price realized by the Straw Paper Company to less than it had obtained when selling its own paper.

The mill owners, although the largest stockholders, never seem to have been treated as a factor in these operations, and in some way or other the syndicate got possession of $2,113,000 in stocks and bonds, which they appeared to have used in furtherance of their own interests.

From this testimony it would appear:

(1.) That the options were to be secured for the benefit of a corporation to be organized by Beard and Ramsdell, and that the mill owners were to be paid principally in the stock of such corporation;

(2.) That Stein, the successor of Beard and Ramsdell, had no title personally to the property he pretended to sell, but that he held it as trustee for the corporation to be organized;

(3.) That the corporation was organized by three parties who held but twelve shares out of forty thousand shares, one of the three being a clerk in the office of the New York firm and the other two acting in their interest;

(4.) That a member of the New York firm drew the proposition by which Stein offered to sell these properties to a corporation, in which the member himself was the only responsible stockholder;

(5.) That the owners of the mill properties knew nothing of the organization of the corporation, or of its acceptance of Stein's proposition to sell his properties to the Straw Paper Company;

(6.) That the stock was fixed at $5,000,000 upon the idea that seventy mills would join in the combination, but as a matter of fact only thirty-nine joined; that but $2,788,000 was paid for these properties, and that $2,113,000 of stock was distributed among the parties who got up the corporation without any distinct consideration being received;

(7.) That the mill owners received stock which was worth but one half the value of that which they supposed they would receive.

Assuming these facts to have made out a case of fraud in the organization of the Straw Paper Company, and in the purchase of the mill properties, it is difficult to see how they affect the validity of the bonds as a whole, the right of the trustee to foreclose, or how they can entitle the complainant to compel the bondholders, so far at least as they were innocent holders, to set off their indebtedness to the paper company for stock, against the indebtedness of the company upon the bonds.

The company did, in fact, go through the form of an organ-

ization under the laws of the State of New Jersey, and while the first board of directors seem to have been mere tools in the hands of the New York firm with no real interest in the company, they appear to have conformed to the letter of the law, and until formally dissolved the corporation had a legal existence. As thus organized it accepted a proposition from Stein to purchase the mills for $5,000,000, namely, $1800 in cash; $1,000,000 in bonds; $1,000,000 in preferred stock, and $2,998,200 in common stock of the paper company, "all of which," both preferred and common, "shall be fully paid and unassessable, and so expressed on the face of the certificates." It thus appears that the entire transaction by which the title of the thirty-nine mills was finally vested in the Straw Paper Company was accomplished through three distinct transfers: First, from the several owners of these properties to Beard and Ramsdell; second, by assignment from Beard and Ramsdell to Stein; and, third, from Stein to the paper company. It also appears that when the mortgage was made, the legal title to the property was in the Straw Paper Company; and that, whatever be the circumstances connected with the organization of the company and the transfer from Stein, it had the legal right to make this mortgage. The master found that all of this issue of $1,000,000 in bonds was negotiated and sold, and is now outstanding, and a valid obligation of the paper company; that they are the same bonds described in the mortgage, and that they are now due and unpaid. The original options given by the owners of the mill properties provided that $766,000 should be paid in cash, and in the facts above stated it appears that a member of the New York firm engaged himself in raising money to pay for the bonds, and deposited over $800,000 with the Trust Company to be disbursed to the mill owners.

The testimony also showed that the bonds were all paid for in full, and there is no testimony to the contrary. The decree of the Circuit Court also found that all of the bonds were duly issued, negotiated and sold, and were outstanding and valid obligations of the company, and the affirmance of that decree by the Court of Appeals showed that also to be its

finding. A list of the parties to whom the bonds were delivered by the Northern Trust Company upon the request of the Straw Paper Company shows that nearly all the bonds were originally issued to Samuel Untermeyer, Philo D. Beard, John D. Hood, to members of the Chicago firm, and others more or less connected with the organization of the company. But the testimony shows that far the larger part of them had been transferred to other parties, presumably for the purpose of raising the $800,000 deposited with the Trust Company. There is nothing to impugn the good faith of most of these holdings. It is true that these parties, in disposing of the bonds, allowed to each purchaser of a one thousand dollar bond two hundred dollars of preferred and four hundred of common stock, but they did not seem to have profited by this themselves. And if it were necessary to the negotiation of the bonds to give a *bonus* in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. *Graham* v. *Railroad Co.*, 102 U. S. 148. Certainly, if this *bonus* were received in ignorance of the fraud practised upon the original mill owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a *bonus*, particularly in view of the fact that the stock might turn out to be worthless.

In addition to this, however, the contract with Stein provided that the stock to be issued to him should declare upon the face of the certificates to be fully paid and unassessable, and we know of no principle upon which it can be held that innocent bondholders can be required to deduct from the face of their bonds the amount unpaid upon their stock. The very authorities which hold that the declaration that the stock is fully paid and unassessable is not binding upon creditors, also hold that the corporation cannot repudiate it and proceed to collect either from the person receiving the stock or his transferee the unpaid part of the par value. Thus in *Scovill* v. *Thayer*, 105 U. S. 143, 153, in which a similar declaration was

held to be invalid against creditors, it was said: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter."

There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defence; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders the declaration that the shares are fully paid up and unassessable is a valid one. If an action by the corporation would not lie to recover the unpaid part of the subscription, then such unpaid part cannot be deducted from the bonds.

Somewhat different considerations apply to those who took part in the organization of the company, and in the purchase of the thirty-nine mills, and who received the bonds and stock of the paper company with notice of the fraudulent character of the scheme. We are not disposed to condone the offences of those who, through Beard and Ramsdell and their assignee, Stein, as their agents, purchased these plants for $2,788,000, and immediately thereafter went through the form of repurchasing of their own agents (in fact, of themselves) the same properties at $5,000,000. These men stood in the light of promoters of the Straw Paper Company. A promoter is one who "brings together the persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation itself." Cook on Stock and Stockholders, sec. 651. Or, as defined by the English statute of 7 & 8 Vict. chap. 110, sec. 3, "every person acting, by whatever name, in the form-

ing and establishing of a company at any period prior to the company" becoming fully incorporated. See also Lloyd on Corporate Liability for Acts of Promoters, 17. He is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. Lloyd, Corporate Liability, 18; *Densmore Oil Co.* v. *Densmore*, 64 Penn. St. 43; *Bosher* v. *Land Co.*, 89 Virginia, 455. The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders. Cook on Stock and Stockholders, sec. 651. "Accordingly, it has been held that, if persons start a company, and induce others to subscribe for shares, for the purpose of selling property to the company when organized, they must faithfully disclose all facts relating to the property which would influence those who form the company in deciding upon the judiciousness of the purchase. If the promoters are guilty of any misrepresentation of facts, or suppression of the truth in relation to the character and value of the property, or their personal interest in the proposed sale, the company will be entitled to set aside the transaction or recover compensation for any loss which it has suffered." Morawetz on Corporations, secs. 291, 294, 546; *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. Div. 73; *Bagnall* v. *Carlton*, 6 Ch. Div. 371; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. Div. 918.

"In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interest of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain." Morawetz on Corp. sec. 546; *The New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. Div. 73; *Brewster* v. *Hatch*, 122 N. Y. 349; *Simons* v. *Vulcan Oil & Mining Co.*, 61 Penn. St. 202; *Twycross* v. *Grant*, L. R. 2 C. P. Div. 469, 503; *Whaley Bridge Calico Printing Co.* v. *Green*, L. R. 5 Q. B. Div. 109, 111; Thompson on Liability of O. & A. 218, sec. 20.

It is true that the options were taken from each owner of the thirty-nine mill plants severally, and that no mention was made of the number that were to be taken into the new corporation. But each option contract showed that it was the purpose of Beard and Ramsdell to organize one or more corporations with a capital of one million preferred and three millions of common stock, and with a bonded indebtedness of one million dollars. This clause of itself, as well as the whole scheme of the contract, indicates that a large number of similar options were to be obtained, and that one or more large corporations was to be organized to conduct the business. It goes without saying that it never could have been contemplated that any one or any small number of these mills, which were comparatively insignificant affairs, were to be reorganized with a capital stock of four million dollars. The oral testimony indicates that it was the understanding that all the straw paper mills in that section of the country, some seventy in number, were to be consolidated into the new corporation, and such upon the testimony before us would appear to be the fact. Now, if it were understood by the owners of these thirty-nine mills, who received in cash and stock $2,788,000 for their plants, that Beard and Ramsdell, who held themselves out in the option contracts as promoters of the new corporation, were to transfer these options to Stein, and that the latter was to set himself up as a purchaser and resell these properties to the new corporation for $5,000,000, it is impossible to suppose that they would have consented to the arrangement. Bound as these promoters were to deal fairly and honestly with the stockholders in the new corporation, they were guilty of apparently inexcusable conduct in excluding the mill owners from all participation in organizing the new corporation, putting in their own clerks as directors, and paying off the mill owners in stock which was really of little more than half the value they must have expected to receive. If they were unable to obtain options upon only thirty-nine out of the seventy mills, they should have made known this fact, or at least given these mill owners the benefit of the surplus stock. Of course, they were entitled to charge

a reasonable sum for their services and expenses, but the parties who represented the substantial interests in the new corporation were entitled to be informed of the steps taken. We think that no acquaintance with legal principles was necessary to apprise these parties that they were not dealing fairly with the owners of the mills in concealing from them the facts connected with this purchase, and in dealing with the property as if they themselves were the only parties in interest.

It is difficult, however, to see how justice can be done by a reversal of the decree appealed from. This is a decree ordering a foreclosure and sale of the property to pay the bonds, to which the bondholders are clearly entitled. It finds that all the bonds were duly issued, negotiated and sold, and that they are outstanding and valid obligations of the company, and that they are now held by a large number of persons who have become the owners thereof for a valuable consideration. These bonds must ultimately be presented for redemption from the proceeds of sale, and we see nothing in the decree appealed from to prevent an inquiry being instituted as to their validity in the hands of their present holders. We are clearly of opinion that, so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defence applicable to each individual bondholder. Whether the corporation, or those who sue in its behalf, may hold them liable for the par value of the stock or are confined to a rescission of the transaction, is a question upon which we express no opinion.

*We are therefore of opinion that the decree of foreclosure and sale appealed from must be affirmed.*

Mr. Justice Shiras and Mr. Justice Peckham concurred in the result, but were of opinion that the question of fraud was irrelevant to the issue.

# GLASS v. CONCORDIA PARISH POLICE JURY.

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

No. 229. Submitted January 8, 1900. — Decided January 29, 1900.

The warrants and orders sued on in this case were payable to the order of Matthew Carr, deceased, who was a citizen of the State of Louisiana. They were assets of his estate, and the plaintiff in error acquired title to them through a judicial sale made by the sheriff of the parish of Concordia on the 22d day of May, 1868, under authority of an order of the probate court of said parish having the administration of said estate. The plaintiff in the suit was, at the date of his said purchase, and at the date of filing his original petition herein, a citizen of the State of Missouri, and the defendant was a citizen of the State of Louisiana. *Held*, that the plaintiff came within the restriction of § 1 of the act of March 3, 1875: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in said court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange," and that the Circuit Court below correctly held that jurisdiction could not be sustained.

This was a suit brought in the Circuit Court of the United States for the Eastern District of Louisiana by William C. Glass, a citizen of the State of Missouri, against the parish of Concordia, to recover on certain warrants or orders for levee work; and, having been dismissed for want of jurisdiction, came to this court on the following certificate:

"This cause was tried at the present term of the court solely on the defendant's exception to the jurisdiction of the court, and it appearing from the jurisdictional facts alleged in plaintiff's petition, admitted to be true by said exception, that the warrants and orders sued on were payable to the order of Matthew Carr, deceased, who was a citizen of the State of Louisiana, and were assets of his estate, and that the plaintiff acquired title thereto through a judicial sale made by the sheriff of the parish of Concordia on the 22d day of May, 1868, under authority of an order of the probate court of said parish having the administration of said estate; that plaintiff

at the date of his said purchase and at the date of filing his original petition herein, on the 2d day of November, 1877, was a citizen of the State of Missouri, and that the defendant was a citizen of the State of Louisiana. Under the state of facts the only question at issue upon the trial of said exception was whether the case, for the purpose of jurisdiction, comes within the following restriction imposed by section 1 of the act of Congress approved March 3, 1875: 'Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange.' And the court, for the reasons set forth in the written opinion hereto annexed and made part hereof, has this day maintained the defendant's exception to the jurisdiction of this court and dismissed plaintiff's petition, with leave to amend, if so advised, and without prejudice, and now grants this certificate for the purpose of enabling the plaintiff to obtain a review of the Supreme Court of said jurisdictional question under the fifth section of the act of Congress approved March 3, 1891."

*Mr. J. D. Rouse* and *Mr. William Grant* for plaintiff in error.

*Mr. Edgar H. Farrar*, *Mr. Benjamin F. Jonas*, *Mr. Ernest B. Kruttschnitt* and *Mr. Henry L. Lazarus* for defendants in error.

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

Counsel for plaintiff in error state in their argument: "We concede that neither Carr, his heirs, nor the administrator of his estate, nor the sheriff who made the sale, nor the judge who ordered the sale, possessed the necessary citizenship to sue on the warrants in the Circuit Court at the time this action was brought. But we assert on principle, that a purchaser at a sale made by authority of a probate court

derives title from none of these sources, but takes title by the adjudication of the law acting directly, *in rem*, upon the property itself."

The eleventh section of the judiciary act of 1789 provided: "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

In *Serè* v. *Pitot*, 6 Cranch, 332, the assets of an insolvent partnership passed to syndics appointed for the benefit of creditors under the laws of the Territory of Orleans, and this court held that the syndics could not sue in the Federal courts if the insolvents could not have done so. Mr. Chief Justice Marshall said: "The circumstance, that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a chose in action in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is therefore within the very terms of the law. The case decided in 4 Cranch, was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term 'assignees,' and are, therefore, not within the words of the act."

The applicable language of the first section of the act of March 3, 1875, c. 137, 18 Stat. 470, which regulated the jurisdiction of the Circuit Courts when this suit was instituted, was as follows: "Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The differences between this provision and that of the act

of 1789 are not material here. *Serè* v. *Pitot*, was decided in 1810; has been cited many times; frequently, with approval, on analogous points, *Smith* v. *Railroad Company*, 99 U. S. 398; *Corbin* v. *County of Black Hawk*, 105 U. S. 659; *Mexican National Railroad* v. *Davidson*, 157 U. S. 201; though criticised in *Bushnell* v. *Kennedy*, 9 Wall. 387, has never been overruled, and is decisive of the present case.

The title to Carr's estate passed on his death to his heirs. (Rev. Civil Code La., Arts. 940 *et seq.*) These warrants were sold at a judicial sale under authority of an order of the probate court of the parish, having the administration of the estate, by the sheriff of that parish. Glass became the purchaser, and the adjudication made and recorded by the sheriff gave him title. Rev. Civil Code, Arts. 2622, 2623. And, moreover, the Code provided that: "All the warranties to which private sales are subject exist against the heir in judicial sales of the property of successions." Art. 2624; *Deloach* v. *Elder*, 14 La. Ann. 662. The title thus obtained did not devolve on Glass in the same manner as the law devolves title by its own operation on an executor, an administrator, an heir, a universal legatee or a receiver, but was transferred by the sale and the adjudication. The purchaser at sales on judgment and execution similarly obtains title through the act of the executive officer.

Conceding that proceedings in settlement of estates in probate courts are in themselves proceedings *in rem*, yet the title to property ordered to be sold in such proceedings is not transferred by the mere order of sale, but by the sale taking place as prescribed. Its validity depends on the jurisdiction of the probate court; its transfer is accomplished in the designated way through the designated instrumentality.

In our opinion Glass came within the restriction of the statute, and the Circuit Court correctly held that jurisdiction could not be sustained.

*Judgment affirmed.*

# UNITED STATES *v.* BELLINGHAM BAY BOOM COMPANY.

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

No. 21. Submitted December 15, 1899. — Decided January 29, 1900.

The power of Congress to pass laws for the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned.

When the Attorney General acts under the authority conferred by the river and harbor act of September 19, 1890, c. 907, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by statute, and the court has jurisdiction, and it is its duty to decide whether the existing obstruction is or is not affirmatively authorized by law.

In such inquiry the court is bound to decide whether the boom, as existing, is authorized by any law of the State, when such law is claimed to be a justification for its creation or continuance.

There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law.

THE case is stated in the opinion.

*Mr. Solicitor General* for the United States.

No appearance for the Bellingham Bay Boom Company.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This suit was commenced in the Circuit Court of the United States for the State of Washington, Northern Division. The Government brought it under the direction of the Attorney General, to obtain an injunction enjoining the defendant from further continuing a certain boom which it had constructed across the Nooksack River in that State, and to obtain the removal of the same as an obstruction to the navigation of that river.

The defendant is a corporation organized under the laws of the State of Washington, and in its answer it denied that the boom was an obstruction to the navigation of the river, and

alleged that it was duly authorized to construct and maintain it by virtue of an act of the legislature of the State, and that it had completed the structure prior to the enactment of the Federal river and harbor bill on the 19th of September, in the year 1890.

The authority under which this suit was commenced is the river and harbor act of 1890, approved September 19 of that year, 26 Stat. 426, 454, c. 907, the tenth section of which reads as follows:

"SEC. 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."

On the trial it appeared that the Nooksack River is a navigable stream having its source in Whatcom County, State of Washington, and runs through Whatcom County to Bellingham Bay, emptying into that bay, and thence into the Pacific Ocean. The waters of the river lie wholly within Whatcom County, and they are navigable from its mouth for a distance

of several miles towards its source by light water craft. The boom in question, built by the defendant company at a point just above where the river empties into the bay, is frequently an obstruction to the navigation of the river by steamboats and other craft, as the boom crosses the channel of the river and entirely fills it, excepting that there is what is termed a "trip," which may be opened and vessels pass through the same on their way up and down the river. This "trip" is, however, frequently so choked and blocked up by logs and drift wood coming down the river as to render it impossible to open it.

The defendant during the continuance of the boom has from time to time expended moneys for the improvement of the navigation of the river by removing brush, trees and drift from the mouth thereof, and it has removed trees, snags and drift from the channel for a distance of from fifteen to twenty miles from the mouth of the river. Navigation for boats and water craft has thereby been considerably facilitated, but at the same time the obstruction to the navigation of the river by reason of the existence of the boom is material and at times total. The river is used for navigation by steamboats and small craft for a distance of some miles from its mouth. One of the chief purposes for which the river is used is as an outlet for floating saw logs and timber products to the mills and to market.

The Circuit Court was of opinion that as the chief value of the Nooksack River as a highway is for the floating of saw logs, that persons and corporations having to use it for that purpose have rights equal to the rights of others to use the river for a highway for boats and vessels, and that a boom at the mouth of the river being necessary for gathering and holding logs is to be regarded as an aid to the use of the river for a lawful purpose and entitled to protection, the same as a wharf or pier constructed at a place for the convenience of vessels; that the boom was constructed under the authority of the state legislature, and it was for that reason excepted from the provisions of the tenth section of the act of Congress. The court therefore dismissed the bill. 72 Fed. Rep. 585.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit, and that court held that as at the time of the building of the boom there was no act of Congress on the subject, and a state statute authorized the building, it was affirmatively authorized by law within the meaning of the tenth section of the act of Congress. It also held that whether or not the boom was constructed in strict accordance with the terms and provisions of the state statute could not be considered, as that was a question to be determined by the state and not by the Federal court. On these grounds it affirmed the judgment. 48 U. S. App. 443.

It is evident that the first sentence of the tenth section of the Federal act refers to an obstruction created after the passage of the act. The obstruction prohibited is one that is "not affirmatively authorized by law," and the section then provides that "the continuance of any such obstruction, . . . whether heretofore or hereafter created, shall constitute an offence," and authority is given to the Attorney General to cause a suit of this character to be commenced.

At the time when the boom was constructed, Congress had not by any legislation asserted its authority over nor taken into its own jurisdiction the subject of obstructions to the navigation of this river. The appropriations made by Congress in different years since 1884, for improvements in the Nooksack, among other rivers in the Territory of Washington, did not constitute such an assumption of jurisdiction over the navigation of the Nooksack River as to prevent the State from legislating upon the subject. *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. As Congress had not assumed such jurisdiction either at the time of the passage of the act by the legislature of Washington permitting the construction of a boom by the defendant, nor at the time of its actual construction, then, if it were constructed in a manner conformable to the state statute, it was affirmatively authorized by law at the time of the passage of the act of Congress. It is contended by the Government that this term refers to a law of Congress and does not include any law of a state legislature. We do not so construe section 10.

Congress, it must be assumed, was aware of the fact that until it acted upon the subject of navigable streams, which were entirely within the confines of a single State, although connecting with waters beyond its boundaries, such State had plenary power over the subject of that navigation, and it knew that when in the absence of any statute of Congress on the subject, an obstruction to such a navigable river had been built under the authority of an act of the legislature of the State, such obstruction was legal and affirmatively authorized by law, because it was so authorized by the law of a State at a time when Congress had passed no act upon the subject. When Congress, in 1890, passed the river and harbor bill we think the expression contained in section ten in regard to obstructions "not affirmatively authorized by law," meant not only a law of Congress, but a law of the State in which the river was situated, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances, we cannot doubt, was an obstruction "affirmatively authorized by law." When, therefore, the section continues, and provides that "any such obstruction, . . . whether heretofore or hereafter created," shall constitute an offence, it referred to an obstruction as described in the first sentence of the section, namely, an "obstruction not affirmatively authorized by law." If the obstruction were affirmatively authorized by a law of the State, it did not come within the condemnation of the section, and its continuance was, therefore, valid.

The power of Congress to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein cannot be questioned. When Congress chooses to act, it is not concluded by anything that the States, or that individuals by their authority or acquiescence have done, from assuming entire control of the matter, and abating any obstructions that may have been made and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. This has been

decided in numerous cases, and in the case of *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, many of them are referred to by Mr. Justice Bradley in delivering the opinion of the court. If, however, in exercising its right in regard to the regulation and control of commerce, private property must be taken, the Government is obliged to make compensation to the owner. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336. Whether ordering the removal of the obstruction, unaccompanied by the actual taking of the property, would under other circumstances affect the question of compensation, it is not necessary to here decide, as for the reason hereafter given, the boom was an unauthorized obstruction and subject to abatement as such under the act of Congress.

As this defendant claims that the obstruction in the river was affirmatively authorized by an act of the state legislature, we must look at that act for the purpose of determining the validity of the claim. The act under which the boom was created is entitled "An act to declare and regulate the powers, rights and duties of corporations organized to build booms and to catch logs and timber products therein." The third section provides: "Such corporations shall have the power and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporations: *Provided*, That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation." 1 Hill Ann. Stat. Washington, § 1592.

The reading of this section shows that the boom authorized to be constructed was one which should allow the free passage between the boom and the opposite shore of boats, vessels, etc. The evidence shows that this boom was not so constructed, because it crossed the channel of the river, completely blocking it, and left no space for the free passage of

boats and vessels between the end of the boom and the opposite shore. The building of the so-called "trip" was no compliance with the act. By the passage of the river and harbor bill, containing the above mentioned tenth section, Congress has acted upon the subject, and has provided for the removal of any obstruction to a navigable river with the exceptions named in the section. When the Attorney General, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction and it is its duty to decide the question whether the existing obstruction is or is not affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the State, when such law is claimed to be a justification for its creation or continuance. That question is not for the State alone, but must necessarily be decided by the Federal court in the course of exercising the jurisdiction conferred upon it by the Federal statute. We, therefore, cannot concur with the views of the Circuit Court of Appeals on this subject.

The authority cited by that court for its position was the *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. In that case, however, there had been no act of Congress upon the subject of the navigation of the Willamette River, and without such statute it was held that the United States could not bring within the scope of its laws, obstructions and nuisances in navigable streams within a State, such obstructions and nuisances being offences against the laws of the State within which the navigable waters lie, and constitute no offence against the United States, in the absence of a statute. The court used the following language:

"There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offences against the laws of the States within which the navigable waters lie, and may be indicted or pro-

hibited as such; but they are not offences against the United States laws which do not exist; and none such exist except what are to be found on the statute book. . . . The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a Federal one. The failure of the state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

If there were here no Federal law in existence, then the question whether the boom was authorized by a state law or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal court to decide.

There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law. For this reason the Government was entitled to a decision in its favor, and

*We therefore reverse the decrees of the Circuit Court of Appeals for the Ninth Circuit and of the Circuit Court of the United States for the District of Washington, Northern Division, and remand the case to the Circuit Court for further proceedings in accordance with this opinion.*

# TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY *v.* CONTINENTAL TRUST COMPANY.

# ROSE *v.* CONTINENTAL TRUST COMPANY.

PETITIONS FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 500, 501. Submitted January 22, 1900. — Decided January 29, 1900.

Clerks of the Circuit Court of Appeals, having prepared the records on which causes are heard therein for the printer, indexed, and supervised the printing of the same, and distributed the printed copies thereof, and been paid therefor, may certify one of such copies for use on applications to this court for certiorari.

The reproduction of transcripts, in manuscript or in print, under such circumstances, is not required.

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

*Mr. James D. Springer*, *Mr. F. Spiegelberg* and *Mr. John Ford* for the Toledo, St. Louis &c. Railroad Company.

*Mr. John S. Miller* for Rose.

*Mr. E. C. Henderson*, *Mr. Henry Crawford* and *Mr. Willard Parker Butler* for the Continental Trust Company.

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

These petitions for certiorari were accompanied by a motion for an order dispensing with the authentication and certification by the clerk of the Circuit Court of Appeals for the Sixth Judicial Circuit of the transcript of the record of the Circuit Court of the United States for the Northern District of Ohio, on which the appeals mentioned in the petitions were heard and submitted to and decided by said Circuit Court of Appeals. The clerk of the Circuit Court of Appeals has certified the transcript of the record and proceedings in that court, "except the transcripts from the Circuit Court, and except

also the printed briefs of counsel filed in my office in said causes." It appears that the transcript of record from the Circuit Court was duly certified by the clerk of the Circuit Court, was filed in the Circuit Court of Appeals, and thereafter was printed under the supervision, direction and control of the clerk of the Circuit Court of Appeals under and pursuant to the rules of that court, and that after the decision of the cases there, which had been heard and decided on one record, petitioners requested the clerk to certify, for the purpose of these applications, the transcript so printed under his supervision without requiring petitioners to pay the entire cost of a reproduction of the same in manuscript, but that the clerk refused to make any deduction by reason of the premises, and insisted that he had no power or authority so to do.

Under the third subdivision of rule 37 of this court, where application is made for certiorari under section six of the judiciary act of March 3, 1891, it is provided that "a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as part of the application."

The table of fees and costs in the Circuit Court of Appeals, established by this court in pursuance of the act of Congress of February 19, 1897, 169 U. S. 740, provides that the clerks of the Circuit Courts of Appeals may charge, among other items, for:

| | |
|---|---|
| Affixing a certificate and a seal to any paper..... | $1 00 |
| Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index..... | 25 |
| Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)..... | 20 |

The record in these cases having been prepared for the printer, indexed, the printing supervised, and copies thereof distributed by the clerk of the Circuit Court of Appeals, and the clerk having been paid therefor, we are of opinion that

Counsel for Roberts.

our rule would have been fully complied with by the certificate of that clerk to one of the printed copies which he had so prepared, indexed, supervised and distributed, and which he, therefore, knew was an accurate transcript of the record from the Circuit Court; and, as it is shown, and is not denied, that the printed copies furnished us are in fact correct copies of the Circuit Court record, we have treated them as if that record had been duly certified to us by the clerk of the Circuit Court of Appeals.

The applications for certiorari are *Denied.*

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## ROBERTS, Treasurer, *v.* UNITED STATES.

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

No. 86. Argued December 15, 18, 1899. — Decided February 5, 1900.

A judgment of the Court of Claims, under the act of June 16, 1880, c. 243, in favor of the claimant, against the District of Columbia, upon a certificate of the board of audit of the District, in an action commenced in 1880, is not affected by the provision in the act of July 5, 1884, c. 227, forbidding the payment of such certificates, not presented for payment within one year from the date of the passage of the latter act.

The evident purpose of the act of August 13, 1894, c. 279, was to give the balance of interest upon the certificates between 3.65 and 6 per cent to the original holders of the certificates, or their assignees, the interest upon which had been paid only at the former rate.

The right of the relator as assignee having been admitted, it is no longer open to inquiry.

If a public officer of the United States refuses to perform a mere ministerial duty, imposed upon him by law, mandamus will lie to compel him to do his duty.

In this case, as the duty of the Treasurer of the United States to pay the money in question was ministerial in its nature, and should have been performed by him on demand; mandamus was the proper remedy for failure to do so.

THE case is stated in the opinion.

*Mr. Robert A. Howard* for Roberts. *Mr. Solicitor General* was on his brief.

*Mr. B. E. Valentine* for the United States.

Mr. Justice Peckham delivered the opinion of the court.

A writ of certiorari was issued in this case to the Court of Appeals of the District of Columbia, for the purpose of reviewing a judgment of that court affirming a judgment of the Supreme Court of the District, which awarded to the relator, Marie A. Valentine, a writ of mandamus to compel the petitioner, who is the Treasurer of the United States, to pay her, as assignee, a residue of 2.35 per cent interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to the provisions of section 6 of the act approved June 20, 1874, entitled "An act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, 118, c. 337.

The facts upon which the controversy arises are uncontradicted, and are as follows: One Charles E. Evans who, previous to 1874, had done a large amount of work for the District in laying concrete and brick pavements in the city of Washington, duly presented his claims on that account to the board of audit constituted under the act above mentioned, which board, after an examination of such claims, executed, on the first of August, 1874, the two certificates which form the basis of the claim of the relator, each certificate being dated on that day, one of which acknowledged an indebtedness to him on the part of the District of Columbia of $19,616.25 and the other $909.40. They were not, however, delivered to Evans, because at the time they were made a claim had been set up by the authorities of the District that Evans was liable for the expense of repairs which were needed on pavements laid by him, (which claim, however, as it afterwards appeared, was not well founded,) and the board of audit, instead of delivering the certificates to Evans, withheld them from him, and at or about their date delivered them to the Commissioners of the District, who held them as collateral security for the payment of any liability of Evans for the repairs mentioned. They remained from August, 1874, until June 9, 1890, in a

tin box in the office of the Treasurer of the United States, who held it and its contents subject to the control of the Commissioners of the District.

By reason of this refusal to deliver the certificates and their retention in the hands of the Treasurer, Evans was unable to avail himself of the right given by the act of 1874 to exchange such certificates for the 3.65 bonds mentioned in that act, and for the same reason he was unable to avail himself of the provisions of section 9 of the act approved June 16, 1880, 21 Stat. 284, c. 243, providing for the redemption of the certificates created by the act of 1874. An action was therefore commenced in December, 1880, in the Court of Claims by the assignee of Evans to recover judgment against the District of Columbia upon those certificates, under the provisions of section 1 of the above act of 1880. In this action, in addition to the claims upon the certificates already mentioned, Fisher, the assignee, included a large amount of other claims against the District, which had also been assigned to him by Evans.

In 1884, Congress passed an act, approved July 5, 1884, c. 227, 23 Stat. 123, 131, providing that no payment should be made of any certificate issued under the act of 1874 that should not be presented for payment within one year from the date of the approval of the act of 1884.

After its commencement, (the certificates still remaining in the custody of the Treasurer,) the action above mentioned continued pending until some time during the December term, 1889, of the Court of Claims, when the executors of the will of Fisher, the assignee, were substituted as parties plaintiff in the action upon the suggestion of the death of Fisher having been duly made upon the record, and the action was revived in the names of the executors of Fisher's will.

In June, 1890, a settlement of that action was agreed upon, by the terms of which the two certificates were to be delivered to the plaintiffs, and the other matters in dispute therein were to be withdrawn from the court by the discontinuance of the action. Pursuant to that settlement and on June 9, 1890, under the advice of the Assistant Attorney General in charge of the case, the certificates were delivered to the plaintiff's

attorney, who thereupon presented them to the Treasurer and requested him, in his capacity as *ex officio* commissioner of the sinking fund of the District of Columbia, to issue in exchange for them the 3.65 bonds authorized by the act of Congress of 1874. The Treasurer refused to redeem the certificates or to issue bonds for the payment thereof, or in any way to pay the same, until the parties had obtained a judgment in the Court of Claims in the action already mentioned, which should provide for their payment. Accordingly the plaintiffs in that action asked and obtained leave to amend their petition by striking out all reference to any other causes of action than those upon these two certificates. The amendment was consented to by the Assistant Attorney General, and on June 12, 1890, a judgment was duly obtained in favor of plaintiffs and against the District of Columbia for the recovery, "in the manner provided by the act of June 16, 1880, chapter 243," of the sums mentioned in the certificates. The judgment roll in the case contained the petition in which these particular certificates were set out in full, and it showed that the judgment entered by the Court of Claims was recovered on those certificates and on them alone. There was thus evidence on record which showed the cause of action on which the judgment was based. On September 12, 1890, the Treasurer paid these certificates with interest from their date, August 1, 1874, to September 11, 1890, at 3.65 per centum, by paying the judgment entered by the Court of Claims. Subsequently to that time the executors of Fisher, the assignee of Evans, assigned to one Robinson all interest in the claims and demands against the District, and Robinson subsequently assigned the same to the relator. Thus some sixteen years after the certificates had been duly made under the authority of the act of 1874 they were finally redeemed, the delay having been caused by their retention as above stated and by the refusal of the Treasurer to deliver them to their owner.

On August 13, 1894, Congress passed an act, 28 Stat. 277, c. 279, the first section of which reads as follows:

"That the Treasurer of the United States is hereby directed to pay to the owners, holders or assignees of all board of audit

certificates redeemed by him under the act approved June 16, 1880, the residue of two and thirty-five hundredths per cent per annum of unpaid legal rate interest due upon said certificates from their date up to the date of approval of said act providing for their redemption."

The relator as assignee, by her attorney, made demand upon the Treasurer for the payment of the balance of the interest as provided for in the above act, and on November 3, 1897, the Treasurer refused such demand, and wrote the following letter to the attorney:

"SIR: Your letter of the 27th ultimo, enclosing a petition for the payment of interest on certain board of audit certificates, under the act of Congress approved August 13, 1894, is received.

"You will note that the act referred to provides for additional interest to be paid only upon board of audit certificates redeemed by the Treasurer under the act of June 16, 1880. Neither of the certificates recited in your petition was redeemed by the Treasurer, and they are not in his possession.

"You state that certain judgments of the Court of Claims were issued in lieu of these certificates. These judgments were paid by this office in the manner prescribed by law, but neither of them states that they were issued in lieu of or upon debts of the District of Columbia represented by board of audit certificates.

"The Treasurer has therefore no authority to pay the additional interest you demand."

The foregoing facts were set forth in the petition of the relator to the Supreme Court of the District of Columbia asking for a mandamus to compel the Treasurer to make the payment demanded.

In answer to the petition the Treasurer alleged "that the certain board of audit certificates, so called, in the said petition mentioned, namely, the certificates numbered 8879 and 19,429, were not redeemed by him or any person holding the office of

Treasurer of the United States at any time, and that the only moneys paid by any Treasurer of the United States on account of any of the matters or things in the said petition mentioned as having relation to the said certificates, or either of them, were paid upon certain judgments of the Court of Claims of the United States, as appears by the transcript from the records of the Treasury Department of the United States, hereto annexed and made part hereof, and that the defendant has no official knowledge, nor has he any official record in his office, showing or tending to show upon what claim or claims either of the said judgments was based."

Nothing but a transcript of the decree contained in the judgment roll was annexed to the return. The relator demurred to the return, and upon these pleadings the cause came on for hearing before the Supreme Court, which ordered a writ of mandamus to issue as prayed for. Upon appeal to the Court of Appeals that court affirmed the judgment, and the Treasurer applied for and obtained a writ of certiorari for the purpose of procuring a review of the judgment by this court.

Upon reading the return made by the Treasurer to the petition for the writ it will be seen that the facts upon which he bases his defence are that he did not redeem the certificates in question, and that the only moneys paid by any Treasurer of the United States were paid on this judgment of the Court of Claims already mentioned, and that it did not appear in any official record in his office upon what claim or claims the judgment of the Court of Claims was based.

The first question which arises, therefore, on this record is whether the Treasurer did redeem these certificates within the meaning of the act of 1894. The act of 1884 did not prohibit their redemption, for they were in suit under the provisions of section 1 of the act of 1880, long before the passage of the act of 1884, and provision was made in the act of 1880 for the payments of the judgments rendered by the Court of Claims upon presentation to the Secretary of the Treasury of a certified copy of such judgments. That they might be founded upon certificates was immaterial, for it

cannot be supposed that Congress by the act of 1884 meant to prohibit the payment of certificates which were in suit under the act of 1880, and upon which judgment might thereafter be rendered by the Court of Claims. Full effect can be given to the act of 1884 by confining it to the prohibition of payment of certificates which might, after the year, be presented in that form for payment, leaving the provisions for payment on suit brought under the act of 1880 in full force.

Taking this case as made by the record, we find that it is not disputed that the certificates were issued under the act of 1874, duly signed by the board of audit therein provided for, and delivered (without the consent of Evans) to the authorities of the District upon their unfounded claim that they were entitled to their possession as collateral security as already stated. It is not disputed that an action was commenced in the Court of Claims under the act of 1880 to recover against the District of Columbia upon the certificates, as well as upon other claims against the District. It is not disputed that upon a compromise made, all other causes of action were stricken from the petition, that the petition as amended contained a full description of the certificates, and an allegation that they were issued by the board of audit under the act of 1874, and that judgment was recovered upon such certificates, and upon them only, and for their payment pursuant to the act of 1874, and that pursuant to that judgment the Treasurer paid the amount thereof, together with interest on the certificates from the date of their issue in 1874 to September 11, 1890, the day before their payment.

Upon these facts we have no doubt that the certificates were redeemed within the meaning of the act of 1894. At the time of the judgment in the Court of Claims they were in the hands of the plaintiff in the action mentioned and were valid instruments in his hands, and his sole cause of action was based upon them, and the judgment entered by the Court of Claims necessarily declared their validity and the right of plaintiff to have the same paid as stated in the judgment. When the Treasurer subsequently paid that judgment, did he not therein and thereby redeem these certificates? If the certificates

themselves had been presented to the Treasurer and he had paid them, they would then, of course, have been redeemed. Were they any the less redeemed because an action had been brought upon them and the court had declared their validity and directed their payment, by a judgment duly entered to that effect, which judgment was subsequently paid by the Treasurer? Such payment, it seems to us, was a redemption of the certificates within the meaning of the act.

The evident purpose of the act of 1894 was to give the balance of interest between 3.65 and 6 per cent to those persons, or their assignees, to whom certificates had been given and the interest upon which had been paid only at the former rate. In all such cases where the certificates had been redeemed by the Treasurer, the additional interest was to be paid, and we cannot doubt that under this act the certificates were redeemed when paid by the Treasurer by virtue of the judgment which had been recovered on them and which was directed to be paid pursuant to the act of 1874. The act of 1894 did not limit the payment to those who had succeeded in exchanging their certificates for bonds bearing interest at the rate of 3.65 per cent. It was through no fault of the holders of these particular certificates that they had not been exchanged for such bonds, but the exchange had not been effected because the authorities of the District improperly retained custody of them, and refused to deliver them to their rightful owner.

The act of 1894 plainly relates to and speaks of the certificates which had been redeemed under the act of 1880, and these certificates had been so redeemed.

The further objection made by the Treasurer, that he had in his office no official record showing or tending to show upon what claim or claims the judgment of the Court of Claims was based, is, under the admitted facts in this case, wholly immaterial.

The judgment roll in the action is of record in the Court of Claims, and that roll showed precisely and in detail that the judgment was recovered upon those specific certificates, and upon nothing else, and when the Treasurer pays such judgment there is thus record evidence that he has paid the certificates

mentioned in the judgment roll, upon which certificates the judgment itself was recovered.

This is all the defence upon the facts that is made to the issuing of the writ so far as appears by the return made by the Treasurer to the application for mandamus, but upon the argument in this court the further objection was taken that the relator was not such an assignee as was within the contemplation of the act of 1894, because, as was stated, she was not such assignee at the time of the payment of the certificates made by the Treasurer.

It is somewhat late to raise this defence, but we think there is nothing in the objection. These certificates had been paid at the rate of interest of 3.65 only, and the act of 1894 intended to give to those people who were their original owners, or who had become assignees of such owners, although subsequent to the payment of the certificates, the right to recover this additional interest. But if the act were construed as intending to provide for the payment of interest to those persons who were the owners of the certificates at the time when they were redeemed, it could not with any force be argued that such persons might not assign their claim to the balance of the interest provided for in the act of 1894 after the passage of that act. Hence if the defendant had set up in his return any such objection, it might have been obviated by proof that the owners of the certificates when redeemed had after the passage of the act of 1894 assigned their right to the interest mentioned therein to the relator. The Treasurer made no such objection to payment, either in his letter to the attorney for the relator before this proceeding was commenced, or in his return herein. The right of relator, as assignee, has been admitted, and the Treasurer placed his objections on grounds altogether different.

The remaining and most important objection is that this is not a case in which the writ of mandamus can properly be issued to one of the executive officers of the government.

The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within

the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in *United States* v. *Black*, 128 U. S. 40, and upon the authority of that case the defendant claims that no mandamus can be issued against him.

The writ was refused in the *Black case*, because, as the court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction and the effect which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus. The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

This case comes within the exception stated in the *Black case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of

the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand. The judgment of the Court of Appeals must be

*Affirmed.*

# BALTIMORE & POTOMAC RAILROAD COMPANY *v.* CUMBERLAND.

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

No. 87. Argued December 19, 1899. — Decided February 5, 1900.

Under a regulation requiring railroad tracks running through the streets of a city to be fenced, whenever the grade is "approximately even" with the adjacent surface of the streets, it is proper for the jury to say whether a track elevated two feet two inches above the surface of the street, is within the regulation.

Where the declaration averred that there was "no light" upon the engine to indicate its approach, and the proof was that an insufficient light was carried, it was held that there was no material variance.

Where the regulation required that "a headlight, or other equivalent reflecting lantern," should be carried upon a train to indicate its approach, it is for the jury to say whether an ordinary hand-lantern is a substantial compliance with the regulation.

In determining the existence of contributory negligence, the plaintiff is not liable for faults which arise from inherent mental or physical defects, or want of capacity to appreciate what is and what is not negligence. He is only responsible for the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger.

While under the circumstances of this case the court might have held the plaintiff liable for contributory negligence, if he had been a man of mature age and average intelligence, as he was a boy of twelve years of age, it was held that the question was properly submitted to the jury.

A person crossing the track of a railroad company in the streets of a city for the more convenient performance of his duties is not *ipso facto* a trespasser.

This was an action begun in the Supreme Court of the District of Columbia by the plaintiff Cumberland, suing by his next friend, against the Baltimore and Potomac Railroad Company, to recover damages for personal injuries inflicted upon him by the alleged negligence of the defendant company.

The undisputed facts were that the plaintiff, who was twelve years and four months of age at the time of the accident, was a street lamplighter by occupation, and for more than a year prior thereto had been engaged, under his father's direction,

in lighting street lamps in the vicinity of the company's tracks on Maryland avenue in the city of Washington.

The accident occurred about dark on the evening of December 10, 1894. The weather was misty, according to some of the witnesses; rainy, foggy and very cold, according to others. The plaintiff, having lighted a lamp on the south side of Maryland avenue, between Thirteenth-and-a-half and Fourteenth streets, started across Maryland avenue and the tracks of the company, for the purpose of lighting a lamp directly opposite on the north side of the street. There was a curve in the tracks at this point, made by a turn in the railroad from Long Bridge into Maryland avenue. There was no crossing for persons or vehicles between Thirteenth-and-a-half and Fourteenth streets, and the street on either side of the right of way was separated therefrom by curbs which projected eight inches above the adjacent roadway. These curbs were about five feet from the outer rails on either side, and the tracks were carried upon ties, elevated about eighteen inches above the level of the curbs and about two feet higher than the surface of the street. The plaintiff, having lighted a lamp on the south side, started across the street; mounted the elevated roadway, in front of a train coming up from Long Bridge with the tender ahead of the engine, and just as he stepped upon the track, was struck by the tender, knocked down and run over. There was a hand signal lantern swung on the advancing end of the tender, and at the time of the accident it appeared to have been burning.

At this part of the avenue there are four or five railway tracks — two main tracks on the north side, used for passenger trains; a third to the south of these two, used for freight trains, which was the one on which the accident occurred; south of that a track diverging eastwardly into the freight station of the Richmond and Danville Railroad Company to the south of the avenue; and still further south, and south even of the gas lamp which the boy had lit, a switch diverging from the east into a private coal yard. About the place of the accident, and thence westward towards Fourteenth street, the tracks begin a curve so as to reach the Long Bridge

at the foot of that street, and to the south, upon the inner side of this curve and about the line of Fourteenth street, there was a switchman's box, which to some slight extent obstructed the view from the east of trains coming to the avenue from the bridge.

As the boy had passed or was passing the Richmond and Danville track, and was approaching the freight track, his attention was directed to a passenger train going out on the northernmost track towards the bridge. When this had passed he proceeded on his way across, and having stepped on the freight track, he was struck, knocked down and injured by the tender attached to an engine drawing the work train, which he states he had not seen, although he testifies that he had looked in that direction, had listened for approaching trains, and had neither seen nor heard any.

The engineer testified that, when he was between Fourteenth street and the place where the accident happened, he saw the form of a person moving at a brisk walk in the direction of the tracks, about fifteen feet away from them and about fifty or sixty feet in front of the train. He could not tell whether it was a man or boy. When in the neighborhood of thirty feet away, he saw he was coming so near the track that he thought probably he was going to walk on it. He then reversed the engine, applied the brake to stop, and the train was brought to a standstill within the distance of eighty or ninety feet.

The fireman testified that when he first saw the boy he was approaching the track at a brisk walk, and was about fifteen or twenty feet from it, making his way north. He appeared to be looking across towards the moving train on the southbound main track. He was carrying some object (a ladder). He saw him put his foot on the end of the ties, and he (witness) called the engineer's attention by "hollering."

The defence rested chiefly upon the contributory negligence of the plaintiff in crossing the track at this point without sufficient care in looking out for the approach of trains.

The trial resulted in a verdict for the plaintiff in the sum of $8000, upon which judgment was entered. The case was car-

ried by the defendant to the Court of Appeals, and the judgment of the Supreme Court affirmed. 12 D. C. App. 598. Whereupon defendant sued out a writ of error from this court.

*Mr. Frederic D. McKenney* and *Mr. Wayne MacVeagh* for plaintiff in error. *Mr. John Spalding Flannery* was on their brief.

*Mr. A. S. Worthington* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Upon the trial the court left it to the jury to say whether the defendant was guilty of negligence in either of four particulars: (1) In failing to protect the tracks by a fence at the point where the accident occurred; (2) in failing to provide a proper light to give warning of the approach of the train; (3) the distance passed over by the train after it struck the plaintiff and before it was brought to a stop, as bearing upon the question of speed; (4) and whether the persons in charge of the engine were keeping a proper lookout. These questions were all left to the jury, and presumptively, at least, determined against the defendant.

1. The regulations of the Commissioners of the District, adopted in pursuance of an act of Congress, approved January 26, 1887, c. 48, 24 Stat. 368, and a joint resolution of February 26, 1892, 27 Stat. 394, require that "whenever the grade of a steam railroad track is approximately even with the adjacent surface, the line of the road shall be securely closed on both sides with a substantial fence," etc. There was no fence upon either side of the track where the accident occurred. The facts were that the track, at the point where the plaintiff was attempting to cross at the time of the accident, was not over two feet two inches higher than the level of the street, and was probably considerably less than that. The argument of the defendant is that, under this state of facts, the court had no right to submit the question to the jury, whether, within the meaning

of the regulations, the grade of the track at this point was "approximately even with the adjacent surface" of the street. There was also some testimony tending to show that it was impracticable to build a fence there consistently with the proper management of the road.

Had the sole design of the fence been to prevent the crossing of vehicles at this point, it would be difficult to say that an elevation of two feet two inches above the surface of the street made the track approximately even with the adjacent surface; but evidently more than this was contemplated by this regulation, which looked to the protection of pedestrians as well as vehicles. The object of the fence is to prevent all crossing of the tracks, and unless the elevation be such as to render it practically impossible to cross, it is a question for the jury whether the track is not approximately even with the surface of the street. An elevation of two feet would afford no serious obstacle to the crossing of foot passengers, and apparently presented no difficulty to the plaintiff, as he had already mounted the track when he was struck by the tender. Had there been a fence upon either side of the track between Thirteenth-and-a-half and Fourteenth streets, the plaintiff would have been obliged to cross the track at one of the street crossings, in order to reach the lamp which he intended to light, and the accident would probably not have occurred. As bearing upon the practicability of a fence at this point, it is pertinent to note that, after the accident occurred, a fence was erected along the north side of the track between these two streets, and still remains there. It was proper to leave the question of the fence to the jury, and we have no criticism to make of the charge upon that point.

2. It is also insisted that there was a material variance between the declaration and the proof with respect to the light on the advancing end of the tender, and, hence that the sufficiency of such light was improperly submitted to the jury. The regulations of the Commissioners require that "between sunset and sunrise of each day, a headlight, or other equivalent reflecting lantern, to give due warning to persons near or crossing steam railroad tracks of the approach of

trains, locomotives or cars, shall be displayed upon the advancing end of every train of steam railroad cars, and of single steam railroad cars and locomotives not in trains, in the District of Columbia. It shall be unlawful for any person to set in motion, or run, or operate, any train of railroad cars, single railroad cars, or locomotives, without the said display of such lights or lanterns."

The declaration averred that "there was no light upon the rear part of said engine to indicate its approach," and that "by reason of the reckless and grossly careless manner in which the agents of said defendant operated said engine in failing to place any light upon the rear part of said engine," plaintiff was injured. The plaintiff showed that there was no regular headlight on the tender, but that there was a signal lantern hanging on a hook on the rear or advancing end of the tender, and that such light was visible at a considerable distance.

The court left it to the jury to say whether the light was substantially such an one as was required by the regulations, or such as was requisite to give proper warning of the approach of the train.

As the light was clearly not an ordinary headlight, or other equivalent reflecting lantern, shedding a dazzling light which could scarcely fail to be noticed by a person crossing in front of an engine, but an ordinary lantern which might readily be mistaken for a lantern carried by a foot passenger, or even a street lamp or other smaller light, it is impossible to say that there was error in submitting the question of the sufficiency of the light to the jury. The averment of the declaration, that there was *no* light, is satisfied by proof that there was no such light as was required by law. An insufficient light is, from a legal point of view, no light at all. The distinction between a powerful headlight, such as is ordinarily carried upon locomotives, and an ordinary lantern, is by no means a fanciful or immaterial one; and it would unquestionably have been error to refuse to submit to the jury the question whether the light in question was such as gave sufficient warning to persons of the approach of trains. Although the regulations

of the Commissioners are satisfied not only by a locomotive headlight, but by an equivalent reflecting lantern of sufficient power to give warning that a train of steam cars is approaching, it was at least a question for the jury whether an ordinary lantern which railway employés carry in their hands answered the requirement. It is very clear that the variance between the declaration and the proof was not of a character to mislead the defendant at the trial. *Nash* v. *Towne*, 5 Wall. 689, 700; *Robbins* v. *Chicago*, 4 Wall. 657; *Grayson* v. *Lynch*, 163 U. S. 468, 476.

3. The case turned mainly, however, upon the question of contributory negligence, and upon the refusal of the court to direct a verdict for the defendant upon that ground. The defence of contributory negligence is one which admits, or at least presupposes, negligence on the part of the defendant, and the party in fault thereby seeks to cast upon the plaintiff the consequence of his own failure to observe the precautions which the circumstances of the case demanded. In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. The defendant is primarily liable for his own negligence, and can only escape liability for a non-observance of such precautions as his observation or the experience of others teaches him to be necessary, by proving that the accident would not have occurred if the plaintiff had taken such precautions as his own observation and experience had taught him to be necessary. Hence the plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances. To an adult, in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris* and totally ignorant of danger, still

another. *Railroad Co.* v. *Gladmon*, 15 Wall. 401; *Railroad Co.* v. *Stout*, 17 Wall. 657; *Union Pacific Railway* v. *McDonald*, 152 U. S. 262, 281. Indeed in the last case the only contributory negligence with which he is chargeable is that of his parent or custodian who permits him to stroll into a place of danger.

Had the plaintiff in this case been a man of mature age and average intelligence, it would be difficult to escape the conclusion that he was guilty of negligence in crossing this track without taking more careful observations of incoming and outgoing trains. But he was not. He was a boy of twelve years, apparently dull for his age, as he had attended school four or five years without having learned to read or write. There was testimony tending to show that he had only the capacity of a child of six or seven. Certain answers given by him upon his examination indicated that his powers of observation were limited or his memory defective. He was employed by his father, who was a city lamplighter, to light about thirty lamps upon or near Maryland avenue; had started shortly before five o'clock on the evening in question, which was dark and misty, to make his accustomed rounds, and had just lighted a lamp on the south side of the avenue, when he started across to light a lamp on the north side, almost immediately opposite the one he had just lighted. He says he looked both ways, up and down Maryland avenue, for trains, waited for the passing of an outgoing passenger train, but failed to notice an incoming train which was being drawn by a locomotive running backward. The light on the tender was obviously not powerful enough to illuminate the tracks in front of the locomotive, since the engineer and fireman, who were looking at him as he stepped on the track in front of the locomotive, could not tell whether he was a man, woman, boy or girl, and could not see the ladder he carried. It is probable that he was somewhat confused by the noise of the outgoing train, by the ringing of the engine bell, and by a number of vehicles which had just come over the bridge from the Virginia side, and were rumbling and rattling over the cobblestone pavement. It may be that these noises prevented

his hearing the shouting of the engineer and fireman, and of two men at a switch lower down the track toward the bridge, who were calling to him to keep away. It is by no means improbable that, if there had been a strong reflecting light on the tender, as the regulations required, it would have compelled his attention, when an ordinary signal lantern might easily pass unnoticed. Indeed, a witness who was standing on the corner of Thirteenth-and-a-half street and Maryland avenue, and saw the plaintiff going from the lamp toward the railroad track, saw no train coming up from the bridge, although he was looking in that direction.

We do not think that under these circumstances plaintiff could be considered a trespasser in crossing the tracks. This term is doubtless applicable to those who unnecessarily loiter upon, or walk along, a railway track as a convenient path. But to say that the plaintiff, who was lighting lamps on both sides of Maryland avenue, was bound every time he crossed the track to do so at a street crossing, is to apply too stringent a rule. The lamp which he had lighted and the one which he had started to light were upon opposite sides of the street, at a distance of from 100 to 150 feet from the crossing of Thirteenth-and-a-half street. The rule contended for would require the plaintiff, after having lighted the lamp on the south side, to return to Thirteenth-and-a-half street, cross the avenue at that point, and then go about half a block to a point opposite the other, nearly double the distance required to cross the tracks directly. This method would have to be repeated every time he had occasion to cross the avenue. Of course, if a fence had been built this would have been necessary, but in the absence of such fence we do not think that the mere crossing of the track in the convenient performance of his duties made him a trespasser *per se*. We have examined the many cases cited by the plaintiff in error upon this point, and find that nearly all of them either turned upon the question whether loitering upon, playing upon or walking along a railroad track made a person a trespasser, or, whether in crossing a track, sufficient care was used to avoid approaching trains. We are not prepared to give our adherence to the

doctrine announced in a very few cases, that a man who steps his foot upon a railroad track, except at a crossing, does so at his peril, though such doctrine when applied to the facts of the particular case may not have been an unjust one. We are rather disposed to say that, where tracks are laid through the streets of a city, upon or substantially upon the level of the street, a person is not limited in crossing such tracks to the regular street crossings, but may cross them at any point between such streets in the convenient performance of his daily duties. We cannot say that there was such danger to an active boy crossing the track at this point as to authorize the case to be taken from the jury upon the ground that he was *ipso facto* a trespasser.

We have no desire to limit or qualify anything said by us in *Railroad Company* v. *Houston*, 95 U. S. 697, or in *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379, both of which involved the question of care at a regular highway crossing, and we have no doubt that in the case under consideration such care should have been used as the nature of the case required, and the intellectual capacity of the plaintiff admitted. But these were all questions for the jury, and were conclusively answered by the verdict. We cannot say that the court should have taken the case from the jury, or that it erred in any material particular. We cannot even say that we should have come to a different conclusion upon the facts.

The judgment of the Court of Appeals was right, and it is therefore

*Affirmed.*

Mr. Justice White and Mr. Justice McKenna dissented.

# UNITED STATES *v.* TENNESSEE AND COOSA RAILROAD COMPANY.

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

No. 53. Argued December 12, 13, 1899. — Decided February 5, 1900.

The grant of public land made to the State of Alabama by the act of June 3, 1856, c. 41, to aid in the construction of railroads, to be subject to the disposal of the legislature for the purposes named in the act and no other, with a provision that if any of said roads were not completed within ten years the lands remaining unsold should revert to the United States, was a grant *in præsenti;* the condition so expressed was a condition subsequent; and the rights and powers of the State continued until the grant should be directly forfeited by judicial or legislative proceedings.

The provision in the act of September 29, 1890, c. 1040, that "there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation, to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain," did not operate upon lands opposite completed roads, and such lands were not thereby forfeited or resumed.

The allegation that the sale to Carlisle was without consideration and colorable was not sustained by the evidence.

Although the bill was framed to secure a forfeiture of the entire grant, that does not preclude a forfeiture for a part of it.

This suit was brought under the act of September 29, 1890, c. 1040, 26 Stat. 496, to forfeit a land grant made to the State of Alabama in aid of the construction of a railroad from the Tennessee River at or near Gunter's Landing to Gadsden, on the Coosa River, conveyed by the State to the Tennessee and Coosa Railroad Company.

The bill alleges that Congress by the act of June 3, 1856, c. 41, 11 Stat. 17, granted to the State of Alabama in trust for certain railroads, of which the respondent, the Coosa Railroad, was one, every alternate odd-numbered section for six sections in width on each side of the road, with the right of selection

of others if rights had attached to such alternate sections, within fifteen miles of the line of the road, as follows:

"That a quantity of land not exceeding one hundred and twenty sections, for each of the roads named in said act, and included within a continuous length of twenty miles of each of said roads named therein, may be sold, and when the Governor of Alabama should certify to the Secretary of the Interior that any twenty continuous miles of any of said roads were completed, then another quantity thereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads, may be sold — and so from time to time until said roads were completed, and if any of said roads were not completed within ten years, no further sales should be made, and the lands unsold should revert to the United States."

That the State accepted the grant by an act of its legislature approved January 20, 1858, upon the terms and conditions expressed in the act of Congress, and granted a portion of the lands to the Coosa Railroad.

That the railroad constructed ten and 22–100 miles of road along the line of definite location of survey, to wit, from Gadsden northward toward Gunter's Landing, but did not construct any portion thereof prior to June 3, 1866, and never constructed or completed twenty miles of railroad prior to September 29, 1890.

That by virtue of the act of Congress all the lands unsold at the expiration of ten years from its date reverted to the United States, and that the railroad company did not sell any lands prior to June 3, 1866, and never became entitled to any of the land or to the possession thereof, but that the railroad company selected the lands described in the bill within the six-mile limit and those within the fifteen-mile limit, which selections were approved by the Secretary of the Interior. Exhibits were attached to the bill giving detail descriptions.

That the selections and approval were made upon the filing of a map of definite location and not upon the certificate of the Governor of the State showing that twenty continuous miles

of road had been constructed, for no section of twenty miles had been constructed before the passage of the act of Congress of September 29, 1890.

That the United States became entitled to the possession of the lands on the 4th of June, 1866, and the right to recover both the title to and the possession of them.

That by the act of September 29, 1890, the United States resumed the title to all the lands which were opposite to and coterminous with any portion of such railroad not completed and in operation at the date of the passage of the act; and that none of the lands described in paragraph 1 and Exhibit "A" were opposite to and coterminous with road constructed and completed at that date.

That the railroad company on the 4th of April, 1887, executed and delivered to Hugh Carlisle an instrument purporting to be a quitclaim deed, by which the company pretended to convey to him seventeen thousand and ten $\frac{33}{100}$ acres of the land granted to it for the consideration of $21,790; and on the 7th of February, 1887, executed another instrument to Carlisle, by which it attempted to convey to him $23,739\frac{51}{100}$ acres, and which recited a payment of $59,348.70.

That said instruments were executed more than twenty years after the expiration of the time required for the construction of the railroad; that the company had no right or power to convey any title or right; that its officers and Carlisle knew the fact, and for the purpose of preventing the reversion of the lands to the United States the company executed and Carlisle accepted the conveyances. That while they recite a valuable consideration paid by him, no money or valuable thing was paid, but that the whole transaction was merely a device to mislead and deceive for the purpose of enabling Carlisle to set up a claim that he held the lands as a purchaser for value and in good faith from the railroad company. That he is a purchaser *mala fide*, well knowing that the purchase was in violation of the act of 1856; that he holds them under a secret trust for said company and its stockholders, and that he and his relatives are the largest stockholders, and elected themselves, and others subject to

their control, directors, and by directors so composed the conveyances to him were executed.

That there is valuable timber on the lands which the company and other persons are cutting and carrying away, and valuable mines which they are working, and that the company is collecting the purchase money for lands sold by them, and is alienating other lands, and it is therefore necessary to have a receiver appointed.

A number of persons beside Carlisle are made defendants on the ground that they are in possession of some of the lands, and the Nashville &c. Railway Company and the Manhattan Trust Company are also made defendants on the ground that they claim an interest in a large part of the lands under contract with the Tennessee and Coosa Railroad Company, which it is averred were taken with knowledge of the rights of the United States.

The prayer is for a receiver and an injunction and cancellation of the selections made by the company, the conveyances and contracts made by it, and for general relief.

The Exhibits A and B contain a list of lands respectively within the six- and fifteen-mile limit, and Exhibits D and E are the conveyances to Carlisle.

A receiver was appointed upon the bill without notice, and an injunction *pendente lite* issued. The injunction was subsequently modified to exclude from its operation certain of the lands.

Carlisle filed a demurrer and answer to the bill. The answer admitted all the allegations of the bill material to the propositions presented on this appeal except those charging deception and fraud in the conveyances to him, but specifically alleged that they were executed in good faith and for valuable consideration, and that the lands included in the deed from the company to him (Exhibit "D" of original bill) are all opposite to and coterminous with the ten and 22–100 miles of completed road. By an amendment to the answer it was alleged that said lands were within six miles of the line of definite location of the road and within the primary granted limits.

It was further alleged that he contracted with the railroad company in 1859 to build the road; that in 1860 the company executed a mortgage upon its franchises and other property, especially upon the lands granted by Congress, to secure 400 bonds, each of the value of $1000, issued by the company, and eleven of them were pledged with him to secure the amount due him for work done prior to 1861, and that at the time the civil war broke out he had 400 hands working on the road, and was progressing rapidly with the building of the same. That during the war and after the war his and the company's financial condition prevented further construction. In 1871 the company made a conditional sale of the road to the East Alabama and Cincinnati Railroad Company to complete the road, but that company only built five miles of it between Gadsden and Attalla; that in 1883 the Coosa company resumed possession, and passed a series of resolutions approving and ratifying what he had done, constituting him its financial agent with power to construct, equip and put in running order the road from Attalla to Guntersville, and empowered him to use all the assets of the company; and agreed to pay him out of the assets the original cost and expenses that he should incur in the construction, equipment and putting the road in running order, together with twenty per cent in addition for superintendence and advances made by him; and that he retain a lien on the railroad and its franchises, both real and personal, until the costs and expenses incurred by him be fully paid off, together with said twenty per cent in addition. The said resolutions also revived and renewed the indebtedness due to him for work done prior to 1860.

That he put forth every energy to build the road, and expended in the work under a contract with the company large sums of his private resources; that the company had no money and no other resources except said lands, and no means except as supplied by him.

That in 1886 the road was completed as far as Littleton, a distance of ten and 22–100 miles; that during all this time the money due him for work done prior to 1861 had not been paid, and that sum, amounting to $47,000, and the money

expended afterwards by him, amounted to $85,750.92, and that his account was submitted to the board of directors of the company and was credited and approved.

That in February, 1887, the directors, desiring to pay him, and having no assets, offered to convey the lands described in Exhibit "E" to the bill in payment *pro tanto* of his account at two dollars and a half per acre; that he finally agreed to accept twenty-three thousand seven hundred and thirty-nine and 57–100 acres at said price, and the company conveyed the same to him absolutely, without any trust or reservation whatever, and that after receiving such conveyance there still remained due him $26,401.27.

That on the 2d of April, 1888, the company conveyed to him about 16,400 acres of land, described in Exhibit "D," attached to the original bill, at the price of one dollar and twenty-five cents per acre, which was the full value of the interest of the company in the lands, because they lay within the conflicting limits of the grants to the company and the Alabama and Chattanooga Railroad Company, and the Coosa company only owned an undivided moiety; that the consideration was money due the respondent as aforesaid, and the conveyance was absolute and without any trust or reservation.

That all the lands described in Exhibit "E" are a part of the first one hundred and twenty sections of the grant, and are opposite to and coterminous with the first twenty miles of the railroad as shown by the map of the definite location, which was duly filed in accordance with the act of Congress, and are included in the lands which the company was authorized to sell in advance of the construction of any portion of the road. And it was alleged in an amendment to the answer that the company sold lands within the first one hundred and twenty sections at divers times to divers persons for two and 50–100 dollars per acre, usually on credit and notes taken and placed in his, Carlisle's, hands as collateral security for the money due him, and most of the notes still remain in his hands, and only a small amount has been paid thereon; that the vendees of the company are in possession, and that he

during the years 1887 and 1888 sold for a valuable consideration the lands described in Exhibit "E" of the original bill to purchasers in good faith, who paid for the same and received his warranty deed. A list of the purchasers is attached to the answer.

The answer of the railroad company was substantially the same as that of Carlisle, and the answers of the other respondents allege their respective relations to the lands, but are not otherwise material to the propositions in controversy.

Upon the testimony submitted, oral and documentary, the Circuit Court found as follows:

"First. That prior to the 29th day of September, 1890, the Tennessee and Coosa Railroad Company had sold to *bona fide* purchasers all the lands embraced in the first 120 sections, which by the terms of the granting act it was authorized to sell in advance of the construction of the road. That these sales were *bona fide* and made to aid in the construction of the road. That the allegations of the bill, that the sale to Carlisle was without consideration and colorable, are not sustained by the evidence, but the sale to Carlisle was *bona fide* and based on good consideration, and the proceeds of the sale used in the construction and equipment of the road.

"Second. The court finds that the Tennessee and Coosa Railroad from Gadsden to Littleton, a distance of ten and 22–100 miles, was completed and in operation on and before the 29th day of September, 1890, and that the lands described in Exhibit D to the original bill, to wit, the lands embraced in and conveyed by the deed from the Tennessee and Coosa Railroad Company to Hugh Carlisle, bearing date the 4th day of April, 1887, are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and therefore not within the lands forfeited by the act of September 29, 1890.

"The court is therefore of the opinion that there has been no forfeiture of the lands as to which a judicial declaration of forfeiture is sought by the bill, and it is accordingly ordered and decreed that the relief sought by the bill be denied and the bill dismissed."

In the opinion of the court it was said, "that the lands embraced in the first one hundred and twenty sections of the granting act, the railroad company was authorized to sell in advance of the construction of the road, and that the parties to whom such sales were made, took good title, and there can be no recovery or restitution of any of these lands to the public domain in this case. 2. That the lands described in Exhibit D to original bill are lands which lie opposite to that part of the road which was completed and in operation on the 29th day of September, 1890, and are not within the lands covered by the act of September 29, 1890." 81 Fed. Rep. 544.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals, 52 U. S. App. 171, and the United States took this appeal.

*Mr. Charles W. Russell* for appellants. *Mr. Solicitor General* was on his brief.

*Mr. Amos E. Goodhue* for appellees.

Mr. Justice McKenna delivered the opinion of the court.

The questions which primarily arise on this appeal are based on the provisions of the granting act of 1856 and the forfeiting act of 1890.

The United States contend that the provisions of the former caused a reversion of the title in 1866; the contention of appellees is that some affirmative action, legislative or judicial, on the part of the grantor, was necessary for the forfeiture of the grant, and that until such action the title and all the powers conferred by the act of 1856 continued and could be exercised. And further, that the act of 1890 was the measure of forfeiture.

By the act of 1856 it is enacted —

"That there be and is hereby granted to the State of Alabama, for the purpose of aiding in the construction of railroads; from the Tennessee River, at or near Gunter's Landing, to Gadsden, on the Coosa River, . . . every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads."

"SEC. 3. That the lands hereby granted to the said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid and no other. . . .

"SEC. 4. That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each such roads, may be sold; and so, from time to time, until said roads are completed; and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

The material part of the act of 1890 is as follows:

"*Be it enacted*, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain."

These principles are established: That acts like that of 1856 convey a present title, that the conditions expressed in them are subsequent, not precedent, and the rights and powers of the grantee continue until the grant is directly forfeited by legislative or judicial proceedings. If the cases were less certain, less directly applicable to the case at bar, we might attend in detail to the able argument of the counsel for the United States.

In *Schulenberg* v. *Harriman*, 21 Wall. 44, the leading case, the road in aid of which the grant was made was not con-

structed, the ten years' limitation upon the sale of the land had expired, and of the provision that the lands should revert to the United States it was said that it was "no more than a provision that the grant shall be void if a condition subsequent be not performed." Sheppard's Touchstone was cited and applied as follows:

"In Sheppard's Touchstone it is said: 'If the words in the close or conclusion of a condition be thus, that the land shall return to the enfeoffor, etc., or that he shall take it again and turn it to his own profit, or *that the land shall revert*, or that the feoffor shall *recipere* the land, these are, either of them, good words in a condition to give a reëntry — as good as the word "reënter" — and by these words the estate will be made conditional.' The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant, and the manner of sale prescribed in the act.

* * * * *

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate, but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investi-

gation, or by taking possession directly under the authority of the government without these preliminary proceedings.' In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

The power of sale of one hundred and twenty sections in advance of the commencement of the construction of the road was impliedly decided. That power, however, came more explicitly into consideration in *Railroad Land Co.* v. *Courtright*, 21 Wall. 310, where again a similar granting act was passed on. The court reaffirmed the principles expressed in *Schulenberg* v. *Harriman*, and said again by Mr. Justice Field:

"It is contended by the defendants, *first*, that under the act of Congress of May 15, 1856, no lands could be sold by the State until twenty continuous miles of the road were constructed; *second*, that if one hundred and twenty sections could be sold in advance of such construction, they could only be taken from lands adjoining the line of the road from its commencement on the east; and, *third*, that the grant by the State to the first company was upon conditions precedent, which not having been complied with, the title did not pass. Neither of these positions can, in our judgment, be maintained. The act of Congress by its express language authorized a sale of one hundred and twenty sections in advance of the construction of any part of the road. It was only as to the sale of the remaining sections that the provision requiring a previous completion of twenty miles applied. It is true it was the sole object of the grant to aid in the construction of the railroad, and for that purpose the sale of the land was only allowed, as the road was completed in divisions, except as to one hundred and twenty sections.

"The evident intention of Congress in making this exception was to furnish aid for such preliminary work as would be required before the construction of any part of the road. No conditions, therefore, of any kind were imposed upon the State

in the disposition of this quantity, Congress relying upon the good faith of the State to see that its proceeds were applied for the purposes contemplated by the act."

Counsel for the United States attempts to distinguish the *Courtright case* from the case at bar, and asserts that in *Schulenberg* v. *Harriman* the power of the State to sell, subject or not subject to the grantor's rights after the expiration of ten years, although the road had not been finished, was not at issue; and any expressions on that topic were mere dicta. We do not assent to this view. Such power was a necessary consequence of the principles announced, and they have a more extensive authority and application than to the instance in that case.

The title passed to the State, it was decided, continued in the State with all its attributes and power, except as expressly limited, until it should be resumed by the grantor by appropriate proceedings for breach of conditions. Hence the logs in that case, though cut upon land to aid a railroad which had not been constructed, and after the time designated for its construction, and after which all unsold lands should revert to the State, was held to belong to the State. And in the *Courtright case* upon the same principles it was held that lands sold by the railroad without constructing the road carried title to the vendee. There was a reassertion and an application of the same principles in *United States* v. *Loughrey*, 172 U. S. 206.

It follows that by the act of June 3, 1856, the State of Alabama took the title to the lands in controversy upon conditions subsequent, and conveyed such title upon the same conditions to the Coosa Railroad; and that it continued in the railroad until determined by proceedings, legislative or judicial, for such forfeiture, and until such determination all the rights and powers conferred by the act continued and could be exercised.

Those rights and powers were (1) to sell 120 sections of land in advance of the construction of any part of the road; (2) to sell a like quantity upon the completion of any twenty miles of road.

The first power, it is claimed, was exercised by sales to *bona fide* purchasers. The condition of the second power was not performed — twenty continuous miles of road were not completed at the time of the passage of the act of 1890. But it is not denied that ten and 22–100 miles were completed before the passage of that act.

1. The Circuit Court found that the first power was exercised as claimed. In other words, that the lands embraced in the first one hundred and twenty sections were sold to *bona fide* purchasers in aid of the construction of the road, and "that the allegations of the bill, that the sale to Carlisle was without consideration and colorable, was not sustained by the evidence, but the sale to Carlisle was *bona fide* and was based on good consideration, and that the proceeds of the sale were used in the construction and equipment of the road." We think that the findings are sustained by the evidence.

2. By the act of 1890 the United States forfeits and "resumes the title thereto all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation for the construction or benefit of which such lands were granted, and all such lands are declared to be a part of the public domain."

The necessary implication of these provisions seems to be that lands opposite completed road are not forfeited or resumed. But the counsel for the United States contests or seems to contest the implication. He says: "The general forfeiture act of September, 1890, intends to forfeit lands opposite unconstructed portions of road. It intends to forfeit them *for that reason.* It intends by no means to say that no lands are to be otherwise and for other reasons forfeited; that all conditions precedent in all cases of land grants are waived. It purports to waive nothing, but to forfeit for a cause common to all the old grants of lands for railroads — failure to construct prior to September, 1890." And again: "That act of 1890 was intended to take away lands and not to grant them, and it is too well settled to need discussion that lands and rights of the public cannot be granted away except in

the most *explicit*, *affirmative* terms." This, perhaps, is but another form of the contention which we have considered and refuted, but we may further say that its error is in assuming that the act of 1890 is claimed to be a grant. The act of 1856 was the grant. The title it conveyed continued until resumed, and as to what lands it was resumed the act of 1890 defines.

These considerations dispose of the contentions as to the 120 sections and the lands opposite completed road, but it is assigned as error that the Court of Appeals omitted to direct "a decree in favor of the United States as to lands not within either the said 120 sections or the 17,410.33 acres [lands opposite completed road], whether sold or not." And it is said: "The road being thirty-six miles and a fraction long, and the 120 sections absolutely required to be along twenty consecutive miles, and being in fact, as certified before the war of 1861, at and near the Guntersville end, sixteen miles and a fraction of road, at least, remain to be considered. Ten miles, beginning at the Gadsden end, were constructed before the act of 1890, leaving at least six miles; so that, obviously, the easy method resorted to by the lower courts of dividing all the lands into 120-section lands and lands opposite constructed road ignores our rights along six miles, to say nothing of the large body of lands along the twenty miles referred to but *not* in the 120 sections of place and indemnity certified before the war, and opposite *uncompleted* road in 1890."

This, it is replied, is contradicted by the findings of the Circuit Court, and that the record affords no evidence to dispute the findings. The findings were, as we have seen, that the lands embraced in the first one hundred and twenty sections were sold to *bona fide* purchasers; that Carlisle was such; that the road from Gadsden to Littleton, a distance of 10.22 miles, was completed and in operation on or before the 29th of September, 1890, and that the lands conveyed to Carlisle by deed dated April 4, 1887, were opposite to that part of the road. The conclusion was that "there has been no forfeiture of the lands as to which a judicial declaration of forfeiture is sought by the bill, and it is accordingly ordered

and decreed that the relief sought by the bill be denied and the bill dismissed."

Manifestly this decision is dependent upon the identity of the lands described in the bill with those embraced in the first one hundred and twenty sections and those opposite the ten miles of completed road. But this does not seem to be the fact. The bill gives a description of the lands by townships, ranges and sections, and at the argument a map was used showing them, their relation to the railroad, and its location and termini. It also showed the end of the first one hundred and twenty sections. Assuming the map to be correct, (and it is not questioned,) some judgment may be formed of the length and location of the road, the relative situation of the lands described in the bill to the road — to its completed and uncompleted part; and it appears that there are a number of acres of land south of the first one hundred and twenty sections, and between them and Littleton, (a distance of six miles,) of which a forfeiture should have been declared. In other words, it appears from the evidence and admissions that the road is thirty-six miles long, that the first one hundred and twenty sections were selected along a continuous length of twenty miles of the road from Gunter's Landing southward, and that the part of the road which was completed at the date of the forfeiting act was from Gadsden northward ten and $\frac{22}{100}$ miles, and terminated at Littleton. It is evident, therefore, that lands opposite the road from Littleton, northward six miles, are not embraced in the first one hundred and twenty sections and were not opposite completed road September 29, 1890, and hence were forfeited by the act of Congress of that date, (*supra*,) and if included in the description of the bill should be declared forfeited.

It is urged, however, by appellees that the decree should not be reversed, because the bill was framed to procure a forfeiture of the grant, not to adjust its limits, and because the question was not raised by the assignment of errors on the appeal to the Circuit Court nor on this appeal. Neither reason is sufficient. We may notice a plain error, though not assigned, and the prayer in the bill for a for-

feiture of the entire grant did not preclude a forfeiture of a part of it.

We think, therefore, a further investigation on the particular point indicated is required by the Circuit Court, and return the case for such investigation.

*The decree of the Circuit Court of Appeals is reversed, and the case remanded to the Circuit Court with directions to proceed in accordance with this opinion.*

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## SOUTHERN RAILWAY COMPANY *v.* CARNEGIE STEEL COMPANY.

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

No. 8. Argued October 13, 14, 1898. — Decided January 29, 1900.

In a decree for the foreclosure and sale of a railroad property under a mortgage, power was reserved by the court to compel the purchaser to pay any and all receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage debts or entitled to preference in payment out of the proceeds of sale. *Held*, That the rights of creditors whose claims had been filed were not affected by the sale of the property or by the fact of its transfer to the purchaser; nor did the reservation in the order of sale prevent the purchaser from contesting upon their merits any claims allowed after the purchase under the decree of sale.

A railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but in order to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the funds thus improperly diverted from their primary use.

Statement of the Case.

A general, unsecured creditor of an insolvent railroad corporation in the hands of a receiver is not entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and the benefit of the mortgage securities. Before such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear, from all the circumstances, that the debt was one to be fairly regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts.

This case is here upon a writ of certiorari for the review of a final decree of the United States Circuit Court of Appeals for the Fourth Circuit allowing certain claims of the Carnegie Steel Company, Limited, as preferential debts chargeable upon current receipts arising from the operation of certain railroad properties in the hands of receivers.

On the 15th day of June, 1892, William P. Clyde, John C. Maben and William H. Goadby, citizens of New York, suing for themselves and other creditors and stockholders of the Richmond and Danville Railroad Company and of other defendant corporations, exhibited in the Circuit Court of the United States for the Eastern District of Virginia a bill of complaint against the Richmond and Danville Railroad Company and the Richmond and West Point Terminal Railway and Warehouse Company, Virginia corporations. The bill made the following case:

The Richmond and Danville Railroad Company (hereafter called the Danville Company), in addition to its own line extending from Richmond to Danville, with a twelve-mile branch, being 152 miles of road, through the purchase or the acquisition of stock, or by written lease or operating contracts, obtained the possession and control of more than twenty other railways built under the respective charters of and owned by the corporations named in the bill. It also owned the entire capital stock of the Baltimore, Chesapeake and Richmond Steamboat Company, and through it operated a line of steamers between Richmond, West Point and Baltimore. Its authorized and outstanding capital stock was five

million dollars, the larger part being owned by its codefendant company.

The lines of railway comprising this system, known as the Danville system, were in Virginia, North Carolina, South Carolina, Georgia, Alabama and Mississippi, and reached many of the most important trade centres of those States.

For more than five years prior to the institution of that suit the Danville Company had held in possession and substantial control all the railways of the other companies in connection with its own road as a single system. Over a large portion of the mileage the engines and cars in traffic service were used without any fixed apportionment thereof to any specific portion of the system, and the income derived from the operations of the parent and auxiliary leased and operated lines were received and distributed through a common treasury with no separation of the earnings and expenses of the several properties, except by entries in books of account apportioning the gross income and expenses on some approximate but arbitrary basis of division as between the different lines over which the traffic yielding the revenue had passed.

The total mileage of the auxiliary portion of the Danville railroad, added to its own mileage, aggregated 3320 miles, exclusive of its steamer service.

The aggregate outstanding capital stock of the lines constituting the system, together with the stock of the steamboat company, amounted to $43,482,950, of which $10,707,354 was neither owned nor controlled by the defendant companies.

Through the ownership of all or a majority of the stock thereof, some of the roads were operated by the Danville Company as proprietary lines. Others were operated upon the basis of a fixed rental or payment of net earnings, or a guarantee of interest on bonds or dividends of stock, or both.

In consequence of the absorption of such roads in its system by lease or contract, the bonded debts and rental obligations which the Danville Company had assumed and became liable for amounted to $71,128,126. Its own direct bonded debt was $16,136,000, making the total bonded and rental debt of the Danville system $87,314,126.

The bonded debt resting on the Danville road proper and equipments was in five separate issues of securities; that resting on its auxiliary and operative lines was embraced in fifty-nine different classes of securities issued by the several companies, secured by separate mortgages or deeds of trust covering different sections of the controlled roads or their equipment, capable of separate default or foreclosure, besides five stock guarantees, representing certain of its rental obligations, also secured by provisions for reëntry on default.

The Danville Company also had outstanding car trust obligations of its own and leased lines amounting to $1,542,824, and a floating debt of over $5,000,000; also an emergency loan of $600,000, advanced by those interested in the property to prevent default on April 1, 1892.

Besides all such outstanding fixed liabilities on account of its own road and controlled lines, the directors of the Danville Company had pledged its credit and subjected it to other heavy liabilities, to enable its codefendant, the Richmond and West Point Terminal Railway and Warehouse Company — to be hereafter referred to as the Terminal Company — or certain of its controlled companies to acquire the stock control of other lines of railroads not directly connected with or operated by the Danville Company and in which it had no interest whatever. Its board of directors had issued $6,000,000 of bonds of the Danville Company, executed jointly and severally with the East Tennessee, Virginia and Georgia Company, and guaranteed by the Terminal Company "Cincinnati Extension Bonds," which were secured by a trust pledge of preference and ordinary shares of the Alabama and Great Southern Railway Company, Limited. Those bonds had been sold in open market, and apparently constituted an outstanding liability of the Danville Company, but for which it received no valuable consideration whatever. It had executed the same as mere accommodation paper and as a partnership adventure, and was only protected against loss by the above pledge of corporate stock of uncertain value, because it was subject to heavy prior mortgage debts, and the line of road of the particular corporation issuing such stock was a

central link in the system of the East Tennessee Railway system over which the Danville Company had no control whatever.

By reason of the absolute stock control which the Terminal Company had over the Danville Company it compelled the latter company about June 1, 1891, to become the assignee and guarantor of a written lease executed by the Central Railroad and Banking Company of Georgia, of all its system of railroads and steamer lines for a long term of years to the Georgia Pacific Railway Company, whereby the Danville Company became bound to operate the Central System and to assume and pay all the interest on the bonded debts and all the rental obligations of the Central Railroad and Banking Company; and the Danville Company was compelled to execute and deliver a bond of $1,000,000 to faithfully perform all the covenants in such lease. The result of the operation of the Central-Georgia system of roads had been a constant and heavy loss to the Danville Company.

The bill next set out the relations between the Danville Company and the Terminal Company, and also described what is known as the Tennessee system, having 2318 miles in length of proprietary, leased and operated roads.

It then stated that the five several issues of bonds of the Danville Company were secured by mortgages to divers trustees and constituted liens of varying rank upon some portion of its road, franchises and equipment; that the bonds issued by the Danville and Terminal Companies, as well as a large majority of the several issues of bonds resting on the different separately mortgaged sections of the Danville system, were owned by a large and constantly shifting number of persons and corporations, who were scattered in many different States and countries and had no organization or registration; that what was known as the emergency loan, for which the income of the Danville system was pledged, was advanced in equal sums by a considerable number of persons, many of whom preferred not to have their names or advances disclosed; that the plaintiff, Maben, was a registered stockholder of the Danville Company; that the plaintiffs were

owners of a large amount of the common preferred stock of the Terminal Company and of its six and five per cent bonds, of the Danville Company's debenture and five per cent bonds and of different classes of bonds resting on parts of the Danville system, and some of them were creditors of the Danville Company on account of advances made to the emergency loan, and entitled to the security given therefor; that while nominally distinct corporations, the actual transactions and financial arrangements between the Terminal Company, conducting no active business as a security company, with no assets except stocks and bonds, (but holding nearly the entire capital stock of the Danville Company,) and the Danville Company, as a corporation, operating a large system of railways, separately organized and mortgaged, had resulted in serious complications; that such community of heavy and extra-hazardous liability and hypothecation indissolubly connected the financial operations of the Danville and Terminal Companies, so that the unrelieved embarrassment of either company would necessarily force the insolvency of the other, "and produce a disruption of the system of roads;" that the then financial condition of the two defendant corporations was alarming to the holders of their stocks and bonds; that in the latter part of 1891 the large and increasing floating debts of the several properties in which the Terminal Company was interested and the heavy losses incurred in the operations of some of the roads, created much uneasiness among the stockholders and creditors; that by reason of such condition of things, the management had invited prominent financiers to investigate the several systems and aid in perfecting the best plan for permanently adjusting the affairs of the companies in question and secure them the credit necessary for their successful operation; that two movements to that end had failed, when about the last of May, 1892, "a large number of security holders joined in a request to an eminent banking firm of New York City that it should investigate the property and its financial condition, and undertake to rescue it from the bankruptcy, shrinkage in value and disruption with which the system was threatened;" that such bankers consented to cause an exami-

nation to be made, and the plaintiffs were advised that the same was in progress, but that no conclusion had been reached or report made, and necessarily the creditors and security holders were so numerous, scattered and unknown, and the classes of liens so varied in character and value, that to perfect any satisfactory plan to reorganize the system and secure the necessary creditors' assent would require considerable time; and that in the meantime the financial embarrassments continued to be urgent and threatening, and the possible consequence thereof might "result in the disruption of the system, and the depreciation of millions of dollars in the value of the securities."

The bill further alleged that the enormous floating debt of the Danville Company was wholly beyond its financial ability to carry out of its ordinary revenues, over $4,500,000 of such debt standing in demand loans subject to summary enforcement; that by reason of the depreciation in the market value of its securities, and the failure of the several efforts to reorganize the property, its credit had been much impaired; it was not able to pay its obligations as they matured, but had been forced to ask renewals; it had no available collaterals to enable it to negotiate such a loan as was necessary to adequately protect it against open default; it had been forced to postpone payment of usual operating expense vouchers for supplies, and was allowing heavy arrears of such debts to accrue; many creditors had brought suits and attached cars and funds forwarded to pay employés; besides its floating debt, mortgage coupons on seventeen sectional mortgages, aggregating $989,000, would fall due on July 1, 1892; it had no available money or assets wherewith to pay the debts which would soon mature and no reasonable hope of financial assistance from any quarter to enable it to do so; its directors had had no meeting for over two months, and had practically abdicated their trust and power of management and confessed their utter inability to devise means to divert the insolvency and disruption of the system in their charge.

Plaintiffs charged that the corporation was insolvent and

this vast trust property was substantially derelict; that the unity of the property, as held and operated as an important trunk line, constituted one of the most important ingredients of its value, and that to permit its severance would result in a ruinous sacrifice to every interest in the property; that the owned and operated lines of road lie in six States, and were subject to the jurisdiction of the courts in each of the many counties in which the property was situate; that unless the court, in view of the impending and inevitable defaults as aforesaid, would deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors, immediately upon default, would assert their remedies in different courts in the several States; that a race of diligence would result, and judgments and priorities attempted; that levies and attachments would be laid upon the engines and cars of the company, and upon the fuel, material and supplies indispensable to the operations of the road and which would greatly interfere and ultimately prevent the company from properly discharging its duties as a public carrier, and seriously diminish the earnings of the road; that lessors of the roads now owned would enforce the reëntry covenants of their leases; that the continued default of the mortgaged debts would produce the immediate maturity of the bonds; and that "a vast and unnecessary multiplicity of suits will result, and a most important and valuable trust property will be dismembered by the clashing decrees of the many courts exercising jurisdiction at the suit of separate creditors, which might be shielded and preserved as a valuable single trust property by adequate judicial protection until such time as a satisfactory financial reorganization could be perfected."

The plaintiffs also averred "that the Central Trust Company is not only the trust depository in the said pledge of income, but is the trustee in over twelve trust deeds executed by the Danville Company and divers roads in its system, and also trustee for the preferred stockholders and 6% and 5% trust deeds of the Terminal Company. That the trusts and duties in said different deeds as to property, equipment and income

are variant, and in some respect antagonistic. In case of default and judicial enforcement, their reciprocal rights will have to be construed and decreed by the court, and such common trustee cannot properly represent such variant trusts; and the bondholders have the equity to apply in their own names to protect the trust estate."

The relief asked was —

That the court would decree that the plaintiffs as holders of aliquot portions of the emergency loan to the Danville Company, guaranteed by the Terminal Company, had a fixed and specific lien upon all and singular the income, tolls and revenues of the Danville Company and its leased, operated and controlled railroads, and each of them, and that the condition of such pledge of income had been broken, entitling the holders of such indebtedness to enforcement thereof;

That the court would also administer the trust fund in which the plaintiffs were interested, constituting the entire railroad and assets of the defendant corporations, and would for that purpose marshal all their assets and ascertain the respective liens and priorities existing upon every part of such system of railways, the amount due upon mortgages and other liens, and enforce and decree the rights, liens and equities of each and all of the stockholders and creditors of the Danville and Terminal Companies as the same were finally ascertained and decreed, in and to not only those lines of railroads, appurtenances and equipments, but also to and upon every portion of the assets and property of each of those corporations; and

That for the purpose of enforcing a lien and equity upon the income of the railroad system aforesaid, to which the holders of the emergency loan were by contract entitled, "as well as to preserve the unity of said system," as it had been for years maintained and operated, and preventing the disruption thereof by separate executions, attachments or sequestrations, the occurrence of which would be inevitable in view of the defaults in interest payments which would presently occur, the court would forthwith appoint one or more receivers of the entire system of railroads and steamers held and operated by the Danville Company, together with all equip-

ment, material, machinery, supplies, moneys, accounts, choses in action and assets of every description and wherever situated, together with all leasehold rights and contracts, with authority to manage and operate the same as the officers of and under the direction of the court, and that all the officers, managers, superintendents and employés of the Danville Company be required to forthwith deliver up the possession of all and singular each and every part of the property, over which the receivers were thus appointed, wherever situate, and also all books of accounts, offices, vouchers and papers in any way relating to the business or operation of such system of railways and steamers, and for injunctions restraining each and every of the officers, directors, managers, superintendents, agents and employés of the Danville Company from interfering in any way whatever with the possession and control of the receivers over any part of the property.

Upon hearing and considering the bill, with the exhibits and answer in support thereof, and on motion of the complainants, Frederic W. Huidekoper and Reuben Foster were appointed by the court receivers of the property and assets of the Danville Company, namely, the system of railways then in the possession of and owned and controlled by that corporation, situated in the District of Columbia and in the States of Virginia, North and South Carolina, Georgia, Alabama and Mississippi, together with all the equipment, shops, appurtenances of every kind, machinery, material and supplies owned, held or in the possession and use of such corporation, wherever situate, including all tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings of every kind, owned, held or possessed by the Danville Company, together with all steamers, wharves and other properties held in connection therewith, and all moneys, choses in action, credits, bonds, stocks, leasehold interests or operating contracts, and other assets of every kind, and all other property, real, personal and mixed, owned, held or possessed by that company.

It was further provided in the order of the court that the receivers "shall, from time to time, out of the funds coming

into their hands from the operation of the property, pay the expense of operating the same and executing their trusts, and all taxes and assessments upon the said property or any part thereof, and also pay and discharge all such traffic and car mileage balances as may be due to connecting and other railways, and all such loss and damage claims arising from the previous operation of said property as, in their judgment, on examination, are proper to be paid as expenses of operation; and shall also, out of the moneys coming into their hands, pay and discharge all the current unpaid pay rolls and vouchers and supply accounts incurred in the operations of said railroad system, at any time within six months prior hereto."

The receivers, who are referred to in the record as the insolvency receivers, entered into full and exclusive possession on the 16th day of June, 1892.

On that and the succeeding day auxiliary suits were instituted by the plaintiffs against the Danville Company in the Circuit Courts of the United States for the Western District of North Carolina, the District of South Carolina, the Northern District of Georgia, the Northern District of Alabama and the Northern District of Mississippi, and orders were duly entered of record by each of those courts confirming the original appointment of receivers and recognizing the Circuit Court of the Eastern District of Virginia as having primary jurisdiction over all the railroad system and property of the Danville Company wherever situated.

On the 28th day of June, 1892, the plaintiffs filed a petition in the cause, stating that the Central Trust Company of New York was trustee in five mortgages executed by the Danville Company, resting upon its property, and of the following dates and amounts: October 5, 1874, $5,997,000; February 1, 1882, $3,368,000; October 22, 1886, $4,498,000; September 3, 1889, $1,390,000; May 1, 1891, $883,000. The petitioners prayed that the receivers be authorized to execute and sell receivers' certificates to an amount not exceeding $1,000,000, which should be a first lien on the Richmond and Danville Railroad, its property, leasehold interests, contracts and income, "and out of the proceeds, as a special fund, to pay and

discharge all outstanding indebtedness of the Danville Company incurred for material and supplies in the operation of the roads in the receivers' hands, which were purchased within six months prior to June 15, 1892, as the said indebtedness shall be ascertained and reported on by special masters to be appointed for such purpose; and also, that out of the funds coming into their hands from the operation of the roads which could be safely used without prejudice to their own current liabilities for operating expenses, the receivers be authorized to pay the instalments of rent and coupons of mortgage bonds resting "upon the several parts of the system, so as to protect and preserve the present unity of the system of roads in their charge." The petition concluded: "The Central Trust Company is the trustee in each and all of the trust deeds and mortgages, and it is made a party hereto, so that it can appear to the application and be heard upon the question of using receivers' certificates, and authorizing the payment of mortgage, interest and rental obligations out of the current net income of the receivership."

Of the application for an order in accordance with the petition, the defendants and the Central Trust Company had notice. The court by order authorized the borrowing of $1,000,000 receiver's certificates to be used for the purposes indicated in the petition. The Trust Company was represented at the hearing of the application; and so far as the record discloses, made no objection to the order.

On the 13th day of July, 1892, the Central Trust Company presented its petition and prayed that it be allowed to intervene in the suit brought by Clyde and others for the protection of the holders of the six per cent bonds of the Danville Company and of the subscribers to the emergency loan made prior to April 1, 1892, and in respect of which that company was the trust depositary of the income of the Danville system pledged to secure such loan; and by order entered August 16, 1892, leave was given for that company to intervene in the cause, "on the condition that it hereby submits to the several orders heretofore entered herein." On the latter day that company presented its petition, asking that Huide-

koper and Foster be appointed as permanent receivers of the Danville Company, if the court should determine to continue its judicial possession of the system. An order to that effect was accordingly made. In presenting the above petition the Central Trust Company appeared not only as trustee of the Richmond and Danville Railroad Company and the consolidated gold mortgage to be presently referred to, but as trustee representing other mortgages and railroads, including the Virginia Midland Railroad, the Georgia Pacific Railway, and the North Eastern Railroad of Georgia.

On the 19th day of December, 1892, an intervening petition was presented by parties representing the underlying bondholders interested in any litigation or proceedings for the foreclosure of any of the mortgage or trust deeds of the Danville Company or any of the companies forming a part of the Danville system, and they were permitted to become parties complainant in the Clyde suit and to file such petitions and take such proceedings as they deemed necessary or requisite for the protection of the interests they represented.

In the suit instituted by Clyde and others, the Carnegie Steel Company, Limited, filed with the Master Commissioner, October 14, 1892, its claims arising out of certain contracts made between that company and the Danville Railroad Company in 1891 for steel rails delivered to the latter between July 25, 1891, and October 10, 1891. The facts relating to those contracts will be hereafter stated.

On the 13th day of April, 1894, the Central Trust Company of New York instituted a separate suit against the Richmond and Danville Railroad Company for the foreclosure of what is known as the consolidated gold mortgage. Upon the filing of that petition, and on the motion of the Trust Company, an order was entered appointing Huidekoper, Foster and Spencer receivers of the court of all and singular the railroads, property, assets, credits and effects of the Richmond and Danville Railroad Company, "the same being the system of railways owned, operated or controlled by the said corporation, situate in the District of Columbia and in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Mis-

sissippi, together with all the equipment, shops," etc., "and other assets of every kind, and all other property, real, personal and mixed, held or possessed by the said railroad company, the above-mentioned property being now in the possession, of said Frederic W. Huidekoper and Reuben Foster, receivers duly appointed by this court in a certain suit brought in this court and now pending therein, wherein William P. Clyde and others are plaintiffs and the Richmond and Danville Railroad Company and others are defendants." These receivers are described in the record as the foreclosure receivers.

The order last named contained this clause:

"Nothing in this order contained shall be construed to vacate any of the orders heretofore entered in the case of William P. Clyde and others; but the court reserves full power to act upon the masters' reports filed in the said cause, and in said cause to adjudge and decree upon the rights of creditors ascertaining [asserting] a claim against the property of the said railroad company or income thereof, in preference to the mortgage debt thereof, by orders to be entered in the said suit of William P. Clyde and others, upon notice to parties, with like effect upon the mortgaged property and income as if such orders were entered in this cause."

The Carnegie Company was permitted to intervene in the suit brought by the Central Trust Company, alleging in its petition that the rails sold and delivered by it to the Danville Company were used upon its roadbed for the purpose of maintaining the same in condition to conduct its traffic thereon and were necessary for that purpose. The claimants referred to the fact that they had previously filed their claim in the Clyde suit, "which claim is now pending in said cause before the masters, the demand of your petitioner that the same shall be allowed as a claim entitled to equitable priority of payment over the mortgage debt of the said defendant not having been heard or considered by said masters."

On the 17th day of February, 1894, the suit instituted by the Central Trust Company of New York and the one brought by Clyde and others were consolidated under the name of "*The Central Trust Company of New York and others* v.

Statement of the Case.

*The Richmond and Danville Railroad Company and others, Consolidated Cause.*" Upon application of the Carnegie Company it was made a party defendant in the consolidated cause.

A decree of foreclosure and sale in the consolidated cause was entered April 13, 1894, and a sale took place June 15, 1894, the property embraced by the decree being sold as a unit. Charles H. Coster and Anthony J. Thomas, a purchasing committee, as joint tenants purchased the property for the use, benefit and behoof of a corporation to be organized pursuant to the terms of an act of the General Assembly of Virginia, approved February 20, 1894, entitled "An act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation." The sale was approved by formal order of court and confirmed to the purchasing committee, composed of Coster and Thomas, for the sole use, benefit and behoof of the Southern Railway Company created under the laws of Virginia.

The decree of confirmation contained the following clauses: "And the court accepts the said Southern Railway Company as the purchaser of all and singular the railroad, property and franchises sold under this decree, and holds it as such purchaser obligated to complete and fully to pay the said bid and comply with all the orders of the court already entered, and hereafter, from time to time, to be entered by it obligatory on such purchaser. And the court further reserves full power from time to time to enter orders binding upon the said Southern Railway Company as such purchaser, requiring it to pay into the registry of the court all such sums as have been or may be ordered by the court for the payment of any and all receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage herein foreclosed, or entitled to preference in payment out of the proceeds of sale." That order also contained this clause: "The court reserves full power notwithstanding such conveyance and delivery of possession to retake and resell the property this day confirmed to such purchaser if it fails or neglects fully to complete such

purchase and comply with the orders of court in respect to full compliance therewith, or to pay into court, in accordance with such decree of sale and orders of court, all sums of money hereafter ordered by the court to be paid into its registry to discharge any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage herein foreclosed."

Subsequently, upon hearing of the exceptions to the masters' report on the claim of the Carnegie Steel Company, Limited, the Circuit Court found that that company furnished to the railroad company, at the dates and in the quantities named in their petition for claim, steel rails to the aggregate value of $125,067.39, which the company used and agreed to pay for, and that the interest on that amount was $29,828.58; in all, $154,895.97. It further found that that sum had never been paid by the railroad company; that "the earnings of said defendant railroad company, which should have been used for the payment of current expenses, including therein this claim, have been used for the benefit of mortgage creditors, in a sum more than sufficient to pay said claim in full;" and that "prior to May 1, 1888, bonds of the Richmond and Danville Railroad Company known as consolidated bonds were issued to the amount of $1,621,000, and that since that date such bonds have been issued to the amount of $2,906,000." And it was adjudged that the claim, with interest thereon from the time when the respective items thereof became due and payable by the Danville Company, was entitled to priority of payment out of the funds resulting from the sale of the mortgaged property, over the bonds secured by the mortgage foreclosed by the decree heretofore passed in this cause, and was also entitled by reason also of the statutes of Virginia "to priority of payment out of the fund resulting from the sale of the mortgaged property, over such of the bonds secured by the mortgage foreclosed by the decree heretofore passed in this cause as were issued after May 1, 1888, being $2,906,000 in amount." It was further ordered that "the purchaser at the sale heretofore made, or his assigns, do forthwith pay to the Carnegie Steel Company, Limited, said sum of $154,895.97, in

compliance with the terms of the decree of sale heretofore passed, whereby the purchaser at such sale, or his assigns, was required to pay off and satisfy all claims filed in this cause, which this court should adjudge prior to the mortgage by said decree foreclosed."

The Southern Railway Company prosecuted an appeal from that order to the Circuit Court of Appeals, and the action of the Circuit Court was approved. 42 U. S. App. 145; 76 Fed. Rep. 492. The case is in this court upon certiorari, sued out by the railway company.

*Mr. Henry Crawford* and *Mr. Edward J. Phelps* for appellant. *Mr. Willis B. Smith* was on their brief.

*Mr. Nicholas P. Bond* and *Mr. David Willcox* for appellees. *Mr. P. C. Knox* was on their brief.

Mr. Justice Harlan, after stating the facts as above, delivered the opinion of the court.

It appears from the above statement that the property in the hands of the receivers in the Clyde or insolvency suit was surrendered to the receivers in the foreclosure suit under an order that expressly reserved power in the court to adjudge and decree in the Clyde suit upon the rights of creditors asserting claims against the property of the railroad company or its income in preference to mortgage debts. Besides, the decree of sale provided that the purchaser or purchasers, or his or their assigns, under any decretal sale should, as a part of the consideration, in addition to any sum bid, take the property upon the express condition that he or they would pay and satisfy (among other specified claims) all claims theretofore "filed in this case or in either of the causes consolidated herein, but only when said court shall allow such claims and adjudge the same to be prior in lien or superior in equity to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto." And the right was dis-

tinctly reserved to retake and resell the property in case the purchaser or purchasers, or his or their assigns, failed or neglected to comply with the order of court in respect of the payment of such prior liens. These conditions were repeated in the order confirming the sale. So that the right of the Carnegie Company to have its claims determined upon their merits is not at all affected by the sale of the property held by the receivers in the consolidated cause, or by the fact of its transfer to the Southern Railway Company. And we add that the above reservation in the orders and decree of the Circuit Court left it open for the Southern Railway Company to contest, upon their merits, any claims allowed after its purchase under the decree of sale.

The respective rights of the mortgagees of a railroad company and of parties having claims against it at the time its property passed into the hands of receivers have been frequently the subject of consideration by this court. But as counsel differ as to the scope and effect of former decisions, it is necessary to examine them and ascertain whether those decisions embrace the case now before the court.

The leading case is *Fosdick* v. *Schall*, 99 U. S. 235, 252, 253, which related to a claim against a railroad company for rent of cars. In that case Chief Justice Waite delivered the unanimous judgment of the court. After observing that the business of all railroad companies was done to a greater or less extent on credit, and that this credit was longer or shorter as the necessities of the case required said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the

mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control." The court further said: "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied. We think also that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income from the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and stockholders; and if they give to one class of creditors that which properly belongs to another, the

court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. . . . No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of the restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

In *Hale* v. *Frost*, 99 U. S. 389, it appeared that a receiver was appointed in a suit brought by trustees to foreclose mortgages executed by a railroad company. He was appointed May 19, 1875, at which time the company owed employés for back wages and was indebted for current supplies. To the Union Car Spring Manufacturing Company it was indebted for springs and spirals furnished in March and April before the appointment of the receiver, and which he continued to use. It was also indebted to Hale, Ayer & Co. for supplies to the machinery department and for materials for construction purposes; and on the 13th day of February, 1873, a given amount was due them, as evidenced by the notes of the railroad company falling due on that day. The judges who

heard the case in the court of original jurisdiction were divided in opinion on the following points made by intervening creditors: 1. That the railway mortgage was a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road was in the possession of the company. 2. That after the default in the payment of the interest November 1, 1873, the fact that the mortgagees funded their coupons and left the company in possession of the road constituted the company their agent and trustee in equity, and they were estopped from objecting to the payment from the earnings of the road of all legitimate debts contracted by the company for operating expenses. 3. That the net earnings of the road, while in the possession of the court and operated by its receiver, were not necessarily and exclusively the property of the mortgagees, but were subject to the disposal of the chancellor in the payment of claims which had superior equities, if such should be found to exist, and that the intervening petitioners' claims had superior equities to those of the mortgagees. The petitions were dismissed and the intervenors appealed. This court, speaking by Chief Justice Waite, said: "The first question certified in this case is answered in the affirmative, upon the authority of *Fosdick* v. *Schall*. The third question is answered in the same way upon the same authority. The Union Car Spring Manufacturing Company is entitled to payment in full, and Hale, Ayer & Co. to payment of so much of their claim only as is for supplies to the machinery department. There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes. An answer to the second question is unnecessary."

In *Burnham* v. *Bowen*, 111 U. S. 776, 780, 783, it appeared that the trustees of a mortgage covering all the property of a railroad company and all the revenues and income thereof, brought suit to foreclose the mortgage and had a receiver appointed. In the order appointing the receiver no special provision was made for the payment of debts owing for current expenses. When the receiver took possession the rail-

road company was indebted for coal used on locomotives — a debt contracted by the company in the ordinary course of a continuing business, and which would have been paid out of current earnings at the time agreed on if the company had remained in possession. The debt due the coal company was evidenced by the acceptances of the railroad company, which were for different amounts, maturing a month apart, thus implying, as this court said, monthly settlements of monthly accounts, with a somewhat extended credit to meet the business requirements of the railroad company. A decree was entered finding the amount due to Bowen, the holder of the acceptances, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof.

Chief Justice Waite, delivering the unanimous judgment of this court, said: "In our opinion the view which the Circuit Court took of this case was the correct one. The company had never paid its bonded interest. From the very beginning it was in default in this particular, yet the mortgage trustees suffered it to keep possession and manage the property. The maintenance of the road and prosecution of its business were essential to the preservation of the security of the bondholders. The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is incumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived. As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 252, 'the income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income.' Such being the case, when a court of chancery, in

enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it. In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors."

It was contended in that case that no part of the income, prior to the receiver's appointment, was used to pay mortgage interest or to put permanent improvements on the property, or to increase the equipment, and therefore there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. Touching that contention, this court said: "The debt due Bowen was incurred *to keep the road running*, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is proba-

ble, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was affected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances we think the debt was a charge in equity on the continuing income, as well as that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick* v. *Schall* the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick* v. *Schall*, which we see no reason to modify in any particular."

The opinion in that case thus concluded: "We do not now hold, any more than we did in *Fosdick* v. *Schall* or *Huidekoper* v. *Locomotive Works*, 99 U. S. 258, 260, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if the current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *Union Trust Co.* v. *Morrison*, 125 U. S. 591, 609, 612, the contest was between the mortgagees and Morrison who had become surety in a bond given by an insolvent railroad company which was harassed by suits in order to prevent a levy by a sheriff upon its rolling stock. Subsequently a suit was brought to foreclose a mortgage upon the railroad. The giving of the bond undoubtedly protected the company's property from seizure and enabled it to remain a going concern, and saved it to the mortgagees. This court, speaking by Mr. Justice Bradley, said: "Even if it [the rolling stock] would have been subject to the mortgage, when taken on execution, nevertheless it could have been taken,[1] and this would necessarily have disturbed, and perhaps interrupted, the operations of the railroad, by separating the property seized from the corpus of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards; on the contrary, they allowed the railroad company to continue to use the property, and to take care of it for them, and stood by and saw Morrison (who had no interest in the matter) put his hands into the fire and rescue the rolling stock of which they were to receive the benefit — both directly, by receiving the property itself without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders, whom they represented, the nominal purchasers, Horsey and Canda, or the present company. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company." Referring to prior cases, and dis-

[1] The constitution of Illinois of 1870, in which State the case arose, declared, Article XI, § 10, that "the rolling stock and other movable property belonging to any railroad company or corporation in this State shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals."

claiming any purpose to modify the rule charging operating expenses upon current earnings, the court said: "The present claim is of a different character, based upon a *bona fide* effort made by the intervenor to preserve the fund itself from waste and spoliation after the mortgage was in arrear and the right to reduce it to possession had accrued. But even here, as we have seen, if the claimant could pursue only the earnings, it is shown that they have been appropriated to the purchase of property which has been added to the fund."

In *St. Louis, Alton &c. Railroad* v. *Cleveland, Columbus &c. Railway*, 125 U. S. 658, 673, the court, speaking by Mr. Justice Matthews, after stating that ordinarily the unsecured debts of an insolvent railroad company cannot take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens, said: "There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens." "The rule," the court said, "governing in all these cases was stated by Chief Justice Waite in *Burnham* v. *Bowen*, 111 U. S. 776, 783, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, this court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and

unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness, in preference to the mortgaged liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as a holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced." Again: "It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." These principles were reaffirmed in *Thomas* v. *Western Car Co.*, 149 U. S. 95, 110, in which it was held that the car company there seeking a preference over mortgage creditors had contracted upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity; consequently its claim to a preference was denied.

In *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355, 365, 368, the court, referring to the decision in *Burnham* v. *Bowen*, said: "It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in

order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of the current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected by the fact that, while the company is operating its road, its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation and improvement of the property."

In the opinion in that case the court observed that it did not intend to detract from the force of the intimations contained in *Kneeland* v. *American Loan & Trust Co.* and *Thomas* v. *Western Car Co.*, above cited, "as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court, having a road or fund under its control, may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership." And it was further said: "In neither the *Kneeland* nor the *Thomas case* was there any intention to question the prior decisions of the court, which allowed priority to claims based upon the furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of the road under the direction of a court of equity."

It is apparent from an examination of the above cases that

the decision in each one depended upon its special facts. This court has uniformly refrained from laying down any rule as absolutely controlling in every case involving the right of unsecured creditors of a corporation, whose property is in the hands of a receiver, to have their demands paid out of net earnings in preference to mortgage creditors. But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company but to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. The doctrine announced in *Burnham* v. *Bowen* — in which case the decisions in prior cases were affirmed — is thus expressed in the recent case of *Virginia & Alabama Coal Co.* v. *Central Railroad Company*, above cited: "The dominant feature of the doctrine as applied in *Burnham* v. *Bowen*, is that, where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the material man as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the

property. The equity thus held to arise when a purchase of necessary current supplies is made by the owning company is not in anywise influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and purchased for use and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt."

Can the decree below be sustained consistently with these principles? Are the debts due the Carnegie Company of the class designated in the adjudged cases as current debts contracted, not on the personal credit of the railroad company, but in the ordinary course of its business and to be met out of current receipts? As already said, whether the parties, seller and buyer, had in view only the personal credit of the latter is to be determined in each case by its special facts, including the amount of the debt and the terms of payment.

All the rails furnished by the Carnegie Company were not supplied under one contract — a circumstance not to be ignored when determining whether the debts were of the kind that would ordinarily be met out of current receipts. The first contract between the Carnegie Company and the Danville Company was made June 10, 1891 — within less than twelve months before the appointment of receivers in the Clyde suit. It called for the delivery by the Carnegie Company, during the month of July, 1891, of only 2500 gross tons of rails for which the railroad company was to pay thirty dollars per gross ton, in its notes at four months from date of shipment *without interest*, with privilege of one renewal for three months with interest at the rate of 5 per cent per annum, and a second renewal for three months with interest at the rate of 6 per cent per annum. The railroad company reserved the option to increase by 200 or 300 the number of tons to be delivered, making the total delivery 2700 or 2800 tons. That option was exercised. By another arrangement between

the parties entered into July 21, 1891, the contract was further extended to cover 1656 tons of rails at the same price, terms and delivery. Subsequently, by agreement of October 2, 1891, provision was made for the delivery of 200 additional tons at the price of $26 per ton. The delivery of the rails was in varying amounts and at different times between July 25, 1891, and October 10, 1891. The whole quantity delivered was $4203\frac{0}{2}\frac{3}{2}\frac{5}{4}\frac{0}{0}$ tons, worth $125,067.39. Notes were given by the railroad company, and they were renewed at their respective maturities. Those last given, and which were unpaid at the time of the institution of the Clyde or insolvency suit, were each payable at three months, except the last one, which was at four months. They were of the following dates and amounts: March 21, 1892, $38,251.77; March 24, 1892, $35,499.38; April 4, 1892, $12,786.16; May 16, 1892, $5355.09; June 7, 1892, $33,174.99. The first note was due June 21–24, 1892, (six days only after the appointment of receivers in the Clyde suit,) and the last October 7–10, 1892.

The rails so received from Carnegie Company were used by the Danville Company on the following roads in its possession and under its control: 1108.5 tons 56lb, $33,174.99, on the Northeastern Railroad of Georgia; 1270 tons 70lb, $37,713.75, on the Virginia Midland Railroad; 1793.5 tons 70lb, $53,258.69, on the Richmond and Danville Railroad; 31.2 tons 70lb, $920.56, on the Georgia Pacific Railroad. This use of the rails is shown by the report of special masters, and to that report on this point no exceptions were filed by either party.

What was the condition of the roads owned and controlled by the Danville Company at the time the rails were purchased and used? It was in the power of the railroad company and its receivers, who had possession of the books of the company, to have furnished evidence on this point that would have removed all possible doubt. But there is enough in the record to show that the rails purchased from the Carnegie Company were needed in order that the roads in question might be kept by the railroad company in that condition of safety which its duty to the public and to the mortgage bondholders required. In August, 1892, *immediately after the receivers took posses-*

*sion of the railroads constituting the Danville system*, they reported to the court that the financial difficulties of the Danville Company during the previous two years had "prevented the operating officers from being able to expend the proper amount *for new rails, and upon the roadbed and structures, to keep the railroad in the condition in which it should be maintained*, and it will be necessary for the receivers, during the summer and autumn, to make a much larger expenditure than they would for ordinary maintenance." Here is a direct admission by the receivers that during the *two years* immediately preceding their appointment the railroad company had not expended for new rails and upon the roadbed and structures the amount necessary to keep its road in proper condition. There is no evidence in the record which even tends to show that the statements of the receivers on this point were not strictly accurate. But this purchase of new rails proved to be inadequate; for on the 27th of January, 1894, the foreclosure receivers represented to the court, by petition, that "for *the proper* and *economical* operation of the lines of railroad of which they are receivers, and *for the safety of passengers and property transported over such roads*, as required by the order of this court appointing such receivers, two thousand tons of new steel rails are *an absolute necessity;*" and that they "had negotiated with and purchased from the Carnegie Steel Company, Limited, subject to the approval of the court, that quantity of rails at the cost of $24 per ton." The court made an order in accordance with that petition. Again, on the 13th day of April, 1894, the court — all parties to the foreclosure suit consenting thereto, including the bondholders' committee — made an order authorizing the receivers to purchase 2500 tons of new steel rails in order "*to properly operate the railroads*" in their charge, "*and for the safety of persons and property transported.*"

It is apparent that the purchases of new steel rails while the railroads were in possession of receivers were made in the ordinary course of business and were properly chargeable upon and payable out of current receipts in preference to the claims of mortgage creditors. In every substantial sense the

expenses thus incurred were operating expenses. They were incurred in the interest of mortgage creditors, the value of whose securities depended upon the unity of the Danville system being preserved and the interests of all concerned not allowed to go to ruin. Why should a different rule be applied to the contracts made with the Carnegie Company *shortly before the appointment of receivers in the Clyde suit*, the original contract being for only 2500 tons, and the last one for only 1656 tons? Is it to be said that the contract for 2000 tons of steel rails and the contract for 2500 tons made by the receivers in the foreclosure suit created debts of a preferential character, while contracts made by the railroad company of exactly the same kind shortly before the appointment of receivers for 2500 and 1656 tons of steel rails could not under any circumstances become a preferential debt chargeable upon current receipts? Surely the quantity of rails purchased from the Carnegie Company and delivered in 1891 was insignificant in view of the interests involved and the extensive mileage of the Danville system, and was by no means so large as to suggest that they were to be used in constructing new and additional road, and not to keep existing roads in proper condition for use. Every railroad company must have on hand a limited quantity of rails in order to keep every part of its line in proper and safe condition. It is evident that the Carnegie rails purchased shortly before the receivers in the Clyde suit were appointed — the rails here in question — were obtained for the same reason that induced the subsequent purchases by the receivers. No one will say that the use of these rails did not add directly to the value of the securities of mortgage creditors. Within the reason of the rule adverted to, the debts contracted with the Carnegie Company were as much current debts in the ordinary course of the business of the railroad company as were the debts contracted by the receivers under the orders of court, when they purchased new rails to put the road in safe condition, or when they purchased at one time four passenger locomotives, and at another time eight passenger and freight locomotives, the cost of which was charged upon the income in their hands. Is it to be said

that such expenses incurred by the receivers were preferential debts, but that debts incurred by the railroad company shortly prior to the receivership for rails needed to keep its road in safe condition for use are not of that class?

We next inquire whether it was not at the time the expectation of both parties, vendor and vendee, that the rails delivered by the Carnegie Company between July 25, 1891, and October 10, 1891, should be paid for out of the current earnings of the railroad company? The attendant circumstances require an affirmative answer to this question, although the parties did not in express words declare that the debts due contracted with the Carnegie Company were to be charged upon the current earnings of the railroad company. The quantity of rails was not so large as to preclude the expectation that they could be paid for out of the current earnings of the railroad company. As already said, it was a very small quantity for purposes of ordinary or necessary repairs, and there is nothing in the record to show that the Carnegie Company relied merely or exclusively on the personal credit of the railroad company. The renewal notes executed by the railroad company were *all* within the *three* months *immediately preceding the appointment of the receivers.* The short credit given strongly indicates, and the fair inference from the record is, that the parties contemplated that the rails were to be paid for out of the current earnings of the railroad. The taking of notes does not indicate the contrary, but only shows that the vendor company preferred to have its debt evidenced by commercial paper which it could use, rather than to stand upon open account. In *Burnham* v. *Bowen* it was said: "When the receiver was appointed the debt was evidenced by business paper maturing at a future date. It was no waiver of any claim on the fund which might come into the hands of the receiver to renew the paper at maturity for the convenience of the holder. It was undoubtedly given originally to enable the coal company to use it as commercial paper if occasion required, and the renewal may have become desirable on account of the use which had been made of it." The equities of the creditor furnishing that which protected and preserved

the mortgage security and materially increased its value are none the less because the original debt was evidenced by the notes of the company, taken for its convenience and renewed for its accommodation.

It may be said that a part of the rails furnished by the Carnegie Company were not used on the Danville railroad, although used on roads belonging to the Danville system. But that is not a controlling circumstance. The contracts were made with the Danville Company, and, as between the contracting parties, the debts so incurred were, under the circumstances stated, current debts chargeable upon the current receipts of the railroad company that purchased the rails. The rights of the Carnegie Company are none the less because the Danville Company chose, after obtaining the rails, to use a part of them on roads under its control and in its possession, and whose preservation in proper condition was vital to its successful operation. The scheme of reorganization was in the interest of the stockholders and mortgage creditors of the roads constituting the Danville system, and chiefly of the bondholders represented by the Central Trust Company, the trustee in the consolidated gold mortgage. That company, as we shall presently show, stood by and assented to, indeed approved, the application, for the benefit of the bondholders represented by it, of funds which should have been applied in payment of current debts contracted in the interest of mortgage creditors before the appointment of receivers in the Clyde suit. Suppose the court had directed the receivers in the Clyde suit, before turning over the property to the receivers in the foreclosure suit, to pay the claims of the Carnegie Company, is it possible that the mortgage creditors would have been heard to object to such an order? Certainly not, if it appeared, as it does satisfactorily appear in the present case, that the Carnegie debts were incurred in the ordinary course of business for the purpose of keeping the railroad in safe condition for use by the public. If the Carnegie claims were preferential debts when the control of the property passed from the railroad company to the receivers in the insolvency or Clyde suit, the latter were bound in equity to

do what the railroad company would have been required to do if it had retained control of the property.

If the parties to the contract contemplated that the notes given for the rails should be paid for out of the current earnings of the railroad, and if the Carnegie Company lost no equity merely by renewing the notes, it follows, under the settled doctrine of this court, that the mortgagees could not have objected to the payment of the renewal notes out of any net earnings in the hands of receivers, although the contract for the rails was a few months back of the six months immediately preceding their appointment. Each case, as already observed, must depend largely upon its special facts. In some cases the courts, in their administration of railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts. But no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. Touching this question of time and the principles upon which the equitable rights of creditors in such cases as this rest, Mr. Justice Brewer said, in *Blair* v. *St. Louis &c. Railway Co.*, 22 Fed. Rep. 471, 474: "The idea which underlies them I take to be this: that the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employés cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees. . . . In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees

and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

What was done with the earnings of the property that originally came to the hands of the receivers, as well as with the earnings during the receivership under the Clyde bill and also during the receivership in the foreclosure suit instituted by the Central Trust Company? As to these matters there is no room for dispute. Assuming, in view of what has been said, that the claims of the Carnegie Company were current debts chargeable upon current earnings of the railroad property, even while in the hands of the receivers, and therefore to be preferred to claims of mortgage creditors, the next inquiry is whether the current receipts were applied during the receiverships for the benefit of the bondholders or otherwise when they should have been applied to the payment of current or preferential debts including the debts due to the Carnegie Company.

During the insolvency or Clyde receivership, from June 17, 1892, to July 31, 1893, the net earnings were $3,297,792.31. Among the items of expenditure during the same period were the following: Construction, $232,134.34, of which $19,717.05 was for *construction on the Danville road;* Equipment, $81,390.32, of which $74,733.28 was *for equipment on the Danville road;* Interest, Rentals and Dividends, $3,249,481.89, of which $396,522.14 was *for the Danville road*, $709,324 for the Virginia Midland, $20,265 for the North Eastern, and $232,127 for the Georgia Pacific road, the last four roads being those on which, according to the special master's report, the Carnegie rails were used; Sinking Fund, Richmond and Danville road, five per cent equipment mortgage, $67,205, and Car Trust payments, $209,500.

Between August 1, 1893, and December 31, 1893, out of the net earnings of the Danville system, excluding certain lines, the receivers paid among other sums the following: Construction *on Danville road*, $9232.61; Equipment on same road, $6791.35; Interest, Rentals and Dividends, $626,735.85, which included $48,082.90 for the Danville road, Virginia Midland, $199,664.50, and $87.50 for the North Eastern Railroad; Sinking Fund, Danville Company, equipment mortgage, $37,790; Car Trust payments, $51,160.

The above figures are found in the statement of the result of the operations of the Danville system for the periods named.

Looking at the cash statement of the receipts and disbursements of the Richmond and Danville Railroad alone, we find that from June 16, 1892, to July 31, 1893, the receipts were $15,432,055.46. In this sum were included $480,427.91 cash received from the Danville Company when the Clyde or insolvency receivers were appointed, and $671,363.40 collected on accounts turned over to those receivers by the railroad company. The disbursements during the above period were $15,290,730.27, leaving in the hands of the receivers on July 31, 1893, $141,325.19 in cash which was turned over to the foreclosure receivers. The disbursements included among other items the following: Interest and Rentals, $3,249,481.89; Car Trust payments and Sinking Funds, $486,368.16.

The account of disbursements for the Danville road from August 1, 1893, to November 30, 1893, shows, among other things, the payment of Interest and Rentals, $591,457.42; Car Trust payments and Sinking Fund, $88,950.

The total floating debt of the Richmond and Danville Railroad remaining unpaid was $318,324.71, of which $22,186.53 represented a claim of the Western Union Telegraph Company in part for labor and supplies and in part for construction of telegraph line, and $90,000 represented a claim of the Pullman Palace Car for mileage of cars. Of the balance, $125,067.39 represented the claims of the Carnegie Company, and $80,317.98 represented all other claims.

These figures show that both during the receivership in the

Clyde suit and the receivership in the foreclosure suit immense sums were expended in paying interest, sinking fund and car trust debts, and for construction and equipment, which were all for the benefit of mortgage creditors, and which, to the extent necessary, should have been applied in payment of preferential claims, including those of the Carnegie Company. It is a clear case of a diversion of income from the payment of current debts in the interest of mortgage creditors. Judge Simonton well said: "There can be no question that the steel rails furnished by the Carnegie Steel Company come within the class of supplies necessary to keep the railroad company a going concern; and the evidence establishes the fact that after incurring the debt the railroad company was in the receipt of large earnings, which were applied to permanent improvements, rentals and interest on the mortgage debt; that the receivers who, under the Clyde bill, took possession of the property, earned large income which was applied in the same way, leaving this debt unpaid; and that when these receivers were discharged they showed in their accounts a cash surplus, which was duly paid over to their successors under the Central Trust Company bill." Looking at the case in the light of the principle that a mortgagee cannot require from the mortgagor an account of the earnings, tolls and income until he has made demand therefor or for a surrender of possession under the provisions of the mortgage, *Sage* v. *Memphis & Little Rock Railroad*, 125 U. S. 361, 378; *Fosdick* v. *Schall*, 99 U. S. 235, 253, the Circuit Court of Appeals also said: "When, therefore, the receivers appointed at the instance of stockholders and creditors took possession, they enjoyed the same right to the earnings and income which the railroad company enjoyed, and rightfully received them. As the railroad company would have been bound to use this income in the payment of the current expenses for labor and supplies, the receivers should have done so also; but, instead of this, the receivers diverted the earnings, income and funds in their hands toward the betterment of the property, permanent improvements and additions to it, and in payment of interest. And this was natural. They were appointed to

take possession of the property and to conserve it until a plan of reorganization could be adopted and perfected. To facilitate this plan, the property must be kept up. To this end the funds coming from earnings were used. When the purpose of the first receivership was accomplished, the mortgage creditors came in and reaped the benefit. Surely those creditors whose claims were neglected, and from whom the earnings were diverted, have the right to ask and receive at the hands of the court the recognition and preservation of their claims." 42 U. S. App. 150. Judge Morris filed a concurring opinion and took the same general view of the case as that expressed by Judge Simonton for the court. He said that the case was that of "a supply creditor seeking to be paid out of the earnings which came to the receivers after his debt matured and which were diverted by them, without opposition from the mortgagee, to expenditures which directly resulted in preserving the mortgaged property, which earnings, if the receivers had not been appointed, there is no ground for supposing would not have been applied by the company to the payment of the supply creditor's debt." 42 U. S. App. 160, 161.

We must not be understood as saying that a general unsecured creditor of an insolvent railroad corporation in the hands of a receiver is entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage securities. That, no doubt, is an important element in the matter. Before, however, such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear from all the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad incurred in the ordinary course of business, and to be met out of current receipts.

Passing by as unnecessary to be determined some of the questions discussed by counsel, our conclusion is that as current earnings which should have been applied in meeting cur-

rent expenses or liabilities, including the debt due the Carnegie Company, were diverted for the benefit of mortgage creditors, it was the duty of the court to see that that company was reinstated in its claim of priority over the mortgage creditors in the distribution or application of the net earnings of the property. That duty was properly performed by the Circuit Court, and the decree of the Circuit Court of Appeals affirming the judgment of the Circuit Court is

*Affirmed.*

Mr. Justice White dissenting.

As I comprehend the record, the rails for which preferential payment is now allowed did not serve the purpose of ordinary repair and maintenance of the tracks in which they were laid. Moreover, my understanding of the proof is that it obviously shows there was no surplus revenue at any time legally applicable to the claim now allowed, and hence that no such revenue was diverted to the benefit of the foreclosing mortgage creditors during either of the receiverships by way of betterments or otherwise. Moreover, I think the proof is clear that, conceding every possible expense which can be claimed to have been a betterment or in any wise to have inured to the benefit of the foreclosing mortgage creditors, nevertheless as such mortgage creditors have contributed to the payment of the general creditors, by the assumption of receivers' certificates and cash contributions, a sum largely in excess of the amount of such payments for assumed betterments, etc., the mortgage creditors are entitled to credit for their advances, and therefore there would be a large balance in their favor. In effect, to state the presumed betterments and charge them against the foreclosing mortgage creditors without referring to or taking into account their contributions, is to charge them for betterments for which they have already paid. *St. Louis, Alton &c. Railroad* v. *Cleveland, Columbus &c. Railway*, 125 U. S. 658.

I therefore dissent.

Mr. Justice Brewer, not having heard the argument in this case, did not participate in the decision.

# LACKAWANNA IRON AND COAL COMPANY *v.* FARMERS' LOAN AND TRUST COMPANY.

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

No. 22. Argued March 10, 1899. — Decided January 29, 1900.

The principles announced in *Southern Railway Co.* v. *Carnegie Steel Co.*, *ante*, 257, reaffirmed; but the claims filed in this suit were held not to be current debts chargeable upon the current receipts of an insolvent railroad company in the hands of a receiver in preference to the claims of mortgage creditors.

THE Houston and Texas Central Railway Company, a corporation of Texas, formerly owned and operated in that State several lines of railroad, as follows: From Houston to Denison, a distance of 345 miles, known as the main line; from Hempstead, on the main line, to Austin, a distance of 118¾ miles, known as the Western Division; and from Bremond, on the main line, to Ross, a distance of 58 miles, known as the Waco and Northwestern Division. It also owned lands donated by the State in aid of the construction of its roads.

Prior to April 1, 1881, the Company had executed various mortgages or deeds of trust, namely: 1. A mortgage dated July 1, 1866, covering the main line and ten sections of land for each mile, known as the main-line first mortgage, in which Easton and Rintoul were substituted trustees. 2. A mortgage dated December 21, 1870, covering the Western Division and ten sections of land for each mile thereof, commonly known as the Western Division first mortgage, in which the same persons were substituted trustees. 3. A mortgage dated June 16, 1873, covering the Waco and Northwestern Division (to be hereafter referred to as the Waco Division) and also 6000 acres of land for each mile thereof, commonly known as the Waco and Northwestern Division first mortgage, in which the Farmers' Loan and Trust Company, a New York corporation, was trustee. 4. A mortgage dated October 1, 1872,

covering the main line and Western Division as a second mortgage and 3840 acres of land per mile of completed road, commonly known as the main line and Western Division consolidated mortgage. 5. A mortgage dated May 1, 1875, commonly known as the Waco and Northwestern Division consolidated mortgage, and covering the Waco Division and 6000 acres of land per mile of completed road. 6. A mortgage dated May 7, 1877, commonly known as the income and indemnity mortgage, and covering all the property of the Railway Company. 7. A mortgage dated April 1, 1881, commonly known as the general mortgage, and covering all the property of the Company.

The present suit, designated in the Circuit Court by the number 227, was brought April 6, 1889, by the Farmers' Loan and Trust Company to obtain a decree of sale of the property covered by the mortgage of June 16, 1873, on the Waco Division. On the same day Charles Dillingham, who was already receiver and in possession of the railway property of the Houston and Texas Central Company, was appointed receiver of all the railway property and property covered by the first mortgage of the Waco Division with power to operate the same, and was directed to keep separate accounts of the expenditures and earnings of that Division.

During the progress of the cause the Lackawanna Iron and Coal Company, a Pennsylvania corporation, intervened by petition, asserting an equitable lien, prior to the claims of bondholders, on the mortgaged property for the value of steel rails alleged to have been furnished by it and laid on the Waco Division. Subsequently the Pacific Improvement Company, a California corporation, became the assignee of the claim of the Lackawanna Company, and was made a coplaintiff with the latter company.

From a report made January 13, 1896, by a special master appointed to find and report upon the subject-matter of the intervening petition, the following facts appear:

Pursuant to a written contract with the Houston and Texas Central Railway Company, dated December 28, 1882, the Lackawanna Company in the year 1883 delivered to the

former 5020 tons of steel rails at the price of $40.40 per ton, in payment for which the Lackawanna Company received ten promissory notes of the Railway Company, payable at six months from their respective dates, amounting with interest to $206,932.16. These notes were all paid either at their maturity or at the maturity of other notes given in renewal thereof.

Pursuant to another contract dated April 26, 1883, between the Lackawanna Company and the Railway Company, the former delivered to the latter in the year 1883, 5009 tons of steel rails at $39.50 per ton, and received in payment therefor the Railway Company's ten promissory notes dated respectively June 21, 22 and 23, 1883, August 10, 14 and 15, 1883, and September 6, 11, 15 and 20, 1883, each payable six months after date, and aggregating, with interest, $201,346.64 — the Railway Company being entitled, under the contract, to renew the notes at maturity for a further term of six months by paying the interest at six per cent or adding the interest to the new notes. As these notes matured, the payment of so much of the debt as was not satisfied at maturity was extended until, in process of settlements and extensions, the Railway Company, in the satisfaction of the balance due the Lackawanna Company under the contract, executed its eight promissory notes payable four months from their respective dates, with six per cent interest from maturity. These notes aggregated $118,000. In the negotiations resulting in this settlement the Lackawanna Company demanded that the Railway Company should secure the renewal notes by the hypothecation of collaterals. In compliance with that demand the Railway Company deposited with the Lackawanna Company, when the renewal notes were delivered, 170 first mortgage bonds of the Galveston, Harrisburg and San Antonio Railway Company of the face value of $170,000. At the date of the master's report, January 13, 1896, the value of those bonds was $157,250, or 92½ per cent of their face value. They were in the possession of the Pacific Improvement Company, as assignee of the Iron Company. No interest on the bonds had been collected by the Iron Company or by the Railway Company, but the

interest had been collected by the Southern Development Company. It was agreed before the special master by the parties in interest that the court should consider the 170 bonds as sold for $157,250 on December 23, 1895, and should credit that sum, as of that date, upon the claim of the Iron Company or of the Southern Development Company.

On the 30th day of October, 1883, — nearly *six years before the present foreclosure suit was brought*, — the Lackawanna Company and the Railway Company made another contract in addition to those above mentioned, under which the former delivered to the latter, during the months of February, March, April and May, 1884, 8552 tons of steel rails. That contract was similar in its general terms to those of December, 1882, and April, 1883. It provided for the delivery by the Lackawanna Company of 10,000 tons of Bessemer steel rails at $36.60 per ton, as nearly as practicable between February 1 and August 1, 1884, at the rate of 1500 to 2000 tons per month. It also provided that upon the delivery of each 500 tons of rails payment should be made therefor either in cash or in the notes of the Railway Company payable at six months from the average date of delivery, with six per cent interest from such date, the purchaser to have the privilege of renewing the notes before their maturity for a further term of six months by paying the interest or adding the same to the renewal notes. In March and April, 1884, the auditor of the Railway Company made a statement or voucher of rails then delivered under the contract. That statement passed into the hands of the treasurer of the Railway Company with a memorandum that notes were to be issued therefor payable at twelve months from their respective dates. In conformity with that memorandum the Railway Company executed and sent to the Lackawanna Company eight notes, payable twelve (instead of six) months from their respective dates. The latter Company thereupon notified the Railway Company of the error, but the notes as executed were received as a matter of accommodation to the Railway Company.

Afterwards, in April and May, 1884, the Railway Company, in settlement of the balance due for the 8552 tons of rails,

executed and delivered to the Lackawanna Company nine promissory notes payable at six months from their respective dates, with the option in the maker of renewal for a like term. Each of those notes were renewed for six months for like amount as the originals, and their aggregate amount was $327,175.50. This sum, added to the $118,000 above referred to, made $445,175.30, the aggregate principal amount due to the Lackawanna Company, not including the $157,250, the amount at which the 170 bonds delivered as collaterals were valued.

All the rails delivered under the first contract, and about one half of those delivered under the second contract, were paid for by the Railway Company prior to the appointment of any receiver of the property; but the remaining half under the second contract, and the rails furnished under the third contract, had not been paid for when the master's report was filed.

The second contract for rails was made one year and ten months prior to the appointment of the receiver in cause numbered 185 (to be hereafter referred to), about three years and three months prior to the appointment of the receiver in consolidated cause numbered 198 (to be presently referred to), and about six years prior to the appointment of the receiver in this cause. The third contract was made about sixteen months prior to the receivership in cause 185, about two years and nine months prior to the receivership in consolidated cause 198, and about five years and six months prior to the appointment of the receiver in this cause.

About 6.2 miles of the railway of the Waco Division (the part of the railway covered by the mortgage to the Farmers' Loan and Trust Company) was laid with the rails furnished under the first two of the above contracts, but it was not shown what proportion of those rails were furnished under each of the contracts; 30.8 miles of the railway were laid with rails furnished under the third contract. The old iron rails removed from the 37 miles of the Waco Division, upon which the above rails were laid — 2960 tons — were received by the receivers in cause No. 185, and were sold by them in 1885 at the price of $13 net.

Statement of the Case.

The master's report contained the following:

"I find that the debt for which the Lackawanna Company claims payment in its petition herein cannot be classed as a current debt made in the ordinary course of business, as those terms seem generally to be understood, yet it appears that at the time when the contracts hereinbefore mentioned were entered into between said Lackawanna Company and the defendant Railway Company that the condition of the track of the defendant Railway Company was such that the demand for new rails upon the most worn portion of the roadway was practically imperative. For a number of years prior to December, 1882, only about 5000 tons of new rails had been purchased. The road north from Houston for 90 miles was built in 1857–1861, and thence northward to Denison, 1867–1872. The Western Division leading to Austin was constructed in part prior to 1861, and completed in 1873, and the Waco Division was completed about 1875. The condition of these roads was bad, except such portions as had been relaid with 5000 tons of rails purchased prior to December 28, 1882. There was continual breakage of rails and wrecking of trains, the track was unsafe, and was generally so regarded, not only by 'railroad men,' but by the travelling public; the damage to merchandise, rolling stock, etc., was continuous, and the need for new rails appears to have been 'absolutely necessary as a preservation of human life, the loss of which was liable to occur at any moment.'

"I find that when the aforesaid contracts were made with the said Lackawanna Company both seller and buyer expected the debts to be paid from the net income of the railway; that the credit extended under said contracts was at the request of and for the accommodation of the defendant Railway Company and upon its general credit. That said sales were made without any stipulation that security should be given by the defendant company for said rails, or that payment therefor should be made out of any particular fund or in any particular way; that said sales were for an unusually large amount of rails, and the defendant was unable to pay cash therefor, and there was no other way of obtaining said rails except upon

credit ; and petitioner herein at the time of said contracts and sales had knowledge of the mortgage of June 16, 1873, given by the defendant Railway Company upon the properties of its Waco and Northwestern Division to secure the first mortgage bonds, which said mortgage has been herein foreclosed. I find that the steel rails supplied by said Lackawanna Company under the aforementioned contracts, 18,581 tons, were placed in the track of the defendant Railway Company as soon as received."

The bonded debt of the Railway Company on January 1, 1885, was $16,874,500. The interest on all classes of its bonds payable in 1894, amounting to $1,194,200, was paid as it matured. The Railway Company first made default in the payment of interest on its bonds January 1, 1895, on which day the interest on first mortgage bonds became payable.

The Southern Development Company, a California corporation, on the 16th day of February, 1885, instituted suit against the Houston and Texas Central Railway Company, asserting a claim against it for about $600,000 for money loaned at various times. This was cause No. 185. It set forth in its bill the embarrassed condition of the Railway Company, the danger of its property being scattered, wasted and lost, and asked that the Company's property be put in the hands of receivers, and a decree passed directing that out of the rents, revenues, issues and profits coming into the hands of the receivers, after payment of costs of administration, operating and other necessary expenses, the claims of the plaintiff, the Southern Development Company, with interest and costs be paid. On the motion of that Company, Clarke and Dillingham were appointed receivers of the property. They immediately qualified as receivers and took possession of the property. An amended and supplemental bill was filed making Easton, Rintoul and the Farmers' Loan and Trust Company defendants as trustees of the various mortgages upon the Railway Company's property. Clarke and Dillingham continued to act as receivers until about July 10, 1886, when they delivered possession of the property and the revenues in their hands to Easton, Rintoul and Dillingham who had previously

been appointed joint receivers of the Railway Company under bills filed by the trustees of certain mortgages on the main line and Western Division, and also by the Farmers' Loan and Trust Company as trustee in the general mortgage of the Houston and Texas Central Railway Company. The last-named litigation was known as cause No. 198.

In cause No. 185 the Lackawanna Company intervened by petition, and asked to be made a coplaintiff. It prayed that an account be taken of its several demands, that the amount thereof with interest be paid out of the net revenues of the Railway Company, and be declared a lien thereon and upon all the property of the Company superior in rank to the claims of the trustees and to the mortgage bonds and coupons issued under their various deeds of trust.

To the bill of the Southern Development Company, Easton and Rintoul, trustees, demurred generally and specially. The demurrer was sustained, and the bill and supplemental bill were dismissed with costs on the 27th day of May, 1886, but without prejudice to the rights of the complainants to assert their claims, if any they had, in such manner as they were advised. By the same decree Clarke and Dillingham were discharged and ordered to turn over all the property and effects of the Railway Company together with its accrued revenues in their possession to Easton, Rintoul and Dillingham, who had then been appointed joint receivers of the Railway Company under an order made in the "Consolidated Cause No. 198," *Easton and Rintoul, Trustees, and the Farmers' Loan and Trust Co.* v. *Houston and Texas Central Co. et al.* — the constituent suits of such consolidated cause being causes Nos. 198, 199 and 201, which were bills of foreclosure against various parts of the railway.

The three mortgages declared on in causes 198, 199 and 201 were duly foreclosed by final decree entered in the consolidated cause on the 4th day of May, 1888, and on September 8, 1888, all the property of the Railway Company was sold under that decree, George E. Downs becoming the purchaser of the Waco and Northwestern Division, subject, however, to the particular mortgage sought in this suit to be foreclosed,

namely, the mortgage of June 16, 1873, known as the Waco Division first mortgage, the Farmers' Loan and Trust Company being the trustee therein. The sale was also made subject to the right which the court reserved by the decree (to use the words of the master in his report) to charge upon the property or any part thereof the payment of any amount that might be found to be due and payable by reason of intervening petitions theretofore filed in that cause and be entitled to priority over the mortgage debts referred to in the decree.

From February 20, 1885, to the date of the report, the property of the Railway Company, forming the subject-matter of the receivership in this cause, was continuously in the possession of the court under proceedings in suit No. 185, and thereafter in suits Nos. 198 and 227.

The master found and reported that no interest had been paid on the bonded indebtedness by either of the receivers in this cause; that Alfred Abeel, receiver in this cause, had expended under the orders of the court $46,505.40 for betterments and permanent improvements from December 10, 1892, to September 3, 1895, consisting of bridges, shops, roundhouse, car shed, water stations, locomotives, chair car and fencing; that no part of the income arising from the operation of the road and no part of the proceeds of sales of old rails, old iron, old cars and engines, coming into the possession of the receivers in causes 185 and 198, ever came into the possession of the receivers in this cause, and it did not appear that any part of the equipments purchased by the receivers in causes 185 and 198 ever came into the possession of the receivers in this cause; that the evidence failed to show that any improvements and betterments of the property, added to the property of the Houston and Texas Central Railway Company by the receivers in causes 185 and 198, were made *on the Waco Division;* that prior to April 6, 1889, no separate accounts were kept of the receipts and disbursements of the Waco Division, but the same was operated as a branch of the general system of the Houston and Texas Central Railway Company, and the evidence failed to show what, if any, of the expenditures made by the receivers in causes 185 and 198 for extraor-

dinary repairs, betterments and improvements, and for operating and running expenses, were made for the Waco Division and what portions for other divisions of the Houston and Texas Central Railway Company, and this was true also as to receipts and income; that the receivers in cause 185 had on hand in cash at the opening of business on January 21, 1886, $175,393.65, but it did not appear that any part of that fund came to the hands of the receivers in this cause; and that the receiver in cause 198 had on hand at the beginning of business on April 6, 1889, cash amounting to $215,842.45, but it did not appear that any part of that sum came to the hands of the receivers in this cause.

The mortgage given by the Railway Company to the Farmers' Loan and Trust Company, dated June 16, 1873, and herein declared on, contained the following provisions:

"And in case the said Houston and Texas Central Railway Company shall fail to pay the principal, or any part thereof, or any instalment of the interest, or any part thereof, on any of the said bonds at any time when the same shall become due and payable according to the tenor thereof, and for sixty days after having been demanded, it shall be competent for the said trustee, its successors or assigns, to enter upon the said railway and the premises and property herein conveyed, by its attorneys and agents, and take possession of the same without let or hindrance of the said first party, and every part and parcel thereof, and the appurtenances, and appoint an agent to operate and manage the same, and receive the revenue and income thereof, applying the said funds, after deducting taxes, necessary expenses and counsel fees, to keep the same in good order and repair, and the surplus to pay the principal and interest of all the bonds which may be due and outstanding, and secured hereby *pro rata*, and thereafter, to the payment of any contributions due to the sinking fund herein established. And upon the request of the holders of one fifth in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of said second party, by its president or agent duly appointed in its behalf, to enter upon and take actual possession with or without entry

or foreclosure of said railway and property herein described, and all and singular each and every part and parcel thereof, and assume its management until the arrears of both principal and interest be paid, or the property sold, as herein prescribed, receiving the rents, revenues and income thereof, and applying them in the same manner as above stated. It is, however, expressly agreed that the said party of the first part may dispose of the current net revenues and income of all the said property and railway hereby conveyed in such manner as it shall deem best, until default shall be made in the payment of the interest or principal of said bonds, or of any one or more of them, and shall have the right to sell and dispose of any of such real estate or other property as it may own or acquire, which may not be needed or required for the purposes and business of the said Waco and Northwestern Division, except in the case of the six thousand acres per mile of completed road, and which sale and conveyance of such outside property shall transfer the said property and title free from incumbrance of this mortgage or deed of trust, and to change its tracks and make any and all alterations necessary for the benefit of the same."

That mortgage contained no provision authorizing the trustee, if it acquired possession of the railway under that instrument, to pay any floating debt or debts of the mortgagor company out of the gross earnings of the railway.

During the receivership of Clarke and Dillingham, in cause 185, they received revenues from the operation of the railway, from February 23, 1885, to January 21, 1886, $2,758,487.40, and paid out for operating expenses, taxes, etc., for the same period, $2,137,322.44, leaving a surplus of $621,164.96. From January 21 to July 10, 1886, they received $1,143,731.05, and paid out for operating expenses during the same period $1,341,753.85, leaving a deficit for that period of $198,022.80, but leaving a net balance from the operation of the railway from February 23, 1885, to July 10, 1886, of $423,142.16. When Clarke and Dillingham took possession of the property of the Railway Company on February 23, 1885, they received in cash $30,416.34, while they collected for traffic balances

and other claims $118,730.08, from sales of old rails on hand February 23, 1885, $110,275, and from sales of old cars $6500, making a total of $265,921.42.

Clarke and Dillingham during the time they were in possession of the property as receivers, and Easton, Rintoul and Dillingham while they were in possession as receivers, expended under the orders of court the following sums outside of operating expenses: $23,274.20 for liabilities of the Railway Company; $751,438.15, interest on first mortgage bonds of the Company due January 1 to July 1, 1885; $245,793.64 for new steel rails; $125,695.44 for car trust notes; $265,696.33 for new passenger coaches, baggage, mail and express cars, locomotives, etc.; and $126,218.62 for right of way, fencing track, real estate, depot, round-house, foundry and pattern-house; in all, $1,536,116.38, of which $384,026.20 was expended under the receivership of Clarke and Dillingham. These were the receipts and expenditures up to January 9, 1888, and there was no evidence as to receipts and expenditures after that date.

Easton, Rintoul and Dillingham during their receivership realized out of proceeds of sale or collection of old assets of the defendant company the sum of $135,889.70.

The receivers in cause 198 received from the receivers in cause 185 the sum of $138,751.37 in cash.

The receivers in the consolidated cause 198, after taking possession on July 10, 1886, paid liabilities of the receivers, Clarke and Dillingham, taxes, outstanding vouchers, pay rolls, traffic balances, $221,421.32, and collected from the amount due Clarke and Dillingham as receivers in cause 185 the sum of $39,016.69.

On the 26th day of November, 1886, the Lackawanna Company filed its petition of intervention in cause 198, praying substantially for the same relief against all the railways, revenues, earnings, moneys and other properties and assets of the defendant company, including those forming the subject-matter of the receivership herein, as was prayed for by its petition of intervention in this cause. Upon that petition the master reported in that cause that under the facts the

debt for which the company filed its petition was of a character equitably entitling it to be discharged in preference to the mortgage represented in that suit, but which preference should be applicable to so much only of the company's debt as should remain unsatisfied after exhausting the 170 first mortgage five per cent bonds of the Galveston, Harrisburg and San Antonio Railway (Mexican & Pacific extension) of the face value of $170,000, and which, as heretofore stated, were pledged as security. The Farmers' Loan and Trust Company filed exceptions in that cause to the master's report, but at the date of the master's report in this cause the exceptions had not been brought to a hearing.

The Lackawanna Company on the 30th day of April, 1889, filed suit upon its claims against the Houston and Texas Central Railway Company in the District Court of Dallas County, Texas, a court of competent jurisdiction, and in that suit, after due citation, judgment was rendered against the railway company May 19, 1899, for $555,914.25 with interest. Upon that judgment execution was issued and was returned August 20, 1899, no property found subject to execution.

Of the interest paid by the receivers on the first mortgage bonds of the defendant railway company, $79,800 consisted of coupons upon the first mortgage bonds of the company secured by mortgage upon the Waco Division, being the property forming the subject-matter of the litigation herein. Interest was paid upon the coupons representing the same, maturing January 1 and July 1, 1885, to the amount of $11,571, making a total amount of interest paid to holders of bonds secured by mortgage on the Waco Division of $91,371, paid May 1, 1887.

During the years 1883 and 1884 the defendant company paid $2,386,400 interest upon its bonds, which amount, less $1,043,198.27, borrowed for interest purposes in those years, was presumably (the contrary not appearing) paid from its income or current earnings, and out of said total the sum of $159,600 was paid as interest upon the first mortgage bonds of the Waco Division, the bonds which are the subject-matter of the bill of complaint in this cause. During 1883 and 1884

$2,225,000 approximately were expended from the earnings and general income of the defendant company's property in the payment of interest on bonds and in additional equipments, permanent improvements, etc.

The accounts of the railway company were not kept in such manner as to indicate the exact fund out of which the interest on the first mortgage bonds of the Waco Division was paid, or the exact fund out of which the interest upon the bonds of the other divisions was paid; and no separate account was kept of the earnings of that division as distinguished from the net earnings of the other divisions of the railway company, either prior to or during the receivership thereof, until about April 20, 1889. During the receivership in cause 198, the receivers expended in the payment of interest upon the bonds forming the subject-matter of the bill of foreclosure herein the sum of $91,371.

By a final decree rendered March 16, 1892, the Circuit Court made in this cause a decree of foreclosure and sale in behalf of the Farmers' Loan and Trust Company. The decree contained these among other provisions:

"And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the property upon the express condition that he or they will pay off, satisfy and discharge any and all claims and interventions now pending and undetermined in this court, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to complainant's mortgage, together with such interest as may be allowed; and also upon the further express conditions that he or they will pay off, satisfy and discharge all debts, claims and demands of whatsoever nature incurred or which may hereafter be incurred by said receiver Charles Dillingham, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defence to any claim, debt or demand sought to be enforced against

said property; and said purchaser or purchasers, their successor or successors, or assigns, shall also have the right to appear and make defence to any claim, debt or demand pending and undetermined at the date of the confirmation of such sale. . . .

"And it is further ordered, adjudged and decreed that it be recited in the deed to be executed and delivered to said purchaser or purchasers, that he or they do take said property, subject to, and that said purchaser or purchasers do assume and agree to pay off any and all debts, claims and demands of whatsoever nature now pending and undetermined, and which may be allowed and adjudged by this court, as prior to any right secured under complainant's mortgage, and subject likewise to all debts, claims and demands of whatsoever nature incurred by Charles Dillingham as receiver in this cause, and which may remain unpaid at the termination of said Dillingham's receivership, provided the same be presented, as hereinbefore provided, within six months after the confirmation of said sale. It is further ordered, adjudged and decreed that the rights of the Lackawanna Coal and Iron Company, the Southern Development Company, the Pacific Improvement Company and the Morgan's Louisiana and Texas Railroad and Steamship Company, intervenors herein, and the rights of all other intervenors herein, be and they are hereby reserved to be hereinafter adjudicated, and are in no manner affected or prejudiced by this decree. It is further ordered that the disposition of any surplus funds arising from the earnings of the road, or otherwise, that may be in the hands of the receiver, is reserved for future determination."

Subsequently, February 26, 1896, a decree was passed in this cause dismissing the intervention herein by the Lackawanna Iron and Coal Company and the Pacific Improvement Company, but without prejudice to the rights of those companies under or by virtue of the intervention in equity cause 198.

This order was affirmed in the Circuit Court of Appeals. 52 U. S. App. 91. The case is now here on certiorari for reëxamination.

*Mr. Maxwell Evarts* and *Mr. E. B. Kruttschnitt* for the Lackawanna Iron and Coal Company, appellant.

*Mr. Herbert B. Turner* for the Farmers' Loan and Trust Company, appellee. *Mr. M. F. Mott* was on his brief.

*Mr. L. W. Campbell* for Moran Bros. and Henry K. McHarg, appellees.

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

In *Southern Railway Co.* v. *Carnegie Steel Co.*, *ante*, 257, just decided, we had occasion to consider in the light of our previous decisions the principal questions arising in the present case. We need not repeat here what was said in the opinion in that case as to the general principles applicable in cases involving the respective rights of mortgage creditors and of unsecured creditors in the earnings of an insolvent railroad corporation in the hands of a receiver.

The above statement of the history of this litigation shows that the Houston and Texas Central Railway Company had three contracts with the Lackawanna Company for steel rails; that those contracts were made, respectively, on December 28, 1882, April 26, 1883, and October 30, 1883; and that all the rails delivered under the first contract, and about one half of those delivered under the second contract, were paid for, leaving unpaid for one half of the rails delivered under the second contract and all delivered under the third contract. But the claim for the balance due for rails covered by the contract of April 26, 1883, is abandoned because, as stated by counsel for the Lackawanna Company, it is impossible to state with certainty how many of the rails delivered under that contract were actually used on the Waco Division. We are therefore only concerned in this case with the contract of October 30, 1883, under which rails were delivered.

It also appears that in suit No. 185, brought by the Southern Development Company in February, 1885, receivers were

appointed of the entire property of the Houston and Texas Central Railway Company, including the Waco Division; that that suit was dismissed in May, 1886, and shortly before that time suits were brought by the trustees of the mortgages on the main line and on the Western Division of that company for the foreclosure of those mortgages, receivers were appointed and the suits were consolidated as Consolidated Case 198; that in the latter cause the entire property was sold September 8, 1888, subject, however, to the first mortgage on the Waco Division; and that the Waco Division was separately sold subject to the first mortgage thereon.

Subsequently, September 6, 1889, the present suit was brought to foreclose the first mortgage on the Waco Division. The Lackawanna Company intervened herein by petition, asking that an account be taken of the amounts due to it, and for a decree "declaring that the sums so due are liens upon the net earnings of said Railway Company, and especially upon those portions of said net earnings which have accrued or may accrue from the railways described in the bill of complaint in this cause, both those accrued prior to said receivership in said cause No. 185, and those accrued and to accrue during the receivership in said cause No. 198, extended to this cause, and upon all of the property of said railway company, superior in rank to the claims of said trustee and of the mortgage bonds and coupons issued under the deed of trust sought to be foreclosed in this cause;" and "that the net earnings of the railway described in the bill of complaint in this cause in the hands of said receiver, accrued or to accrue, be first devoted to the payment of the accounts so decreed, and if they be not sufficient prior to the final decree in this cause to pay said amounts, then that your honors do decree the payment of said amounts out of any proceeds of sale of the property of said Railway Company to be made under said final decree, the amounts so decreed to your petitioner to be paid in preference to any amount due under the mortgage bonds and coupons issued under the deed of trust annexed to the bill of complaint in this cause."

The principal ground upon which the Lackawanna Com-

pany bases its claim for the relief asked is that when each of the above contracts were made the Waco Division was in such condition that new rails were imperatively required in order that the road might be safely used for the transportation of persons and property. Such, it may be assumed, was the condition of the road when the rails were contracted for and delivered, for it was so found by the master to whom the intervening petition of the Lackawanna Company was referred with direction to take the account prayed for and to report the facts, and to that report no exceptions were filed. But the necessary inference from the report in connection with the averments of the intervening petition is, that the work required to be done in order to put the main road of the Houston and Texas Central Railway Company and its divisions in proper condition was not such as would be done in the ordinary course of the business and operations of a railroad, but was so extensive as to amount to reconstruction, or the construction of new road. That was the view expressed by the Circuit Court of Appeals, and it explains what the master meant by the finding that the debt for which the Lackawanna Company claimed payment could not be classed as a "current debt made in the ordinary course of business." This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts. But we are of opinion that such expenditures as those incurred in the making of the contracts with the Lackawanna Company were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon

such income. *Southern Railway Co.* v. *Carnegie Steel Co.*, *ante*, 257, and authorities there cited. They are rather to be regarded as extraordinary expenditures, outside of the ordinary course of business and incurred for purposes not of repair but of construction. This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 98; *Thomas* v. *Western Car Co.*, 149 U. S. 95, 111. We have said that priority of unsecured claims is recognized only in a few specified cases in which equity and good conscience require that the vested liens of mortgage creditors shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna Company. To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest. Besides, the rails in question were delivered long before the railroad company had made any default in the payment of interest; about sixteen months before the company's property was put into the hands of a receiver, and about five and a half years before the appointment of a receiver in this cause. Then there is the circumstance that the Lackawanna Company, during the negotiations resulting in the execution of renewal notes under the second contract for rails, demanded and received collateral security to a large amount from the railroad company — a circumstance tending to show that it did not regard itself as entitled to an equitable claim upon net earnings in preference to mortgage creditors, but relied upon the general credit of the railroad company. However meritorious the claim of the Lackawanna Company may be as between it and the railroad company, we cannot by reason of anything appearing in the record impair or displace the liens of mortgage creditors for its benefit. Under all the circumstances, including the amount of the debt and the long period of credit, the claims in question must be regarded as general unsecured debts, not contracted in the ordinary course of business, and

with the expectation of the parties that they were to be met out of current receipts in preference to claims of mortgage creditors. It is not therefore entitled to the priority claimed. The view taken of the case by the Circuit Court of Appeals is indicated by Judge Parlange, whose opinion, on behalf of that court, thus concludes: "The unusually large purchase of rails, the time within which they were to be delivered, the condition of the road, the contracts providing for notes at six months renewable for a like term at the maker's option, the hypothecation of securities for the payment of the claim, the knowledge which the intervenor had of the mortgage, the fact that the contracts contained no promise to pay out of any particular fund, the time which elapsed between the date of the contracts and the appointment of a receiver in cause No. 185 — are circumstances which, taken together, cannot fail to convince us that the intervenor relied upon the general credit of the railway company."

The decree of the Circuit Court of Appeals is therefore

*Affirmed.*

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## UNITED STATES *v.* PARKHURST-DAVIS MERCANTILE COMPANY.

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

No. 130. Submitted January 31, 1900. — Decided February 26, 1900.

This case comes within the provision of Rev. Stat. § 720 to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings in any court of a State except in matters of bankruptcy.

On August 21, 1897, the United States filed their bill in the Circuit Court of the United States for the District of Kansas seeking an injunction restraining defendants from enforcing in the courts of the State of Kansas certain claims against Eli G. Nadeau and John Nadeau, members of the

Prairie band of Pottawatomie Indians, and residing on a reserve within the limits of that State. On November 22, 1897, an amended bill was filed, to which bill the defendants demurred, and on March 4, 1898, the demurrer was sustained and the bill dismissed. From such order of dismissal the Government took its appeal directly to this court.

The amended bill alleged in substance that the two Indians were members of the Prairie band of Pottawatomie Indians; that such band had a reservation in the county of Jackson, within the limits of that State; that by the act of Congress admitting Kansas into the Union it was expressly provided, among other things, as follows, to wit: "That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property or other rights by treaty, law or otherwise, which it would have been competent to make if this act had never passed;" act of January 29, 1861, c. 20, 12 Stat. 127; and that the Prairie band had never in any manner consented or signified to the President of the United States that any rights of person or property formerly appertaining to these members should be extinguished, nor have they ever consented that they or their reservation should be governed or controlled by the laws of the State of Kansas. The bill then proceeds to state a series of facts tending to show that this reserve had been exempted from the laws of the State of Kansas; that the tribal relation had been preserved, and the Government superintendency and

control over the Indians maintained. It further disclosed that the two Indians had received patents for their respective portions of the reservation, as provided in section 5 of the act of Congress of February 8, 1887, c. 119, 24 Stat. 388; that they resided each on the separate tract or parcel allotted and patented to him; but, as averred, they had never been naturalized as citizens of the United States, and had maintained in all respects their peculiar life as members of the Indian tribe. The bill also disclosed that the Bureau of Indian Affairs, prior to the commencement of the actions referred to, had lawfully authorized the two Nadeaus and one Henry B. Ekcam, a white man, to trade and do business as licensed traders of the United States, with said Prairie band of Pottawatomie Indians upon said reservation, under the firm name and style of Eli G. Nadeau, Son & Company; and averred that the said Ekcam, in May, 1897, became an embezzler, and fled the country, with practically all the available means and assets of the firm except a stock of merchandise located in the storehouse on the reservation. It alleged that the various defendants, including among them the sheriff of Jackson County, were, by several writs already issued out of the state courts, attempting to enforce claims of the defendants, other than the sheriff, against the property of said Nadeau and his son. The prayer of the bill was for an injunction restraining all the parties from further prosecuting those actions or in any manner proceeding in the state courts to enforce those claims.

*Mr. Solicitor General* and *Mr. F. E. Hutchins* for the appellants.

No appearance for appellees.

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

It is conceded by counsel for the Government that so much of the bill as alleges that by treaties with the Pottawatomie

Indians and the act admitting Kansas into the Union the reservation was excluded from the State and from the jurisdiction of Kansas, is erroneous, and may be ignored.

Section 6 of the act of February 8, 1887, 24 Stat. 388, c. 119, *supra*, contains this provision:

"Each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

Upon these admissions and facts the case comes clearly within the provision of section 720 of the Revised Statutes, to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings in any court of a State except in matters of bankruptcy. *Peck* v. *Jenness*, 7 How. 612, 625; *Watson* v. *Jones*, 13 Wall. 679, 719; *Haines* v. *Carpenter*, 91 U. S. 254, 257. In this latter case, Mr. Justice Bradley, delivering the opinion of the court, said:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in sec. 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law."

Without stopping to consider any other questions presented by counsel this is sufficient to sustain the ruling of the Circuit Court, and the decree is

*Affirmed.*

# FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY *v.* BELL.

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

No. 95. Argued and submitted December 22, 1899. — Decided February 26, 1900.

As the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both courts below dealt with the case on that assumption, this court has jurisdiction to review the judgment of the Circuit Court of Appeals.

As the plaintiffs, some of whom were citizens of Florida, and some of whom were citizens of Texas, elected to assert a joint claim to land in Florida in dispute in this case, which was commenced before the Circuit Court of the United States for the Southern District of Florida, and carried by appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and as they recovered a joint judgment for their undivided interests therein, and as the plaintiffs' declaration disclosed no Federal question, the principles settled in the cases cited by the court in its opinion apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court.

In the Circuit Court of the United States for the Southern District of Florida, William J. Bell, John W. Bell, Frank A. Bell, citizens of the State of Texas; E. A. Bell, Matilda P. Feihe, all heirs of and children of Louis Bell, deceased, late of Hillsborough County, State of Florida; and George A. Bell and Simon Bell, heirs of and grandchildren of said Louis Bell; and Anton Feihe, husband of said Matilda P. Feihe, brought an action of ejectment against the Florida Central and Peninsular Railroad Company, a corporation of the State of Florida, seeking to recover possession of about seven acres of land in Hillsborough County, Florida, alleged to be of the value of thirty thousand dollars, and damages in the sum of ten thousand dollars. The declaration alleged that the land in controversy was occupied by defendant as its roadbed and right of way, and that the plaintiffs claimed title to said land under and by virtue of a patent granted by the United States

to said Louis Bell and his heirs upon a preëmption claim filed in the local land office of the United States in 1883, and upon appeal to the general land office, and upon and from an appeal from the decision of the Commissioner of the general land office to the Secretary of the Interior of the said United States, when by the order of the said Secretary the said patent was granted. The declaration further alleged that, in the proceedings in the land department, the defendant claimed and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to said Louis Bell and his heirs, and that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to said land under and by virtue of the said patent, and at the same time claimed that under the laws of the United States, and especially under and by virtue of the first section of an act of Congress entitled "An act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of certain railroads in said States," approved May 17, 1856, c. 31, 11 Stat. 15, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said land was a part of that tract of land, which constituted at one time a military reservation, known as the Fort Brook Military Reservation at Tampa, State of Florida. And the plaintiffs further alleged in their declaration that after the passage of an act of Congress entitled "An act to provide for the disposal of abandoned and useless military reservations," approved July 5, 1885 [1884? See 23 Stat. 103], they contended for and claimed title and a patent to said parcel of land, under and by virtue of the first proviso of the second section of the last-mentioned act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior, and that the defendant appeared in both of the said offices, by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to a patent or title to said parcel of land under the

said proviso of said act of Congress, and, at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land and to be in possession thereof under and by virtue of the third proviso of the aforesaid act of Congress approved May 17, 1856.

This declaration was filed on December 29, 1896, and on January 4, 1897, the defendant appeared and filed a plea of not guilty.

On February 4, 1897, the defendant, after notice to the plaintiffs, asked leave to file further and special pleas, denying that the court had jurisdiction of the action, denying that the defendant claimed title under the act of May 17, 1856, or under any other act of Congress or law of the United States, and alleging the pendency of a prior suit in equity between the same parties in the Circuit Court of the United States and also the pendency in the Circuit Court of the sixth judicial circuit of the State of Florida, of a petition and proceeding by the defendant to condemn the land in dispute under its right of eminent domain under the laws of the State of Florida.

Thereafter, on February 18, 1897, the court made the following order:

"This cause coming on to be heard upon the motion of the defendant for leave to file additional pleas and upon the motion of the plaintiffs to transfer the cause to Tampa for trial, and it having been fully heard and considered, and it appearing that none of said pleas constitute a good defence to said action that could not as well be shown under the general plea of not guilty, it is ordered that said motion to file additional pleas be denied, and that the order to transfer the cause for trial be granted, and that this order be without prejudice to any motion for a stay of an enforcement possession under any judgment which may be recovered on account of condemnation proceedings."

On February 10, 1897, the defendant moved for a continuance, which motion was on February 18 denied.

On March 5, 1897, the defendant moved the court to "dismiss the cause, for the reason that there is nothing on the face

Counsel for Plaintiff in Error.

of the declaration to show that this court has jurisdiction to hear and determine the said cause."

On March 11, 1897, after a consideration of this motion to dismiss, it was ordered in open court that said motion be dismissed. On the same day, an agreement, signed by the attorneys of the respective parties, to waive a jury and that the cause might be tried by the court, was filed.

The cause was so proceeded in that on March 23, 1897, the court found that the plaintiffs were entitled to possession and have a fee simple title in and to the land in dispute, and assessed their damages in loss of rent and profit in the sum of nineteen hundred and fifty-five dollars, and entered a judgment as follows:

"It is considered by the court that the plaintiffs herein, William J. Bell, John W. Bell, Frank A. Bell, Eliza A. Bell and Matilda P. Feihe, and George A. Bell and Simon Bell, do receive and recover from the defendant, the Florida Central and Peninsular Railroad Company, the sum of nineteen hundred and fifty-five dollars, as well as for costs in this behalf; and it is further considered that said plaintiffs have a fee simple title in and to the lands and premises described as follows, to wit," etc.

On April 10, 1897, the defendant moved the court for a writ of error and a citation to review the judgment in said cause, returnable to the United States Circuit Court of Appeals, and for a supersedeas of the said judgment upon filing a bond. On the same day the writ of error was allowed, and it was ordered that, on the defendant filing a bond with sufficient sureties in the sum of thirty-five hundred dollars, to be approved by the court or by the clerk thereof, the said writ should operate as a supersedeas of the judgment in said cause. A bond was approved and filed accordingly.

On May 24, 1898, the Circuit Court of Appeals affirmed the judgment of the Circuit Court. 59 U. S. App. 189.

And thereupon, on June 2, 1898, a writ of error from this court was allowed.

*Mr. J. C. Cooper* for plaintiff in error. *Mr. J. A. Hender-*

*son* was on his brief. *Mr. William Wirt Howe* also filed a brief for same.

*Mr. H. Bisbee* for defendants in error submitted on his brief.

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

Our first inquiry is whether this court has jurisdiction to review the judgment of the Circuit Court of Appeals. The writ of error in this case was brought under section six of the judiciary act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final, under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different States. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different States, or because the case was alleged to be one arising under the Constitution, laws or treaties of the United States?

The action was in ejectment to recover possession of a tract of land in Hillsborough County, State of Florida. The plaintiffs were eight in number, three of whom were alleged to be citizens of the State of Texas, and there was no allegation as to the citizenship of the other five. The defendant, the Florida Central and Peninsular Railroad Company, was alleged to be a corporation organized and existing under the laws of Florida. Hence, upon the face of the declaration, the jurisdiction of the Circuit Court would have failed, at least as to five of the plaintiffs, if that jurisdiction depended solely on the citizenship of the parties. The declaration, however, alleges that the plaintiffs claim title to the land in dispute by virtue of a patent granted to their ancestor by the Government of the

United States; that the defendant claimed title under the first section of an act of Congress, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17, 1856; and further, that the defendant railroad company claimed and insisted that it was entitled to locate and maintain the route of its road through the land in question under said act of Congress.

Accordingly, it appears that the theory of the plaintiffs, in bringing their suit in the Circuit Court of the United States, was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States. This was the view of the judge who tried the case in the Circuit Court, as he refused to grant the defendant's motion to dismiss for want of jurisdiction, and this view was also taken by the Circuit Court of Appeals, as appears in the following passage of its opinion:

"There is no effort in this case to found the jurisdiction of the court on the diverse citizenship of the parties. There is nothing in the record to indicate that the Judge of the Circuit Court entertained jurisdiction of the case on that ground. The declaration shows that in the preëmption claim by the ancestor of the defendants in error to the land involved, the claim was stoutly resisted by the plaintiff in error in the different stages of the prosecution thereof and before the different officers of the land department. It shows that under a named act of Congress, approved May 17, 1856, the defendant claimed the right to occupy the land in question in the manner that it was occupying it, without accountability to the defendants in error. . . . So that, independently of the claim for mesne profits for the time transpiring between the preëmption entry and the issuance of the patent, it is clear that the issues made by the declaration presented a case within the jurisdiction of the Circuit Court."

As, then, the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on a con-

struction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different States.

Nor do we find merit in a second ground urged to maintain the motion to dismiss, namely, that the action was in ejectment; that the defendant admitted of record that it had no title; and that therefore the only question it could raise was one of jurisdiction. An inspection of the defendant's answer shows that, while it did disclaim title under the act of Congress, it claimed a right of possession on other grounds, with respect to which it had a right to be heard, if indeed the Circuit Court had jurisdiction.

We come to the case, then, as one in which we have a right to supervise the judgment of the Circuit Court of Appeals. And the first question, and indeed, as we read the record, the only one we have to meet, is whether the Circuit Court had jurisdiction of the case. Not having, as we have seen, jurisdiction because of a controversy between citizens of different States, did it have jurisdiction because the case was one arising under the Constitution or laws of the United States? This question was answered affirmatively in both courts below, and this because, as it seemed to them, the plaintiffs' declaration disclosed such a case.

It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiffs' statement of their case.

"When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of Federal nature, it must appear, at the outset, from the declaration or bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon

its own inspection of the pleadings, must dismiss the suit, just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind." *Metcalf* v. *Watertown*, 128 U. S. 588; *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490; *Hanford* v. *Davies*, 163 U. S. 273; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105.

We do not, however, understand that these cases are questioned by the defendants in error, but their contention is that in the plaintiffs' declaration it did sufficiently appear that a Federal question was necessarily involved, upon the solution of which the determination of the case depended.

The paragraph of the declaration which sets forth the plaintiffs' claim is as follows:

"The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the Government of the United States of America to the said Louis Bell and his heirs, upon a preëmption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and presented by the heirs of the said Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the general land office of the Government and upon and from an appeal from the decision of the commissioner of the general land office to the Secretary of the Interior of the United States, the said heirs prosecuted to the preëmption claim, until by the order and decision of the said Secretary the said patent was granted."

In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, pre-

sents no question which, of itself, confers jurisdiction on a Circuit Court of the United States. *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571.

But it seems to be thought that, by alleging that the defendant claimed and contended, in the land department, that the plaintiffs were not entitled, under any of the laws of the United States, to have a patent granted to them, and that the defendant at the time of the commencement of this suit claimed and insisted that the plaintiffs derived no title to the said land under and by virtue of the said patent, and at said time claimed that, under the laws of the United States, and especially under and by virtue of the first section of an act of Congress, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of railroads in said States," approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said section eight was a part of that tract of land which constituted at one time a military reservation known as the Fort Brooke Military Reservation, at Tampa, State of Florida, there was presented a question needing for its solution a construction of laws of the United States.

It is obvious that all that is added, by these allegations, to the plaintiffs' statement of their own claim, is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of the declaration, the source of the defendant's title, but it could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a Federal question, cannot create jurisdiction in a Circuit Court by anticipating the defendant's claim, and by alleging that the defendant will set up a defence under some law of the United States.

Thus in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, 464, Mr. Justice Gray, after citing *Metcalf* v. *Watertown*, 128 U. S. 586, and other cases, said:

"In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. In the first and second bills the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the State under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws."

*Chappell* v. *Waterworth*, 155 U. S. 102; *East Lake Land Co.* v. *Brown*, 155 U. S. 488; *Oregon Short Line Co.* v. *Skottowe*, 162 U. S. 490.

And, even if it could be held that, by anticipating a supposed defence, a Federal question might be made to appear to be involved in the controversy, jurisdiction in the Circuit Court would fail if, on the coming in of the plea or answer, the defence would turn out to be based on matter wholly independent of the Constitution or any law of the United States, and it would be the clear duty of the court to dismiss the suit for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction of that court."

So it was held in *Robinson* v. *Anderson*, 121 U. S. 522, 524, where an order of the Circuit Court dismissing the case was affirmed, this court saying, through Mr. Chief Justice Waite:

"Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiff would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were

relied on. The Circuit Court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made 'for the purpose of creating a case' cognizable by the Circuit Court, when none in fact existed."

Such observations are directly applicable to the present case, for the defendant, in its plea to the jurisdiction of the court, explicitly admitted the plaintiffs' title to the land under the patent, and denied that the defendant claimed title to the land in dispute under the act of May 17, 1856, or under any other act of Congress, but placed its defence, by way of confession and avoidance, on totally different grounds than those mentioned in the declaration, and which involved no construction or application of the Constitution or laws of the United States.

It is contended, however, that, whether or not the Circuit Court had jurisdiction to determine the question of title to the land in dispute or of the right of possession thereof, the plaintiffs' demand to recover mesne profits, accruing between the preëmption entry and the issuance of the patent, presented a question within the jurisdiction of that court. It is not easy to perceive why, if the Circuit Court did not possess jurisdiction to decide the right of possession, it could have jurisdiction to pass upon the question of mesne profits, the right to recover which would depend on the right of possession.

In affirming this view of the case, the Circuit Court of Appeals cites *Durango Land & Coal Company* v. *Evans*, 49 U. S. App. 305. That was a case where the Circuit Court of Appeals of the Eighth Circuit held that the inquiry as to the right of the plaintiff to recover mesne profits, accruing while the alleged contest was depending and undetermined in the general land office, involved an examination and construction of the laws of the United States. The case was brought to this court, but was dismissed on stipulation of the

parties. The report of the case does not disclose whether there was really a controversy between the parties respecting the construction of the land laws of the United States. What really seems to have been involved, in respect to mesne profits, was whether the doctrine of relation, which is a common law doctrine, would enable the plaintiff, after having established his title, to recover the mesne profits which accrued while the plaintiff was wrongfully excluded from possession. Such a question would not seem to be a Federal one, but one incidental to the determination of the principal controversy concerning the right of possession.

At all events, there is nothing disclosed in the declaration in the present case showing that, so far as the damages and mesne profits are concerned, any Federal question was presented. If the Circuit Court had jurisdiction to determine the right of possession, and, in the exercise of that jurisdiction, decided in the plaintiffs' favor, the incidental question of the time when damages and profits would accrue to the plaintiffs would legitimately arise. But if that court had not jurisdiction to determine the controversy as to the right of possession, it could not draw to itself the jurisdiction of the case by considering what the consequences would be if the plaintiffs were permitted to recover possession.

Apart from the question of jurisdiction arising from the presence of any Federal question, can it be said that jurisdiction did attach in respect to those plaintiffs who were alleged to be citizens of Texas?

As we have seen, neither of the courts below were of that opinion. The judgment of the Circuit Court was in favor of all the plaintiffs jointly for the entire tract in dispute, and in so doing, followed the plaintiffs' claim in their declaration, wherein they claimed title to the whole tract as belonging to them jointly. They did not allege that they were tenants in common, although in the findings the court found that the respective plaintiffs held undivided interests in the land.

In *Strawbridge* v. *Curtiss*, 3 Cranch, 267, it was said: "Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued,

in those (Circuit) Courts, but the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue or liable to be sued, in the courts of the United States."

*New Orleans* v. *Winter*, 1 Wheat. 91, 94, was the case of a possessory action brought by the heirs of Elisha Winter, deceased, to recover the possession and property of certain lands in the city of New Orleans. One of the petitioners was described in the record as a citizen of the State of Kentucky, and the other as a citizen of the Territory of Mississippi. The plaintiffs recovered a judgment in the Circuit Court, but this judgment was reversed by this court, Chief Justice Marshall saying:

"Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge* v. *Curtiss* it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The Circuit Court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed."

In *Barney* v. *Baltimore*, 6 Wall. 280, it was held that part owners or tenants in common in real estate, of which partition is asked in equity, have an interest in the subject-matter of the suit, and in the relief sought, so intimately connected with that of their cotenants, that if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed.

*Hooe* v. *Jamieson*, 166 U. S. 395, was an action of ejectment brought in the Circuit Court of the United States for the Western District of Wisconsin, by a complaint in which the plain-

tiffs alleged that they resided in and were citizens of the city of Washington, D. C., and that defendants all resided in and were citizens of the State of Wisconsin. Defendants moved to dismiss the action on the ground that the Circuit Court had no jurisdiction, as the controversy was not between citizens of different States. The Circuit Court ordered that the action be dismissed unless plaintiffs within five days thereafter should so amend their complaint as to allege the necessary jurisdictional facts. Plaintiffs then moved for leave to amend their complaint by averring that three of them were when the suit was commenced, and continued to be, citizens of the District of Columbia, but that one of them was a citizen of the State of Minnesota, and that each was the owner of an undivided one fourth of the lands and premises described in the complaint, and that they severally claimed damages and demanded judgment. This motion was denied, and the action dismissed. Plaintiffs sued out a writ of error, and the Circuit Court certified to this court these questions of jurisdiction: First. Whether or not said complaint set forth any cause of action in which there is a controversy between citizens of different States, so as to give said Circuit Court jurisdiction thereof. Second. Whether or not said complaint as so proposed to be amended would, if so amended, set forth any cause of action in which there is a controversy between citizens of different States so as to give said Circuit Court jurisdiction thereof. This court held, through Mr. Chief Justice Fuller, after reviewing the cases, that the voluntary joinder of the parties had the same effect for purposes of jurisdiction as if they had been compelled to unite; that as no application was made to discontinue as to the three plaintiffs who were citizens of the District of Columbia, and to amend the complaint and proceed with the cause in favor of that one of the plaintiffs alleged to be a citizen of Minnesota, jurisdiction as to four plaintiffs could not be maintained on the theory that when the trial terminated it might be retained as to one. Accordingly the judgment of the Circuit Court was reversed.

As, then, in the present case, the plaintiffs elected to assert a joint claim and title to the land in dispute, and recovered a

joint judgment for their undivided interests therein, and as the plaintiffs' declaration discloses no Federal question, the principles of the cited cases apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court.

This conclusion withdraws from our consideration the errors assigned to the action of the courts below in respect to the defendant's several pleas of *lis pendens*.

*The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to dismiss the action for want of jurisdiction.*

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## ADIRONDACK RAILWAY COMPANY *v.* NEW YORK STATE.

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

No. 439. Argued January 15, 16, 1900. — Decided February 26, 1900.

While the legislative power to amend or repeal a statute cannot be availed of to take away property already acquired, or to deprive a corporation of fruits of contracts lawfully made already reduced to possession, the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and, when unexecuted, cannot be held to be in itself a vested right surviving the existence of the franchise, or an authorized circumscription of its scope.

The highest court of the State of New York having held that there is no property in a naked railroad route in that State which the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are by appropriate legislation authorized to act, this court accepts the views of that court, and thinks that the proceedings on the part of the State which are complained of in this case, impaired the obligation of no contract between it and the railway company.

The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the Government; and this must obviously be so when the State takes for its own purposes.

Statement of the Case.

THIS was a writ of error to a judgment of the Court of Appeals of the State of New York affirming a final judgment of the Supreme Court of New York perpetually enjoining the Adirondack Railway Company from taking certain lands by condemnation proceedings. The People of the State of New York brought the action and obtained judgment at a special term of the Supreme Court, which was reversed by the Appellate Division, 39 App. Div. 34, whose order was in turn reversed by the Court of Appeals, and the original judgment affirmed. 160 N. Y. 225.

The case is thus stated in the opinion of the Court of Appeals by Vann, J.:

"In 1882 the Adirondack Railway Company was incorporated for the term of one thousand years to construct and operate a railroad from Saratoga Springs to the river St. Lawrence, near the city of Ogdensburg. It was a reorganization of an older corporation known as the Adirondack Company, which was organized in 1863, under the provisions of chapter 236 of the laws of that year. Prior to the foreclosure which resulted in the reorganization, the Adirondack Company had constructed a railroad from Saratoga Springs to North Creek, in the county of Warren, and this railroad, together with the right to extend the same, became the property of the Adirondack Railway Company, which, in April, 1892, applied to the railroad commissioners for a certificate, under chapter 565 of the laws of 1890, to relieve it from the statutory obligation of extending its lines; on the 9th of May following, the commissioners issued their certificate accordingly. The Adirondack Railway Company, thenceforth called the defendant, made no attempt to extend its road until the early part of 1897, when a survey was made for a proposed extension from North Creek through the counties of Warren, Hamilton and Essex, to the outlet of Long Lake in Hamilton County, where it was expected that, by connecting with other roads, a route would be secured to the St. Lawrence River. Before anything further was done to extend the road, certain action, taken by the State, should be briefly alluded to.

"In 1885 the forest preserve was created by statute, embrac-

ing 'all the lands now owned, or which may be hereafter acquired by the State of New York within' certain counties, and the area was extended by subsequent legislation. (L. 1885, ch. 283; L. 1887, ch. 639; L. 1893, ch. 332.) These acts required said lands to be forever kept as wild forest lands, and provided that they should not be sold, leased or taken by any corporation, public or private. A forest commission with appropriate powers was created to care for the forest preserve, and appropriations were made from time to time to enable it to properly discharge its duties.

"In 1890 the forest commission was authorized to 'purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park,' and in 1892 the Adirondack park was established and placed under the control of said commission. (L. 1890, ch. 37; L. 1892, ch. 707.)

"The revised constitution, which went into effect on the 1st of January, 1895, provides that 'the lands of the State, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.' (Const., art. 7, § 7.)

"In 1895 the legislation relating to the forest preserve and the Adirondack park was extended by the fisheries, game and forest law, and it was declared by section 290 that 'such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve.' (L. 1895, ch. 395, §§ 270, 295.) During the same year the forest commission was authorized to purchase 80,000 acres for the use of the Adirondack park. (L. 1895, ch. 561.) In 1897 an act was passed, the object of which, according to its title, was 'to provide for the acquisition of land in the territory embraced in the Adirondack park, and making an appropriation therefor.' (L. 1897, ch. 220.) By this act the appoint-

ment of a forest preserve board was authorized, and it was made its duty 'to acquire for the State, by purchase or otherwise, land, structures or waters, or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the State.' Section 3 of said act provides that 'the forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack park, the appropriation of which in its judgment shall be necessary for the purposes specified in section 290 of the fisheries, game and forest law, and in section 7 of article 7 of the constitution.' It is provided by the next section that 'upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated by the State for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the Secretary of State. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description, and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State. § 4. Provision is made by the next section for the payment for lands so taken and for damages resulting from the appropriation by agreement with the owner and the delivery of a certificate payable by the state treasurer upon the warrant of the comptroller. § 5. If the forest preserve board is unable to agree with the owner upon

the value of the property appropriated, the owner, within two years after the service upon him of the notice of appropriation, may present a claim for the value of the land to the Court of Claims, which has jurisdiction to hear and determine the same and to render judgment thereon. The amount of the final judgment is payable to the treasurer upon the warrant of the comptroller. § 6. No provision is made by the act for the payment of any lien upon the lands except that when a judgment for damages is rendered and it appears that there is a lien or incumbrance upon the property appropriated, the amount thereof shall be stated in the judgment and the comptroller may deposit the amount awarded in the proper bank to be paid and distributed to the persons entitled to the same as directed by the judgment. § 19. The sum of $600,000 was appropriated for the purposes specified in the act, and the comptroller was authorized to borrow $400,000 more upon the request of the forest preserve board to be expended under its direction.

"On the 6th of August, 1897, after certain negotiations with the owners of a part of an extensive tract of land known as the Totten & Crossfield purchase, the forest preserve board passed a resolution accepting the offer of the owners of about 18,000 acres of township 23, and 32,000 acres of township 15 of that purchase for the sum of $149,000, of which $99,000 was for the land and $50,000 was for certain improvements at Indian Lake for the use of the State, to be made in accordance with the plans and specifications to be furnished by the state engineer. Township 15 of the Totten & Crossfield purchase lies, as is admitted in the answer, 'wholly within the bounds of the forest preserve and also of the Adirondack park.' Upon the 15th of August, 1897, a representative of the state engineer with a surveying party began surveying at Indian Lake for the purpose of constructing a dam at its mouth in order to stow water for the use of the Champlain Canal and for water power on the Hudson River. Upon the completion of the survey plans and specifications were prepared and the construction of the dam was commenced.

"September 18, 1897, the defendant caused a map and pro-

file to be filed in the counties of Hamilton, Warren and Essex for the extension of its road across township 15, which the forest preserve board had agreed to purchase as aforesaid, and which lies partly in each of said three counties. It also gave notice of such filing to the occupants as required by statute, but did nothing else. About the 1st of October following, as the owners were about to convey to the State the lands covered by the resolution of August 6th, and receive their money, they were restrained from so doing by an injunction issued in an action brought by the Adirondack Railway Company against them. Thereupon they placed the deed *in escrow* to be delivered when the injunction was dissolved, made another deed embracing the same premises, except the land described in the railroad survey, delivered it to the forest preserve board, and received the $99,000, according to agreement. Immediate steps were taken to vacate the injunction, but they were not at first successful, and on the 7th of October the forest preserve board met, and learning that the justice who granted the injunction had declined to vacate it, they took steps to appropriate the land in question for a park under the power of eminent domain. The state engineer having furnished a description in writing of the six-rod strip, which the defendant desires for a railroad, and certified that the same was correct, the three members of the forest preserve board, acting under chapter 220 of the Laws of 1897, annexed thereto a certificate of condemnation and signed the same as the forest preserve board, in these words: 'State of New York, county of Albany, city of Albany, *ss.* We, Timothy L. Woodruff, Charles H. Babcock and Campbell W. Adams, being the forest preserve board, acting under and in pursuance to an act of the legislature of the State of New York, being chapter 220 of the Laws of 1897, entitled "An act to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor," do hereby certify that the lands in township 15, Totten & Crossfield purchase, in the counties of Hamilton, Essex and Warren, of the State of New York, described in the foregoing certificate of the state engineer, have been and hereby are

Counsel for Parties.

duly appropriated by the State of New York for the purpose of making them a part of the Adirondack park.' These papers, indorsed 'state engineer's certificate and description and forest preserve board's certificate of condemnation,' were filed in the office of the secretary of state on the 7th of October, 1897. On the same day a notice of this action of the board, with a general description of the property appropriated and a copy of the papers above mentioned, were served on William McEchron, the president of the Indian River Company, which then owned the lands involved. This service was made, as the special term is presumed to have found, at ten minutes before noon. On the same day the defendant began proceedings to condemn said strip for the purpose of extending its railroad, but as the special term is also presumed to have found, they did not file the *lis pendens* until afternoon, and hence not until after the aforesaid proceeding in behalf of the State had been completed. No notice of condemnation was served on the defendant.

"On the 2d of March, 1898, the injunction restraining the conveyance of said lands to the State was reversed on appeal by the appellate division, and thereupon the original deed *in escrow* was delivered and recorded. The defendant went on with its condemnation proceedings until it was restrained by a temporary injunction granted in this action, which was brought to restrain that company and the other defendants from further continuing the proceedings to condemn.

"The defendant alone answered, and after a trial the special term rendered judgment for the People, perpetually enjoining it from taking the land. Upon appeal the judgment was reversed by the appellate division and a new trial ordered, by a divided vote, upon the ground that the company, by the filing of its map on the 18th of September, had impressed upon the land a lien that was good as against the State of New York. The People have appealed to this court, giving the usual stipulation for judgment absolute."

*Mr. R. Burnham Moffat* for plaintiff in error.

*Mr. Edward Winslow Paige* for defendant in error.

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

The Court of Appeals ruled that on the record it must be presumed that all the facts warranted by the evidence and necessary to support the judgment were found by the courts below; that it was to be assumed that the condemnation proceedings instituted by the forest preserve board were fully completed as required by the statute of 1897 before proceedings to condemn on its part were commenced by the railroad company; and that, thereby, if the condemnation act under which the board proceeded was valid, title to the strip of land in question passed to the State, became a part of the forest preserve, and the railroad company was forbidden by the Constitution to take it. The court sustained the validity of the law, and, without discussing "whether the State became the equitable owner through contract, possession and performance," held that "it became the legal owner through the power of eminent domain."

Plaintiff in error contends, in substance: that it possessed by contract a vested right to construct its road over the six-rod strip in question, and to take that strip by the exercise of the power of eminent domain, and that the condemnation features of the act of 1897, as construed by the Court of Appeals, are void because impairing the obligation of the contract; that the condemnation features of the act as construed to confer authority on the State to acquire, by the proceedings in question, title to the six-rod strip are unconstitutional and void in that they authorize the taking from plaintiff in error its vested property right to construct, maintain and operate its railroad over said strip, "without any notice whatsoever or opportunity to be heard, and without the making of any compensation therefor;" that the proceedings authorized by the act of 1897 do not constitute due process of law.

Section 1 of Article VIII of the constitution of New York authorized the formation of corporations under general laws, and by special act (for municipal purposes and) in cases where in the judgment of the legislature the objects of the corpora-

tion could not be attained under general laws, but provided that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The Adirondack company was organized in 1863 under the general railroad law of New York of April 2, 1850, which reserved the right of the legislature to "at any time annul or dissolve any incorporation formed under this act."

The Revised Statutes, in force from 1829 to 1882, provided: "The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

By an act of March 31, 1865, the Adirondack company was authorized to "amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or river St. Lawrence."

April 25, 1867, the railroad law of April 2, 1850, was amended so as to provide that if corporations formed under the act should not within five years after the filing and recording of its articles of association commence construction or finish its road and put it in operation within ten years, its corporate existence and powers should cease.

In 1882 the railroad of the Adirondack company extended from Saratoga Springs to North Creek, and in that year the Adirondack railway company acquired all the rights of the Adirondack company, and, under the reorganization laws of New York, organized itself with a life of a thousand years.

The eighty-third section of the railroad law of June 7, 1890, provided as follows: "A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, which certificate

shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed or operated or apply to Kings County."

On the ninth of May, 1892, on the application of the Adirondack railway company, the board of railroad commissioners issued its certificate, certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road of the Adirondack railway company beyond the portion thereof constructed at the time the said company acquired title to said railroad property and franchises, namely, beyond North Creek, in the county of Warren.

Counsel argue that the contract with the State was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association, or forfeit its existence and powers; that this was one of the conditions of the contract; that it was perfectly competent for the State to release the other party from the fulfilment of such condition without in any way withdrawing its own grant if it chose to do so; and that this was the sole effect of the application for and the obtaining of the certificate. In other words, that the Adirondack railway company was released from the obligation to extend its road, but retained the right to do so at any time within nine hundred and ninety years, and that although the company still possessed and operated the road so far as constructed, and had asked and received a dispensation from carrying its enterprise further except as it might choose during the passage of centuries, the State was bound by contract not to withdraw the bare right, notwithstanding the contract, according to its express terms, might be changed or abrogated.

Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a cor-

poration of the fruits already reduced to possession of contracts lawfully made. But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope. *People* v. *Cook*, 148 U. S. 397; *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646; *Bank of Commerce* v. *Tennessee*, 163 U. S. 416, 424.

But it is said that by the filing of the map across township fifteen and the service of its notices, the railroad company so far exerted its capacity to extend and construct as to secure rights in the strip of land which could not be taken at all, or if so, not without compensation.

The railroad law provided that companies formed under it before constructing any part of their road into or through any county named in their articles of association should make a map and profile of the route intended to be adopted, file the same in the office of the clerk of the county in which the road was to be made, and give written notices to all actual occupants of the route so designated, and that any party feeling aggrieved by the location might within fifteen days after receiving notice apply to a justice of the Supreme Court, by petition, who could affirm or alter the proposed route in such manner as might be consistent with the just rights of all parties and the public. The code of civil procedure provided for proceedings to be taken to acquire title to real property for a public use by condemnation.

In this case the railroad company filed its map on September 18 and served its notices September 23, 1897. The forest preserve board on August 6, 1897, had accepted an offer by the owners of lands, over which the route was projected, and conveyance thereof was about to be delivered, when on September 30, 1897, an injunction was granted at the suit of the railway company restraining the owners from conveying. The fifteen days for objections to the proposed route prescribed by the railroad law had not then expired. The State condemned October 7, and on the same day, but subsequently,

the company commenced proceedings to condemn under the code.

The Court of Appeals held that assuming that the filing of the map created a lien, or something in the nature of a lien, as this was by statute and not by contract, it could be done away with by statute without liability to make compensation, unless some vested right had accrued under it.

The court further held that no lien nor any right in the nature of a lien could be created as against the State by the mere filing of a route map under the railroad law; that the filing established no right against the owners, because that would be in violation of the Constitution; and that it established none against the State because the power of the State was paramount. But the court was of opinion that, as against all other railroad companies, and as against all other creatures of the State empowered to use the right of eminent domain, "it gave the exclusive right to occupy the particular strip of land for railroad purposes until the legislature authorized it to be devoted to some other public use." And the court said: "The claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no property in a naked railroad route existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

In arriving at these conclusions the Court of Appeals was construing and applying the laws of the State of New York, and we perceive no adequate ground for declining to accept its views in accordance with the general rule on that subject. In any view, we think that the proceedings on the part of the State impaired the obligation of no contract between it and the railroad company.

Counsel concedes that the sovereign power of eminent domain is inherent in government as such, requiring no constitutional recognition and is as indestructible as the State itself;

and "that all private property, tangible and intangible, is held subject to the exercise of the right by the sovereign power, even that which may already be devoted to a public use."

It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured.

And the constitutionality of the act of 1897 is attacked as authorizing the deprivation of property without due process of law, and the taking thereof without provision for compensation.

The forest preserve was created by an act of May 15, 1885, and consisted of "all the lands now owned or which may hereafter be acquired by the State of New York within the counties of Essex, Warren, Hamilton and other counties."

Section eight read: "The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private." The forest commission was created by the act, and in 1890 was authorized to "purchase lands so located within such counties as include the forest preserve, as shall be available for the purposes of a state park," and an appropriation was made for that purpose. By an act of May 20, 1892, the Adirondack park was established in the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex and Warren, was made part of the forest preserve, and declared to be "forever reserved, maintained and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the head waters of the chief rivers of the State, and a future timber supply," and the forest commission was given power to contract for the purchase of land subject to restrictions therein mentioned. Laws on the subject of this park were passed in 1893, 1894 and 1895, and in the latter year a new state constitution came into effect, of which section seven of Article VII was as follows: "The lands of the State now owned or hereafter acquired, constituting the forest preserve, as now fixed by law, shall be forever kept as wild forest lands.

They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."

Then came the act of 1897, creating the forest preserve board, which was empowered to acquire for the State by purchase or otherwise "such lands, structures or waters" within the limits of Adirondack park as might be deemed advisable for the interests of the State, and to enter thereon and take possession thereof.

By section four it was provided that when the board should have determined to appropriate certain lands, the state engineer should furnish it with an accurate description thereof certified by him to be correct; that a majority of the board should indorse on such description a certificate setting forth that the lands specified had been appropriated by the State for the purpose of making them a part of Adirondack park, which description and certificate should thereupon be filed in the office of the secretary of state; that the board should then serve on the owner of the property so appropriated a notice setting forth the fact of such filing, the date of filing and a general description thereof; and that "from the time of such service the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be conclusive evidence of an entry and appropriation by the State."

Under the sixth section the owner, if unable to agree with the board on the value of the property appropriated or the amount of damages resulting from such appropriation, might within two years after the service upon him of the notice of appropriation, present to the Court of Claims a claim for the value of the land and for damages, and the Court of Claims shall have jurisdiction to hear and determine such claims and render judgment thereon, provision being made for the payment of such judgment.

By the nineteenth section it was provided that when a judgment for damages was rendered, "and it appears that there is

any lien or incumbrance on the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the State may be deposited, to the account of such judgment to be paid and distributed to the persons entitled to the same as directed by the judgment."

The lands taken for the park were thereby dedicated to a public use regarded by the State as of such vital importance to the people that they were expressly put by the constitution beyond the reach of any other destination. The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government, and this must obviously be so where the State takes for its own purposes. The State possesses the power as a sovereign and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done?

It is true that the State may delegate the power, and where it has done so to a railroad corporation and by its exercise lands have been subjected to a public use, they cannot be applied to another public use without specific authority, expressed or imperatively implied, to that effect. But the sovereign power of the State cannot be alienated, and where exercised is exclusive.

In this case the use for the park was in itself inconsistent with the use for railroad purposes, and the legislation and the constitution alike forbade this company to acquire for its use any portion of that which the State had taken for its own exclusive and designated purposes.

Compensation must indeed be made, and inquiry as to its amount in some appropriate way, before some properly constituted tribunal, must be provided for, *Backus* v. *Union Depot Company*, 169 U. S. 557, and it is the rule in New York that where this is done, and a certain, definite and adequate source of payment is provided, compensation need not actually be made in advance of a taking by the State or one of its municipal

subdivisions. *In the Matter of the Mayor, &c.*, 99 N. Y. 569; *Sweet* v. *Rechel*, 159 U. S. 380, 400.

This act fulfils these requirements in that the state treasury is the source of payment, and an appropriate mode is designated for the ascertainment of compensation as to owners and those holding liens and incumbrances. In providing for notice to owners only, the act seems to contemplate that it will appear in the progress of the proceedings to ascertain compensation whether there are outstanding claims, and that such claimants may thereupon come forward and be heard.

We need not discuss the sufficiency of the provision in this respect, since we agree with the Court of Appeals, as has already been indicated, that the railroad company occupies no position entitling it to raise the question. The steps it had taken had not culminated in the acquisition of any property or vested right; and no contract between it and the State was impaired, nor was due process of law denied to it within the meaning of the Constitution of the United States under the circumstances disclosed on this record.

*Judgment affirmed.*

## THORMANN *v.* FRAME.

ERROR TO THE CIRCUIT COURT OF THE COUNTY OF WAUKESHA STATE OF WISCONSIN.

No. 341. Submitted January 22, 1900. — Decided February 26, 1900.

The bare appointment of an executor or administrator of a deceased person by the courts of one State cannot be held, on principle or authority, to foreclose inquiry as to the domicil of the deceased in the courts of another State.

The general rule is that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased.

The constitutional provision that full faith and credit shall be given in each State to the judicial proceedings in other States, does not preclude inquiry into the jurisdiction of the court, in which the judgment is rendered, over the subject-matter or the parties affected by it, or into the facts necessary to give such jurisdiction.

Statement of the Case.

JOSEPH Fabacher died March 3, 1897, in the city of New Orleans, leaving a last will and testament dated October 29, 1896, in which he described himself as of Waukesha, Wisconsin, where the will was executed and where he had a residence and a considerable amount of personal property. His widow and ten of his children were named as legatees and devisees. On March 27, 1897, A. J. Frame, appointed executor, presented the will for probate in the county court of Waukesha County, Wisconsin, alleging that it had been duly executed under the laws of Wisconsin, and that Joseph Fabacher was at the time of his decease "an inhabitant of the said county of Waukesha." Publication of the application was made according to law and the matter set for hearing May 4, 1897. On that day Antoinette Thormann, daughter of Fabacher by a prior marriage, appeared and objected to the admission of the instrument to probate, alleging herself to be, under the law of Louisiana, the sole heir of the deceased, and also setting forth matters, which, it was contended, would by the law of that State disqualify the beneficiaries named in the will from taking under it, and averring, as to Joseph Fabacher, that "continuously ever since 1843 up to and at the time of his death he, the said deceased, was domiciliated in the city of New Orleans, in the State of Louisiana, and an inhabitant and resident thereof, and that this court has no jurisdiction in the probate of said alleged last will and testament and in the settlement and distribution of said estate of said deceased." She further charged that any attempt on the part of Fabacher to acquire or create a domicil at Waukesha was in fraud of her rights; that the will was procured by undue influence; and that it was not duly executed in the manner and form required by law. It was conceded that Fabacher's adult children resided in New Orleans, but insisted that the domicil of the minor children was in Wisconsin, and a guardian *ad litem* was appointed as to them. Trial was had in the county court, which held the will in all respects valid; that at the time of his death and some time prior thereto, Joseph Fabacher was domiciled in the county of Waukesha, State of Wisconsin; and that the will was entitled to probate.

The case was then carried to the Circuit Court of Waukesha

Counsel for Parties.

County and there tried before a jury, who returned a verdict sustaining the will and finding the domicil of Joseph Fabacher at the time of his death, March 3, 1897, to have been at the city of Waukesha, whereupon the circuit court made findings of fact and conclusions of law and entered judgment admitting the will to probate and affirming the judgment to that effect of the county court. A large amount of testimony was introduced on these trials, and among other things it appeared that on March 29, 1897, Antoinette Thormann petitioned the civil district court for the parish of Orleans, Louisiana, to be appointed administratrix of the succession of Joseph Fabacher, her father, asserting that he "was at the time of his death and many years before a citizen of Louisiana, domiciled and residing in the city of New Orleans; that said deceased left property in this city and within the jurisdiction of this honorable court," and "that your petitioner is the sole surviving heir and legitimate child of said deceased, issue of his marriage with petitioner's mother. . . ." Letters of administration were granted by the court April 30, 1897.

The inventory stated the property of deceased as "one marble tomb in lot situated in St. Joseph cemetery, #2, bearing the inscription, 'Family of Joseph Fabacher;' also two (2) galvanized iron sofas and five (5) vases, valued by said appraisers at the sum of thirty-five hundred dollars ($3500)." An attempt was made to inventory some household effects, which, however, were claimed as the property of one of the sons.

From the judgment of the Circuit Court of Waukesha County an appeal was taken to the Supreme Court of Wisconsin, the judgment affirmed, and the record remanded to the Circuit Court. 102 Wisconsin, 653. A writ of error having been sued out from this court, motions to dismiss or affirm were submitted.

*Mr. T. E. Ryan*, *Mr. Charles F. Buck* and *Mr. D. S. Tullar* for the motion.

*Mr. William A. Maury* and *Mr. E. Howard McCaleb* opposing.

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

The contention is that the issuing of letters of administration to Mrs. Thormann by the civil district court of the parish of Orleans was an adjudication that Fabacher was domiciled in that parish at the time of his death; that Mrs. Thormann was sole surviving heir; that he died intestate; that this adjudication was in all these respects conclusive against the world; and that the Wisconsin courts in admitting the will to probate did not give to the Louisiana proceedings that full faith and credit to which they were entitled under the Constitution and laws of the United States, and, therefore, denied a right secured thereby.

But it is objected that no such right was specially set up or claimed in the county and circuit courts, and this would appear to have been so. The Louisiana record was not pleaded, and seems to have been offered and admitted in evidence as tending to throw light on the question of domicil, and not as concluding it. Mrs. Thormann contested that question on the merits, and also denied the validity of the will in respect of its execution, and because of undue influence. As the Supreme Court was reviewing the decision below for errors committed there, it would ordinarily follow that error could not be predicated on the deprivation of a right which had not been asserted, and perhaps might properly be held to have been waived.

However, while we think that on this record there was color for the motion to dismiss, we shall decline to sustain that motion inasmuch as the Supreme Court in its opinion considered the particular question here presented, but will dispose of the case on the motion to affirm as the ruling of that court, so far as open to our examination, is so obviously correct, under the circumstances, that further argument is unnecessary.

The question before us is whether the Supreme Court deprived Mrs. Thormann of a right secured to her by the Constitution and laws of the United States in holding that her appointment as administratrix of the succession of Joseph

Fabacher was not a conclusive adjudication that Fabacher's domicil was at the time of his death in the parish of Orleans, Louisiana. The court said: "The record of the Louisiana court in evidence merely shows that the contestant was, after appropriate proceedings, appointed administratrix of the succession of the deceased, and that the inventory of the estate there presented consisted of the tomb, etc. There was no attempt in that court to adjudicate as to the property situated in Wisconsin nor as to the domicil of the deceased. That court, it may be conceded, had jurisdiction as to any tangible property actually located in the State. . . . Certainly there was no adjudication in the Louisiana court which precluded the county court of Waukesha County from taking jurisdiction and admitting the will to probate and administering so much of the estate as was actually located in Wisconsin, and this includes the bonds, mortgages and evidences of debt deposited in the Waukesha bank with the president thereof, who is executor of the will."

Fabacher's property in Wisconsin consisted of movables and immovables. His will was executed in that State in accordance with its laws, and was open to no objection for want of testamentary capacity. But Mrs. Thormann resisted the probate on the ground that the will was invalid by the law of Louisiana, and that that law must be applied in Wisconsin, because Louisiana was, and Wisconsin was not, the domicil of the deceased. We need not go into the rules and their exceptions governing such cases, for the issue as to Fabacher's domicil, raised by Mrs. Thormann in the Wisconsin proceedings to which she made herself a party, was regularly tried at large and determined against her. Nevertheless she contended in the state Supreme Court that the judgment below was erroneous as matter of law, because the question of domicil had been absolutely concluded by her appointment in Louisiana.

Yet the proceeding in Louisiana, instituted, it may be remarked, after the will was presented for probate in Wisconsin, amounted to no more than an *ex parte* application for letters of administration and a grant thereof. Doubtless the desti-

nation of the tomb and accompanying seats and vases was thereby fixed, but not that of property in Wisconsin; nor can the bare appointment be held, on principle or authority, to foreclose inquiry into the fact of domicil in the courts of another sovereignty.

The technical distinction between an original and an ancillary administration is unimportant here.

Whatever the effect of the appointment, it must be as a judgment and operate by way of estoppel. Now a judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment *in personam*, and as a judgment *in rem* it merely determined the right to administer the property within the jurisdiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated.

In this country the general rule is, "that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased." 1 Woerner on Administration, (2d ed.) § 204.

As to successions, the law of Louisiana provides as follows (Code of Practice, 1899):

"Art. 929. The place of the opening of successions is fixed as follows:

"In the parish where the deceased resided, if he had a domicil or fixed place of residence in this State.

"In the parish where the deceased owned immovable property, if he had neither domicil or residence in this State, or in the parish in which it appears by the inventory, his principal effects are, . . . if he have effects in different parishes.

"In the parish in which the deceased has died, if he had no fixed residence, nor any immovable effects within this State, at the time of his death."

The order of appointment by the Louisiana court did not make, nor did the letters themselves recite, any finding as to Fabacher's last domicil, and as he died in the parish of

Orleans, and owned, as contended, immovable property, and effects, there, such a finding was wholly unnecessary to jurisdiction, and is not to be presumed.

In *De Mora* v. *Concha*, 29 Ch. Div. 268, it was held that the decree of a probate court was not conclusive *in rem* as to domicil, although the fact was found therein, because it did not appear that the decree was necessarily based on that finding; and it was doubted whether the findings on which judgments *in rem* are based are in all cases conclusive against the world. The decision was affirmed in the House of Lords. 11 App. Cas. 541. The case is a leading and instructive one, was ably argued, and has been repeatedly followed since the judgment was pronounced.

In *Brigham* v. *Fayerweather*, 140 Mass. 411, conclusive effect to judgments in probate proceedings in respect of their grounds was denied altogether.

Again, it is thoroughly settled that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, or the parties affected by it, or into the facts necessary to give such jurisdiction. *Thompson* v. *Whitman*, 18 Wall. 457; *Cole* v. *Cunningham*, 133 U. S. 107; *Grover and Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Simmons* v. *Saul*, 138 U. S. 439; *Reynolds* v. *Stockton*, 140 U. S. 254; *Cooper* v. *Newell*, 173 U. S. 555.

The point before us is a narrow one, but in any aspect in which it may be considered we are unable to assent to the view that the Supreme Court of Wisconsin was bound to treat the proceeding in Louisiana as conclusively determining the question of domicil; and unless it was so bound its decision deprived plaintiff in error of no right secured to her by the Constitution and laws of the United States.

*Judgment affirmed.*

# BENEDICT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 435. Argued January 15, 1900. — Decided February 26, 1900.

Extra compensation received by a District Judge for holding court outside of his own district is no part of his official salary, or recoverable as such under the provisions of the retiring act.

THIS was a petition by the late District Judge for the Eastern District of New York, for his retiring salary, under Rev. Stat. § 714, at the rate of $6800 per annum, which the petition avers was the salary which was by law payable to him during the year previous to his resignation. The petitioner acknowledges the payment of $5000 and claims a residue of $1800, to which he avers himself to be justly entitled.

Upon hearing the case and upon the consent of parties, the Court of Claims found the following facts:

"First. The petitioner, Charles L. Benedict, is a citizen of the United States, of lawful age, and resides at Dongan Hills, Staten Island, in the city of New York, and State of New York.

"Second. In the month of April, 1865, the petitioner was duly appointed by the President of the United States Judge of the District Court of the United States for the Eastern District of New York.

"Third. The petitioner duly entered on the duties of his office, and duly performed the same until the year 1897, during which, and on or about the 20th of July, 1897, he resigned his office, having then held his commission as judge of said court for more than ten years, and having attained the age of 70 and upward.

"Fourth. Since the passage of the act of February 7, 1873, the petitioner has held, under the provisions of that act and the Revised Statutes, to wit, sections 613 and 658 of the Revised Statutes, the six terms of the Circuit Court of the United States for the Southern District of New York, referred

to in said statutes, in every year, and has received for holding each of said terms the sum of $300; the same being paid to him by the United States marshal for the Southern District of New York, pursuant to sections 613 and 597, Revised Statutes.

"Fifth. That the same was paid upon a voucher in substance as follows:

(Omitted.)

"The total amount thus paid annually to the plaintiff was $1800.

"Sixth. That such payments to the petitioner by the marshal were from time to time allowed in the marshal's accounts and paid to him out of the appropriations for defraying the expenses of the courts of the United States.

"Seventh. During the year previous to the petitioner's resignation he received the said $1800 for that year, in accordance with the provisions of sections 613, 597 and 658, Revised Statutes, as above set forth, and also the salary of $5000, payable to him, as provided by the act of Congress of February 24, 1891, 26 Stat. 783, out of the appropriation to pay the salaries of District Judges of the United States.

"Eighth. During the year since his resignation petitioner has only received as salary the sum of $5000, which sum has been received by him without prejudice to the claim which he makes in this proceeding.

"Ninth. The petitioner presented to the auditor of the State and other departments a bill for the amount of his salary claimed by him herein to be remaining due and unpaid, and made claim on the auditor for the payment of said bill, but the auditor refused to audit or approve the said bill, and no part of the said $1800 has been paid to him."

The petition was dismissed, (34 C. Cl. 388,) and petitioner appealed to this court.

*Mr. Robert D. Benedict* for appellant.

*Mr. Assistant Attorney General Pradt* for appellees.

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

By Revised Statutes, sec. 714, "when any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

In April, 1865, petitioner was appointed by the President, Judge of the District Court of the United States for the Eastern District of New York, and served as such until July 20, 1897, when he resigned his office, having then held his commission for over thirty years, and attained the age of seventy years and upwards. The salary of all District Judges was fixed by the act of February 24, 1891, c. 287, 26 Stat. 783, at the rate of $5000 per annum. There is no question made but that petitioner was entitled to this amount, and that it has been paid him.

The controversy arises over the proper construction of the act of February 7, 1873, reproduced in Rev. Stat. §§ 658 and 613. By section 658 it is enacted that "the regular terms of the Circuit Courts shall be held in each year, at the times and places following: . . . in the Southern District of New York, at the city of New York, . . . exclusively for the trial and disposal of criminal cases, and matters arising and pending in said court, on the second Wednesday in January, March and May, on the third Wednesday in June, and on the second Wednesday in October and December;" and by section 613 it is provided that "the terms of the Circuit Court for the Southern District of New York, appointed exclusively for the trial and disposal of criminal business, may be held by the Circuit Judge of the Second Judicial Court (Circuit) and the District Judges for the Southern and Eastern Districts of New York, or any one of said three judges; and at every such term held by said judge of said Eastern District he shall receive the sum of three hundred dollars, the same to be paid in the manner now prescribed by law for the payment of the expenses of another District Judge while holding court in said district."

The facts are that, after the passage of this act of February 7, 1873, petitioner held each year the six terms of the District

Court of the United States for the Southern District of New York, referred to in the statute, and received for holding each of said terms the sum of $300, amounting in all to $1800 per annum. Petitioner now insists that this was a part of the salary which was by law payable to him at the time of his resignation, within the meaning of the retiring act, sec. 714, and should, therefore, be added to the $5000 per annum admitted to be due him.

The case in reality turns upon the meaning of the word "salary," as used in section 714. The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered. *Thompson* v. *Phillips*, 12 Ohio St. 617; *Landis* v. *Lincoln County*, 31 Oregon, 427; *Dane* v. *Smith*, 54 Alabama, 49; *State* v. *Murphy*, 24 Florida, 33; *Castle* v. *Lawler*, 47 Conn. 345; *Commonwealth* v. *Butler*, 99 Penn. St. 542. As applied to District Judges in general, and indeed to every District Judge except the Judge of the Eastern District of New York, it doubtless refers to the salary of $5000 fixed by the act of February 24, 1891. Such salary is an annual stipend, payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the Judge in person, or by the Judge of another district called in to take his place. It is a compensation which cannot be diminished during the continuance of the incumbent in office, and of which he cannot be deprived except by death, resignation or impeachment.

Wholly different considerations apply to the compensation provided for by section 613. To entitle the Judge of the Eastern District of New York to the $300 per term, provided for by that section, it is necessary that the term be actually held by him, when he is paid for his services in the manner provided by law for the expenses of a District Judge holding court in another district than his own. He may hold but one term a year, for which he would receive $300. He may hold three terms, for which he may receive $900, or he may hold the entire six terms and receive $1800. Such compensa-

tion is a variable quantity, dependent upon the number of terms held by the Judge. Upon the theory of the petitioner, if he had held but one term during the year previous to his resignation, he would be entitled to but $300 in addition to his regular salary of $5000. The fact that he was able to hold the entire number of six terms for the twenty-four years preceding his resignation is a tribute to his industry, faithfulness and capacity, as well as to his good health, but it does not affect the question in a legal point of view. This compensation was not only for services actually performed, but was subject to be diminished or taken away at the will of Congress. It was something entirely distinct from the salary paid to him as Judge of the District Court for the Eastern District of New York, but was in fact, as was held by the Court of Claims, extra pay for extra work performed — for particular as distinguished from continuous services.

We are all of opinion that the judgment of that court was right, and it is therefore

*Affirmed.*

Mr. Justice McKenna did not sit in this case.

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## THE ADULA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 167. Argued November 7, 1899. — Decided February 26, 1900.

A legal blockade may be established by a naval officer acting upon his own discretion, or under direction of superiors, without governmental notification.

In view of the operations being carried on for the purpose of destroying or capturing the Spanish fleet at Santiago de Cuba, and the reduction of that place, it was competent for the Admiral commanding the squadron to establish a blockade there, and at Guantanamo, as an adjunct to such operations, and such blockade was valid as against all vessels having notice thereof.

It appearing that Guantanamo was eighteen miles from the mouth of Guan-

tanamo Bay and was still occupied by the enemy, *held*, that although the American troops occupied the mouth of the bay, the blockade was still operative as to vessels bound to the city of Guantanamo.

The legal effect of a lawful and sufficient blockade is a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business.

The sailing of a vessel with a premeditated intent to violate a blockade, is *ipso facto* a violation of the blockade, and renders her subject to capture from the moment she leaves the port of departure.

If a master has actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries.

If a neutral vessel be chartered to an enemy, she becomes to a certain extent and *pro hac vice* an enemy's vessel, and a notice to her charterer of the existence of a blockade is a notice to the vessel.

It appearing in this case that both the charterer and the vessel had been previously engaged in bringing away refugees from Cuba, and were chargeable with notice of the military and naval operations against that island, that such facts were of common knowledge at the port from which she sailed, and that intercourse with Cuban ports was dangerous; and it appearing from a preponderance of evidence that both the charterer and master of the vessel had knowledge of the blockade: *held*, that the vessel was properly condemned.

If an examination of the ship's papers and the testimony of the crew, taken *in preparatorio*, make a case for condemnation, an order for further proof is only made where the interests of justice clearly require it: *held*, in this case that there was no error in denying the motion of the claimant for further proofs.

This was a libel in prize against the British steamship Adula, then under charter to a Spanish subject, which was seized June 29, 1898, by the United States cruiser Marblehead, for attempting to run the blockade established at Guantanamo Bay in the island of Cuba, and was subsequently sent into the port of Savannah for adjudication.

The Adula, a vessel of 372 tons, was built at Belfast in 1889, for her owner, the Atlas Steamship Company, Limited, a British corporation, and was registered in the name of its managing director, Sir William Bowers Forwood. Prior to the American-Spanish war she was engaged in general trade between Kingston and other ports on the coast of Jamaica, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons in the intervals of its regular work, for voyages to Cuba.

Statement of the Case.

In the meantime, however, under the command of Rear Admiral Sampson, a blockade was established at Santiago, where the Spanish fleet lay under the command of Admiral Cervera. Upon June 8, a blockade of Guantanamo Bay was also established by order of Admiral Sampson, the blockading squadron being under the command of Commander McCalla. Both of these blockades were maintained during the war. On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda and of Cienfuegos on the south coast, was declared by the President. On June 27, the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Frances and Cape Cruz. This included the port of Manzanillo. On the 28th, this proclamation was made known to the vessels off Guantanamo.

On June 27, the Adula, then at Kingston, was engaged in taking on a cargo for shipment. On the 28th she discharged this cargo, and the agent of the Atlas Company entered into a charter party with one Solis, a Spanish subject formerly resident in Manzanillo, of the material parts of which the following is a copy:

The Adula was put at the disposal of the charterer "for the conveyance of passengers from Cuban ports hereinafter to be named, to Kingston. The ports that the vessel is to go to are Manzanillo, Santiago and Guantanamo; but it is distinctly understood and agreed by the parties aforesaid that it shall not be deemed a breach of this agreement should the steamer be prevented from entering any of those ports from causes beyond the control of the company, but that should she be able to enter one or all of them, she shall embark the passengers that the charterer shall engage for her and proceed on her voyage. If she is not permitted to enter either Manzanillo, Santiago or Guantanamo, the vessel is to return to Kingston, and the voyage shall be considered completed, and the charter money hereinafter referred to earned without any deductions. . . . The charterer is to provide a good and efficient government pilot to conduct the ship safely into the ports which have been named. Should she be permitted to

enter them the charterer guarantees that the proper and efficient clearances shall be obtained for each port, so that the ship shall not be subjected to any fines for breach of regulations. . . . The company will give the option to the charterer for another voyage similar to this on similar terms, providing the charterer gives the company twenty-four hours' notice after the arrival of the steamer at Kingston."

Accompanying this charter were certain instructions, printed in the margin,[1] from the agent of the company to Captain Yeates, the commander of the Adula. These were taken from

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[1] ATLAS STEAMSHIP COMPANY,
JAMAICA AGENCY, *June* 28, 1898.

Captain Yeates, S. S. Adula.

DEAR SIR: I enclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I ask you to show him every attention on the voyage.

You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American warships off the port. You will, when signalled to, stop immediately and communicate to the commanding officer the voyage that you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port.

You must be careful on your arrival there not to interfere or in any way make any observation or sketches of anything that you may see or hear of, but adhere strictly to the duties of your ship.

At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in.

From Guantanamo you will proceed to off Santiago. Here you will meet the other fleet, and carry the same instructions out with them as I have mentioned to you in reference to Guantanamo. The charterer is telegraphing at once to Santiago for a pilot to come off to meet the ship, if permission is granted, to pilot your ship into the port.

From Santiago you will proceed to Manzanillo, and from thence back to Kingston. The charterer, Mr. Solis, may order you direct from Guantanamo to Kingston or from Santiago to Kingston, and in such a case you will follow out his orders, which he will give you in writing. He has the option of going to the three ports, but it may be convenient for him to go to only one or even two. The boat's crew that is mentioned in the appendix of this agreement

Counsel for Appellant.

the ship when she was captured. The Adula left Kingston late in the afternoon of June 28. Before sailing, Solis asked from the United States consul at Kingston a permit to enter the ports of Guantanamo, Santiago and Manzanillo. This the consul refused to give without special instructions from Washington. Just before sailing to Santiago, Solis cabled for a licensed pilot to meet the Adula. On leaving Kingston she took her course around Morant Point at the easterly end of the island, first toward Santiago, and then to Guantanamo, and about 4 P.M. of the following day was met before reaching the harbor and brought to by the steamship Vixen; was directed to proceed, entered the harbor of Guantanamo, and was seized by the Marblehead, which, with other vessels of the fleet, was lying inside the bay, and was sent to Savannah, where a libel in prize was filed against her on July 21, 1898. The depositions *in preparatorio* were taken July 21, and her owner, the Atlas Steamship Company, appeared as claimant and filed its answer. The case was heard upon the proofs *in preparatorio*, and a decree of condemnation entered July 28. (89 Fed. Rep. 351.) Before the decree, claimant moved for leave to take further proofs. The court set the motion down for August 9, giving claimant leave to serve such affidavits and other papers as it might desire to read upon the motion, and directed the entry of the decree to be without prejudice to such motion. The motion was finally denied, and the vessel released upon a stipulation for her value.

From the decree of condemnation her owner and claimant appealed to this court.

*Mr. Everett P. Wheeler* for appellant.

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you will provide, but it will be necessary for you to have the ensign in the stern, so as to show your nationality.

You will not allow any provisions of any sort to leave your ship at any of the ports or to do anything that is contrary to the laws of the country or that may be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports, and I must ask you not to permit any of your crew to land at any of the ports, and only yourself, if necessary, to visit the British consul.

Wishing you a pleasant voyage, I am, sir,

Yours faithfully,

(S'g'd) W. Pepploe Forwood, *Gen. Ag't, Jca.*

*Mr. James H. Hayden* for the captors. *Mr. Joseph K. McCammon* was on his brief.

*Mr. Assistant Attorney General Hoyt* for the United States.

*Mr. George A. King*, *Mr. William B. King* and *Mr. William E. Harvey* filed a brief for the captors.

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

The rectitude of the decree of the District Court condemning the Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

The legality of a simple or actual blockade as distinguished from a public or Presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." (Halleck Int. L. chap. 23, sec. 10.) A *de facto* blockade was also recognized as legal by this court in the case of *The Circassian*, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the Chief Justice observed: "There is

a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of *The Rolla*, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of *The Henrick and Maria*, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction." See also *The Johanna Maria*, Deane on Blockades, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been

a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy, as they would be quite sure to do, if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. Here again the case of *The Circassian*, 2 Wall. 135, is decisive. The Circassian was captured May 4, 1862, for an attempted

violation of the blockade of New Orleans. The city, including the ports below it on the Mississippi, was captured during the last days of April, and military possession of the city taken on May first. It was held that neither the capture of the forts nor the military occupation of the city terminated the blockade, upon the ground that it applied, not to the city alone, but controlled the port, which included the whole parish of New Orleans, and lay on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city. The following language of the Chief Justice is equally pertinent to this case: "Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment." The occupation of the city terminates a blockade because, and only because, it supersedes it, and if a vessel be bound to a port or place beyond, which is still occupied by the enemy, the occupation of the mouth of the harbor does not necessarily terminate the blockade as to such places.

Granting the existence of a lawful and sufficient blockade at Guantanamo, its legal effect was a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. It is well described by Sir William Scott in *The Vrouw Judith*, 1 C. Rob. 126, 128, "as a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to

assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that a neutral ship departing can only take away a cargo *bona fide* purchased and delivered, before the commencement of the blockade. If she afterwards takes on board a cargo it is a fraudulent act and a violation of the blockade." It is also said by Phillimore, 3 Int. Law, 383, that "the object of a blockade is to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place." The sailing of a vessel with a premeditated intent to violate a blockade is *ipso facto* a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure. *Yeaton* v. *Fry*, 5 Cranch, 335; *The Circassian*, 2 Wall. 135; *The Frederick Molke*, 1 C. Rob. 72; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110; Wheaton on Captures, 196. If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty could not fail to lead to attempts to violate the blockade under pretext of approaching the port for the purpose of making such inquiries. *The Admiral*, 3 Wall. 603; *The Prize cases*, 2 Black, 635, 677; Duer on Ins. 661; *The Cheshire*, 3 Wall. 231; *The James Cook*, Edwards, 261; *The Josephine*, 3 Wall. 83; *The Spes*, 5 C. Rob. 76; *The Betsey*, 1 C. Rob. 280; *The Neptunus*, 2 C. Rob. 110; *The Little William*, 1 Acton, 141, 161; *Sperry* v. *Delaware Ins. Co.*, 2 Wash. C. C. 243. If there be any distinction in this particular between a proclaimed blockade and an actual blockade by a naval commander, it does not aid the Adula in view of the admitted fact that she was informed by the Vixen that the port was under the control of the United States military forces, and that the war ships were visible before she entered the bay.

In this connection we are cited by counsel for the Adula to a change in the law said to have been effected by the adhesion of this Government, at the beginning of the war, to the

declaration of Paris abolishing privateering. This supposed change apparently rests upon an extract from a French treatise upon international law by Pistoye and Duverdy, vol. 1, p. 375, in which it is said that by the modern law, in consequence of the declaration of Paris, a vessel must be notified to depart from the blockaded port before she can be captured, and that the contrary rule was the result of the doctrine of the British Orders in Council during the Napoleonic wars, which is now given up by that country. It is also said that "the old rule was that it was a breach of blockade to enter upon a voyage to the blockaded port. This rule is now changed, because neutrals are obliged only to respect effective blockades. It may well be that a blockade of which official notice has been given is not an effective blockade, or it may be that a blockade which has been established by a sufficient force may have ceased to exist. Neutrals then have the right to begin a voyage to a blockaded port in order to see if the blockade still continues. They are only guilty when, while the blockade continues, they actually endeavor to break it."

We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court in the cases above cited, to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon the subject.

We have not overlooked in this connection the provision contained in Art. 18 of Jay's treaty of 1794, to the effect that "whereas, it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained nor her cargo, if not contraband, confiscated, unless after notice she shall again attempt to enter." *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185. Waiving the question whether this clause of Jay's treaty was abrogated by the war of 1812, and accepting it as a cor-

rect exposition of the law of nations, it applies only to vessels which have sailed for a hostile port or place without knowing that the same is either besieged, blockaded or invested. The whole case against the Adula depends upon the question whether those in charge of her knew before she left Kingston that Santiago and Guantanamo were blockaded. If they did, the treaty does not apply. If they did not, they are entitled to the benefit of this principle of international law. In the case of the *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29, in which it was held that the vessel could not be placed in the situation of one having notice of the blockade until she was warned off, the decision was placed upon the express ground that orders had been given by the British government, and communicated to our government, "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them." This order was treated by the court as a mitigation of the general rule so far as respected blockades in the West Indies.

2. The questions concerning the notification of, and the intent to, violate blockade depend largely upon the same testimony, and may be properly disposed of together. There is no doubt that the Adula belonged to a British corporation, the Atlas Steamship Company; was registered in the name of the managing director of such corporation; flew the British flag, and prior to the Spanish-American war was engaged in general trade between Kingston and other ports on the coast of Jamaica, in connection with other steamers of the same line from New York, and from time to time had made voyages to Cuban ports. After the breaking out of the war the steamer was chartered by various persons, in the intervals of its regular work for voyages to Cuba. On May 7, in pursuance of a verbal arrangement between the agent of the steamship company and the American consul, the Adula was sent to Cienfuegos in Cuba to bring away refugees. On arrival off Cienfuegos she was boarded by officers of the U. S. S. Marblehead, who, upon being shown the permit and the ship's papers, allowed her to proceed, though the officers served the master with a

printed copy of the President's proclamation blockading Cienfuegos and several ports on the north side of Cuba, and made a memorandum on the ship's log that they had done so. She sailed from Cienfuegos May 10, with 350 passengers, mostly women and children; was again boarded on leaving the port, but was allowed to proceed.

On May 16, she was chartered by a Cuban refugee to proceed to Santiago; arrived there the following day, and returned with 200 passengers. No war ships were off Santiago at that time. She arrived at Kingston on the 19th, and landed her passengers.

On May 21, she was again chartered to go to Cienfuegos, having a permit from Washington, through the consul, to pass the blockade. She reached the blockading fleet on the 23d, was boarded by a boat from one of the vessels, and was again given permission to proceed; was arrested upon suspicion by the Spanish authorities in the port of Cienfuegos, but after a detention of sixty hours was released. She sailed again on May 26 directly for Kingston; saw no war ships in sight, and arrived at Kingston on May 28.

After making two of her ordinary coasting voyages around Jamaica, she was offered a further charter for Cienfuegos, but could not obtain the permission of the American consul, who told the master he had no authority to grant it. She left June 15, with a letter of instructions to the captain to proceed to the fleet off Cienfuegos, then under a public blockade, to ask permission from them to enter the port, and if granted, to go in, and if not granted, to return to Jamaica. She arrived at Cienfuegos June 17; landed some provisions which had been shipped for her passengers, found no war ships there, and sailed away on the 19th with only ninety-eight passengers. Sixty miles S.S.E. from Cienfuegos she was stopped by the U. S. S. Yankee, and an officer sent on board. The master showed the boarding officer his instructions and the ship's papers, as well as the passenger list; was informed that Cienfuegos was blockaded, and that he must not enter it again. She arrived in Kingston on June 21; proceeded around the island on her usual coasting trip, and returned to Kingston on the 27th.

She was chartered for her last voyage June 28, by one Solis,

a Spanish subject, born near Havana, and living with his family at Manzanillo. He had landed recently from Manzanillo with a cargo of refugees. He had lived in Cuba, and at one time had been the French consul at Manzanillo, though there was no evidence that he had ever coöperated with the Spanish authorities during the war, or rendered aid or comfort to the Spanish forces. He had, however, a passport from the Spanish consul to enter the cities to which he was bound and take passengers away as refugees. He had previously been engaged in shipping supplies to Cuban ports and returning with passengers for Jamaica. He also carried a special personal Spanish passport granted the year before. Such being his political character, he entered into a charter party with the Atlas Steamship Company, under which he was at liberty to go to Manzanillo, Santiago and Guantanamo, and if not permitted to enter these harbors, to return to Kingston. An option was also given to the charterer for another similar voyage upon like terms upon twenty-four hours' notice after arrival at Kingston. The charter was for the conveyance of passengers from Cuban ports to Kingston at one hundred pounds per day. Solis was entered upon the ship's articles as supercargo. She was evidently chartered for his personal benefit, with power to name the port which she was to visit, but with no right to interfere with the navigation of the ship. Solis had made the same sort of trip twice before with English schooners, and expected upon this trip to make $19,000 net profit. He appeared to have known nothing about the previous voyages of the Adula, and had seen her for the first time only about two months before. The vessel bore a passport from the Spanish consul at Kingston; a bill of health *viséd* by the Spanish consul. With regard to his knowledge of the blockade at Guantanamo he testified as follows:

"I knew that there was a condition of war existing between America and Spain on the 21st. They told me on board the Adula that the blockade of Guantanamo was published on the 27th, the day before. I had not heard it before I left Kingston. I did not know officially Guantanamo was blockaded. On board the Adula I heard that on the 27th there was issued

an order from the President of the United States declaring a blockade of the port of Guantanamo, but I did not know it until we arrived at Guantanamo. At Kingston I heard there were some war ships at Guantanamo, and I told Captain Forwood that the first thing I would do would be to go to the admiral and tell him my intentions. I did not think the papers in Kingston published the blockade. I did not see it if they did. The people generally did not talk about it. I read something about 'McCalla's camp.' I understood Guantanamo was not blockaded by the United States. I heard that marines had been landed at the entrance to Guantanamo, Caimenera — the bay is called Caimenera — and that the marines had possession of the port, and that the ships were inside. I cannot tell when I received the information that marines had been landed there and taken possession of the point of Guantanamo or Caimenera. Perhaps it was one or two days before. I don't know what the others knew about a state of war existing. I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston, and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side; they call it 'East Point.'"

It further appeared that the American consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade in the following language, as stated by the agent himself: "'Well, Forwood, I would not advise you to let the ship go; they won't let her into Guantanamo, and they will be watching for her.' I said to him, 'Oh, Dent, let me show you the captain's instructions. He has got orders to go to the fleet there and ask their permission to take some refugees.' 'Well,' he said, 'I don't know, but they will be watching for her, and I think that Senor Solis is a Spanish agent, carrying $300,000 in gold to buy over the rebels in the American camp.' I told him that I had inquired about the man, and that it was one of the usual Kingston yarns." It also appears that Mr. Forwood knew that Mr. Solis was a Spaniard, and had been shipping supplies to Cuban ports. After taking on board a large supply

of coal, the Adula left Kingston on June 28; rounded Morant Point on the east end of the island of Jamaica; proceeded at her usual speed toward Santiago, and sighted the blockading fleet off that port about noon of the 29th. The captain gives as his reason for going by the way of Santiago that he was not acquainted with the coast line to the eastward of that port; had no large scale chart, and therefore steered more to the westward than he should have done, because he knew the coast about Santiago, and did not know that about Guantanamo; but it is quite as probable that it was the presence of a number of war vessels off Santiago which sent her to Guantanamo. She was hailed by the Vixen within half a mile of the entrance to the harbor of Guantanamo, brought to, and then directed into the harbor, where several war vessels were lying, and was shortly thereafter seized by order of Commander McCalla of the Marblehead.

In his testimony before the prize commissioners, Captain Yeates, master of the Adula, stated that he was stopped by the Vixen about a half a mile from the entrance to the bay and permitted to proceed, and that it was not until after he had anchored that he was acquainted with the blockade of the harbor. One of the crew testified somewhat to the contrary and swore that "about three days before I left Kingston I heard that Guantanamo was blockaded; I heard it from people around the streets; I did not see it; I heard it was in the papers; I never heard any of the officers of the Adula or people on board talking about Guantanamo being blockaded, and I don't know exactly whether the owner or master or officers of the ship Adula knew that Guantanamo was blockaded. I knew about it, but I don't know anything about them. I don't know how I found it out, but I heard it on the streets of Kingston." He also swore "that at that time he went up to the mouth of the harbor, and at that time, when we got to Guantanamo, we found the war ships there blockading the harbor." A small cruiser, the Vixen, "ran up across our bow and the captain of the cruiser asked us: 'Didn't you sight the war ships down at Santiago?' and the captain said, 'Yes.' And the captain stopped, and he said: 'Didn't you hear that Guantanamo was

blockaded?' and our captain said 'Yes.' Then he said, 'You can proceed on.' I heard about the blockade in Kingston, but after leaving Kingston, until we met the cruiser, I never heard anything more about it." Captain Yeates also testified that he expected to be stopped when he approached Santiago. Mr. Solis, who had chartered the Adula for this voyage, testified that he was told, while on board the Adula, that the blockade of Guantanamo was published on the 27th, the day before, but that he had not heard of it before he left Kingston, though he had heard, while in Kingston, that there were some war ships at Gauntanamo. At the time the Adula was captured she was searched for her ship's papers and other documents and letters. Several letters were found, as well as copies of a newspaper published at Kingston, which spoke of the American military and naval operations both at Santiago and Guantanamo.

Among these extracts from The Gleaner of July 14, 1898, is the following, apparently telegraphed from London: "A dispatch boat off Santiago reports that the Americans now hold thirty-five miles of the coast east of Santiago, including Guantanamo harbor, and that 20,000 Spanish troops at Santiago are preparing to desperately resist the Americans, who have landed 3000 rifles, 300,000 rounds of ammunition, and large stores of provisions;" and the following from the issue of June 25: "On board the Adula, which arrived from Cienfuegos this week, there was an individual officially appointed by the Captain General in Cuba to make arrangements in Jamaica for regularly supplying the Spanish troops with provisions; in fact, to make Jamaica a base for Spanish purposes."

In this connection it would seem from the report of the Bureau of Navigation that the consul at Kingston telegraphed to Washington that the Under Secretary of the Captain General of Cuba and certain Spanish naval officers "came aboard the Adula with, it is supposed, $250,000 to purchase provisions to be taken to Manzanillo for Cervera. . . . Extensive preparations being made for shipping provisions to Cuba."

In a letter from Captain Yeates to his parents, under date of July 13, and apparently written while the Adula was at Savannah, he says: "And now to tell you dear ones how it is

or was that we got into this pickle, which has not come as any surprise, as I have anticipated this for some time; it is I did not think I should be in command when it happened, but it was my luck to be, I suppose." Speaking of the capture, he says: "They turned the ship upside down; took my papers; measured the coals, and took stock generally. As far as the ship is concerned she was on perfectly legitimate business, fetching refugees. Whether Mr. Solis chartered the ship for that purpose alone, of course, has to be proved, and we are now on our way to Savannah for that purpose with a prize crew and Lieutenant Anderson in charge." In a postscript dated at Savannah, July 15, he says: "We have not yet reached the town proper, for we are going through the same performance as we did at Tampa, but I was not caught this time, for I managed to keep my things out of the oven."

As tending to show the good faith of this expedition, and more particularly the owners of the Adula, much reliance is placed upon the letter of Mr. Forwood to Captain Yeates of June 28, the day upon which the Adula left Kingston, in which he instructs him, in case he finds American war ships off Guantanamo, to stop immediately upon being signalled, and communicate to the commanding officer the object of the voyage, and to be careful upon his arrival "not to interfere, or in any way make any observations or sketches of anything you may see or hear of, but adhere strictly to the duties of your ship," and observe the same precautions off Santiago. In this letter he also instructs him not to allow any provisions to leave the ship, or to do anything which could be interpreted as a breach of faith in being allowed to pass the blockade and enter the ports. While this letter doubtless tends to show good faith on the part of Mr. Forwood, still it was written with full information from Mr. Solis that the consul had refused to give him a passport, without permission from the American authorities in Washington. That Mr. Forwood recognized the necessity of an authority from Washington in order to pass the blockade is shown by his letter to Captain Walker of May 21, 1898, in reference to one of the voyages to Cienfuegos, in which he says: "In giving this letter to the blockade, be sure and ask

the officer if he would allow the ship to pass another voyage without cabling to Washington."

From all the testimony in the case it appears very clear:

That Guantanamo was actually and effectively blockaded by orders of Admiral Sampson from June 7 until after the capture of the Adula;

That the Adula was chartered to a Spanish subject for a voyage to Guantanamo, Santiago or Manzanillo, for the purpose of bringing away refugees, and that such voyage was primarily, at least, a commercial one for the personal profit of the charterer. During such charter she was to a certain extent, *pro hac vice*, a Spanish vessel, and a notice to Solis of the existence of the blockade was a notice to the vessel. *The Ranger*, 6 C. Rob. 126; *The Yonge Emilia*, 3 C. Rob. 52; *The Napoleon*, Blatch. Prize Cases, 296. The fact of her sailing under a Spanish passport — in fact, an enemy's license — is not devoid of significance. Indeed, we have in several cases regarded this as sufficient ground for condemnation. *The India*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440; *The Ariadne*, 2 Wheat. 143. This passport gave the Adula authority to enter the Cuban ports and take away refugees, and it is a circumstance worthy of notice that it could not be found when the vessel was captured. Solis acknowledged its existence, but made no effort to account for its loss;

Both Solis himself and the Adula had been previously engaged in similar enterprises to the coast of Cuba, and were chargeable with notice, not only of war between the United States and Spain, but with the fact of military and naval operations upon the southern coast of Cuba;

The fact of such war, that the object of it was the expulsion of the Spanish forces from Cuba, and that military and naval operations were being carried on by us with that object in view, must have been matters of common knowledge in Kingston, as well as the fact that the commerce with the southern ports of Cuba was likely to be interrupted, and that all intercourse with such ports would become dangerous in consequence of such war;

While the mission of the Adula was not an unfriendly one

to this Government, she was not a cartel ship, privileged from capture as such, but one employed in a commercial enterprise for the personal profit of the charterer, and only secondarily, if at all, for the purpose of humanity. Her enterprise was an unlawful one, in case a blockade existed, and both Solis and the master of the Adula were cognizant of this fact. The direction of the commanding officer of the Vixen, which overhauled the Adula off Guantanamo, to enter the harbor, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. *The Hope*, 1 Dod. 226; *The Amado*, Newb. 400; *The Joseph*, 8 Cr. 451; *The Benito Estenger*, *post* 568.

That upon arrival off Santiago the blockading fleet was plainly visible, and we think there is a preponderance of evidence to the effect that both Solis and the master of the Adula knew of the actual blockade, that it was generally known in Kingston before she sailed, and that the Adula was chargeable with a breach of it, notwithstanding the letter of instructions from Mr. Forwood to Captain Yeates. As the blockade had been in existence since June 7, it is scarcely possible that, in the three weeks that elapsed before the Adula sailed, it should not have been known in Kingston, which was only a day's trip from the southern coast of Cuba, and with which it appears to have been in frequent communication. This probability is confirmed by the direct testimony of the sailor Morris, that it was matter of common talk in Kingston. The testimony of Solis, that he did not know "officially" that Guantanamo was blockaded, by which we are to understand that it had not been officially proclaimed, is perfectly consistent with a personal knowledge of the actual fact. His statement seems to be little more than a convenient evasion. Upon the principle already stated his knowledge was the knowledge of the ship.

We think the facts herein stated outweigh the general statement of the officers that they had not heard of the blockade.

3. There was no error in denying the motion of the claimant to take further proofs. It appears from the opinion of the court that "the hearing upon the proceedings for condemnation was upon the evidence afforded by the examination of the

captured crew taken upon standing interrogatories, the ship's papers, and other evidence of a documentary character found upon the ship by the captors. This was done in conformity to the established rule in prize causes."

The motion to take further proof was made upon the affidavit of Robert Gemmell, the New York agent of the company, the statement of W. P. Forwood, the Kingston agent, annexed thereto, as well as his own affidavit and exhibits, and upon the counter testimony of Anderson, Ellenberg and Gill taken *de bene esse*. Upon the hearing of this motion the court considered the allegations of Forwood, attached to Gemmell's affidavit, as if Forwood had testified upon depositions regularly taken, giving due weight to the same in connection with other evidence in the case; and was of opinion that the evidence as it stood was not susceptible of any satisfactory explanation; and comparing the proof proposed to be brought forward with that already in the case, came to the conclusion that the legal effect of the facts before the court could not be varied by the explanation offered. The motion was denied. In considering this case we have also given effect to these affidavits, and have come to the conclusion that, if they are to be taken as true, and the further proofs, if taken, would support them, they would not change our opinion with respect to the affirmance of the decree.

If an examination of the ship's papers and of the crew, taken *in preparatorio*, upon which the cause is first heard in the District Court, make a case for condemnation, the order for further proof is, as stated in *The Gray Jacket*, 5 Wall. 342, 368, always made with extreme caution, and only where the interests of justice clearly require it. If the ship's papers and the testimony of the crew do not justify an acquittal, it is improbable that a defence would be established by further proof; and as the interest of all parties require that prize causes be quickly disposed of, it is only where the testimony *in preparatorio* makes a case of grave doubt, that the court orders the taking of further proofs. *The Pizarro*, 2 Wheat. 227; *The Amiable Isabella*, 6 Wheat. 1, 77; Benedict's Adm'y, sec. 512 *a*; Story on Prize Courts, 17.

It was said by Sir William Scott in *The Sarah*, 3 C. Rob. 330, that "it has seldom been done except in cases where there has appeared something in the original evidence, which lays a suggestion for prosecuting the inquiry farther. In such case the court has allowed it; but when the matter is foreign, and not connected with the original evidence of the cause, it must be under very peculiar circumstances indeed that the court will be induced to accede to such an application; because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions."

These remarks are specially pertinent to the offer of further proof that, while Solis owed allegiance to the Queen of Spain, yet, that he left Cuba soon after the war broke out, took no part in the hostilities, but on the contrary had done all in his power while he remained in Cuba to assist citizens of the United States residing there; had sided with the natives of Cuba, and was desirous that a government should be established in the island under the auspices of the United States. As was observed in the very satisfactory opinion of the District Judge in this case, this evidence was altogether irrelevant to the case of the Adula, and was, to a certain extent, a contradiction of his testimony before the prize commissioners that he was a loyal subject of Spain, bore a Spanish passport, and carried a bill of health *viséd* by the Spanish consul at Kingston. It would throw the whole practice in prize cases into confusion if the testimony, taken *in preparatorio*, when the facts are fresh in the minds of the witnesses, were subject to be contradicted by the same witnesses after its weak points had been developed. It was said by Mr. Justice Story in *The Pizarro*, 2 Wheat. 227: "Nor should the captured crew have been permitted to be reëxamined in court. They are bound to declare the whole truth upon the first examination; and if they fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice

equally point out the necessity of an inflexible adherence to this rule."

Upon the whole, we think the decree of the District Court was correct, and it is therefore

*Affirmed.*

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

I cannot concur in the judgment of the court in this case, and shall state my views briefly, without entering at length upon a discussion in support of them.

By a joint resolution of the Senate and House of Representatives of the United States, approved April 20, 1898, it was declared "That the people of the Island of Cuba are, and of right ought to be, free and independent." "That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters." "That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry these resolutions into effect." "That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." 30 Stat. 738.

By an act approved April 25, 1898, Congress declared "That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, A.D. 1898, including said day, between the United States of America and the Kingdom of Spain." 30 Stat. 364, c. 189.

On April 22, a blockade of the north coast of Cuba between Cardenas and Bahia Honda, and of Cienfuegos on the south

coast, was declared by the President, and on June 27 the President by proclamation gave notice that the Cuban blockade had been extended to include all the ports on the southern coast between Cape Frances and Cape Cruz. Neither of these proclamations included the port of Guantanamo, nor was any blockade of that port ever proclaimed by the President.

The Adula was a British vessel, and on June 28 she left the British port of Kingston, in the Island of Jamaica, bound, according to the instructions from the agent of the Atlas Steamship Company, the owners, to Captain Yeates, the master of the vessel, directly to the port of Guantanamo. Among the instructions, found on the vessel when she was captured, were the following:

"I enclose herein a copy of the agreement under which your vessel is proceeding on, and on board the ship will be the charterer, to whom I now introduce you, Mr. José R. Solis, and I will ask you to show him every attention on the voyage.

"You will see by a perusal of the agreement that you are on a voyage wholly and solely for the conveyance of refugees from the ports named to Kingston.

"On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American war ships off the port. You will, when signalled to, stop immediately and communicate to the commanding officer the voyage that you are on, and in fact you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port. You must be careful on your arrival there not to interfere or in any way make any observations or sketches of anything you may see or hear of, but adhere strictly to the duties of your ship. At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in."

On the afternoon of the 29th June the Adula approached the harbor of Guantanamo, and there met the United States war vessel Vixen. It was testified by Captain Yeates before

the prize commission as follows: "We passed one vessel. I think it was the Vixen. He fired a gun. I stopped immediately, and he told me to proceed. He did not stop his engines at all; just steamed right on by. Captain Forwood told me I should see vessels of war around there. When the Vixen hailed me we were about half a mile from the entrance of the bay, and about four miles from where we anchored." This evidence was not contradicted, and, in respect to the permission to proceed, was corroborated by one of the crew of the Adula.

After the vessel had entered and anchored in the bay she was seized by the Marblehead, a war ship of the United States, which was lying inside the bay, and was sent to Savannah, where, on July 28, a decree of condemnation was entered against her. No goods of a contraband character were on the vessel.

Upon these admitted facts, there was no duly constituted blockade of Guantanamo existing when the Adula sailed for and entered that port.

On the contrary, by the successive Presidential proclamations of blockade, that port was left free and open for the entrance of neutral vessels. Indeed, it may be fairly said that, in the special circumstances of our war with Spain, those proclamations were intended to permit, if not to invite, the continuance of commerce in goods, not contraband, in all the Cuban ports not included within the limits defined. The United States were not carrying on warlike operations against the people of Cuba. They were declared, by the joint resolution of the two houses of Congress, to be free and independent, and the Government of Spain was called upon to relinquish its government, and to withdraw its land and naval forces from Cuba and Cuban waters. It was notorious that great misery and destitution had been caused among the inhabitants by the military operations of the Spanish army in a long and fruitless effort to subdue the revolutionary movement. Indeed, that condition of the people of Cuba was one of the principal inducements to the United States to intervene on their behalf.

It may be well here to refer to the message of the President

to Congress, of the date of April 11, 1898, wherein will be found the following statements:

"Our people have beheld a once prosperous community reduced to comparative want, its lucrative commerce virtually paralyzed, its fields laid waste, its mills in ruins, and its people perishing by tens of thousands from hunger and destitution. . . . The policy of devastation and concentration, inaugurated by the Captain General's bando of October 21, 1896, in the province of Pinar del Rio, was thence extended to embrace all of the island to which the power of the Spanish arms was able to reach by occupation or by military operations. The peasantry, including all dwelling in the open agricultural interior, were driven into the garrison towns or isolated places held by the troops."

And, after reciting the fact that he had made an appeal to the American people to furnish succor to the starving sufferers in Cuba, the President concluded:

"In view of these facts and of these considerations I ask the Congress to authorize and empower the President to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government, capable of maintaining order and observing its international obligations, insuring peace and tranquillity and the security of its citizens as well as of our own, and to use the military and naval forces of the United States as may be necessary for these purposes. And in the interest of humanity and to aid in preserving the lives of the starving people of the island, I recommend that the distribution of food and supplies be continued, and that an appropriation be made out of the public treasury to supplement the charity of our citizens."

The policy of our Government, in respect to the rights of neutrals, was further made to appear in the President's proclamation of April 26, 1898, declaring our adhesion to the rules of the Declaration of Paris, whereby important modifications, in recognition of the rights of neutrals and of principles of humanity, were introduced into international law.

What was more natural, then, than that our Government

would approve all efforts to furnish food to those famishing people, and to aid them in escaping from the seat of war? It appears that the Adula, after the declaration of war, had made several voyages to Cuban ports, with the express permission of the American consul at Kingston; had brought away several hundred refugees, chiefly women and children, and was engaged in a similar errand when seized.

It is, however, claimed that an actual blockade of Guantanamo had been established by Admiral Sampson early in June, which was in existence at the time the Adula entered that port, and that her master had knowledge of such blockade before leaving Kingston.

To declare a blockade effective against neutrals not carrying contraband goods is said by all the authorities to be one of the highest acts of sovereignty, not to be resorted to except for reasons based on well-known principles of modern warfare, and to be proclaimed so as to give full notice to friendly and neutral nations.

As was said by this court, through Mr. Justice Grier, in *Prize cases*, 2 Black, 635, 665: "Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent, engaged in actual war, to use this method of coercion, for the purpose of subduing the enemy. . . . That the President, as the executive chief of the Government and commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been and cannot be disputed."

So it was held by Sir William Scott, in *The Henrick and Maria*, 1 Rob. 123, 125, that "notification of a blockade is an act of high sovereignty, and not to be extended by those employed to carry it into execution. . . . A declaration of blockade is a high act of sovereignty; and a commander of a King's ship is not to extend it."

"Where a blockade has been declared by the Government, the commander of the blockading squadron has no discretion-

ary power to extend its limits. If he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded." 1 Duer Ins. 647, sec. 23.

"A declaration of blockade is a high act of sovereignty, and it is usually made directly by the government to which the blockading squadron belongs. A blockade is however in some cases declared by an officer of a belligerent power, and when so declared it will affect the subjects of neutral nations as far as it is authorized, or adopted and ratified, by his government. The implied authority in this respect vested in a naval commander is much greater at a distance from his government than when he is near it. To affect neutral nations, it must be laid by competent authority, and they are affected only in the extent to which it is so laid." 1 Phillips on Insurance, 466.

As it does not appear that the Government delegated any authority to Admiral Sampson to declare a blockade of the port of Guantanamo, but declared a limited and specified blockade of portions of the Cuban coast by Presidential proclamation, leaving the port in question free and open to neutral commerce, in goods not contraband, it follows that for Admiral Sampson to declare a blockade of such port would have been, on his part, an effort to defeat the policy of his Government, which, as we have seen, was shown, by the proclamations and messages of the President, to have intended to leave open a large portion of the Cuban coast, and ports included therein, to neutral and friendly commerce, designed to furnish food to our starving allies, and to enable their women and children to flee from the oppression under which they were suffering.

Moreover, it does not appear that Admiral Sampson claimed or exercised any right to declare a blockade of Guantanamo. Doubtless he occupied that bay and its adjacent waters with his war vessels, and that gave him a right to visit and search even neutral vessels, to discover whether they carried contraband goods. But this did not warrant any vessel of his

squadron to seize a neutral ship, not carrying contraband goods, when entering a port in effect left free by the proclamation of the President.

But, even if it were conceded that the American commander could establish, without proclamation, a valid actual blockade of the port in question, it would still be true, in my opinion, that the seizure of the Adula was contrary to well-established principles of international law.

When a blockade of a given coast or port of one belligerent has been declared by the sovereign power of another, all vessels of neutral or friendly nations are thereby supposed to be visited with notice of such blockade, and it has been held that if they sailed for the blockaded port, with the intent to enter it, and approach it for that purpose, they are subject to seizure and condemnation, and that they cannot even approach the blockaded port for the purpose of making inquiries of the blockading vessels, since such liberty might lead to attempts to violate the blockade under pretext of approaching for the purpose of making such inquiries. *The Cheshire*, 3 Wall. 231.

But, in the case of a blockade established by a naval officer, acting upon his own discretion, without governmental proclamation, neutrals are not visited with implied notice of the existence of such a blockade, and they may rightfully sail for such a blockaded port, and if, when approaching it, armed vessels are seen to be in its immediate neighborhood, they may apply to such vessels for information and for leave to enter, without subjecting themselves to capture. The duty of the blockading squadron, if objection exists to permitting neutral vessels to enter, is to warn them off. If, after such warning, the neutral vessels, disregarding it, attempt to enter, they are liable to seizure.

As was said in the case of *The Circassian*, 2 Wall. 135, 150, which was a case where the blockade had been proclaimed by the American government: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion, or under direction of superiors, without governmental notification; while a public blockade is

not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade the captors are bound to prove its existence at the time of capture; while, in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter character. It was legally established and regularly notified by the American government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance."

In *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch, 185, 198, it was held that the fact of clearing out for a blockaded port is, in itself, innocent, unless accompanied by other incidents; that the offence consists in persisting in attempting to enter the interdicted port after having been warned; and it was said by Chief Justice Marshall:

"The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact. But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"'And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper.'

"This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or

to constitute a rule in the place of it. Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact."

The distinction between a blockade declared by a government and a blockade *de facto* is thus stated by Chancellor Kent:

"A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

"In the case of a blockade without regular notice, notice in fact is generally requisite; and there is this difference between a blockade regularly notified, and one without such notice, that, in the former case, the act of sailing for the blockaded port, with the intent to evade it, or to enter it contingently, amounts, from the very commencement of the voyage, to a breach of the blockade; for the port is to be considered as closed up, until the blockade be formally revoked, or actually raised; whereas, in the latter case of a blockade *de facto*, the ignorance of the party as to its continuance may be received as an excuse for sailing to the blockaded place, on a doubtful and provisional destination."

It should be noted that the American cases cited, on behalf of the captors, to the effect that sailing from a neutral port to a blockaded port is, in itself, a violation of the blockade, were cases in which there had been a Presidential proclamation, of which neutral vessels were bound to take notice. *The Circassian*, 2 Wall. 135; *The Admiral*, 3 Wall. 603.

It should further be considered that in the President's proclamation of April 22, 1898, establishing the extent of the blockade, there was contained the following provision:

"Any neutral vessel approaching any of said ports, or attempting to leave the same, without notice or knowledge of the establishment of such blockade, will be duly warned by the commander of the blockading forces, who will indorse on her register the fact, and the date, of such warning where such instrument was made; and if the same vessel shall again

attempt to enter any blockaded port she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo as prize, as may be deemed advisable." 30 Stat. 1769.

Of course, if the blockade of Guantanamo was illegal, as inconsistent with the terms and intent of the President's proclamations, no consideration of the evidence regarding the movements of the vessel is called for, and it is a clear case for restitution. In such a case, no importance can be ascribed to any supposed notice to the owners of the ship. The Admiral's want of power to override the policy and intentions of the Government cannot be supplied by imputing to the vessel a knowledge of an actual occupation of the port by armed vessels of the United States. Such occupation would be no reason why neutral ships, not carrying contraband cargo, might not fearlessly approach and enter the harbor.

If, however, the other view be taken, namely, that it was competent for the Admiral, of his own motion, to establish a blockade, still, as we have seen, neutral vessels were entitled, on principle and authority, to a warning by the blockading squadron, and could only become lawful prize by disregarding the warning, and renewing the attempt to enter. Mere knowledge by the neutral vessel that vessels of war occupied the harbor and adjacent waters would not constitute notice or knowledge of a blockade; she would be entitled to an actual warning. *Maryland Ins. Co.* v. *Woods*, 6 Cranch, 29.

The Adula received no such warning. When she approached the harbor she was hailed by a war vessel, the Vixen, and was told to proceed. If, by telling the Adula to proceed, the commander of the Vixen is to be understood as taking charge of the Adula as engaged in an attempt to break the blockade, there was, of course, no warning. If, what seems the natural import of the language, the commander of the Vixen gave the neutral vessel permission to enter the harbor, not only was there no warning, but such permission protected her from the subsequent seizure after she had entered and anchored in the harbor.

Dissenting Opinion: Shiras, Gray, White, Peckham, JJ.

But it is contended that the Adula had actual knowledge of the existence of the blockade when she sailed from Kingston, and that such knowledge deprived her of the right to a warning.

As already said, if the blockade had been regularly proclaimed by the United States government, the Adula, as a neutral vessel, if aware of the blockade, could not lawfully have sailed from Kingston and approached Guantanamo with an intention to enter it unless intercepted. It is well settled that, in the case of a proclaimed blockade, the neutral vessel may not, with a knowledge of the proclamation, approach the prohibited port, even for the purpose of inquiring from the vessels in occupation whether the blockade was still in existence. The reason given for such a decision is that it would seriously affect the efficiency of the blockade if ships were permitted to approach the blockaded port on pretext of inquiry, and thus be enabled to slip in if there was a momentary absence of a blockading vessel.

But different principles prevail in the case of a blockade *de facto*. Then, neutral vessels may, even with knowledge that such a blockade had been in existence, sail for such port with a clear right to inquire whether the blockade was still in force, and to enter the port if it is found not to be actually blockaded. The reason for the distinction, given in the authorities, is that a proclaimed blockade is deemed to continue until the blockade is raised by a declaration of the power that established it. But a simple or *de facto* blockade lasts only so long as the blockading squadron chooses to maintain it by a present and actual force. The reasons for constituting such a blockade may cease at any time, and a neutral vessel, on a peaceful voyage, and not carrying a contraband cargo, may lawfully sail for such a port, and, if when she reaches it the blockade continues, is entitled to a warning.

Thus far it has been assumed that the Adula had actual knowledge of the blockade when she sailed from Kingston, and it has been shown that, in the case of a blockade of the character that this one is claimed to have been, namely, one created by and depending on the will of the commander of

the fleet, the neutral was entitled to a warning, whether she had or not previous information that a blockade had existed some time before.

But, in point of fact, as I read the evidence, the Adula had not such previous knowledge, but approached Guantanamo Bay, within the terms of the President's proclamation, without notice or knowledge of the establishment of a blockade, and was therefore entitled to be "duly warned by the commander of the blockading forces."

Captain Yeates, Purser Williamson and Solis testified in direct terms that they had no knowledge or information before sailing that Guantanamo was blockaded. The only testimony to the contrary was that of Morris, a colored seaman, who said that about three days before he left Kingston he heard that Guantanamo was blockaded. He does not give the source of his information, or pretend that he made known the matter to the owners or to the officers of the vessel. Probably all he meant was that he had heard that the United States fleet was at Guantanamo. The other facts plainly corroborate the captain's testimony. Consider the direction contained in the instructions given the captain, and shown in the record: "On your arrival at Guantanamo, to which port you will proceed direct, you will find, no doubt, American war ships off the port. You will, when signalled to, immediately stop and communicate to the commanding officer the voyage you are on, and, in fact, you can show him these sailing orders, and I do not think that the commanding officer will make any trouble whatever to your continuing the voyage into the port. . . . At Guantanamo it is likely there may be some difficulty in obtaining a pilot, and if the commanding officer gives you permission to proceed it is just possible that he may be able to tell you where you can obtain the services of a pilot to go in." Such instructions are not consistent with knowledge, on the part of the general agent who gave them, that a blockade was actually in force, nor with any intention to violate it.

So, too, the conversation that Solis, the charterer, had with the United States consul at Kingston, in which he sought to

obtain a passport for the voyage, and in which he informed the consul of the object of the voyage, and of his intention to ask permission of the American Admiral to enter the port, shows that no clandestine or improper voyage was intended. A person designing to violate a blockade assuredly would not inform the consul of the nation whose vessels were maintaining the blockade of the time and circumstances of his voyage.

Solis further testified that he first heard of the blockade on the Adula on June 28; that he then heard that on the 27th there was issued an order of the President of the United States declaring a blockade, etc. But as it is not pretended that the President had issued any such proclamation, it is evident that Solis was speaking of a mere rumor; and he immediately added: "I understood Guantanamo was not declared officially blockaded, although there were some vessels there. I got that information from newspapers in Kingston and from those newspapers I got the information that marines had been landed at the entrance to the bay on the east side."

It is stated, in the opinion of the majority, that the American consul warned Mr. Forwood, the agent of the ship at Kingston, of the existence of the blockade. This statement is based on Forwood's recital of what passed between the consul and himself, in the following language: "Well, Forwood, I would not advise you to let the ship go. They won't let her into Guantanamo, and they will be watching for her." So far from this language importing a notification of an existing blockade, it rather implies the contrary — that the voyage would be fruitless because the consul believed that the ship would not be allowed to enter the destined port. It certainly cannot be regarded as an official notice of an existing blockade, as is claimed in the argument for the captors. The consul was right, in the existing circumstances, in declining to give the permit desired; but he had no power to declare a port to be in blockade, nor did he pretend to do so.

So far, therefore, as respects the matters urged as evidence, that the Adula, her owners, master or charterer knew, or had any good reason to believe, that, at the time she sailed, there

was an existing blockade of the port of Guantanamo, they seem to me to be "trifles light as air."

What this court said, through Mr. Justice Grier, in the *Prize cases*, 2 Black, 635, may well be repeated here:

"All reasonable doubts shall be resolved in favor of the claimants. Any other course would be inconsistent with the high administration of the law, and the character of a just government."

Some make-weights are attempted to be thrown into the scales by adverting to the fact that Solis had passports from the Spanish consul, and the following cases are cited in the majority opinion: *The Julia*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Hiram*, 1 Wheat. 440, and *The Ariadne*, 2 Wheat. 143.

The case of *The Julia* was thus stated by Mr. Justice Story:

"It is sufficient to declare that we hold that the sailing on a voyage under the license and passport of protection of the enemy in furtherance of his views or interests, constitutes such an act of illegality as subjects the ship and cargo to confiscation as prize of war."

Surely; but in the present case there was no license or passport of protection for the voyage in furtherance of the views and interests of the enemy, but the obnoxious instrument was a personal passport to Solis, dated April 13, 1897, more than a year before the war, in the following terms: "Don José R. Solis Velasquez, native of Santiago de las Vegas, province of Havana, by profession a merchant, dwells in Marina street, No. —, and resides habitually in that ward and at that number." Were these personal passports, one given long before the war and the other a mere permission to enter cities on the island, at all similar to the case of *The Julia*, where, as the opinion in that case shows, "The master was a part owner of the vessel and cargo, and the regular depository of all the *papers connected with the voyage*. It is utterly incredible that he should not recollect, in his examination, the existence of these British documents. They were put on board for the *special safeguard and security of the vessel and cargo*."

In the case of *The Aurora*, a formal passport or permit had

been given by the British consul to "the American ship Aurora, William Augustus Pike, master, burthen 257 tons, now lying in Newburyport, etc., . . . requesting all officers commanding his majesty's ships of war, or private armed vessels belonging to subjects of his majesty, not only to suffer the said Aurora to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to the West Indies," etc. The judgment of the court was thus stated: "The acceptance and use of an enemy's license on a voyage to a neutral port, prosecuted in furtherance of the enemy's avowed objects, is illegal, and subjects vessel and cargo to confiscation."

In the case of *The Hiram*, the vessel was sailing under protection of an enemy's license to the vessel, and this was held to have been in principle an offence of trading with the enemy. In the case of *The Ariadne*, the vessel was sailing with a license or passport of protection from the enemy's admiral.

It is scarcely necessary to say that a personal passport given to Solis, a Cuban, more than a year before the war, cannot be regarded as intended as a passport or protection to a British vessel, sailing under a British flag, on an errand friendly to the United States and their allies. And as respects the permission Solis had obtained from the Spanish consul to enter the cities to which he was bound, "and take passengers, refugees," such permission was in furtherance of humanity and not of any warlike object or interest.

The conclusions reached may be summarized thus:

(1) The port of Guantanamo was intentionally and as matter of policy left open and free to neutral commerce, not contraband, by the President's proclamations, and the Adula had a clear right to sail for and enter that port, even if aware that war vessels of the United States were in occupancy of the port. Such war vessels would, of course, have a right to prevent the Adula from entering the port if such entry would interfere with any military operation in hand.

(2) It was not competent for the commander of the fleet to extend the proclaimed blockade so as to include a port exempted by the President's proclamation, and to thus make prize

of war a neutral vessel approaching such port on a peaceful errand.

(3) If an immediate exigency — and none such is shown to have existed in the present case — justified the Admiral of the United States in prohibiting the entrance of neutral vessels, sound principles of international law required that such vessels should be warned on approaching the port, and they could not be seized as lawful prize, unless they disregarded the warning and attempted again to enter.

This is no time, in the history of international law, for the courts of the United States, in laying down rules to affect the rights of neutrals engaged in lawful commerce, to extend and apply harsh decisions made a hundred years ago, in the stress of the bitter wars then prevailing, when the rights of the comparatively feeble neutral states were wholly disregarded. Still less should our courts, as it seems to me was done in this case by the District Court, adopt strained and unnatural constructions of facts and circumstances, in order to subject vessels of nations with whom we are at peace to seizure and condemnation.

I am authorized to say that MR. JUSTICE GRAY, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

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## ROLLER *v.* HOLLY.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 104. Submitted January 18, 1900. — Decided February 26, 1900.

A state statute authorizing service of process by publication or otherwise upon absent and non-resident defendants, has no application to suits *in personam;* but is a sufficient authority for the institution of suits *in rem,* where, under recognized principles of law, such suits may be instituted against non-resident defendants.

Where a statute specifies certain classes of cases which may be brought against non-residents, such specification operates as a restriction and

Statement of the Case.

limitation upon the power of the court; but where the power is a general one it is, as respects suits *in rem*, subject to no limitation.

Where service of process was made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, it is held that such notice was not a reasonable one, was not "due process of law" within the Fourteenth Amendment to the Constitution of the United States, and that a judgment obtained upon such notice was not binding upon the defendant.

This was an action instituted July 14, 1894, by the plaintiff Roller in the District Court of Limestone County, Texas, to recover a judgment against Stephen Holly and William Holly upon five promissory notes for $228 each, dated January 1, 1890, payable to plaintiff, for the purchase price of a tract of one hundred and fourteen acres of land in that county, sold by him to them, and also to foreclose a vendor's lien upon the land to the amount of such notes.

To this action Joseph Peoples, H. W. Williams and W. T. Jackson were also made parties defendant under an allegation that they were asserting an interest in the land; and a foreclosure of the vendor's lien was sought as against them. The defendants were all duly cited; the Hollys failed to answer, but the defendants Peoples, Williams and Jackson filed an amended answer at the January term, 1895, of the court, in which they alleged that the plaintiff Roller bought the land in question from John W. and Cora E. Jordan in January, 1887, and gave in part payment therefor his note for $216.17, due November 1, 1890, in which note as well as in the deed made to him a vendor's lien was retained; that before the maturity of this note the firm of McClintic & Proctor had become its owners, and on December 24, 1890, began in the District Court of Limestone County a suit against the plaintiff for a foreclosure of the vendor's lien upon the land; that, "after due service being had," McClintic & Proctor on January 9, 1891, recovered a judgment against the plaintiff for $276.65, with interest and costs of suit, and an order for the foreclosure of the vendor's lien; that an order of sale was issued, and on March 3, 1891, the land was sold by the sheriff of Limestone County for $300, and bought by defendant Williams, who paid the amount to the sheriff, though the defendant Jackson was interested with him

in the purchase, and on May 4, 1891, the two sold the land to their codefendant Peoples.

Prayer: That in the event plaintiff recovered the land as against the defendants Williams, Jackson and Peoples, they recover of plaintiff the $300 paid for the land, and that the same be decreed a lien thereon.

To this amended answer plaintiff filed a first supplemental petition, consisting of demurrer, exceptions and answer, containing —

First. A general denial.

Second. That at the time of the institution of the suit of McClintic & Proctor against him, plaintiff was a citizen of the State of Virginia, and resided in the county of Rockingham, in said State.

That in January, 1890, he sold and conveyed the land in controversy to Stephen and William Holly by written instrument signed by him, and took the notes sued on as purchase price of the land.

That he put his said vendees in possession of the land, and that they were in possession of the land at the time of the institution of the McClintic & Proctor suit and had been in possession since the sale to them, and that neither they nor the Jordans were made parties to that suit.

That the McClintic & Proctor judgment was void as to plaintiff, because the District Court of Limestone County, Texas, never acquired jurisdiction over him nor the property in question.

That the judgment was not obtained nor was the sale of the land made and obtained by due process of law, but was in contravention of the Fourteenth Amendment to the Constitution of the United States.

That service of process on him in the McClintic & Proctor suit was obtained without the jurisdictional limits of the State of Texas, to wit, in the county of Rockingham and State of Virginia.

That no writ of attachment or other writ was levied on the land.

Third. That the proceedings in the McClintic & Proctor

suit prior to the judgment and the allegations in the petition were ineffectual to confer jurisdiction on the District Court of Limestone County over either the person of plaintiff or the land.

Fourth. That the time given him in which to answer the suit of McClintic & Proctor before the actual rendition of their judgment was not reasonable notice, nor such due and orderly proceedings, under the facts and circumstances as disclosed by the record thereon, as the law requires.

Fifth. That the lien attempted to be enforced in the McClintic & Proctor suit was an equitable lien, created by operation of law, and there has been no legislation in Texas authorizing such suit.

Upon an agreed statement of facts, substantially as above, judgment was rendered by default in favor of plaintiff against the Hollys for $1722.66, but the court refused to enforce the vendor's lien against the land, and gave judgment against plaintiff and in favor of Williams, Jackson and Peoples for costs. Plaintiff appealed to the Court of Civil Appeals, which affirmed the decree of the District Court. 13 Tex. Civ. App. 636. Plaintiff thereupon applied to the Supreme Court of the State for a writ of error, which that court refused; whereupon he sued a writ of error from this court.

*Mr. W. S. Laidley* and *Mr. John E. Roller* for plaintiff in error.

*Mr. W. T. Jackson*, *Mr. H. W. Williams* and *Mr. J. Peeples* for defendants in error.

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

Briefly stated, the case is this: Roller, the plaintiff, who was a resident of Virginia, bought this land in January, 1887, gave a note in part payment for $216.17, which passed into the hands of McClintic & Proctor, who brought suit thereon for a personal judgment against the plaintiff, and for the fore-

closure of a vendor's lien upon the land; served plaintiff with notice of the suit in Virginia, December 30, 1890, to appear in Texas January 5, 1891, and took judgment against him by default January 9, 1891, for $276.65, and for a foreclosure of the lien. Upon a sale in pursuance of this foreclosure, March 3, 1891, the land was struck off to Williams and Jackson, and by them sold to Peoples.

Meantime, however, and on January 1, 1890, a year before the McClintic & Proctor suit was begun, plaintiff sold the land to the Hollys, who went into possession, and took from them five notes of $228 each, and also reserved a vendor's lien, which he sought to foreclose in this suit. Williams, Jackson and Peoples, who purchased the land under the sheriff's sale in the McClintic & Proctor suit, were made parties defendant, and now aver that the plaintiff's title passed to them, which plaintiff denies upon the ground that no process was served upon him within the State of Texas, or within a reasonable time before he was required to appear and answer.

The question in dispute, then, is whether a notice served upon the plaintiff in Rockingham County, Virginia, December 30, 1890, to appear in Limestone County, Texas, on January 5, 1891, to answer the foreclosure suit is due process of law within the meaning of the Fourteenth Amendment? The Hollys, who bought this land and went into possession a year before the McClintic & Proctor suit was begun, were not made parties to that suit, probably because the deed from the plaintiff to them was not on record in Limestone County at the time of the institution of the suit, and their rights are not involved here. It is conceded that the McClintic & Proctor judgment is invalid as a personal judgment against the plaintiff under the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 723, and other cases in Texas of the same import.

1. The position of the plaintiff that, as there was no statute in Texas authorizing a suit against a non-resident to enforce an equitable lien for purchase money, and as there had been no seizure *in rem* of the lands, nor any notice to Roller's vendees, the Hollys, who were in possession, the jurisdiction of the Texas courts could not attach, and the whole proceeding was void, is unsound.

Opinion of the Court.

In the case of *Hart* v. *Sansom*, 110 U. S. 151, relied upon in support of this contention, an action of ejectment was brought against several defendants, who set up in defence a judgment against the plaintiff as one having some pretended claim or title to the lands, and other defendants holding recorded deeds thereof, which were averred to be fraudulent and void. Plaintiffs in that suit averred that these pretended deeds and claims cast a cloud upon their title; and that one of the defendants had ejected them from the lands and withheld possession from the plaintiffs. Due service was made on the other defendants, and a citation to Hart, who was a citizen of another State, was published as directed by the local statutes. All the defendants were defaulted, and upon a writ of inquiry the jury found that Hart claimed the land, but had no title by record or otherwise, and returned a verdict for the plaintiffs upon which judgment was entered for a recovery of the land, the cancellation of the deeds and the removal of the cloud upon the title. It was held that this judgment was no bar to an action by Hart in the Circuit Court of the United States, to recover the land against Sansom, who held under a lease from the plaintiffs in the former suit. We held that none of that judgment was applicable to Hart, since that part which was for recovery of possession could not apply to him, as he was not in possession; and that part which was for the cancellation of the deeds set up in the petition, was a decree *in personam* merely, and could only be supported against a non-resident of the State by actual service upon him within the jurisdiction of the State, and that constructive service by publication was not sufficient. Neither of the plaintiffs, however, was in possession of the land or claimed a lien thereon.

In *Arndt* v. *Griggs*, 134 U. S. 316, it was held directly that a State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a non-resident defendant is brought into court by publication. It appeared in that case that a suit had been begun by a party alleging that he was the owner and *in possession of* the land in controversy, by virtue of certain tax deeds, against defendants claiming to have some title or interest in

the lands by patent from the United States, which title, as was alleged, was divested by the tax deeds, and was unjust, inequitable and a cloud upon plaintiff's title, and that the suit was brought for the purpose of quieting such title. The defendants were brought in by publication, and a decree entered in favor of plaintiff quieting his title. The question was whether that decree was a bar to an action in ejectment between the grantees of the respective parties to the proceedings to quiet title. In other words, as put by the court: "Has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication?" The question was answered in the affirmative. In delivering the opinion of the court Mr. Justice Brewer observed: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice. . . . Mortgage liens, mechanics' liens,

material-men's liens and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication."

This case is readily distinguishable from that of *Hart* v. *Sansom* in the important fact that the plaintiffs in the judgment set up as a defence in that case were *out of* possession while the defendants were *in* possession, and the action was really in ejectment with a somewhat superfluous prayer for the cancellation of all the deeds under which the defendants claimed title. In *Arndt* v. *Griggs* the plaintiffs were in possession, under tax deeds it is true, but having a *prima facie* valid title which they sought to vindicate against the former owners.

The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain State, he may institute proceedings against non-residents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.

In suits for the foreclosure of a mortgage or other lien upon such property, no preliminary seizure is necessary to give the court jurisdiction. The cases in which it has been held that a seizure or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class *Cooper* v. *Reynolds*, 10 Wall. 308, is the most prominent example. In that case a plaintiff in an action for false imprisonment had attached the property of Reynolds in certain lands, which were sold upon execution to Cooper, who was put in possession by the sheriff. Reynolds, the original owner, brought ejectment against him, and it was held by this court that Reynolds' title to

the land had been divested by the attachment proceedings, upon the ground that, in this class of cases, the levy of the attachment gave the court jurisdiction. But the object of such attachment is merely to give a lien upon the property which the courts may enforce; and if a lien already exists, whether by mortgage, statute or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.

It is true there is no statute of Texas specially authorizing a suit against a non-resident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and non-resident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the Supreme Court of Texas in *York* v. *State*, 73 Texas, 651; *Kimmarle* v. *Houston & Texas Central Railway*, 76 Texas, 686; *Maddox* v. *Craig*, 80 Texas, 600; and by this court in *Pennoyer* v. *Neff*, 95 U. S. 714, 723. The article must then be restricted to actions *in rem;* but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against non-resident defendants. In the case of *Hollingsworth* v. *Barbour*, 4 Pet. 466, relied upon by the plaintiff, a statute of Kentucky authorized suits in chancery against non-residents "where any person or persons, their heirs or assigns, claim land as locator, or by bond or instrument in writing;" and as the plaintiff in the case did not claim as locator, it was held that the court acted without authority, and that the decree was void for want of jurisdiction. Where the statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the

Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the Court of Civil Appeals, and apparently by the Supreme Court of the State, and is obligatory upon this court as a construction of a state statute. *Battle* v. *Carter*, 44 Texas, 485; *Oswald* v. *Kaufmann*, 28 Fed. Rep. 36, a Texas case; *Martin* v. *Pond*, 30 Fed. Rep. 15.

2. We are therefore remitted to the principal question in dispute between these parties, namely, the sufficiency of the notice given to the plaintiff of the McClintic & Proctor suit. In this connection our attention is called to certain articles of the Texas Code, the first one of which, Art. 1228, Sayles' Texas Civil Statutes, provides generally for the service of process by giving five days' notice, exclusive of the day of service and of the return day. In addition to this there are the following sections:

Art. 1230. "Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of holding of the court, naming such time and place. Its style shall be 'The State of Texas,' and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon; and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice."

Art. 1234. "Where a defendant has been served with such notice he shall be required to appear and answer in the same manner, and under the same penalties as if he had been personally served with a citation within this State."

Art. 1280. ". . . The fifth day of each term of the district court and the third day of each term of the county court are termed appearance days."

Art. 1281. "It shall be the duty of the court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable in such term."

Art. 1340. "Judgments for the foreclosure of mortgages and other liens shall be, that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

From these requirements it appears that the time for service of process in the courts of Texas was five days, exclusive of the day of service and return, and that there is no distinction in this particular between defendants living in the town where the court is sitting and defendants living in other States, or even in a foreign country. In short, for aught that appears here, parties may be called from the uttermost parts of the earth to come to Texas and defend suits against them within five days from the day the notice is served upon them. In the case under consideration it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham County, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone County, Texas; that it would have required four days of constant travelling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit. It is true that, by articles 1280 and 1281, the case could not have been called for trial or default until the fifth day

of the term, January 9, and that Roller's default was not actually taken and judgment entered until that day. But, as a citizen of Virginia, he was not bound to know the practice of the Texas courts in that particular, and was at liberty, even if he were not compelled, to construe the notice as it read upon its face. Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion —a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.

That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701–712. What shall be deemed a reasonable notice admits of considerable doubt. In the case of a witness subpœna the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defence.

In 2 Chitty's General Practice, 175, it is said in reference to summary proceedings before justices of the peace: "The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of the Court of King's Bench, if not be subject to a criminal information.

The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should not be required, *omissis omnibus aliis negotiis*, instantly to answer a charge of a supposed offence necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts, in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defence." In vol. 2, page 144, it is said that the ancient practice was that a person residing at a considerable distance from a metropolis should be allowed more time for performing the act than a person within, or near, the metropolis, but that there is now no distinction between an arrest on process in London or Yorkshire, and in each case the defendant must appear or put in bail within eight days after the date of service or arrest. This, considering the small area of the kingdom, and the rapid means of transportation, seems just and reasonable.

While, as before stated, there is but little in the way of judicial authority upon the question, in the statutes of the several States regulating proceedings against absent and non-resident defendants, there is a consensus of opinion, which is entitled to great weight in passing upon the question of the reasonableness of such notice.

In the act of Congress providing for the enforcement of liens upon property as against non-residents, Rev. Stat. § 738, the court is required to make an order fixing a day certain, which shall be served on the absent defendant wherever found, or, if personal service be impracticable, such order shall be published once a week for six consecutive weeks, with a proviso that, if there be no personal service, he shall have one year after final judgment to enter his appearance, and set aside the judgment. The same proviso allowing the court to fix the time of appearance is found in the statutes of Massachusetts, New Hampshire, Pennsylvania, Alabama, Maryland and Virginia.

By the sixth rule of this court, a party moving to dismiss must give a notice of at least three weeks, and where counsel to be notified reside west of the Rocky Mountains, a notice of at least thirty days.

By the Code of Civil Procedure of New York, sec. 440, the judge is required to make an order for publication once a week for six successive weeks, and in addition thereto the plaintiff, on or before the day of the first publication, is bound to mail a copy of the summons, complaint and order for appearance to the non-resident defendant. By sec. 2525, citations from Surrogate's Courts must be served on non-residents at least thirty days before the return day.

By the General Statutes of Vermont, (1894) §§ 1641, 1643, non-resident defendants (served out of the State) are entitled to at least twenty days' notice before the time when they are required to appear.

By the practice in Michigan, the court orders the absent or non-resident defendant to appear in not less than three months, if he be a resident of the State, absent or concealed, and if a resident of some other of the United States or of the British provinces, in not less than four months; and if a resident of any foreign State, in not less than five months from the date of making the order; and if the order be not published for six successive weeks, defendant shall be personally served at least twenty days before the time prescribed for his appearance. 2 Howell's Statutes, §§ 6670, 6671 and 6672.

By the Revised Statutes of Illinois, (1899) chapter 22, § 14, there must be either publication or a personal service upon the non-resident defendant, "not less than thirty days previous to the commencement of the term at which such defendant is required to appear."

By the General Statutes of New Jersey, (1895) Vol. 1, page 405, the chancellor may order the non-resident defendant to appear not less than one nor more than three months from the date of the order; "of which order such notice as the chancellor shall by rule direct shall, within ten days thereafter, be served personally on such defendant," or be published for four weeks. This gives the defendant at least twenty days' personal notice.

By the General Statutes of Arkansas, (1894) §§ 5677, 5678, a non-resident defendant is entitled to a copy of the complaint and the summons warning him to appear and answer "within sixty days after the same shall have been served on him."

By the Code of Georgia, (1895) § 4979, the party obtaining an order for the appearance of a non-resident defendant shall file in the office of the clerk, at least thirty days before the term next after the order for publication, a copy of the newspaper in which said notice is published, which the clerk is required to at once mail to the party named in the order; and, by sec. 4980, the judge is required to determine whether the service has been properly perfected.

By the Revised Statutes of Florida, (1892) § 1413, the clerk must publish the order for the appearance of a non-resident defendant once a week for four consecutive weeks, and also, within twenty days after the making of the order, mail a copy to the defendant, if his residence be shown by the bill or affidavit.

By the Code of Montana, (1895) § 638, publication must be made for four successive weeks, and, where the residence of the defendant is known, the clerk must forthwith deposit a copy of the summons and complaint in the post office, directed to the person to be served at his place of residence. A similar practice also obtains in California.

By the General Statutes of Mississippi, (1892) sec. 3423, publication may be dispensed with, if the summons be served upon the absent party at least ten days before the return day. This is the shortest length of notice to be found in any of the statutes.

By the Code of Oregon, (1892) sec. 57, in case of publication, which must be not less than once a week for six weeks, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, addressed to the defendant, if his place of residence be known; and "in case of personal service out of the State, the summons shall specify the time prescribed in the order for publication."

It may be said in general, with reference to these statutes, that in cases of publication notice is required to be given at

least once a week for from four to eight weeks, and in case of personal service out of the State, no notice for less than twenty days between the service and return day is contemplated in any of the States except Mississippi, where a personal notice of ten days seems to be sufficient. While, of course, these statutes are not obligatory here, they are entitled to consideration as expressive of the general sentiment of legislative bodies upon the question of reasonableness of notice.

Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law; that the judgment obtained upon such notice was not binding upon the defendant Roller, and constitutes no bar to the prosecution of this action.

*The judgment of the Court of Civil Appeals, affirming the judgment of the District Court of Limestone County, must therefore be reversed, with instructions to remand the case to that court for further proceedings not inconsistent with this opinion.*

THE CHIEF JUSTICE and MR. JUSTICE BREWER dissented.

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## MOSS *v.* DOWMAN.

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

No. 141. Argued and submitted January 31, February 1, 1900. — Decided February 26, 1900.

Decisions of the land department in contest cases on questions of fact are conclusive.

Dowman went upon the public land in controversy, then unoccupied, on the 19th September, 1890, built a cabin and continued to live there. November 18, 1890, he made a formal homestead entry in the local land office, and after five years of continued occupancy and proof of the same he received a patent. On May 7, 1890, one Doran made a homestead entry of the same land without occupying it, which he subsequently relinquished, Moss pay-

Statement of the Case.

ing him $1000 therefor, and thereupon Moss on the 24th of October, 1890, filed that relinquishment in the local land office, and made a homestead entry in her own name. April 22, 1891, she appeared on the land, commenced the construction of a house, and occupied it when finished. A contest between the two as to which had the right to acquire title was finally settled by the Secretary of the Interior in favor of Dowman. *Held*, that the decision of the Secretary was correct.

On March 17, 1897, a patent was issued to the appellee, defendant below, for the southeast one quarter of section 22, in township 65 north, of range 4 west of the fourth principal meridian, in the State of Minnesota. Thereafter, and on March 23, 1897, the appellant, plaintiff below, filed her bill in the Circuit Court of the United States for the District of Minnesota, seeking to charge the defendant as trustee of the legal title for her benefit. To the bill as thus presented a demurrer was filed, which, on November 4, 1897, was sustained by the Circuit Court, and the bill dismissed. On appeal to the Circuit Court of Appeals for the Eighth Circuit this decree was, on June 27, 1898, affirmed, 60 U. S. App. 69, and to review this decision this appeal was taken.

The title of defendant, as disclosed by the bill and exhibits, is as follows: On September 19, 1890, he went upon the premises in controversy, then unoccupied, built a cabin, and continued to live therein (having on November 18, 1890, made formal homestead entry in the local land office) during all the proceedings in the land department, hereinafter stated, and until he had completed five years of occupancy, and then upon proof of such continued occupancy was awarded and received a patent on account of his homestead entry and occupation. The claim of the plaintiff on the other hand rests upon an entry in the land office prior to that of defendant, followed by a settlement on the land later than his. From 1885 to 1890 this tract, though never settled upon or occupied by any one, was the subject of repeated entries at the local land office, such entries being made under the homestead law, the later ones being as follows: On May 7, 1890, Robert H. Doran made a homestead entry. Subsequently, the plaintiff paid to Doran the sum of one thousand dollars for a relinquish-

ment of his homestead entry, and on the 24th day of October, 1890, she filed in the local land office that relinquishment, and at the same time made a homestead entry in her own name. On April 22, 1891, two days less than six months after her entry, she appeared on the land, with assistants, material, furniture, etc., and commenced the construction of a home, completed and occupied the same. A contest between the plaintiff and defendant in reference to the right to acquire title to this property was initiated in the local land office, and carried by appeal to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, resulting in a decision by the latter on December 19, 1894, in favor of the defendant; and in pursuance thereof the patent was issued to him.

*Mr. James K. Redington* for appellant. *Mr. Thomas J. Davis* was on his brief.

*Mr. Charles A. Towne* for appellee, submitted on his brief.

Mr. Justice Brewer delivered the opinion of the court.

Repeated rulings of this court have settled that the decisions of the land department in contest cases on questions of fact are conclusive.

Defendant by taking actual possession on September 19, 1890, his entry in the land office on November 18, 1890, his continued occupation and proof thereof, was entitled to the patent which was thereafter issued to him, unless other facts found by the department show that as matter of law a superior right was vested in the plaintiff. Such facts it is contended are the successive formal entries in the land office unaccompanied by any actual possession of the land. It may be well to state some of these in detail: On May 11, 1888, following similar prior action, Lyman E. Thayer, of Wausau, Wisconsin, made a homestead entry. On November 10, 1888, one day less than six months thereafter, Thayer relinquished,

and Julia McCarty made a like entry. On May 9, 1889, one day less than six months thereafter, McCarty relinquished, and Napoleon B. Thayer made a like entry. On November 9, 1889, exactly six months thereafter, Thayer relinquished, and John A. Murphy made a similar entry. On May 7, 1890, two days less than six months thereafter, Murphy relinquished, and Robert H. Doran made a like entry. On October 24, 1890, Carrie Moss paid Doran one thousand dollars for a relinquishment of his entry, and on the same day, having obtained that relinquishment, she filed it in the land office and made her entry. Thereafter, and on April 22, 1891, two days before the expiration of six months, she went upon the land, and made improvements in the way of building and otherwise. As the Secretary says in his opinion: "Although numerous persons have made homestead entry of this land, none appear to have done so in good faith, for none appear to have made any settlement during the period of five years in which it was entered and relinquished every six months." In other words, the findings of fact made by the land department show that the first person who made actual settlement upon the premises was the defendant, that his settlement and occupation continued for the term prescribed by the statute, and therefore that such settlement and occupation thus continued entitled him to a patent unless defeated by these proceedings in the nature of entries without settlement. In respect to them it was found that for five years this tract had been subjected to repeated entries, each entry made within six months of the prior entry and accompanied by a relinquishment of such prior entry, and thus for five years the land, without any settlement, without any occupation, was a football for homestead speculators, and withdrawn from actual settlement.

Counsel for appellant thus states the question:

"The application of supposed law to this state of fact, in the determination by the Secretary of the Interior of the rights of the litigants respectively, was as follows:

"'The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office. For, although

Doran's entry was erroneously allowed, being of record it segregated the land, and therefore no right could be initiated by reason of the settlement. But the instant the relinquishment was filed in the local office, the right of the settler on the land attached and an entry could not defeat it.

* * * * *

"'In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not in good faith, under the established rulings of this department the settler Dowman's rights attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry.'

"Upon this application of law to ascertained facts as recited, and upon no other or different facts, patent issued to appellee as hereinbefore recited."

We are content to take this statement, and upon it are clearly of the opinion that the decision of the land department was correct. The obvious purpose of the preëmption and homestead statutes of the United States is to secure to the actual settler the land upon which he has settled, and to give him the prior right to perfect title by purchase or continued occupation. While undoubtedly under the provisions of the statutes and the regulations of the land department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that in the eye of the public land laws of the United States the speculator is never an object of favor. Preëmption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes make such a result necessary from a true construction of their language it ought to

be rejected. Again and again has this court affirmed the proposition that the settler is the beneficiary of the preëmption and homestead laws of the United States. In *Lytle* v. *Arkansas*, 9 How. 314, 333, it was said:

"The claim of a preëmption is not that shadowy right which by some it is considered to be. Until sanctioned by law, it has no existence as a substantive right. But when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years."

So also in *Clements* v. *Warner*, 24 How. 394, 397:

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

Again, in *Bohall* v. *Dilla*, 114 U. S. 47, 51:

"Those laws are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon."

And again, in *Anderson* v. *Carkins*, 135 U. S. 483, 487:

"The theory of the homestead law is, that the homestead shall be for the exclusive benefit of the homesteader. . . . The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes."

These quotations might be multiplied, and nothing contradictory thereof can be found in our decisions. Their oft repetition simply accentuates the proposition heretofore stated, that the actual settler is the one for whose benefit the homestead and preëmption laws were enacted.

Opinion of the Court.

Counsel say that "a *prima facie* valid entry of record operates to appropriate the land covered thereby and to reserve it pending the existence of such prior entry from all subsequent disposition;" that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months; "that from 1859 to 1885, a period of over twenty-six years, an uninterrupted chain of cases held that no right upon cancellation of an entry inured by reason of a settlement made during its existence; that to hold otherwise would be to enable a trespasser to benefit by his own wrong, and that any such pretended claim was invalid and of no effect against another entry made at the time of cancellation."

We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a certain length of time in which to perfect his settlement and improvement. The Revised Statutes in terms give no such right. It is true that section 5 of the act of May 20, 1862, c. 75, 12 Stat. 392, 393, carried into the Revised Statutes as section 2297, provides —

"If at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

But that section simply authorizes the Government to annul an entry if thereafter it appears that the homesteader has actually changed his residence or abandoned the land for more than six months. But the very phraseology, "changing residence," "abandoning land," implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, section 2291, Rev. Stat., providing for final proof, requires an affidavit that the applicant has "resided upon or cultivated the same for the term of five years immediately succeeding the time of filing

the affidavit." In other words, the one section contemplates an immediate settlement and occupation, and the other provides for temporary abandonment.

It is also true that on March 3, 1881, said section 2297 was amended by adding this proviso:

"That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe." Act of March 3, 1881, c. 153, 21 Stat. 511.

But this contemplates a separate ruling for specific reasons in particular cases, and no such ruling was applied for in the present case. It may be argued, it is true, that in view of the practice of the department it was a Congressional recognition of its validity and an enlargement of the time in the particular cases specified.

But, as we have said, we do not feel called upon to decide upon the validity of any ruling or practice which secures to one making a homestead entry the right to perfect that entry by subsequent settlement and occupation.

In the case at bar every right which Doran possessed was ended on October 24, 1890, by the filing of his relinquishment in the local land office. The act of May 14, 1880, c. 89, 21 Stat. 140, provides: "That when a preëmption, homestead or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. It is true he must perfect his right of settlement by making an

entry in the land office, and section 3 of the act of May 14, 1880, 21 Stat. 140, heretofore referred to, provides:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws."

Within less than thirty days from the filing of Doran's relinquishment Dowman made a formal entry in the land office, and that entry, based upon actual possession, is entitled to preference over an entry without possession.

Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead entry has by lapse of time or relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of the land has a prior right to perfect title thereto. We indorse in this respect what was said by the learned judge of the Circuit Court:

"That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser, makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual, but a lawful settler. There was no evidence of *mala fides* about Dowman's settlement which should affect its legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settle-

ment as the Secretary finds as a fact that it was made — in good faith."

For these reasons we are of opinion that the judgment of the Court of Appeals was right, and it is

*Affirmed.*

## UNITED STATES *v.* ORTIZ.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 20. Argued October 11, 1899. — Decided February 26, 1900.

In the hearing of an application for confirmation of an alleged Mexican grant the law casts primarily upon the applicant the duty of tendering such proof as to the existence, regularity and archive record of the grant, as well as his connection with it, such as possession, ownership and other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from the claimant to the United States.

The surveyor general had authority to make a supplementary investigation, and the supplementary proceedings were properly admitted in evidence.

The special qualifications of the witness Tipton, resulting from his great familiarity with the signatures of Armijo and Vigil, qualified him to testify as an expert as to the genuineness of the signatures upon the alleged grant which were claimed to be theirs.

Genuine signatures of Armijo and of Vigil, shown to have come from the archives, were properly received in evidence as standards of comparison with the signatures offered to prove the alleged grant.

Enlarged photographs of such original signatures were also properly received.

After an extended examination of the testimony, the court holds that it is unnecessary to examine or decide upon the questions made as to the form of the alleged grant and other questions, and refrains from expressing an opinion upon all, and holds that the court below erred in confirming the grant.

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

*Mr. William H. Pope* for appellant. *Mr. Solicitor General* and *Mr. Matthew G. Reynolds* were on his brief.

*Mr. T. B. Catron* for appellees.

Opinion of the Court.

MR. JUSTICE WHITE delivered the opinion of the court.

Did the court below err in confirming an alleged Mexican land grant, is the inquiry which arises on this record.

The asserted grant is designated as the "Sierra Mosca," and embraces many thousand acres of land situated in the county of Santa Fe, New Mexico. The official proceedings had in relation to the grant prior to the commencement of this suit were as follows: In 1872 a petition was filed before the surveyor general of New Mexico, asking the confirmation of the grant in the name of "the heirs and those holding under them of Juan Luis Ortiz, deceased." No other or fuller description of the persons asserting the right appeared in the proceedings. The surveyor general, after hearing, forwarded his recommendation that the grant be confirmed, to the Commissioner of the General Land Office in October, 1873, and the papers were in the same year submitted by the Secretary of the Interior to Congress. The proceedings before the surveyor general and the resulting official action, as above stated, were by virtue of the act of Congress of July 22, 1854, c. 103, 10 Stat. 308. No action having been taken by Congress, in December, 1876, certain persons alleging themselves to be part owners of a claimed Spanish grant of land, which it was averred conflicted with the one in question, petitioned the then surveyor general of New Mexico to hear additional testimony as to the reality of the grant which had been recommended for confirmation, on the ground that the testimony when heard would establish that the grant had been erroneously recommended for confirmation, because, among other reasons stated, it was a forgery. Whilst intimating a doubt as to his power to review the action of his predecessor in office, the surveyor general yet ordered the inquiry to be made, and, after some lapse of time on due notice, testimony was taken. In consequence of the notice given, the attorney for the petitioners, on the original application to confirm, appeared and cross examined the witnesses. Subsequently acting upon such evidence, the then incumbent of the surveyor general's office transmitted the proceedings to the Commissioner of the General Land Office with

the recommendation that the grant be rejected on the ground that it was affirmatively shown by the proof to be a forgery. This supplementary report and papers were also, in December, 1887, submitted by the Secretary of the Interior to Congress for its consideration.

No action having been taken by Congress upon either the original or supplementary report, the present suit was commenced, in the Court of Private Land Claims, to obtain the confirmation of the grant. The petition by which the cause was initiated was filed in the name of Luis Maria Ortiz and Tomaz Ortiz, and averred that the alleged Sierra Mosca grant had been made on June 4, 1846, by Manuel Armijo, the then governor of the Territory of New Mexico, to Juan Luis Ortiz, and that the grantee had on June 8, 1846, been placed in legal possession of the granted land by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in the Republic of Mexico. It was averred that "the original papers relating to this said grant of land are now on file in the office of the surveyor general of the Territory of New Mexico, known in that office as private land claim No. 75, for the Sierra Mosca tract, and are not in the control of the plaintiffs, so that they can file them herewith." A copy, however, with a translation of the papers thus referred to, was annexed to the petition. The petitioners asserted their right under the grant as follows: "The plaintiffs are the owners in fee in and to the said land grant by inheritance from their father, Gaspar Ortiz, who acquired his title thereto, as they are informed and believe, by inheritance from his father, and their grandfather, Juan Luis Ortiz, the original grantee, and by purchase from the other heirs of the same." No enumeration of the other heirs and no more precise specification of the date and character of the alleged purchase was contained in the petition.

The petition was generally traversed, and subsequently an answer was filed, specifically averring that the alleged granting papers were forgeries, and denying that delivery of possession had ever been made by a justice of the peace, as stated in the petition. After trial upon these issues, the grant was confirmed, Murray, J., dissenting.

Inverting the order in which they have been discussed at bar and stating them in a condensed form, the questions presented for decision are: First. Does the proof establish that the grant in question was made and that delivery of juridical possession thereunder was operated by a Mexican official charged with such duty? Second. If it be found that the grant was made, was there legal power in the then governor of New Mexico to make it, and, if so, was the power so executed as to authorize the court to enter a decree of confirmation? The first of these questions opens for consideration not only the issue of forgery, but also involves deciding whether the proof is of such a character as to engender the affirmative conviction of the genuineness of the granting papers. The second raises several questions of law — that is, as to the power of the governor, at the date when the alleged grant is averred to have been made, the necessity of approval of his action by the departmental assembly, and other legal issues. Necessarily, all the questions coming under the second head arise only in the event the objections to the confirmation of the grant embodied in the first proposition are found to be untenable.

Before analyzing the evidence in order to develop and weigh the proof tending to show the existence of the grant, it will subserve clearness of statement, at the outset, to determine upon whom is cast the burden of showing the existence of the grant, and in a general way to consider briefly the quantum of proof required for that purpose. By the first subdivision of section 13 of the act of March 3, 1891, c. 539, 26 Stat. 854, constituting the Court of Private Land Claims, that court and this court are commanded not to allow a claim "that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico," etc. The statute authorizes no presumption in favor of the genuineness of a title from the mere fact that the claimant for confirmation presents a paper which is asserted to be a grant from a Mexican official. The command of the statute is not that the United States, when an alleged Mexican title is presented for confirmation, shall be put to the burden of showing that the title in question is not genuine, but that the evidence presented in favor of the asserted

title shall be of such persuasive and preponderating force as to convince the court that the title is real, and besides, possesses the legal attributes which the statute requires as essential to confirmation. It is clear then that the law casts, primarily, upon the applicant for confirmation, the duty of tendering such proof as to the existence, regularity and archive record of the grant as well as his connection with it, such as possession, ownership and other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant before the burden of proof, if at all, can be shifted from the claimant to the United States. This construction which arises from the text of the act of 1891 is sustained by considering that previous to that enactment there had been many decisions of this court, rendered under the California act of 1851, construing that act as imposing upon the claimants for confirmation the primary burden of proof, although the provisions of the California act were not as explicitly mandatory as are those of the act of 1891. Thus from the date of the decision in *United States* v. *Cambuston*, 20 How. 59, announced in 1857, to the ruling in *Berreyesa* v. *United States*, 154 U. S. 623, rendered in 1876, it was often decided that the burden of proof to sustain a Spanish grant rested upon the claimants, and that the failure to show that the official archives contained evidence that the grant had been made and the fact of the production of the original title papers solely from the custody and possession of the grantee were circumstances so suspicious as to create a presumption against the genuineness of the grant, calling for the production by the grantee of more than slight evidence to overthrow the presumption. *Luco* v. *United States*, 23 How. 515, 528; *Peralta* v. *United States*, 3 Wall. 434, 440. Indeed, this burden of proof resting upon the grantee had been frequently declared by this court, prior to the enactment of the law of 1891, to be essentially necessitated by the situation and as the sole means of avoiding the danger of imposing upon the United States by means of forged or fabricated grants. *United States* v. *Teschmaker*, 22 How. 392, 405; *United States* v. *Pico*, 22 How. 406; *Fuentes* v. *United States*, 22 How. 443; *Luco* v. *United States*, 23 How. 515; *United States* v. *Bolton*, 23 How.

341, 347; *Palmer* v. *United States*, 24 How. 125; *United States* v. *Knight's Administrators*, 1 Black, 227; *United States* v. *Neleigh*, 1 Black, 298; *United States* v. *Vallejo*, 1 Black, 541; *White* v. *United States*, 1 Wall. 660; *Romero* v. *United States*, 1 Wall. 721, 743; *Pico* v. *United States*, 2 Wall. 279, 281; *Peralta* v. *United States*, 3 Wall. 434.

It is preliminarily necessary to dispose of certain exceptions taken to the admissibility of evidence, and which are pressed on our attention.

1. The petitioners in opening their case offered in evidence the original proceedings before the surveyor general, including the testimony of the witnesses then examined, after having made the prerequisite proof of death of such witnesses in accordance with the requirements of section 5 in the act of 1891. 26 Stat. 854. Subsequently, the defendant, in proving its case, offered the supplementary proceedings which had been had before the surveyor general (including the testimony of the witnesses taken in that proceeding — proper foundation also having been laid for the introduction of such testimony), the finding of the surveyor general made in the proceedings, and the forwarding of the whole to the Commissioner of the General Land Office, and the submissions made of all the matters in question by the Secretary of the Interior to Congress. All this was objected to on the ground that the power of the surveyor general was exhausted by the original investigation and report, and that therefore a succeeding incumbent of the office was without legal authority to have further considered the grant or to have taken any additional testimony as to its genuineness or validity.

But the function of the surveyor general, under the act of 1854, 10 Stat. 308, was merely advisory, and, until action by Congress had supervened, it was not only the right, but the duty of that official, on proper suggestion being made to him, to hear additional evidence and transmit it for the consideration of Congress, in a claim pending for confirmation. The act of the surveyor general in making the supplementary investigation was certainly either directly or impliedly authorized or ratified by his official superiors, since the knowledge of

the investigation was conveyed to the Commissioner of the General Land Office, and not only the action taken by the surveyor general, but all the papers relating thereto, were by the Secretary of the Interior laid before Congress. Obviously, the purpose of the fifth section of the act of 1891, in permitting the use, subject to the restrictions and qualifications found in the act, of the proceedings had before the surveyor general, was to allow all the proof then existing to be received and to be given such weight as it was entitled to have. The court below therefore properly admitted the supplementary proceedings.

2. William Tipton was called as a witness for the government. The witness, after stating that he was appointed by the Department of Justice to assist in preparing the defence of cases coming before the Court of Private Land Claims, proceeded to say that for a long period of time, covering about sixteen years, he had been previously employed in the office of the surveyor general of New Mexico; that in such employ as clerk, copyist, translator and custodian of the archives, he had constant official occasion to examine, translate and consider the Spanish and Mexican archives extant in the office; that, in consequence of these facts, he was entirely familiar with the signatures of Governor Armijo and Secretary Vigil, the signatures of whom purported to be affixed to the grant relied upon; that his knowledge on the subject had been derived from examining not less than seventy-five or eighty signatures of Governor Armijo, and not less than one hundred and twenty signatures of Secretary Vigil, found in the archives, which were either attached to grants, to the journals of the territorial deputation and departmental assembly, or to other official documents. Besides the familiarity of the witness with the signatures in controversy, he was examined as to his capacity as a general handwriting expert, the whole as a basis for eliciting from him his opinion as to the genuineness of the signatures referred to. Objection was made to allowing the witness to testify on this subject, because it was contended the proof did not lay an adequate foundation therefor, and the overruling of this objection was excepted to.

It is unnecessary to decide whether the witness was competent to express an opinion as a general scientific expert on handwriting or to consider the limitations as to the admissibility of testimony of that character, since the special qualifications of the witness resulting from his great familiarity, acquired during a long course of official action, with the official records and the signatures of Governor Armijo and Secretary Vigil, qualified him beyond question to testify as an expert as to the genuineness of the signatures found upon the alleged grant. The case is directly within the principle decided in *Rogers* v. *Ritter*, 12 Wall. 317, where it was held that witnesses who in the course of administration of the duties of an official position had acquired a familiarity with a certain signature, although they had never seen the party write and had never corresponded with him, were competent to express an opinion on the subject of the genuineness of a signature purporting to have been made by that person. The court said (p. 322):

"It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Certainly not, for in the varied affairs of life there are many modes in which one person may become acquainted with the handwriting of another, besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information, and if the court on the preliminary examination of the witness can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject."

Referring to the testimony of the witnesses showing knowledge derived from the connection with the official archives which were undoubtedly genuine, the court added:

"The three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of

Sanchez, than if they had only received one or two letters from him, or saw him write his name once."

The court below did not err in admitting the testimony.

3. The witness Tipton produced fifteen signatures of Governor Armijo and several of Secretary Vigil, written approximately about the time when the alleged grant in question purported to have been made, taken from among the signatures of these officers contained in the archives, and they were offered as standards of comparison with the signatures found on the grant in controversy. It is objected that the genuineness of these signatures had not been adequately proved, and therefore they should not have been admitted to be used as standards of comparison.

They were correctly received. The whole testimony of the witness demonstrated that the signatures in question were upon documents which the witness produced from the archives, the appropriate place for them, and the genuineness of the papers to which they were annexed had never been challenged and were officially treated as authentic. This justified their admission, at all events in the absence of any suggestion of proof as to their non-genuineness.

4. The defence caused the signature of Governor Armijo to the alleged grant and one existing on one of the documents offered as a standard of comparison, to be photographically enlarged. After proving by the photographer by whom the photographs were made the accuracy of the method pursued and the results obtained by him, the enlarged photographs were tendered and were admitted in evidence over objection. The ruling was correct. *Marcy* v. *Barnes*, 16 Gray, 161, 163.

The petitioners offered in evidence the alleged granting papers, which are reproduced in the margin.[1] Postponing for after consideration the determination of the legal value

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[1] [Translation.]

Alleged Documents of Title.

"Most excellent governor and commanding general of the Department of Mexico:

I, Juan Luis Ortiz, a resident of Pojoaque, before the superiority of your

of the documents so offered, we come to review the evidence relied upon to show that the asserted grant had been actually executed. Having proven the death of all the witnesses who

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excellency, with the highest respect and in the most ample form allowed by law and proper for me, appear and state: That, desiring through the most legitimate and proper means to encourage agriculture, so much recommended of the laws, and finding myself at this time with land so considerably restricted as not to furnish a fair subsistence for the support of the large family I provide for, and having seen and examined with great care a tract of public land which is situated near the place of my residence, which I describe to your excellency under the following boundaries: On the east by a mountain called the Mosca, or Panchuelo slope; on the west one fourth of a league below the waterfall on the Little Springs Meadow; on the north a little flat mountain and some arroyos running between north and west; and on the south a rocky hill situated above the Chupadero Valley, or boundary of the citizens of Tesuque River; and finding in the said tract, which I solicit of your excellency, the advantage of containing fertile lands for cultivation, pastures and water sufficient, and else which is needed necessary for raising stock; and, satisfied, as I am, that it is public and unappropriated land, as I have already stated, I have not hesitated to apply to the justice of your excellency, asking, very respectfully, that for the sake of, and in justice, you be pleased to grant me the said possession, which I ask in the name of the Mexican nation, to which we have the honor to belong, protesting that I do not act in dissimulation, and whatever be necessary, etc., stating to your excellency at the same time that my petition is not upon paper of the proper stamp, there being none in this city; but I promise to attach one cancelled as soon as there shall be any.

Most excellent sir, JUAN LUIS ORTIZ.
Sante Fe, June 3, 1846.

SANTA FE, N. M., *June 4th*, 1846.

What is stated by the petitioner in the foregoing petition, asking that there be granted to him the public land which he describes in the same, being true, and this government being convinced of the good reasons he sets forth, the petitioner will apply to the proper justice that he may place him in possession of the land solicited in entire conformity to the laws in the premises.

JUAN B. VIGIL Y ALARID, *Sec.* ARMIJO.

At this place, our Lady of Guadulupe of Pojoaque, on the eighth day of the month of June, one thousand eight hundred and forty-six, before me, Citizen Jose Dolores Trujillo, justice of the peace at said place, appeared Citizen Juan Luis Ortiz, resident of the same, who presented me the foregoing superior decree of Manuel Armijo, most excellent governor and commanding general of the Department of New Mexico, placed upon the margin of the present petition, dated on the 4th instant, in which I am notified

testified before the surveyor general in 1872, offer was then made of all the proceedings, including such testimony. Upon this evidence and the testimony of one witness tending to show the possession at one time in the original grantee of the granting papers, the claimants in opening rested.

The witnesses who testified before the surveyor general in 1872 were as follows: Antonio Sena, who was for some time prior to December, 1845, prefect of the department in which the land in question was situated and who ceased to hold that office about the month stated, and after an interregnum again held the office after the end of March, 1846; Ramon Sena y Rivera, who in 1846 was an employee in the office of the military commandancy of New Mexico, under the official direction of Donaciano Vigil, military secretary of Governor Armijo in June, 1846, and prior thereto; Pablo Dominguez, who was also employed as clerk in the same office with Ramon Sena y Rivera, and Joab Houghton, Esq., an attorney residing at Santa Fe, who had been United States vice consul, chief justice and associate justice of the Supreme Court of the Territory, and register of the United States land office. Of these witnesses, the two first (the Senas) testified

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to place the said Juan Luis Ortiz in possession of the land he requests be granted him, in conformity with the laws of possession; wherefore, I, said justice of the peace, accompanied by my attending witnesses, proceeded to put in execution the said superior decree, which I fulfilled, designating the boundaries set forth: On the east a high mountain called the Mosca, or Pachuelo slope; on the west a fourth of a league below the waterfall on Little Springs Meadow; on the north a small flat mountain, some arroyos running between west and north; and on the south a rocky hill, which stands above the Chupadero Valley, or boundary of the residents of Tesuque River; and having complied with what I am directed to do by the most excellent governor and commanding general aforesaid, I gave him to understand that said favor and donation has been conferred upon him in the name of the Mexican nation, to which we have the honor of belonging. And in due testimony as well in the present as in the future, I executed to him the present document of possession, signed by myself and my attending witnesses, with whom I act specially for lack of a notary public, there being none in this department. To all of which I certify.

JOSE DOLORES TRUJILLO.

Attending: YGNACIO ALAVID.
Attending: MIGUEL GONZALES."

that the grant was genuine, from the fact that they had seen it executed, one besides swearing that he was present at the delivery of juridical possession by Jose Dolores Trujillo, the alleged justice of the peace. The other two witnesses (Houghton and Dominguez) testified to their familiarity with the signatures of Governor Armijo and the civil Secretary Vigil, from having seen them write and sign, and that the signatures to the alleged grant were in their opinion genuine.

The defence offered the proceedings before the surveyor general on the supplementary hearing, in 1878, including the testimony then taken of witnesses since deceased, and then offered other proof, oral and documentary, tending to make out the defence. The only evidence directly relating to the genuineness of the signatures was that of Donaciano Vigil and William Tipton, the signatures of Armijo and Vigil introduced for the purposes of comparison, and the enlarged photographs heretofore referred to. The question then is, Did the evidence offered by the petitioners make out a case, and if so, did the defence rebut the proof, if any, which arose from the evidence upon which the claimants rested?

Without reference to the testimony of the witnesses on either side, a comparison of the signatures of Governor Armijo and Secretary Vigil, as found on the alleged grant, with the signatures on the documents offered for the purposes of comparison, engenders, in our minds, a very strong conviction against the genuineness of the grant relied upon. And this conclusion is not at all shaken by a comparison of the signatures to the grant with those which were introduced by the petitioners in rebuttal, also for the purposes of comparison. Without elaborating the reasons by which the conviction of want of genuineness is suggested, by the comparison, it suffices to say that the entire characteristics of the signatures to the grant present such saliently suspicious features, when the comparison is made, as to leave it impossible for the mind to resist if not the absolute conviction, in any event the grave doubt which irresistibly arises. It is worthy of being noted that the surveyor general before whom the first proceedings were had considered that the mere inspection of the signatures to the

grant created such a doubt of its genuineness that he would not have been able to have recommended confirmation on the face of the papers, but for testimony taken before him. He said:

"I doubted at first the genuineness of the papers as showing the grant and possession to have been given as set forth; but the testimony brought before me, especially of the two last witnesses, who, beyond all question, are highly respectable men, has set my mind at rest on that point."

By the application of the rule which we have at the outset referred to, casting upon the claimant the burden of sustaining the validity of an asserted grant, we are compelled to refuse to affirm the judgment of confirmation, unless the testimony offered for the claimants removes the doubt in question.

Now, the testimony as to the grant as we have seen was twofold in its nature. First, Joab Houghton and Pablo Dominguez, who, from a knowledge of the handwriting of the officials, testified that in their opinion the signatures on the grant were genuine, and that of the two Senas who swore that they had personally witnessed the execution of the grant, and therefore gave direct testimony to the genuineness of the signatures. Let us consider whether these two classes of evidence dispel, if not the conviction, at least the grave doubt which has arisen, as above stated.

The testimony of Mr. Houghton, whose sincerity we do not doubt, embodied but his opinion of the genuineness of the signature. That the appearance, however, of the signatures was, to his mind — as it was to that of the surveyor general — suggestive of suspicion, is, we think, manifest from his testimony. Thus, on being shown the alleged decree or grant, and on being asked by counsel for claimants whether the signatures of Armijo and Vigil were genuine or not, the witness said: "I recognize Armijo's signature as being genuine on this document, as I do that of Juan B. Vigil, though signed somewhat differently from his usual way." Being interrogated by the surveyor general, and after stating that he did not know that Mexican officials used steel pens at Santa Fe in 1846, the witness testified as follows:

"Q. Was Governor Armijo in the habit of becoming intoxicated?

"A. I think not. I have seen him often, but never saw him intoxicated.

"Q. Have you ever seen him in a condition of excitement or nervousness, such as would be likely to affect his handwriting if using a kind of pen he was unfamiliar with?

"A. Yes; I have seen him frequently in such a condition, particularly at the time of the battles in Mexico in 1846, and of the approach here of the American troops during the summer of 1846."

The testimony of Dominguez also but expressed his opinion. The probative force of the opinion of this witness as to the signatures in question is greatly weakened, however, by his statements on other subjects, such as the possession under the grant and the official capacity of Trujillo as justice of the peace, which, as will be hereafter seen, are entirely irreconcilable with the facts, which if not conclusively established, are in any event sustained by a preponderance of proof.

In conflict with the opinion of Houghton and Dominguez is that expressed by Donaciano Vigil in his testimony on behalf of the Government. He, as has been stated, was military secretary of Governor Armijo at the time the grant was alleged to have been made, and Dominguez was a clerk in Vigil's office. With respect to the signatures upon the decree, purporting to have been made by Armijo, the witness said that he had been intimate with Governor Armijo, and had seen him write, and was well acquainted with his handwriting, and, while unwilling to swear positively that the signature "Armijo" on the decree was not genuine, because the witness had not actually seen the name written, the witness swore that Governor Armijo always wrote his name like the signature upon a document exhibited by the witness, which he had seen Armijo write, and further stated that he (the witness) had never seen a genuine signature of Governor Armijo like that on the decree of grant, and that, in his judgment, "the signatures is not the same Armijo was accustomed to write."

The testimony of this witness conveys an impression of con-

scientious circumspection, the absence of which is particularly to be remarked in the testimony of Dominguez with which Vigil conflicts. The document produced by Vigil as a type of the signature of Armijo has been certified up, and placing it in juxtaposition with the signature of Armijo on the alleged grant fortifies and strengthens the doubt arising from the comparison previously referred to.

The testimony of Vigil is fortified by that of Tipton, who, in lucid and cogent reasoning, supports the opinion which he unequivocally expressed, that the signatures of both Armijo and Vigil y Alarid were not genuine. The proof on this branch of the case, in the best view which may be taken of it for the petitioners, comes then to this: The genuineness of the signatures to the grant as a matter of opinion is supported by two witnesses, the testimony of one of whom at once suggests the doubt which arises on the face of the paper and the statements of the other one of whom is weakened by his declarations on other subjects which, as will be hereafter seen, have been substantially overthrown. On the other hand, the proof of want of genuineness as a matter of opinion is sustained by two witnesses, one of whom (Vigil) based his opinion from an intimate official and personal relation with Governor Armijo which existed at the time the alleged grant was made and prior thereto, and the other of whom, Tipton, by a long official relation with documents containing the signatures of Governor Armijo and Secretary Vigil, had apt and valuable means of forming a correct and reliable opinion, and whose testimony is so clear and so intelligent as to carry great weight with it. This state of the proof certainly, instead of removing the doubt suggested by the inspection and comparison, greatly confirms it.

What, then, is the effect of the testimony of the two witnesses (the Senas) who in the first proceeding before the surveyor general testified to their personal knowledge of the signing of the grant?

Antonio Sena, after stating that he was prefect in June, 1846, of the first district of New Mexico, on being asked whether a grant had been made, and, if he replied yes, to say by whom and to whom, testified as follows:

"There was a grant made for this property in June, 1846, by Governor Armijo to Juan Luis Ortiz; and the decree now here is the original one, signed by Governor Armijo, in my presence, on the 4th day of June, 1846. I now mean the paper in this case marked 'Sierra Mosca grant — original.' In the month of June, 1846, there was no stamped government paper here, and we had to use common paper."

Ramon Sena testified to an intimate acquaintance with the governor and secretary, and on being asked to state whether the signatures to the decree were genuine and whether Juan Luis Ortiz was placed in possession, answered:

"I have examined the signatures of Armijo and Vigil y Alarid, upon the document mentioned, and am satisfied that they are both genuine. In the year 1846 — I think in the month of June — I was requested by Juan Luis Ortiz to go with him to present to Governor Armijo a petition for land, and the petition of said Ortiz shown me on said document A is the petition, and bears the genuine signature of said Ortiz. Governor Armijo directed a clerk (I don't remember who) to write the decree, the same on the margin of the document shown me as document A, which decree he then and there signed, as did also Senor Vigil y Alarid; the governor then handed the document to Ortiz, who requested me to proceed with him to the alcalde at Pojoaque, to be by him placed in possession of the land, and who did place Ortiz in possession, executing the act in my presence, and the record of that act borne by said document A is the act of possession I refer to, and the signature of Jose Dolores Trujillo, which it bears, is his genuine signature. . . . The petition of Ortiz to the governor was presented to him in duplicate, and when he had acted upon them he handed one of the documents to Ortiz and the other he handed to Senor Vigil y Alarid, to be placed among the archives."

It is worthy of remark that it was not shown when, if dead, the attesting witnesses to the act of possession had died, and they were not called upon to testify before the surveyor general or at the trial below — a circumstance which necessarily greatly detracts from the weight of the testimony of Ramon Sena.

Both the Senas were sons in law of the alleged grantee, Juan Luis Ortiz. One was certainly a clerk with Dominguez in the office of Donaciano Vigil at the very time the grant is asserted to have been executed, and yet Vigil, who was military secretary of Armijo, says that he never heard at the time anything concerning the alleged execution of the grant. It is suggestive of doubt, therefore, that a grant for many thousand acres of land should have been made by Armijo to Juan Luis Ortiz, an acquaintance of Vigil, and yet that the fact should have been witnessed and known by a clerk in Vigil's office without any information having been conveyed to the head of that office. It is worthy also of remark that Ramon Sena says that when the grant was executed he took such an interest in it that he left the office where he was employed and went to the place where the land was situated to witness the delivery of juridical possession made by the justice of the peace, although, as already stated, Ramon Sena's name does not appear upon the act of possession as an attesting witness thereto.

In addition to the peculiarities in the testimony of the witnesses, to which attention has been called, there is a conflict between their statements which the record leaves wholly unexplained. Thus, Antonio Sena explicitly says that but one paper was signed by Governor Armijo, and that the decree shown him was the *original* grant, and he makes no reference to any duplicate original petition being presented to the governor, whilst Ramon Sena affirms that duplicate originals of the certificate were made and presented to the governor and that he acted upon both.

Despite the inconsistencies in and the improbabilities suggested by the testimony of the Senas above stated, let it be conceded, *arguendo*, that their statements of personal knowledge of the execution of the grant, standing alone, would be sufficient to overthrow the doubt engendered by the appearance of the signatures to the grant and by the other testimony on the subject, still such admission cannot be here controlling because of the fact that the testimony of the Senas is shown to have been incorrect in other particulars

so important as to deprive it of the weight which otherwise might be attributed to it.

A direct issue was made in the pleadings in this case as to the official existence of the person by whom the act of juridical possession purported to have been executed. The petition presented for confirmation to the surveyor general in 1872 alleged on this subject as follows:

"The said Juan Luis Ortiz was placed in the legal possession of said grant by Jose Dolores Trujillo, a justice of the peace, according to the laws and customs then in force in said republic, governing the making, granting and placing persons or grantees in possession of lands granted to them."

In the asserted granting papers Trujillo specifically describes himself as "justice of the peace at said place," (Pojoaque,) and grants the juridical possession in his capacity as such officer. On the subject of this official, Antonio Sena, on being shown the act of juridical possession, testified as follows:

"Q. Who was, if you can state, the justice of the peace at Pojoaque at that time?

"A. It was Jose Dolores Trujillo.

"Q. Do you know the signature of Jose Dolores Trujillo? If so, please examine the signature on the document marked 'Sierra Mosca grant — original,' purporting to be his, and state whether it is genuine.

"A. I know the signature, and have examined the one referred to; and it is his genuine signature. I, as prefect, had authority to appoint the justices of the peace in my district, and I appointed him for the precinct or demarcation of Pojoaque."

By necessary implication in the passage already quoted from the testimony of Ramon Sena, he also affirms the official character of Trujillo as an alcalde or justice of the peace.

By the Mexican law in force at the time of the making of the alleged grant a justice of the peace exercised his authority over a designated area known as a demarcation. Contemplating the contingency of the absence or inability from other cause of such an appointed official to act, there was an official known

as a *juez de paz suplente* or substitute justice of the peace. The area embraced within the demarcation over which the jurisdiction of the justice of the peace extended was subdivided into precincts, for which an inferior official was appointed, known as a *juez de barrio*.

It is unnecessary to consider the difference, if any, between the authority of these officials, as the question is not what was the power of Trujillo, as an officer, but whether the proof shows that he was an official, or at all events whether it does not give rise to such serious doubt, on the subject, as to cause us to be unable to sustain the alleged delivery of juridical possession.

It is clearly proven that in 1846, at the time the alleged granting papers purport to have been executed and long prior thereto, there was no justice of the peace for the demarcation of Pojoaque, as there was no such demarcation. At that time Pojoaque was a small town within the demarcation of San Ildefonso, that demarcation being subdivided into four *barrios*, as follows: El Rancho, Cuyamungue, Jacona and Pojoaque.

Now, the proof is that in 1845, and also in the year when the grant was alleged to have been made (1846), the justice of the peace of the demarcation of San Ildefonso was Jesus Maria Serrano. This fact is established by official documents in the record and is conceded by the defendants in error. It is also shown by official documents, and is not denied, that in 1845 the substitute of Serrano for the demarcation of San Ildefonso was Teodoro Gonzales. Whilst there is no official record of the reappointment of Gonzales as *juez de paz suplente* for the demarcation for the year 1846, Gonzales — who was examined before the surveyor general in 1878 — testified positively to that fact, and said that in 1846 he and he alone was such officer. Another witness also, Jesus Maria Ortiz y Baca, who was examined before the surveyor general at the same time, but who again testified at the trial, confirmed this statement of Gonzales. The uncontradicted statements of these witnesses were corroborated by those of other witnesses living in the vicinage of Pojoaque, who said that they knew Serrano to have been justice of the peace, and Gonzales to have been his substitute in June, 1846, and that

although they were personally acquainted with Jose Dolores Trujillo, they never heard of his laying any claim to any one of these offices or exercising or pretending to exercise any of the functions thereof.

It is impossible to deduce any reasonable conclusion favorable to the contention that Trujillo was a *juez de paz suplente* in 1846 upon the assumption that lapse of time had led these witnesses to confound one year with another, since the testimony shows that both in 1845 and subsequently in 1846 no person of the name of Trujillo held that office.

What is the state of the proof as to the *juez de barrio* of Pojoaque in 1846, when the alleged grant was made?

Those officials, it would seem, were recommended for appointment by the justice of the peace of the demarcation, through the prefect of the district, to the governor of the department for confirmation, their commissions going to them through the justice of the demarcation. It is shown by official evidence — which is undenied — that in 1845 the *jueces de barrios* for the four precincts within the demarcation of San Ildefonso were as follows:

At El Rancho, Don Joaquin Lujan.
" Jacona, Don Jesus Lujan.
" Cuyamungue, Don Jesus Maria Ortiz.
" Pojoaque, Don Miguel Trujillo.

In December, 1845, it is shown that the then prefect of the department, Santiago Flores, addressed a letter to Serrano, as justice of the peace of the demarcation of San Ildefonso, advising him that it had been seen fit to "reëlect" him "justice of the peace for the coming year," and directing him: "As soon as you receive this to appoint the precinct justices which there ought to be within the limits of the demarcation under your charge, reporting to this prefecture with the greatest possible promptness as to whom you have appointed to those positions, in order that they be approved by his excellency the governor."

No documentary proof was adduced showing that Serrano complied with this order, although of course the assumption would be either that the incumbents held over, or that a

vacancy was not allowed to exist, and the appointments were promptly made as directed. Now, as Trujillo was not even a *juez de barrio* in the previous year, he could not have held over, and the testimony excludes the implication that he could at that time have been appointed to fill a vacancy and acted as such officer without the knowledge of the residents at the place where his functions would have been exercised.

Santiago Flores was not the incumbent of the office of prefect on January 12, 1846, as on that date one Jose Francisco Baca y Terrus was acting as prefect, and he appears from the record to have continued to be prefect as late as March 27 following, his successor in the office being Antonio Sena. Assuming then that Sena's testimony can be construed as relating to the office of *juez de barrio*, it would have to be further assumed that the appointments for the year 1846 had not been made as commanded by the prefect and as required by law, and that therefore either the offices had been vacant from the close of 1845 until Sena's assumption of the prefecture in April, 1846, or that a vacancy had occurred in the office of *juez de barrio* at Pojoaque, as to which, however, no proof has been offered. True it is that counsel for the petitioners who conducted the cross-examination of the witnesses before the surveyor general in the proceedings initiated in 1872, testified that when the files of the former demarcation of San Ildefonso were produced before the surveyor general in 1878, in looking over them he saw a paper, not among the records as produced at this trial, signed by Antonio Sena from the prefect's office, "in which he designated or appointed Jose Dolorez Trujillo as *alcalde suplente*, located at Pojoaque, in the jurisdiction of San Ildefonso," the witness afterwards correcting his testimony by stating that the document which he recollected to have seen "was dated either the very last days of the month of December, 1845, or in the first three or four months of the year 1846, and it was a document appointing Jose Dolorez Trujillo as alcalde or *juez de barrio suplente* of the jurisdiction of San Ildefonso at Pojoaque." In the brief, however, our attention is called to the fact that there is a mistake in the record, and that the word "*suplente*" in the quo-

tation just referred to is erroneously placed after the words "*juez de barrio*" instead of following the word "alcalde," and that the statement should read "*alcalde suplente* or *juez de barrio*." Although one of the questions pending before the surveyor general in 1876 was whether Trujillo had ever been appointed by Sena as a justice of the peace, it is conceded this paper was not when seen offered in evidence, nor was the attention of the surveyor general called to it, nor was any copy taken of it. The course pursued, it is said, having been taken because it was deemed that the investigation before the surveyor general could have no legal force, and because it was feared that if attention was directed to the document it might be abstracted. On this subject also there is testimony from the counsel who appeared for the petitioners in the supplementary proceedings referred to, showing that when the records were then produced he also made a critical examination of them, and no such paper as the one described was seen by him. But no conflict need necessarily arise from the statements of the two witnesses, for it might well be that a paper was seen by one of the witnesses at one time and was not seen by the other at another time, because it may have been surreptitiously placed on the files and thereafter abstracted unknown to either counsel. This is fortified by the fact that the custodian of the archives who produced them at the supplementary hearing, and who had the custody of them long prior to that occasion and was familiar with them, had never heard of or seen any such paper. If surmises were compelled, in view of the high position of counsel, the direction which conjecture would take may be indicated by the suggestion that Sena was alive at the time of the supplementary hearing, and that Gaspar Ortiz not only was alive, but on one occasion was present in an adjoining room when the testimony of witnesses was being taken before the surveyor general, although not called as a witness. Considering the paper as testified to, its presence would accentuate rather than assuage the grave suspicion which the other facts to which we have alluded give rise.

Certainly, it could not have been a cotemporaneous paper, if Sena purported to have acted as prefect in December, 1845,

and as such to have appointed Trujillo as *alcalde suplente* for the year 1846, because the official documents in the record show that on December 6, 1845, Santiago Flores and not Sena was prefect, and that Flores was such officer prior to that date appears in his official communication to justice of the peace Serrano, of date December 6, 1845, showing that before that date as prefect Flores had nominated Serrano to the governor to serve as justice of the peace for the year 1846. Nor could it have been genuine if the appointment was of Trujillo as *alcalde suplente* or *juez de barrio* during any time from the beginning of December, 1845, up to the close of the month of March, 1846, because during all that time the record shows that Sena was not prefect. Besides, if the paper as testified to was now here just as it is described in the testimony, it would not help the situation, for it would vary from the declarations in the act of possession and from the testimony of Sena. In the paper as to the delivery of possession, Trujillo represents himself not as *juez de barrio*, but as a justice of the peace, and Sena testified as follows: "I, as prefect, had authority to appoint the justices of the peace in my district, and I appointed him for the precinct or demarcation of Pojoaque." Now, as a former prefect, he was familiar with the designation of minor officials, and would not therefore have confounded a justice of the peace with a *juez de barrio*. The official correspondence of Sena contained in the record shows that the designation "justice of the peace" was applied by Sena to the justice of a demarcation, and the term *juez de barrio* he applied to a justice of a precinct within the demarcation. And a like practice is shown by the record to have been pursued by the successor of Sena.

And on this subject the record contains a very suggestive fact.

It is shown that at a time subsequent to the date of the alleged grant the demarcation of San Ildefonso was divided, and from the territory of which it was composed there were established two demarcations, one that of San Ildefonso and the other that of Pojoaque, and that the records of the former demarcation were kept at Pojoaque. This of course necessarily gave rise to two justices of the peace, one of the demarcation

of San Ildefonso and the other of Pojoaque. The new demarcations thus created, if they did not continue up to the trial below, certainly so continued for many years. The description of the capacity of Trujillo found in the alleged act of possession and of his official character given by Sena, is more aptly appropriate to the demarcation of Pojoaque as it existed after the the division and subsequent to the making of the alleged grant. From this circumstance may well arise the reflection that if the papers were not executed until at or about the time their existence was publicly asserted in 1872, the mind of the draughtsman might inadvertently have taken into consideration the demarcation of Pojoaque created after June, 1846, and which had many years obtained, and have thus overlooked the state of things existing in 1846.

2. The impossibility of deducing from the testimony of the two Senas proof sufficient to overcome the grave doubt as to the genuineness of the grant already engendered by the proof referred to, is further confirmed by considering the state of the evidence on the subject of possession.

In the petition for grant Ortiz is represented as living at Pojoaque, and as asserting that he found himself at that time "with land so considerably restricted as not to furnish a fair subsistence for the support of the large family" he provided for, and it was further represented that the tract which was solicited possessed "the advantage of containing fertile lands for cultivation, pasture and water sufficient, and else which is needed for raising stock." In the proceedings instituted before the surveyor general in 1872 the land embraced within the boundaries mentioned in the grant was marked on a sketch filed with the petition as aggregating about 115,200 acres, while a survey made by the United States in 1876 — asserted by petitioners in their petition filed below to be incorrect — gave the area as 33,250.39 acres. The brief for defendants in error, however, now declares that the claim is limited to not exceeding eleven leagues, the claim as confirmed by the court below. In the petition of 1872 it was averred that from the date Ortiz was placed in possession he "and his heirs had cultivated a portion of said grant and the rest they have used in

herding their animals and in obtaining wood." The only proof, however, introduced by the petitioners before the surveyor general in 1872, bearing upon the occupancy or cultivation of the tract in question by Ortiz and those claiming under him, were statements contained in the depositions of Antonio Sena, Ramon Sena and Pablo Dominguez. These witnesses, however, spoke only in general terms. Antonio Sena and Dominguez simply testified that Juan Luis Ortiz and his heirs had always occupied the land and it had always been reputed to be theirs, while Ramon Sena thus expressed himself:

"Ortiz lived upon the land during his lifetime, and his heirs have continued to occupy it since his death, and it has been continuously occupied by him and them, and they have always been the reputed owners of the land, and respected as such."

The evidence introduced at the trial below, however, tended to show that the upper portion of the tract in question had been claimed by the heirs of the father of Juan Luis Ortiz under an alleged prior grant to their ancestor, and that portions of such tract had been occupied and cultivated by some of said heirs, under such claim; and a number of witnesses, relatives and neighbors of Juan Luis Ortiz during his lifetime, testified not merely that they had never known Juan Luis Ortiz to have occupied or cultivated the land, but that the existence even of the alleged grant of 1846 was not known or heard of in the neighborhood until its presentation in 1872 to the surveyor general for confirmation. Further, it is established, though Juan Luis Ortiz may have lived at Pojoaque in June, 1846, he took up his residence at Santa Fe in the house of his son Gaspar not very long after the date named. In fact, the widow of Gaspar in her testimony said that Juan Luis Ortiz died about 1861 or 1862, and that he resided at her house in Santa Fe for about twenty to thirty years before his death. If, however, we accept the statement of another witness, a relative named Jose Ortiz, aged 58 years at the time he testified, Juan Luis Ortiz died in 1859 or 1860, and lived with his son Gaspar, and clerked in the store of that son in Santa Fe for ten or twelve years before he (Juan Luis Ortiz) died. It would thus appear that Juan Luis Ortiz left Pojoaque and the vicinity of this grant for

Santa Fe, if not before, at least very soon after, the date of the asserted grant. The widow of the son Gaspar, however, did not give any evidence tending to show any knowledge on her part of any cultivation or use of the tract by or on behalf of Juan Luis Ortiz, during her acquaintance with him, which must have extended back at least to the time of her marriage to the son, which she stated to have been in 1848. Particularly she did not explain how he could have so occupied and cultivated when living at her house in Santa Fe and acting as clerk for her husband.

Despite the great weight of the adverse testimony above referred to, the claimants in the court below introduced no evidence whatever as to possession, cultivation or improvement of the alleged granted land, except that in the opening of their case there was introduced the *ex parte* testimony of the witnesses before the surveyor general on the first investigation.

3. The foregoing considerations, weighing against the validity of the asserted grant, are fortified by the fact that although Juan Luis Ortiz and his son Gaspar lived, prior to 1854 and subsequent thereto, in Santa Fe, where was located the office of the surveyor general of New Mexico, and the act authorizing the presentation of claims to that official was passed in 1854, it was not until 1872 that the alleged grant made its public appearance. There are also many other facts and circumstances in the record casting the gravest doubt on the genuineness of the alleged grant, and tending to contradict the testimony of the Senas. To avoid too much prolixity, however, we shall not refer to them.

All the foregoing considerations render it unnecessary to examine the questions which are pressed in argument as to the form of the alleged grant here relied on, the claimed inattention to the requirements of the regulations of 1828, and the non-production of an *expediente* or of a *testimonio* of title, upon which questions we refrain from expressing any opinion whatever. *Luco* v. *United States*, 23 How. 528; *United States* v. *Castro*, 24 How. 346; *United States* v. *Moorehead*, 1 Black, 227; *United States* v. *Knight*, Id. 228; *Peralta* v. *United States*, 3 Wall. 434; *Van Reynegan* v.

*Bolton*, 95 U. S. 33, 35. The view we have taken of the proof also conclusively negates the premise of fact upon which it is argued that there was archive evidence of the grant, (as this premise must rest upon the testimony of Ramon Sena alone,) and therefore brings the case directly under the rule laid down in *United States* v. *Cambuston*, 20 How. 59; *United States* v. *Castro*, 24 How. 346; *United States* v. *Moorehead*, 1 Black, 227, and *Peralta* v. *United States*, 3 Wall. 434.

It results that it becomes unnecessary to examine the legal questions to which at the outset attention was called, and that

*The court below erred in confirming the grant, and its decree so doing is reversed and the cause remanded to that court with directions to enter a decree rejecting the claim and dismissing the petition; and it is so ordered.*

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## GUARANTY SAVINGS BANK *v.* BLADOW.

ERROR TO THE FOURTH JUDICIAL DISTRICT COURT FOR RICHLAND COUNTY, NORTH DAKOTA.

No. 134. Submitted January 31, 1900. — Decided February 26, 1900.

The power to review and set aside the action of local land officers exists in the general land department.

When an entry is cancelled, after due notice to the entryman, and after a hearing in the case, it is conclusive against him everywhere, upon all questions of fact; and it cannot be regarded as a mere nullity, when set up against his mortgagee, even though such mortgagee had no notice of the proceeding to cancel the certificate.

Such an entry does not transfer the title to the land, but simply furnishes *prima facie* evidence of an equitable claim for a patent, and the use of the certificate for that purpose is subject to be destroyed by its official cancellation.

This action was brought to foreclose a mortgage, owned by the plaintiff in error, upon certain land in North Dakota which the defendant in error claimed was his, and not subject to the lien of the mortgage. It was brought in the proper state

Statement of the Case.

court, and the trial resulted in a judgment in favor of the defendant, declaring him to be the owner of the land; that the mortgage of the plaintiff in error was no lien upon it, and that it should be cancelled as an apparent cloud upon the title of the defendant.

The plaintiff appealed from this judgment to the Supreme Court of the State, where it was affirmed, 6 N. D. 108; 69 N. W. Rep. 41, and the case was brought here on writ of error.

The material facts are as follows: On January 6, 1881, one Anderson filed in the proper land office at Fargo, in the then Territory of Dakota, his homestead application to enter the land which is involved in this action. On July 20, 1881, he appeared before the register and receiver, and, under section 2301, Revised Statutes, commuting his homestead to a preëmption entry, made final proof of his claim, which was allowed and a final certificate issued, which was filed in the office of the register of deeds of the proper county on July 25, 1881. After the filing of proof, and on July 20, 1881, Anderson mortgaged the land to one H. E. Fletcher, who on June 20, 1882, assigned the mortgage to the plaintiff. Both the mortgagee and the assignee acted in good faith, and each instrument was executed for a valuable consideration.

On May 8, 1882, Anderson conveyed the land to one R. M. Ink, who on April 7, 1883, conveyed the same to one J. S. Ink, and on January 6, 1885, J. S. Ink conveyed the premises to the defendant.

All of the above were warranty deeds and duly recorded.

On March 14, 1882, after the final proof had been made by Anderson and passed upon by the register and receiver of the land office, and the record had been transmitted to the General Land Office at Washington, the Commissioner held the entry of Anderson upon said land, and directed the register and receiver of the local land office to hold the entry for cancellation, upon the ground that the testimony in the final proof made by Anderson for the land in question was evasive and failed to show six months' residence.

On January 22, 1886, the defendant filed in the land office at Fargo his application and affidavit to contest the entry of

Anderson upon the land on the ground that the proof furnished by Anderson upon that entry was false and that the entry was fraudulent, and in that affidavit he set forth that Anderson had never established his residence upon the land and had never resided thereon and never made the same his home as provided by the homestead laws of the United States.

The Commissioner of the General Land Office thereupon ordered a hearing before the register and receiver at Fargo between the defendant and Anderson as to the truth of the allegations in defendant's affidavit and application for contest. Due notice of the hearing was given to Anderson by publication, in accordance with an order of the register, which was granted upon an affidavit that personal service could not be made upon him.

At such hearing the defendant appeared with his witnesses and gave evidence tending to establish the truth of the allegations in his affidavit of contest, but no appearance was made or testimony offered by Anderson, and after the hearing the evidence taken thereon was transmitted to the Commissioner of the General Land Office at Washington, who, on the 14th day of November, 1887, directed the entry of Anderson to be cancelled as a fraudulent entry, which the register and receiver of the land office at Fargo thereafter did, and the entry was duly cancelled of record as a fraudulent entry, and the defendant was notified thereof. From this decision Anderson took no appeal.

After the final decision of the Commissioner of the General Land Office upon the contest and after the cancellation of the entry of Anderson, the defendant made his homestead entry upon the land, and on the 26th of April, 1893, submitted his final proof therefor, which was passed upon by the register and receiver and placed of record on that date, and a final certificate in due form was then issued to him by the register and receiver, and thereafter, on July 6, 1893, the government issued to him a patent for the land, which was recorded on October 25, 1893.

No notice of the cancellation of the homestead entry and certificate of Anderson was ever given to H. E. Fletcher,

the mortgagee, or to the plaintiff herein, his assignee, and the cancellation was made without actual notice of the decision of the Commissioner of the General Land Office to either Fletcher or the plaintiff, and neither Fletcher nor the plaintiff was served with any notice of the contest of defendant involving the land, nor was either made a party defendant in that contest.

After the cancellation and on June 15, 1891, plaintiff filed in the United States land office at Fargo proof of its interest as assignee of the mortgage, and moved that a patent be issued under the provisions of section 7 of the act of March 3, 1891, c. 561, 26 Stat. 1095, 1098, which motion was denied by the Commissioner of the General Land Office on August 13, 1891, and on appeal, by the Secretary of the Interior on July 15, 1892.

The notes secured by the mortgage, not having been paid, this action was brought to foreclose the same, and the defendant set up as a defence the facts in relation to the entry of Anderson and its cancellation and the issuing of the patent to him as above set forth.

*Mr. S. B. Pinney*, *Mr. F. B. Morrill* and *Mr. Edward Engerud*, for plaintiff in error.

*Mr. W. H. Standish* and *Mr. W. E. Purcell* for defendant in error.

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

When Anderson obtained the decision of the register and receiver upon his application for the land it was subject to the power of the land department to review the judgment of those officers, and, upon facts showing that the entry was fraudulent, the department had power to cancel it. This could be done upon the same evidence which was before the register and receiver, and at least, upon notice to the party entering the land. Although the power to review and to cancel is not arbitrary or unlimited, and does not prevent

judicial inquiry in regard to its exercise, in some appropriate form, yet it is unquestionable that the power of reviewing and setting aside the action of the local land officers does exist in the general land department. *Orchard* v. *Alexander*, 157 U. S. 372, where many of the cases upon the subject are gathered in the opinion of the court.

In this case the Commissioner of the General Land Office at Washington held the entry of Anderson upon the land, and directed the register and receiver of the local office to hold such entry for cancellation, upon the ground that the testimony in the final proof was evasive and failed to show six months' residence. Subsequently, and upon sufficient notice to him, the defendant contested the entry of Anderson as fraudulent, on the ground that the proof furnished by him to procure it was false; that Anderson had never established his residence upon the land, and never had, in fact, resided thereon, and had never made the same his home, as provided by the laws of the United States.

A hearing was had before the register and receiver at Fargo, due notice whereof was given to Anderson, who did not appear, and the evidence taken upon the hearing was transmitted to the Commissioner at Washington, who, on November 14, 1887, directed that the entry of Anderson upon the lands should be cancelled, and thereafter in the due and usual course of business the register and receiver of the local office at Fargo did cancel that entry of record.

If this were all no question could be raised in regard to the regularity and sufficiency of the proceedings which ended in the cancellation of Anderson's entry.

The difficulty, however, arises from the fact that before the entry was cancelled, and on July 20, 1881, Anderson mortgaged his interest in the land to Fletcher, the mortgagee, who subsequently, as stated, assigned the mortgage to the plaintiff in error. Through various mesne conveyances, the defendant on the 6th of January, 1885, became the owner of whatever interest Anderson had in the land by virtue of his above mentioned entry. Thereafter the defendant filed his papers for a contest as to the validity of the entry of Anderson, and although

Anderson was duly notified of the proceedings, neither Fletcher nor his assignee, the plaintiff in error, had any notice of the same. The plaintiff, therefore, contends that the whole proceeding in the General Land Office, including the hearing on the contest before the register and receiver at Fargo, was, so far as it was concerned, an absolute nullity, and the cancellation of Anderson's entry had in law no effect upon its claim to use the certificate as evidence of Anderson's right to a patent. In our opinion this contention is not well founded.

The favorable decision of the register and receiver of the local land office upon the claim of Anderson was, under the statute, reviewable by the officers of the General Land Office, and the officer of that department who directed the cancellation of the entry had by law jurisdiction to make that direction. The certificate was *prima facie* evidence of the right of the entryman to a patent, but the power rested with the land department, upon proper notice, to set it aside and cancel the entry, and thus take away from him that *prima facie* evidence. *United States* v. *Steenerson*, 4 U. S. App. 332; *American Mortgage Company* v. *Hopper*, 56 Fed. Rep. 67; *S. C.* on appeal, 29 U. S. App. 12. If the entry were cancelled arbitrarily, and without evidence or notice to him, it would not conclude him, and he would, notwithstanding the decision, have the right to show that his entry was valid, and that he was entitled to a patent. And when the entry has been cancelled upon due notice to the entryman and after a hearing in the case, so that the cancellation is conclusive against him everywhere upon all questions of fact, it cannot be regarded as a mere nullity, when set up against the mortgagee of the fraudulent entryman, even though such mortgagee had no notice of the proceeding to cancel the certificate. The cancellation of the entry being valid as against Anderson, it left him without the right to avail himself of it in any future claim he might make for a patent, and it left his mortgagee also without the right to use that entry as *prima facie* evidence of Anderson's claim. The mortgagee, as was remarked by the court below, had no vested right to use the certificate as *prima facie* evidence of the right of the entryman to a patent, and after

its cancellation the plaintiff in error could not so use it, because it had been validly extinguished and cancelled in a proceeding against the mortgagor, although the mortgagee had no notice of such proceeding.

This result follows by reason of the character of the entry, and of the certificate given thereon. It does not transfer the title to the land from the United States to the entryman, and it simply furnishes *prima facie* evidence of an equitable claim upon the Government for a patent, and the use of the certificate for that purpose is subject to be destroyed by the cancellation thereof under direction of the department. This is the legal effect of such certificates, and all who deal in them or found any right upon them must be held to do so with full knowledge of the character of such papers.

But the cancellation, although conclusive as to the entryman, upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein showing the validity of the entry, or from proceeding before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been cancelled. Had the mortgagee taken either of these courses, it might have demanded in the one case, upon proving the validity of the entry, that a patent should be issued to the mortgagor or his grantees, leaving the land subject to the lien of the mortgage, or if a patent had been issued, the mortgagee might then have demanded relief against the patentee upon proof of the validity of the entry, in a proceeding in court to hold him as trustee. Although the mortgagee might have taken either of the courses above suggested, (and perhaps others,) it took neither of them. It relied on the absolute nullity of the cancellation and proceeded to foreclose the mortgage as if the certificate still subsisted and was evidence of the validity of the entry. This was a conclusion not well founded.

Opinion of the Court.

If the plaintiff in error, even in this foreclosure suit, had alleged that the entry had been cancelled and that a patent for the land had been thereafter issued to the defendant, and had asked that the patent so issued to him should be held by him in trust and as security for the payment of the plaintiff's mortgage on the ground that the entry had been improperly cancelled as to it, and had proved on the trial that Anderson's entry was legal, it may be that it would have been entitled to a judgment decreeing the defendant a trustee of the title under his patent from the government and providing for the sale of the land in order to pay the mortgage, or some other appropriate relief might have been granted. But this was not done, and the case must be decided upon the record before us.

It is erroneous to state, however, that plaintiff in error has admitted the entry was fraudulent. The facts are that in the statement agreed upon by the parties it was admitted that in the contest and upon the evidence therein submitted the register and receiver of the local land office decided as a conclusion of fact that Anderson's entry was fraudulent. This is plainly no admission of the fact itself, and in no way is the plaintiff in error thereby precluded from showing that the entry was valid.

It is further contended that the defendant could not himself take the title of Anderson and then contest before the land department the validity of Anderson's entry, nor could he, having succeeded in obtaining the cancellation of such entry, himself take proceedings under the preëmption or homestead act to obtain the same land. Having procured the title of Anderson and then instituted the contest in the land department, notice of which was given solely to Anderson, it is contended that Anderson had no longer any interest in defending his entry, and that the defendant occupied the position of being the only party to both sides of the contest, and could not therefore be permitted, after securing the cancellation, to himself make an entry and obtain a patent for the land; that by reason of these facts the cancellation was as to the mortgagee an absolute nullity, and the mortgagee could maintain its action to foreclose and sell the land under its

judgment of foreclosure the same as if no cancellation had taken place.

But it must be remembered that Anderson was a grantor of the land upon a warranty of title, and it is not clear he had no interest in supporting his right of entry as valid and sufficient. Ink had himself conveyed with warranty. Whether the defendant could avail himself of the warranty under the facts regarding his own action in being a mover in the proceeding to cancel the entry, might be doubtful; but, at any rate, there was a question which might cause Anderson to endeavor to uphold his entry. It will be remembered, too, that nearly three years prior to the conveyance to the defendant the Commissioner had held Anderson's entry for cancellation on account of fraud. The defendant thus stood in danger of a cancellation of that entry without notice to him, and, if an entry were then made by some one else, the defendant would be without right to thereafter make an entry for himself. Could he not anticipate that danger, and himself commence the contest?

As a mere grantee by deed, which conveyed the interest of Anderson, the defendant did not take title under him, within the meaning of the rule, which prevents one who takes title under another from questioning that other's title; like a tenant taking under his landlord. A simple grantee in a deed can set up another title in a third party, and can himself claim title under such party and can deny the title of his grantor. He takes no title under the grantor, and is at full liberty to deny the title of the latter.

When the defendant, therefore, took his conveyance from Ink, it may be assumed that he took all the title which came through Ink from Anderson, but he was under no obligation to Anderson or to his mortgagees to admit the validity of Anderson's entry, and had the right to deny its validity and to make a contest before the land department. The only objection to be urged against his proceeding is that he gave no notice of the contest to the mortgagee. But it was not the duty of the defendant to direct who should have notice in such contest, for that was a matter for the officials of the

department, before whom the contest was inaugurated, to decide. It was for them to determine who, if any one, should be notified of the contest, and the duty was not imposed upon the defendant. Of course, he could give notice if he chose. If he did not, the person who had any rights, if not notified at all, either by him or by the department, could not be concluded by the decision of the contest, and we hold now that the mortgagee was not thereby concluded, and had the right, if possible, to subsequently show that Anderson's entry was valid. But the cancellation of the entry and certificate was not rendered a nullity because the mortgagee had no notice.

The character of the proceeding before the department must be kept in mind. It is not like a proceeding in court. It is administrative in its nature, and when the proceedings are conducted in accordance with the provisions of law creating the department and giving it jurisdiction, they may be upheld, and the decisions of the officers supported when not made arbitrarily and without evidence.

If the defendant in inaugurating his contest were guilty of any fraud, by means of which notice to the mortgagee was omitted, or Anderson induced not to defend his entry, and the defendant was thus enabled to procure a decision as to the fraudulent character of that entry, it might perhaps be that in such case the mortagee would have the right to make use of the original entry as still *prima facie* evidence of Anderson's right to a patent, the same as if the certificate had not been cancelled. But there is no allegation of those facts in the bill nor is there any proof in this record which would sustain them if they had been alleged. The action is not brought for that purpose nor upon any such theory. Unless the facts that the defendant had taken this conveyance of Anderson's interest, and had subsequently commenced the proceedings for a contest in regard to the entry of the latter, of which the mortgagee had no notice, amount in law to a fraud by the defendant upon such mortgagee, which nullifies those proceedings and leaves the entry the same as if it had not in fact been cancelled, then the cancellation made after notice to Anderson was valid, and it deprived the

mortgagee of the use of the certificate as evidence of Anderson's right to the patent, while not in any way interfering with the mortgagee's right to prove it by other evidence. In our opinion the facts stated do not prove fraud, as a legal conclusion, on the part of the defendant, who had the right to take the proceedings he did.

Plaintiff in error also contends that the motion made by it on June 15, 1891, for the issuing of a patent to it, as a *bona fide* incumbrancer of the land, under the provisions of section 7 of the act of March 3, 1891, entitled "An act for the repeal of the timber culture law, and for other purposes," 26 Stat. 1095, 1098, should have been granted.

It will be seen that at the date of the passage of this act the entry of Anderson no longer existed, because on November 14, 1887, it had been cancelled. The case of *Parsons* v. *Venzke*, 164 U. S. 89, decides that the act of 1891 applies only to entries existing at the time of its passage. The claim of the plaintiff in error that the cancellation was wholly void for all purposes cannot, as we have seen, be supported.

Our conclusion upon the whole case is that the cancellation of the entry was valid as regards Anderson, and that the effect of such cancellation was to prevent the plaintiff in error from using the entry as *prima facie* evidence of the right of Anderson to a patent, and under the pleadings the plaintiff in error had no right to a judgment of foreclosure. As the case was not brought or tried on the theory that the defendant had only the legal title to the land under his patent, and that such patent should be decreed to be held by him in trust for the plaintiff to the extent of its mortgage because the entry of Anderson was in fact valid and proper, the plaintiff in error ought not to be obstructed in the pursuit of any remedy which it may be advised it is proper to take, by the use of the judgment herein as a conclusive adjudication against it.

*We, therefore, think it proper to modify the judgment by striking out that portion which cancels the mortgage, and as modified, affirming the same without prejudice to the right of the mortgagee to seek such other relief as it may be advised, notwithstanding the adjudication of this judgment, and it is so ordered.*

# UNITED STATES v. MRS. GUE LIM.

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

No. 123. Submitted January 29, 1900. — Decided February 26, 1900.

Under the act of July 5, 1884, c. 220, 23 Stat. 115, construed in connection with the treaty with China of November 17, 1880, 22 Stat. 826, the wives and minor children of Chinese merchants domiciled in this country, may enter the United States without certificates.

DISTINCT appeals were taken direct to this court from the judgment of the District Court of the United States for the District of Washington, Northern Division, in the case of the above defendant in error, Mrs. Gue Lim, and from the judgment of the Western Division of that court in the cases of Ah Tong, Yee Yuen and Ah Quong, under the fifth clause of the fifth section of the act of March 3, 1891, c. 517, creating the Circuit Court of Appeals, 26 Stat. 826, 828, because the cases involve, among other questions, the construction of the treaty between the United States and China, entered into in 1880, 22 Stat. 826, article second, as affected by the third article of the treaty of December 8, 1894, 28 Stat. 1210. The various appeals were heard here as one case.

The facts in regard to Mrs. Gue Lim were agreed upon in the court below, and it appears therefrom that she is the lawful wife of Fook Kee, a Chinese merchant engaged in buying and selling merchandise in the city of Seattle and State of Washington, under the firm name of Fook Kee & Company. He was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, for over one year next preceding the date of his last departure from the United States, which was in April, 1896, and was in all respects a Chinese merchant lawfully domiciled in the United States. He arrived at the port of Tacoma, Washington, from China, accompanied by his wife, this being her first arrival in the United States, and the collector of cus-

toms, acting under general instructions from the Secretary of the Treasury, allowed her to land on the —— day of May, 1897, without the production of the certificate mentioned in section sixth of the act of July 5, 1884. 23 Stat. 115, c. 220. Complaint was subsequently made to the District Court that she was a Chinese laborer, and was found unlawfully in the United States, in the county of King, in the District of Washington, on the 2d day of October, 1897, without having been registered as a Chinese laborer, and without having in her possession a certificate of registration as such laborer, and without having any other legal right or authority to be and remain in the United States.

A warrant was issued by the District Court, upon which she was arrested, and after hearing evidence on behalf of the plaintiff and defendant the court decided (83 Fed. Rep. 136) that she was not a Chinese laborer, but the wife of a Chinese merchant lawfully domiciled and doing business as a merchant, and was not excluded by the laws of the United States from coming to or remaining in the United States, and she was therefore discharged from custody and the cause dismissed.

The other defendants in error had been admitted by the collector of customs at Port Townsend, and were thereafter adjudged by the United States commissioner, upon complaint made before him, to be Chinese laborers unlawfully in the United States, and the commissioner thereupon ordered them to be deported to China. They appealed from such decision, and the United States District Court for the District of Washington, Western Division, after hearing the evidence, decided that the defendants were minor children of Chinese merchants, and that they were lawfully entitled to be and remain in the United States.

The facts were agreed upon in the court below, and they are stated in the record as follows:

(1.) The defendants were born in China of parents lawfully married, and had resided in that country up to the time they came to the United States to live with their respective fathers, and were still minors under the age of fifteen years.

(2.) The fathers of these boys were, and for a long time prior

to the coming of the boys to this country, had been *bona fide* Chinese merchants, lawfully residing and doing business in the city of Walla Walla, in the State of Washington, and had sent for their sons to come from China to live with them in Walla Walla, where they were residing with their fathers when arrested by a United States immigration officer.

(3.) The boys had never procured any certificate under section sixth of the act of July 5, 1884, (*supra*,) but relied entirely upon the status of their fathers as merchants here to entitle them to come to this country, and upon that claim had been admitted by the collector of customs at Port Townsend.

A judgment discharging the defendants having been entered, the United States appealed to this court.

*Mr. Assistant Attorney General Hoyt* for the appellant.

No appearance for the appellee.

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

The question here arising in regard to the correctness of the decision of the District Court in the case of the married woman depends for its solution upon the construction to be given to the sixth section of the act of Congress of 1884, c. 220, 23 Stat. 115, which is set forth in the margin.[1]

[1] Sec. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family and tribal name in full, title or official rank, if any, the age, height and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the

That section must be construed in connection with the treaty concluded between this country and China in November, 1880. 22 Stat. 826.

It is contended on the part of counsel for the Government that by the subsequent treaty of March, 1894, 28 Stat. 1210, the two Governments have agreed that the requirements of a certificate as provided for in the sixth section of the act of Congress shall apply to all permitted Chinese subjects who must, without exception, produce such certificates. Article two of the treaty of 1880 and article three of the treaty of 1894 are set out in the margin.[1]

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United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character and estimated value of the business carried on by him prior to and at the time of his application as aforesaid. . . . The certificate provided for in this act and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be viséd by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate viséd as aforesaid shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the persons named therein shall arrive, and afterwards produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

[1] *Treaty of* 1880.

Article II.

Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.

We do not think the treaty of 1894 alters the result flowing from the treaty of 1880 and the act of 1884. The question is, whether under the act of 1884, construed in connection with the treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, because she is the wife of such merchant.

Although the third article of the treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband who himself enjoys the right is not enough for the wife, the fact being proved or admitted that she is such wife. Possibly the result of the treaty of 1894 may be held to be, instead of simply prohibiting the entrance of Chinese laborers, to restrict the right of entry to those classes who are specially named in the third article of the treaty. But the question would still remain whether the wives of the members of the classes privileged to enter, were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the act of 1884.

There has been some difference of opinion among the lower courts as to the true construction to be given to the treaty and the act of Congress. The judges in some cases have taken the view that the wife and minor children of a Chinese merchant, who is himself entitled, under the second article of the treaty of 1880 and section sixth of the act of 1884, to come within and dwell in the United States, were entitled to come into the country with him or after him as such wife and children without the certificate prescribed in that section. Other judges

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*Treaty of* 1894.

Article III.

The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their government or the government where they last resided viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

have held that they were not entitled to enter the country without the production of the certificate mentioned in the act.

Those cases holding the right of the wife to enter without a certificate are *In re Chung Toy Ho*, 42 Fed. Rep. 398, in the Circuit Court, District of Oregon, May, 1890, in which case the opinion was delivered by Judge Deady; *In re Lee Yee Sing*, 85 Fed. Rep. 635, decided in 1898 in the District Court for the State of Washington; also in this case, *United States* v. *Gue Lim*, 83 Fed. Rep. 136, District Court of Washington, 1897.

Those adverse to the doctrine are *In re Ah Quan*, 21 Fed. Rep. 182, 186, decided in 1884 in the Circuit Court, District of California; *In re Ah Moy*, 21 Fed. Rep. 785, in the same court, September, 1884; *In re Wo Tai Li*, 48 Fed. Rep. 668, in the District Court, Northern District of California, August, 1888; *In re Lum Lin Ying*, 59 Fed. Rep. 682, District Court of Oregon, February, 1894; *In re Li Foon*, 80 Fed. Rep. 881, Circuit Court, Southern District of New York, 1897.

Some of the latter cases do not involve the exact point now before the court, but they are in the direction stated.

It is not necessary to review these cases in detail. It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge Deady. *In re Chung Toy Ho*, 42 Fed. Rep. *supra.* In our judgment the wife in this case was entitled to come into the country without the certificate mentioned in the act of 1884.

The act of 1882, of which that of 1884 was an amendment, was passed, as is stated in its title, "To execute certain treaty stipulations relating to Chinese," and therefore we must assume that the body of the act has that purpose.

This court has already sustained the power of Congress to provide for excluding or expelling Chinese, even in contravention of a treaty; also the power to intrust the final determination of the facts upon which the individual is to be expelled, to an executive officer. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Wong Wing* v. *United States*, 163 U. S. 228. But it is not the power of Congress over the subject with which we are now dealing. The question is, What did Congress

mean by the act of 1884? Some light upon that question can be derived from the treaty of 1880, which must be read in connection with it. By article two of the treaty, Chinese subjects proceeding to the United States, either as teachers, students, merchants, or from curiosity, together with their body and household servants, were to be allowed to go and come of their own free will and accord, and were to be "accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." It was for the avowed purpose of carrying these treaty stipulations into effect that the act of 1882, 22 Stat. 58, and the amended act of 1884, 23 Stat. 115, were passed.

It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty. As was stated by Mr. Justice Harlan in delivering the opinion of the court in *Chew Heong* v. *United States*, 112 U. S. 536, 539: "The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coördinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted." We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution and not to violate the provisions of the treaty.

There is nothing in the act of 1884 which, in terms, enumerates and provides for the admission of particular classes of

persons. It speaks in the sixth section of those who may be entitled under the treaty or under the act to come within the United States, but the act does not assume to enlarge the number or character of the classes specially named in the treaty as entitled to admission. It is plain that in this case the woman could not obtain the certificate as a member of any of those specially enumerated classes. She is neither an official, a teacher, a student, a merchant nor a traveller for curiosity or pleasure. She is simply the wife of a merchant, who is himself a member of one of the classes mentioned in the treaty as entitled to admission. And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty.

Does the sixth section mean that in such case the wife must obtain the certificate therein provided for? We think not. Although the section provides that every Chinese person, other than a laborer, who may be entitled by the treaty or by the act to enter the United States must have a certificate, the contents whereof are therein stated, yet when we come to look at the particulars which it directs shall be set forth in the certificate, we see that the section was not drawn with the view of embracing the case of one who claims the right of admission simply as the wife of a person entitled to enter and remain in this country. She may have had no former, and may have no present, occupation or profession within the meaning of the section, and, of course, in that case, it cannot be stated when and where and how long it has been pursued.

The section assumes that the applicant for a certificate has some occupation or profession which has been theretofore pursued at some place, which is not the case here.

Various other provisions in the section render it plain to our minds that it was never intended to extend to the wives of persons who were themselves entitled to entry. A certificate that should only state that the person therein identified was the wife of a member of the admitted class, and had no occu-

pation or profession, it seems to us would not be a compliance with the section, and if not, then it would not be possible to comply with its provisions in this case, and the consequence would be that (if a certificate were necessary under the sixth section,) the statute would exact as a condition of entrance into the country, that which the person could not perform, although otherwise entitled to enter.

While the literal construction of the section would require a certificate, as therein stated, from every Chinese person, other than a laborer, who should come into the country, yet such a construction leads to what we think an absurd result, for it requires a certificate for a wife of a merchant, among others, in regard to whom it would be impossible to give the particulars which the statute requires shall be stated in such certificate.

"Nothing is better settled," says the present Chief Justice, in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59, "than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The purpose of the sixth section, requiring the certificate, was not to prevent the persons named in the second article of the treaty from coming into the country, but to prevent Chinese laborers from entering under the guise of being one of the classes permitted by the treaty. It is the coming of Chinese laborers that the act is aimed against.

It was said in the opinion in the *Lau Ow Bew case*, in speaking of the provision that the sole evidence permissible should be the certificate: "This rule of evidence was evidently prescribed by the amendment as a means of effectually preventing the violation or evasion of the prohibition against the coming of Chinese laborers. It was designed as a safeguard to prevent the unlawful entry of such laborers, under the pretence that they belong to the merchant class or to some other of the admitted classes."

It was also held in that case that although the literal wording of the statute of 1884, section six, would require a certificate in the case of a merchant already domiciled in the United States and who had left the country for temporary purposes,

*animo revertendi*, yet its true and proper construction did not include his case, and the general terms used in the act were limited to those persons to whom Congress manifestly intended to apply them, which would be those who were about to come to the United States for the first time, and not to those Chinese merchants already domiciled in the United States who had gone to China for temporary purposes only, with the intention of returning. The case of *Wan Shing* v. *United States*, 140 U. S. 424, was referred to, and attention called to the fact that the appellant therein was not a merchant but a laborer, who had acquired no commercial domicil in this country, and was clearly within the exception requiring him to procure and produce the certificate specified in the act. The ruling was approved, and the differences in the two cases pointed out by the Chief Justice.

To hold that a certificate is required in this case is to decide that the woman cannot come into the country at all, for it is not possible for her to comply with the act, because she cannot in any event procure the certificate even by returning to China. She must come in as the wife of her domiciled husband or not at all. The act was never meant to accomplish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly and reasonably construed, it does not do so. If we hold that she is entitled to come in as the wife, because the true construction of the treaty and the act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife.

In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned

Statement of the Case.

in the treaty as entitled to enter, then that person is entitled to admission without the certificate.

These views lead to the affirmance of the judgments, and they are accordingly

*Affirmed.*

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## WALSH *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 90. Submitted December 13, 1899. — Decided February 26, 1900.

By an act of Congress passed in 1828, a large quantity of land was granted to the State of Ohio for the construction of canals. The act provided that such canals, "when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States." The grant was accepted by the State; but in 1894, the state legislature authorized the abandonment of certain canals, which had been constructed under the act of Congress, and the leasing of the same to a railroad company.

Held, that there was reason to claim that the act of 1894 impaired the obligation of the previous contract between the State and the Federal Government, and that a Federal question was thereby raised.

Held, further, that in accepting the Congressional land grant of 1828, there was no undertaking on the part of the State to maintain the canals as such in perpetuity, and that the Government was only entitled to their free use as long as they were kept up as public highways, and that the act of the legislature of Ohio, authorizing their abandonment as canals and leasing them to a railway company, did no violence to the contract clause of the Constitution.

Held further, that a private property owner was no party to the contract between the State and the Federal Government, and stood in no position to take advantage of a default of the State in respect to its contract. His rights were entirely subsidiary to those of the Government, and if the latter chose to acquiesce in the abandonment of the canals, he had no right to complain.

This was a petition filed in the Court of Common Pleas of Franklin County, Ohio, by the plaintiff Walsh, to enjoin the defendant railroad company from entering upon the property of the Lancaster Lateral Canal Company, and upon plaintiff's premises, and from constructing a railroad thereon, and for

a decree declaring a certain act of the General Assembly of Ohio giving it permission to do so to be null and void.

The case was determined upon demurrer to the petition, which set forth, substantially, the following facts: On February 4, 1825, the General Assembly of the State passed "an act to provide for the internal improvement of the State of Ohio, by navigable canals," 23 Ohio Stat. 50, among which was the Ohio Canal, extending from the mouth of the Scioto River through the State of Ohio to Lake Erie, and passing through the village of Carroll in the county of Fairfield. On February 8, 1826, the Lancaster Lateral Canal Company was incorporated by act of the General Assembly, 24 Ohio Laws, 71, and authorized to construct and operate a canal "from the town of Lancaster to such point of the Ohio Canal as shall be found most eligible." The village of Carroll was fixed upon as the terminus.

On May 24, 1828, Congress passed an act to aid the State of Ohio in the construction of its canals, 4 Stat. 305, by the fifth section of which act (printed in full in the margin)[1] Congress granted to the State 500,000 acres of land in that State for this purpose, with a proviso that "the said canals, when completed or used, shall be, and forever remain, public high-

[1] SEC. 5. And be it further enacted, That there be, and hereby is, granted to the State of Ohio five hundred thousand acres of the lands owned by the United States, within the said State, to be selected as hereinafter directed, for the purpose of aiding the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of said State, now in force, or that may hereafter be enacted, for the extensions of canals now making; which land, when selected, shall be disposed of by the legislature of Ohio, for that purpose, and no other: *Provided*, The said canals, when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same: *And provided further*, That the said canals, already commenced, shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales shall not be affected by that failure.

ways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same." The seventh section of the act declared that "this act shall take effect, *provided*, the legislature of Ohio, at the first session thereof, hereafter to commence, shall express the assent of the State to the several provisions and conditions hereof; and unless such expression of assent shall be made, this act shall be wholly inoperative."

Pursuant to this act, the General Assembly of the State of Ohio on December 22, 1828, passed an act expressly declaring the assent of the State to the provisions and conditions of the act of Congress. Under these acts the State received and took possession of the 500,000 acres of land provided by the grant, and from time to time sold and disposed of the same, and received from the proceeds of such sale somewhat more than $2,200,000.

The Lancaster Lateral Canal Company, incorporated as above stated, proceeded to construct and operate its canal under its charter until December 22, 1838, when it sold and conveyed the same to the State of Ohio, under an authority conferred upon the Board of Public Works, by an act passed March 9, 1838, for the sum of $61,241, which was paid to the company out of the funds realized by the State from the sale of the Congressional land grant. The canal was subsequently, under an act of the legislature, extended from its terminus in Lancaster to the town of Athens, in Athens County, was opened as a continuous line of canal for navigation purposes prior to January 1, 1842, and this extension was also paid for by moneys realized from the sale of the land grant.

The complaint further averred that "ever since the construction of said canal, which is and has been known as the Hocking Canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth."

On April 12, 1894, the Columbus, Hocking Valley and

Statement of the Case.

Athens Railroad Company, defendant herein, was organized and incorporated for the purpose of building a railroad from the city of Columbus through the counties of Franklin, Fairfield, Hocking and Athens to the city of Athens, and on the 18th day of May, 1894, the General Assembly of the State passed an act for the abandonment of the Hocking Canal for canal purposes and for leasing the same to this railroad company. (91 Ohio Stat. 327.) The act is printed in full in the margin.[1] The fourth section of the act provided that the rail-

[1] An act to provide for the abandonment of the Hocking Canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking Canal, from its junction with the Ohio Canal in the village of Carroll, Fairfield County, to its southeastern terminus in the village of Nelsonville, Athens County, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise and privilege of constructing, maintaining and operating over, upon and along the Hocking Canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns, for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said instalment of fifty thousand dollars shall be paid into the state treasury before the construction of said railroad is begun, and for the remaining instalments of rental the State of Ohio shall have a first lien upon said railroad, together with its switches, side tracks, bridges and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of state, secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that said company will faithfully build said railroad in compliance with the condition and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond

road company should have the exclusive right during the term of the lease (ninety-nine years) "to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad."

The plaintiff further averred that the defendant was making preparations to build its road upon the line of the canal, and was threatening to take possession of its property without having acquired the rights and interests in the said lands and tenements belonging to the plaintiff, whose lands are located on both sides of the Hocking Canal, about five miles north of the city of Lancaster, in Fairfield County, and without having purchased or acquired by condemnation or otherwise the right to enter upon said lands and to construct said railroad. That such road will constitute a permanent trespass upon plaintiff's property, and will place large addi-

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shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payments aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating a railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad: *Provided*, That when said railroad, its successors and assigns, cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

tional burdens upon his lands, which will render the same inconvenient and difficult of access; and great and irreparable injury will be done in the premises unless the defendant be restrained by an order of the court from taking possession of said canal and the said premises of plaintiff and constructing the railroad thereon.

The gist of the complaint lies in the allegation that the act of May 18, 1894, authorizing the abandonment of the canal, conflicts with that clause of the Constitution which provides that "no State shall pass any law impairing the obligation of contracts," and also with several provisions of the constitution of Ohio not necessary to be here enumerated.

A general demurrer was filed to this petition, which was sustained by the court and the petition dismissed. Plaintiff appealed the case to the Circuit Court, which also sustained the demurrer, whereupon plaintiff appealed the case to the Supreme Court of the State, which reversed the judgment of the Circuit Court, and ordered that the railroad company be enjoined from entering upon the lands of the plaintiff until it had condemned and paid for the additional burden of constructing and operating the railroad on the land according to law. 58 Ohio St. 123.

Upon motion of the plaintiff the court certified that, in the rendition of this judgment it became material to determine whether the act of May 18, 1894, was repugnant to the contract clause of the Constitution, and ordered it to be further certified that the court adjudged that it was not in violation of or repugnant to such clause, and that such act was valid and binding upon the plaintiff. Whereupon plaintiff sued out a writ of error from this court.

*Mr. J. B. Foraker*, *Mr. T. E. Powell* and *Mr. D. J. Ryan* for plaintiffs in error.

*Mr. D. L. Sleeper*, *Mr. C. H. Grosvenor* and *Mr. John J. Stoddart* for defendant in error.

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

Opinion of the Court.

1. Motion was made to dismiss the writ of error in this case for want of a Federal question. The decision of this motion was postponed to the merits, and we are now of opinion that it must be denied.

The position of the plaintiff is that, the act of Congress of May 24, 1828, granting to the State of Ohio 500,000 acres of land for the construction of canals, and providing that such canals, "when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States," and the acceptance thereof, by the General Assembly, constitute a contract by the State for the perpetual maintenance of such canals as public highways, at least until they were given up by consent of the United States, and that the subsequent act of the General Assembly of May 18, 1894, providing for the abandonment of such canals, without such consent being given, was obnoxious to that provision of the Federal Constitution declaring that no State shall pass a law impairing the obligation of contracts.

The main question then is, whether the acceptance of this act of Congress of 1828 by the General Assembly of Ohio should be interpreted as raising a contract by the State for the perpetual maintenance of these canals as public highways. We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation, it is for this court to determine whether such contract existed, as well as the question whether the subsequent legislation has impaired it. *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubted that the construction put by state courts upon their own statutes will be followed here. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McGahey* v. *Virginia*, 135 U. S. 662; *Douglas* v. *Kentucky*, 168 U. S. 488; *McCullough* v. *Virginia*, 172 U. S. 102.

We cannot say that it is so clear that the statute in question is not open to the construction claimed that we ought to dismiss the writ as frivolous, within the meaning of the cases

which hold that, where the question is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dismissed. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *N. O. Waterworks Co.*, 142 U. S. 79, 87; *Hamblin* v. *Western Land Co.*, 147 U. S. 531. If the statute were given the construction claimed by the plaintiff, it would be difficult to avoid the conclusion that the abandonment of the canal under the act of 1894, and its lease to the defendant railroad company, was a repudiation of the duty of the State to maintain it as a public highway; though the question would still remain whether the plaintiff would be in a position to take advantage of such default.

2. In disposing of this case the Supreme Court of the State of Ohio held (1) that the defendant railroad corporation had the power to build a railroad between the termini named, and to acquire by purchase or condemnation a right of way for its road, and other property necessary for its operation; (2) that the act of Congress of 1828, donating land to the State for the construction of canals, and the act of the General Assembly of the State accepting the same, did not constitute a contract for the perpetual maintenance of such canals; (3) that if such a contract existed, the plaintiffs in these suits were not parties to it; (4) that the Lancaster Lateral Canal Company did not acquire a fee simple in the lands, but a title for the uses and purposes of the canal, and the company could not, when the use ended, sell them to others, but the lands reverted to the owners of the freehold; (5) that by leasing the lands for the purposes of a railroad, the original easement in the lands was not extinguished, but passed to the purchaser, who took it subject to the duty of making compensation to the owner of the freehold for the additional burden imposed on the land, and such damages as might result to him from the new use.

We are concerned only with the second and third of these conclusions, which turn upon the construction to be given to the act of Congress of 1828. If, by the acceptance of this act by the General Assembly of the State of Ohio, the State

became irrevocably bound to keep up the canals for all time, for the use, not only of the Government, but of every one who incidentally profited by their preservation, it is impossible to escape the conclusion that their subsequent abandonment impaired the obligation of such contract. But we think the Supreme Court of Ohio was clearly right in its interpretation of the statute. The principal object of the act was a donation of lands to aid the State in works of internal improvement, which were then being extensively contemplated in the newer States of the West. Canals, at that time, embodied the most advanced theories upon the subject of internal transportation. Congress annexed as a condition to the grant that the canals built by its aid should "when completed or used, be and forever remain, public highways, for the use of the Government." Counsel for the defendant insists that, under the terms of the proviso, the obligation to maintain these canals as public highways existed only so long as they were "*used*" as such, and this was evidently the opinion of the Supreme Court of Ohio. Counsel for plaintiff insists, upon the other hand, with much reason, that the proviso, that "the said canals, *when completed or used*, shall be and ever remain public highways," marks the beginning of the time when the obligation was intended to operate — that is, if the canals were completed, or without being completed, were so far completed as to be capable of use, and were *used*, the obligation to maintain them in perpetuity attached. Whatever be the proper interpretation of these words, and they are by no means free from ambiguity, the dominant idea of the proviso was evidently to compel the State to maintain the canals as *public* highways, and to allow the Government free use of them "for any property of the United States, or persons in their service passing along the same." Whether the canals should be maintained forever as such, or should give place to more modern methods of transportation, was a matter of much less moment to the United States than to the State. The General Government was only interested in securing their use for the public, and the free transportation of its own servants and property. The object of the act was to facilitate and encourage public improve-

ments, but not to stand in the way of the adoption of more perfect methods of transportation which might thereafter be discovered. Had the question of internal improvements arisen ten or fifteen years later, when railways began to be constructed, it is quite improbable that the State would have embarked upon this system of canals, or that Congress would have aided it in the enterprise. Waiving the question whether the State could have abandoned the lands upon which these canals were built as public highways, we think it entirely clear that Congress could not have intended to tie the State down to a particular method of using them, when subsequent experience has pointed out a much more practicable method, which has supplanted nearly all the canals then in use. There was no undertaking to keep up the canals for all time, and we think the proper construction of the proviso is that the Government should be entitled to the free use of the canals so long as, and no longer than, they were maintained as public highways, and that the act of 1894, leasing these lands to the defendant for an analogous purpose, does no violence to the contract clause of the Constitution.

Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the Supreme Court of Ohio, through several changes in its personnel, holding it to be within the power of the State to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it, *Hubbard* v. *City of Toledo*, 21 Ohio St. 379; *Little Miami Elevator Co.* v. *Cincinnati*, 30 Ohio St. 629; *Fox* v. *Cincinnati*, 33 Ohio St. 492, affirmed by this court, 104 U. S. 783; *Hatch* v. *Railroad Co.*, 18 Ohio St. 92; *Malone* v. *City of Toledo*, 28 Ohio St. 643; *State* v. *Board of Public Works*, 42 Ohio St. 607; *Pennsylvania & Ohio Canal Co.* v. *Commissioners*, 27 Ohio St. 14; *McComb* v. *Stewart*, 40 Ohio State, 647; *State* v. *Snook*, 53 Ohio State, 531; but the State of Ohio does not stand alone in affirming this principle. *People* v. *Kerr*, 27 N. Y. 188; *Lexington &c. Railroad* v. *Applegate*, 8 Dana, 289; *West* v. *Bancroft*, 32 Vermont, 367; *Haldeman* v. *Pennsylvania Central Railroad*, 50 Penn. St. 425; *Chase* v. *Sutton Mfg. Co.*, 4 Cush. 152.

In addition to this, however, the plaintiff stands in no position to take advantage of a default of the State in this particular. He was not a party to the contract between the state and the Federal Government; his rights were entirely subsidiary to those of the Government; and if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain. He can only sustain this bill upon the theory that his rights are equal to those of the Government, and that he can call upon the State to maintain the canal for his benefit.

The case of *Grinnell* v. *Railroad Company*, 103 U. S. 739, is pertinent in this connection. That was an action in ejectment brought by a railroad company to recover certain parcels of its land grant, upon which the defendants had settled and asserted rights under the homestead and preëmption laws of the United States. Their defence was that the company had no title, because it had lost whatever right it had to the lands by a change in the location of the road, and because locating the road as it was completed did not bring these lands within the limits of the land grant act. The court held that the lands, being within the limits of the first location, the construction of the road on the new line did not annul or defeat, without further action on the part of the United States, the title thus vested; that Congress had consented to the change without any declaration affecting the title already vested in the company by the first location, and that defendants were bound thereby. In delivering the opinion of the court, Mr. Justice Miller observed: "Another point equally fatal to the plaintiffs in error is, that the assertion of a right by the United States to the lands in controversy was wholly a matter between the Government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the Government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the Government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the Government itself can only assert by some direct proceeding. These plaintiffs had no right to stir

up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the Government. Then the land would be subject to homestead or preëmption rights."

A similar case is that of *Van Wyck* v. *Knevals*, 106 U. S. 360. In that case the railroad company had filed a map of definite location, and the land department had withdrawn the odd-numbered sections appropriate thereto; but in constructing the road the company departed from the line indicated. The lands in dispute were within ten miles of the road as built and of the line delineated on the map. They were entered by Van Wyck, who received a patent for them, and Knevals, who had acquired his rights from the railroad company, filed a bill against Van Wyck seeking to charge him as trustee for the lands, and the court decreed a conveyance accordingly. The defendant attacked the right of the company to the grant, alleging that it never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior it changed the route of the road for a part of the distance. The court held, however, that the company had constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of Congress; that if the whole of the proposed road had not been completed any forfeiture consequent thereon could only be asserted by the United States through judicial proceedings or through the action of Congress. "A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property."

The only contract in this case was between the State of Ohio and the United States. Plaintiff was neither party nor privy to such contract. It was within the power of the Government to prosecute the State for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course and has deemed it proper to acquiesce in the abandonment of the canals and in the State turning them over to the railroad

company, it does not lie in the mouth of the plaintiff to complain. This disposes of every question called to our attention in the briefs of counsel.

The plaintiff is amply protected by the decree of the Supreme Court enjoining the railroad company from entering upon his lands until payment has been made, after proper proceedings, for the increased burden caused by the use of the lands for the railroad. If any taking of the lands consequent upon the remanding of the cause for the purpose stated should suggest ulterior questions they do not arise there, and would not be concluded by an affirmance of the decree now before us for review.

The decree appealed from is therefore

*Affirmed.*

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VOUGHT *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY. Error to the Supreme Court of the State of Ohio. No. 92. Submitted February 26, 1900.

MR. JUSTICE BROWN delivered the opinion of the court.

This was also a petition by a land owner for damages which he avers will be caused by the abandonment of the canal. The case took the same course as the case of *Walsh*, and the same judgment was rendered. So far as the constitutional question is concerned, the cases are precisely alike, and the judgment is accordingly

*Affirmed.*

This was submitted with No. 90, *ante*, 469, and by the same counsel.

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## WRIGHT *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 91. Submitted December 13, 1899. — Decided February 26, 1900.

The Federal question set up in the assignment of errors is precisely the same as the one set up in No. 90, *ante*, 469, and No. 92, *ante*, 481, and being the only one called to the attention of the court by counsel, those cases are followed in this.

Statement of the Case.

THIS was also a petition in the same court to enjoin the railroad company from entering upon or taking possession of the canal property and constructing a railroad thereon, but in certain particulars differs from the case already considered.

Plaintiff averred that he is the owner in fee simple of a certain tract of land in the county of Hocking, through and along which said canal passes; that he is also the owner of a mill located on said land on the south side of the canal, which is now and has been for many years past operated by water power supplied by the canal; that such mill was originally constructed before the location and construction of the Hocking Canal, and was run and operated by water power from the Hocking River until the canal was constructed, when it became necessary to appropriate the Hocking River and the water power which had been used to supply his mill for the purposes of the canal; that at that time the land and the mill were owned by one Worthington, who entered into a contract with the State, by which the latter agreed to enlarge and forever maintain the dam across the Hocking River above the grist mill, in order to afford an ample supply of water, in consideration of his granting to the State the right to construct the canal through his lands; that the canal was constructed and the dam built in pursuance of such contract, and that all the water power necessary to operate the mill has been supplied from the said canal and the Hocking River up to the present time; that the plaintiff is the present owner of the land by deeds from Worthington, and that the grist mill has been supplied by such power from the Hocking River and the canal from the date of the construction of the canal, a period of fifty-seven years; that, relying upon such contract, he has made improvements and repairs upon said mill, put the same in excellent condition, and is doing a large and profitable business; that, if the defendant is permitted to enter upon the canal and construct its railroad, the water power will be cut off and destroyed, and the property rendered of little value; that he is also the owner of other lands on both sides of the canal for a long distance, to the amount of

a thousand acres, and that the construction of the railroad will place increased burdens upon his lands, and cut off and destroy his access to parts of them through the highways, and that he will be deprived of watering privileges for his stock.

A general demurrer was filed to this petition, which was sustained by the court and the petition dismissed. Plaintiff appealed to the Circuit Court, which also sustained the demurrer and dismissed the petition. Whereupon plaintiff appealed the case to the Supreme Court of the State, which affirmed the judgment of the Circuit Court, whereupon plaintiff sued out a writ of error from this court.

*Mr. J. B. Foraker*, *Mr. T. E. Powell* and *Mr. D. J. Ryan* for plaintiffs in error.

*Mr. D. L. Sleeper*, *Mr. C. H. Grosvenor* and *Mr. John J. Stoddart* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Plaintiff insisted before the Supreme Court that he made the improvements on his mill with reference to the contract between the State and the Federal Government, but the Supreme Court was of opinion that he had no legal right to make investments on the faith of a contract between others to which he was not a party or privy, and insist for that reason the contract should be observed by either of the parties; that, so far as related to the contract between Worthington and the State, his remedy would be in damages for breach of the contract, and not an injunction against the company entering upon the lands purchased from the State in which he had no interest. The decree against him was therefore affirmed.

The Federal question set up in the assignment of errors was precisely the same as in the other cases, and the issues which arise from such assignments are the only ones called to our attention by counsel. The judgment of the Supreme Court is therefore

*Affirmed.*

# WARBURTON *v.* WHITE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 101. Argued January 16, 1900. — Decided February 26, 1900.

The statute of Washington Territory of November 14, 1879, providing that one half of community property of husband and wife should be subject to the testamentary disposition of the husband or wife, subject respectively to the community debts, and, in default of such testamentary disposition that the share of the deceased husband or wife should descend to his or her issue, and if there was no such issue should pass to the survivor, does no violation to the Constitution of the United States, when applied to such community property held under the statute of that Territory of November 14, 1873, which provided that property acquired after marriage by either husband or wife, except such as might be acquired by gift, bequest, devise or descent, should be common property, of which the husband should have the entire management and control, with the like absolute power of disposition as of his own separate estate.

This case involves the title to a lot of land in the city of Tacoma, in the State of Washington. The pertinent facts presenting the controversy are as follows:

Prior to 1877, Eli G. Bacon and Sophia D. Bacon were husband and wife and citizens and residents of the then Territory of Washington. In the year named, Bacon, the husband, with community funds, that is, with money acquired after his marriage with his wife, Sophia D. Bacon, purchased the real estate in question and took title thereto in his own name, the property being used as the residence of the husband and wife.

At the time of the purchase the laws of the Territory of Washington provided, with reference to community or "common" property, as it was termed in the earlier statute, as follows: By an act approved November 14, 1873, (Laws of 1873, Wash. Ter. p. 450,) the property acquired after marriage by either husband or wife, except such as might be acquired by gift, bequest, devise or descent, was declared to be "common property," and it was further provided that the husband should have the entire management and control of such property,

Statement of the Case.

"with the like absolute power of disposition as of his own separate estate." There was also in force an act approved November 12, 1875, (Laws of 1875, Wash. Ter. p. 53,) providing that upon the death of the husband or wife the whole of the "community" property, subject to the community debts, should go to the survivor.

Subsequently to the purchase of the real estate in question, by an act approved November 14, 1879, (Laws of 1879, Wash. Ter. p. 77,) it was, however, provided that one half of the community property should be subject to the testamentary disposition of the husband or wife, subject respectively to the community debts, and in default of such testamentary disposition that the share of the deceased husband or wife should descend to his or her issue, and if there was no such issue should pass to the survivor. On July 28, 1880, Mrs. Bacon died intestate, leaving surviving her the following children, her only heirs at law, viz.: Matilda B. White and Amelia McDonald, two daughters by a first marriage, and Ellen T. Nelson, a daughter by the marriage with Mr. Bacon.

In August, 1892, twelve years after the death of his wife, Bacon became indebted to Stanton Warburton, plaintiff in error, and the latter recovered a judgment upon such indebtedness in April, 1895. Upon an execution issued on the judgment, a judicial sale was made on March 2, 1896, to Warburton of the interest of Mr. Bacon in the property in controversy; and — after confirmation by the court and the expiration of the time allowed by law for redemption — a deed was duly made to Warburton by the sheriff of Pierce County, Washington, on May 4, 1897. Twenty days thereafter, Warburton instituted an action in the Superior Court of said Pierce County, against the aforementioned children and heirs of Mrs. Bacon, to quiet his title to said lot against alleged adverse claims of said heirs. A joint answer to the complaint was filed on behalf of all the defendants, setting up the facts as to the acquisition of the property by Bacon, the death of Mrs. Bacon intestate while the title to the community property was still in Bacon, and asserting that the defendants had an undivided interest therein as heirs of their mother.

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Thereafter, on October 12, 1897, Mrs. Nelson conveyed to the plaintiff whatever interest she had in the property. An amended answer was filed on behalf of the two remaining defendants, reiterating the main allegations of the former answer; setting up that the defendant, Amelia McDonald, for a valuable consideration, had sold and conveyed to her codefendant and sister, Mrs. White, before the commencement of the action, all her interest in said real estate; and it was prayed that the latter might be adjudged the absolute and unqualified owner in fee simple of an undivided one third of the property. A reply was filed to this amended answer, admitting that the lot in question was purchased with community funds, "and that the said property became then and there the community property" of Mr. and Mrs. Bacon, and that Bacon still held title thereto on the decease of his wife.

The cause was heard by the court without a jury upon an agreed statement which embodied the facts above recited, and the additional fact that intermediate the purchase by plaintiff at the sheriff's sale and the purchase by him from Mrs. Nelson, Bacon had died intestate. Each of the parties submitted conclusions of law to be deduced by the court from the facts stated. To a proposition submitted for the defendant, upholding her claim to an undivided one third interest in the property, the plaintiff duly excepted as follows:

"II. Plaintiff excepts to the proposed conclusion of law numbered II on the ground that it is contrary to the findings of fact and the law; on the further ground that under the laws in force at the time the property was purchased and the deed taken, E. G. Bacon was the owner of the property, and was entitled to the succession to all the property in case of the prior death of Mrs. Bacon, and that at the death of Mrs. Bacon, in 1880, Mr. Bacon was the owner in fee simple of all said property; that to give the law of 1879, entitled 'An act regulating and defining the property rights of husband and wife,' approved November 14, 1879, the construction, effect and force given by the court, to wit, that it took away from Mr. Bacon the right of succession to the whole of the property and the right to dispose of it, would be to

give it a retroactive force, contrary to section 31 of said act, and to give it such a retroactive force and take away the right of survivorship in said property, and take away the right to dispose of it would be contrary to article 1, section 10, of the Constitution of the United States, in that it would impair the obligation of the deed or contract by which Mr. Bacon acquired said property, and would deprive said Bacon, his successors and assigns, of the right of survivorship in the property in controversy, which was a vested right under the contract or deed and the laws in force in the Territory at the time the property was acquired. Plaintiff further excepts to said conclusion on the ground that if said law is given said effect and force above mentioned it would be depriving Mr. Bacon, his successors and assigns, of property without due process of law, and contrary to and in contravention of amendments of the Constitution of the United States, and plaintiff claims the protection of both said provisions of the Constitution of the United States."

The court decided as matter of law that the defendant Mrs. White was, as claimed by her, the owner of an undivided one third interest in the property, and was entitled to a decree quieting her title thereto. From the decree thereupon entered, so far as it sustained the claim of said defendant, the plaintiff appealed to the Supreme Court of the State of Washington. That court affirmed the judgment and denied a petition for rehearing. 18 Wash. St. 511. A writ of error having been allowed, the cause is now here for review.

*Mr. S. Warburton* for plaintiff in error. *Mr. Frederic D. McKenney* was on his brief.

*Mr. Charles S. Fogg* for defendant in error. *Mr. James Hamilton Lewis* was on his brief.

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

The law of the Territory of Washington approved Novem-

ber 14, 1879, provided that in case of intestacy the share of a deceased husband or wife, in community property, should pass to the legal issue of the intestate, and in default of such issue should go to the surviving husband or wife, as the case might be. It is undoubted that if the decision of this cause is to be controlled by this enactment, there is no error in the record.

The error asserted is predicated on the claim that, under the laws of the Territory of Washington existing at the time the property was bought, there was in fact no such thing as community property, since by those laws property bought during marriage with community funds was subject to the disposition of the husband as if it were his separate property, and he was entitled to the whole of the community property in case of the death of his wife before him. The effect of this state of the law in force at the time of the purchase, it is claimed, was in substance to make him the real owner of the property.

The argument is that if the provisions of the law of 1879, previously referred to, conferring on the husband or wife testamentary power to dispose of his or her interest in the community property subject to the community debts, and also providing that in case of intestacy such interest, subject to the debts aforesaid, should descend to the children of the deceased and should only pass to the survivor in default of issue, be given a retroactive effect so as to be operative upon property acquired before the act of 1879, the consequence will be to impair the obligations of the contract of purchase made by the husband, which is at issue in this case, and besides to deprive him of his property without due process of law. This, it is asserted, will be the necessary legal effect, since to cause the statute of 1879 to be operative, upon community property bought by the husband before the enactment of that statute, will be the equivalent of giving to one person the testamentary power to dispose of the property of another person, or, in the absence of a will, amounts to providing that the death of one person intestate shall transmit to the issue of such person property not owned by the deceased intestate, but which belongs to another and distinct living person.

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It is manifest that this proposition rests upon the assumption that the act of 1873 which was in force when the property was bought by the husband, with community money, made the property so bought solely and exclusively that of the husband, and hence that the wife had no community interest in it. This follows because if under the act of 1873, the wife had a community interest in property bought with funds of that character, then the transmission of the wife's estate in accordance with the act of 1879, and contrary to the rule of descent provided by the act of 1875, in force at the time the property was purchased, cannot possibly bring about the consequences upon which the argument is based. The result just stated must be the case, since if when the property was acquired the wife had an interest in it, the mere change of the law or rule of inheritance existing when the property was bought would be lawful. Manifestly the proposition that the Territory of Washington had a right to regulate both the power of testamentary disposition of property and the passage thereof in case of intestacy is too elementary to require more than mere statement.

The fallacy which is involved in the contention that under the laws in force at the time the property was bought by the husband, with community money, it became exclusively his, and that the wife had no community interest therein, is plainly demonstrated by a consideration of the import of the laws of Washington existing at the time the purchase was made, as construed both by the Supreme Court of the Territory and of the State of Washington. To these adjudications we shall now refer.

The nature of common or community property, within the Territory of Washington, as such property was constituted by the act of 1873, and the operation of the act of 1879 upon property of that character acquired prior to the passage of the latter act was considered in 1882 in the case of *Holyoke* v. *Jackson*, 3 Wash. Ter. 235. The question for decision in that case was whether, while the act of 1879 was in force, a husband could, without his wife joining, make a valid contract to sell community property acquired prior to 1879. In decid-

ing this question in the negative the court, in the course of the opinion, said (p. 238) :

"By the provisions of the husband and wife acts passed in 1879, and previously, the husband and wife were conceived as constituting together a compound creature of the statute called a community. . . . In it the proprietary interest of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis* — a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon the husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate,' bestowed by the ninth section of the act of 1873, was a mere power conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done."

In 1893, the Supreme Court of the State of Washington, in the case of *Hill* v. *Young*, 7 Wash. St. 33, considered the nature of common or community property under the act of the Territory approved December 2, 1869, defining the rights of husband and wife. The provisions of the acts of 1869 and 1873, it may be added, were identical, the act 1869 having been repealed by an act passed in 1871. The suit was for partition

of land which had been acquired by a husband with community funds, while the act of 1869 was in force. The husband still held title to the community property in 1883, when the wife died, leaving a child and her husband surviving. It was contended that the power to dispose of the common property conferred by section 2 of the act of 1869 upon the husband was a vested right which could not be taken away by any subsequent statute. Replying to this contention, the court said (p. 38):

"But it is not necessary to decide this point. The act of 1869 having declared certain property 'common' property, did not make provision for the disposal of such property upon the death of either spouse, as was done by later laws on the same subject; but we think that, without anything further than was contained in that act, the courts of the Territory would have been bound to administer upon such property, after the death of husband or wife, according to the established rules of those States and countries where common or community property laws had existed. The first and cardinal of such rules was that the community was dissolved by the decease of either spouse; next the right of disposal in either spouse was ended; and, third, the property became vested by moieties in the survivor and the children. Therefore, upon the death of Mrs. Hill, in 1883, even if the act of 1869 was the only law applicable to this land, the right of the husband to dispose of the whole estate terminated."

In the subsequent case of *Mabie* v. *Whittaker*, 10 Wash. St. 656, the provisions of the law of 1869 were again considered. Land had been purchased on August 10, 1871, by one Mabie, with community funds, during the existence of the act of 1869. While Mabie held the legal title, the legislature repealed the act of 1869, and on November 29, 1871, an act was approved which, in section 12, provided that the husband should have the management of all the common property, but should not have the right to sell or incumber real estate without the joinder of his wife. By section 22 it was provided that common property should be partnership property, and that the share of the wife should be one half thereof, and should be to

her and her heirs forever. On October 25, 1874, after the death of his wife leaving issue, Mabie executed a deed purporting to convey all of the land to one Hallett. Ejectment was brought by the surviving child to be let into possession of the land as tenant in common, etc. It was contended for the defendants that whatever the nature of the interest of Mrs. Mabie in the land, the right of Mabie under the act of 1869, in force when the land was purchased and title taken by Mabie, to convey the entire title could not be impaired by subsequent legislation. The court, however, said (p. 658):

"But, leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title, under the former law, after her death, and cut off her heirs, we think the subsequent act took away his power to do so. It was immaterial whether the record title to the community lands stood in the name of the husband or of the wife, or of both of them, when considered with reference to the power of the legislature to authorize either or both of them to convey. The legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less. Furthermore, prior to the conveyance to Hallett, the community in question had been dissolved by the death of the wife, and at the time of her death the law of 1871, relating to the descent of community property, was in force. Laws 1871, p. 73, sec. 22; Abb. Real Prop. St. 478, provided that: 'The common property being partnership property, the wife's share shall be one half thereof and shall be hers and her heirs forever; and her share of the common property may be increased so as to be more than one half, by the wife's compliance with the provisions of section five of this act.'"

In the course of the opinion, discussing and overruling a further contention, based upon the common law, that Mabie and wife held the land in question as joint tenants with a right of survivorship, the court said (p. 659):

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"The act of 1869 did not fix the status of such property, other than to declare it to be common property, and made no provision for its descent. Nor was there at that time, nor for some time thereafter, any express legislative recognition of estates in joint tenancy.

* * * * *

"The statute of 1871 did not undertake to divest any right which had become vested. Mabie, receiving this conveyance under the act of 1869, thereby became the owner of an undivided one half interest in the land, and his wife thereby became the owner of the other half. Her right was as much a vested right as his. Under the weight of authority, the legislature had power to change the law of descent, and could take away the right of survivorship, as to estates in joint tenancy, and make the same applicable to lands already acquired. Cooley Const. Lim. 5th ed. 440; Freem. Coten. sec. 36, and cases cited by each; also *Miller* v. *Dennett*, 6 N. H. 109. Section 22, aforesaid, is substantially a statute of descent. It has the technical and apt words of such a statute, 'hers and her heirs forever,' which indicate the legislative intent. There was also a general statute of descent in force, which could more logically be applied to community estates than could the doctrine of joint tenancy. St. 1862, p. 261; Abb. Real Prop. St. 375–378. Subsequently, another act was passed to regulate the descent of real property. Laws 1875, p. 55. Section 2 provided, 'Upon the death of husband and wife, the whole of the community property, subject to the community debts, shall go to the survivor.' This statute continued in force until November, 1879, when an act was passed (Laws 1879, p. 77), section 13 of which was as follows: 'In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor subject to the community debts, and to the exclusion of collateral heirs, the family allowance and the charges and expenses of administration.'

In neither of these acts were community lands referred to as being held in joint tenancy, and the only reference of the kind thereto is contained in the act aforesaid, passed in 1885, subsequent to all of them."

Next discussing the proposition that a partnership was not a joint tenancy, the court, after calling attention to the fact that by the act of 1871 provision was made for the descent of the wife's share in community property, thus cutting off the husband's right of succession as survivor, concluded on that branch of the case as follows (p. 662):

"We know of no instance, judicial or otherwise, where such doctrine of joint tenancy has been recognized or applied, in the history of the State and Territory, and none has been called to our attention. We are of the opinion that the universal belief and course of acting has been contrary thereto, and that the right of taking by survivorship has at no time existed, as to community lands, here, except under the statute of 1875, providing for such descent."

The rule announced in the foregoing cases was reiterated in the opinion delivered in the case at bar, it being held that Bacon did not become the sole owner of the property in question by the purchase in 1877, but that it became and continued community property so long as the community existed, and that the descent of such property was subject to regulation at will by the legislature.

Now, it cannot in reason be denied that the decisions from which we have just quoted held that the purpose of the legislature of Washington, whether territorial or state, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system — that is, that property acquired during marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property when

sold by him becoming an acquêt of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community.

The argument of the plaintiff in error then comes to this: That although the statutes of the Territory of Washington, which were continued in force within the State on the organization of the state government, have been construed by the state court contrary to the view now urged upon this court, nevertheless this court should disregard such judicial construction and treat the statutes as conferring rights which the highest tribunal of the State has held never arose from them. It is claimed that where a contract is asserted to have been impaired by a subsequent statute it is the duty of this court to determine for itself the nature and extent of the contract, where the subsequent legislation has been by the decision of the court held operative upon or enforced against the alleged contract rights. The doctrine is elementary, but the principle which it embodies is subject to a well-settled qualification, which is, that where it is asserted that a contract has been entered into on the faith of the state laws, existing at the time when it was made, the construction of such laws, which was settled at the time of the making of the contract, by the court of last resort of the State, will be adopted and applied by this court in considering the nature of the contract right relied upon. This rule, however, it is argued, is not applicable in this case, because it is said that all the decisions of the Supreme Court of Washington referred to were announced since the contract of purchase by the husband was made, and therefore the interpretation, which these decisions expound, cannot be considered as having entered into and formed a part of the contract, since they were not in existence when the contract was made. From this it is argued that the decisions in question do not, therefore, relieve this court of the duty of interpreting for itself, as a matter of first impression, the laws of the Territory or of the State of Washington which are here involved, and upon the faith of which, it is asserted, the obligations arising from the contract took being.

Whilst abstractly considered the proposition is conceded, it

is not apposite to the controversy here presented. The rule is subject to a limitation, which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature; in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the State, and thus conform to the rule of property within the State. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Miller* v. *Ammon*, 145 U. S. 421, 423.

Applying the principle just stated to the case before us, we feel no hesitation in construing the contract of purchase, which is here in question, in accordance with the nature and extent of community property, as settled by the decisions of the Supreme Court of Washington, interpreting the laws which were in existence when the purchase was made. Obviously, the reasoning of the plaintiff in error, upon which the assumption that community property bought during the existence of the act of 1873 was solely the property of the husband, involves not only a contradiction in terms but invokes at the hands of this court, in order to overthrow the rule of property in the State of Washington, an interpretation of the statutes of that State which is not only confusing, but self-destructive. It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated the community system, and that in consonance therewith the statute referred to treated property acquired during marriage with community money as community or common property. Although this is patent, the argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and render it impossible, under the statute, for community or common property

to exist. In other words, the interpretation relied upon asked us to say that because of a provision which simply pointed out how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about a result which was contrary to its express language, providing for the existence of the community system. It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property. As the property in question had not been sold by the husband, but on the contrary was held by him at the date of the death of the wife, no question is presented on this record of the nature and scope of his authority during the existence of the marriage, and we intimate no opinion on that subject.

We have been cited to a decision of the Supreme Court of California, *Spreckels* v. *Spreckels*, 116 Cal. 339, construing an act somewhat similar to the Washington act of 1873, which it is claimed is in conflict with the views enunciated by the courts of Washington in determining the proper construction of the statute of 1873 and the nature of an estate vested in a husband by virtue of that act. But the case referred to involved only the validity of the exercise by a husband, during the existence of a community, of the power of dominion and control over the community property, and the right of the legislature to modify such authority and control with respect to prior acquired community property. We are, therefore, unable to perceive the pertinency of that decision to the question arising for determination on this record, and we need not, therefore, review or consider it.

There being no error in the judgment of the Supreme Court of the State of Washington, that judgment is

*Affirmed.*

Syllabus.

# BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY *v.* VOIGT.

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

No. 88. Argued December 20, 21, 1899. — Decided February 26, 1900.

The railway company, being engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. Voigt made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to his application, was employed by the express company under a contract in writing signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be com-

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pelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. *Held*, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood*, 17 Wall. 357; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

The following statement and question were certified to this court by the Judges of the Circuit Court of Appeals for the Sixth Circuit:

"This was an action brought by William Voigt, the defendant in error, against the Baltimore and Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which, a fast passenger train, he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was travelling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above-mentioned contract between his company and the railway company. The answer of the railway company set up two grounds of defence. The first admitted that Voigt was an express messenger on its train, but denied that he was travelling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defence, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

"'For a second and separate defence the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more employés of said express company should accompany said goods in said cars over the said line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employés of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employés or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and

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injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company), upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employés of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defence it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company and not otherwise.'

"To this second defence a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a

defence to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 560. The decision of the court went upon the ground that although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers travelling by a train of a common carrier, and further that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff and the damages were assessed at the sum of $6,000.00, and judgment was thereupon entered that the plaintiff recover that sum with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defence of the answer of the defendant, and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company, which, for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employés, and to which the employé agrees, upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employé of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself for liability from the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and, therefore, upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

Statement of the Case.

"*Question.*

"A railroad company, engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify

and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume, toward such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employés of the railroad company?"

*Mr. Edward Colston* for plaintiff in error. *Mr. Judson Harmon*, *Mr. A. W. Goldsmith* and *Mr. George Hoadly, Jr.*, were on his brief.

*Mr. Charles M. Cist* for defendant in error. *Mr. Edgar W. Cist* was on his brief.

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

The question we are asked to answer is, whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by

invoking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence?

The Circuit Judge thought the case could not be distinguished from the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, where a recovery was maintained by a drover injured whilst travelling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover travelling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Railway Co.* v. *Stevens*, 95 U. S. 655; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing &c. Co.* v. *Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public

policy to consider — that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of *Railroad Co.* v. *Lockwood:* "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put aside the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the *Lockwood case* as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million.

He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier may present; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual

shipper or passenger, dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the *Express cases*, 117 U. S. 1, and from the opinion in that case we shall make some pertinent extracts:

"The express business has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purpose of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the Government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

* * * * *

"When the business began, railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true that no railroad company in the United States has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter. Express companies undoubtedly have invested their capital and built up their busi-

ness in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. These contracts, as is shown by those in this record, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. . . .

"The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have, from the beginning, been provided for

the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another express company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. . . .

"In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 28,000 miles; and the Southern, ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements

with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases in which the opinion from which the foregoing extracts are taken were suits brought by certain express companies which had been doing business on certain railroads, under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of

the contract between the plaintiff in error, The Baltimore and Ohio Southwestern Railway Company, and The United States Express Company, but it is sufficiently disclosed in the statement made by the Judges of the Circuit Court of Appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employés of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employés of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the ex-

press company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no local compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employé than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business — the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employé of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow-servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doc-

trine of public policy than was justified by the facts and reasoning in the *Lockwood case*.

This subject has received attentive consideration in several of the state courts.

In *Bates* v. *Old Colony Railroad*, 147 Mass. 255, it was held that if an express messenger holding a season ticket from a railroad company and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under the contract as construed in this case. See *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Griswold* v. *New York & New England Railroad*, 53 Conn. 371. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. . . . The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as

those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of *Hosmer* v. *Old Colony Railroad*, 156 Mass. 506.

*Robertson* v. *Old Colony Railroad*, 156 Mass. 526, was an action brought for personal injuries caused to the plaintiff, an employé of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring, and it was held that, as the defendant company was under no common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

*Griswold* v. *New York & New England Railroad*, 53 Conn. 371, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The Supreme Court of Michigan, in *Coup* v. *Wabash, St. Louis &c. Railway Co.*, 56 Michigan, 111, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo

to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held, that such transportation was not a transaction with a common carrier as such; that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the Circuit Court of Appeals of the Seventh Circuit, citing *Coup* v. *Railroad Co.*, 56 Michigan, 111, and *Robertson* v. *Old Colony Railroad*, 156 Mass. 506, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from *Railroad Co.* v. *Lockwood:* "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." *Chicago, Milwaukee & St. Paul Railroad* v. *Wallace*, 24 U. S. App. 589.

*Louisville, New Albany & Chicago Railway* v. *Keefer*, 146 Indiana, 21, 34, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger and the railroad company were in terms similar to those existing in the present case, and the defence was the same as that made here. It was held that the contracts were valid and that the defence was good. It was said:

"Under the doctrine declared in the *Express cases*, 117 U. S. 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known

to the law by which the right, either as to the goods or appellee as messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the Supreme Court of Indiana, in *Pittsburgh, Cincinnati &c. Railway* v. *Mahoney*, 148 Indiana, 196, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employé of an express company of all liability for injuries sustained by the negligence of the employé or otherwise includes the liability of the express company to hold a railroad company, with which it does business, harmless against claims by employés of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employé of such express company.

A precisely similar question was presented in the case of *Blank* v. *Illinois Central Company*, and was decided the same way, by the Appellate Court for the First District of Illinois, in an opinion rendered March 14, 1899. 80 Ill. App. 475. The court cites the *Express cases*, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the Supreme Court of Illinois. 182 Illinois, 332.

The same doctrine prevails in the State of New York. *Bis-*

*sell* v. *New York Central Railroad*, 25 N. Y. 442; *Poucher* v. *New York Central Railroad*, 49 N. Y. 263. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *Railroad Co.* v. *Lockwood* to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the Government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith* v. *Nashville & Decatur Railroad*, 57 Fed. Rep. 165; *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435; *Ketcham* v. *New York, Lake Erie &c. Railroad*, 133 Indiana, 346; *Seybolt* v. *Railroad Co.*, 95 N. Y. 562.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the Government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

*Brewer* v. *New York, Lake Erie & Western Railroad*, 124 N. Y. 59, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified and protected against all risks and liabilities. But the court put its judgment against the railroad company

expressly upon the ground that the messenger had no knowledge or information of the contract between the companies, and was not himself a party to the agreement to exempt the railroad company.

*Kenney* v. *N. Y. Cent. &c. Railroad*, 125 N. Y. 422, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent to or knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employés. The rule is firmly established in this State that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed and not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*."

*Chamberlain* v. *Pierson*, 59 U. S. App. 55, 64, in the Circuit Court of Appeals of the Fourth Circuit, was a case in which an express messenger was injured while travelling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

"The discussion of this feature of the case presents this question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his

duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy. Accordingly,

*We answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.*

Mr. Justice Harlan, dissenting.

In *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 384, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover travelling on a pass, such as was given in this case, is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of *Railroad Co.* v. *Lockwood*, and that the judgment should be affirmed upon the broad ground that the defendant corpora-

tion could not, in any form, stipulate for exemption from responsibilty for the negligence of its servants or employés in the course of its business whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

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## MATTESON *v.* DENT.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 124. Submitted January 29, 1900. — Decided February 26, 1900.

As a general rule, the legal owner of stock in a national banking association — that is, the one in whose name stock stands on the books of the association — remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable for contributions in case of the insolvency of the bank.

The exceptions to this general rule so far as established by decisions of this court are: (1) That where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner be held liable; (2) That where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, those acts will operate a transfer on the books, and extinguish the liability, as stockholder, of the transferrer; (3) Where stock was transferred in pledge, and the pledgee for the purpose of protecting his contract caused the stock to be put in his name as pledgee, and a registry did not amount to a transfer to the pledgee as owner.

On October 31, 1864, Sumner W. Matteson became the owner of ten shares of capital stock of the First National Bank of Decorah, established in the city of Decorah, State of Iowa, and the shares were duly registered on the books of the bank in his name. In July, 1895, Matteson, whilst the stock was yet owned by him and still stood registered in his name, died intestate at St. Paul, Minnesota, where he resided,

leaving surviving his widow and six children, two of whom were minors. The probate court of Minnesota having jurisdiction over his estate appointed an administrator, who filed an inventory in which was embraced the shares of stock in question. In September, 1896, a final account having been previously filed by the administrator, a decree turning over the estate, including the ten shares of stock, was entered. Under this decree the widow and heirs took the ten shares of stock in indivision in proportion to their interest in the estate; that is to say, the widow became the owner of an undivided third interest in the stock and each of the children, there being six, of a one ninth interest therein, thus the widow owned three ninths of the ten shares and each of the six children one ninth. No notice of the death of Matteson or of the allotment in question was conveyed to the bank, nor was any transfer of the stock on the books of the bank operated at the time of the allotment or subsequent thereto. Indeed, under the proportions of undivided ownership of the stock in the widow and heirs, it was impossible to have registered on the books of the bank in the name of each owner separately according to their respective ownership in the ten shares without some further partition of the undivided ownership existing between them. It follows that the stock which stood on the books of the bank in the name of Matteson during his life continued to so stand after his death, so remained at the time of the allotment, and was so registered at the time this suit was brought. On November the 10th, 1896, the bank became insolvent and was closed by the Comptroller of the Currency, who on the 24th of November, 1896, appointed a receiver. In January, 1897, in order to pay the debts of the bank, under the authority conferred on him by law (Rev. Stat. § 5151), the Comptroller made an assessment upon the shareholders of one hundred dollars upon each share, and proceedings for its enforcement were by him directed to be taken. The assessment not having been paid, although due notice was given to do so, the receiver sued in the state court of Ramsey County, Minnesota, the widow and children of Matteson, as next of kin, asking judgment for the amount

of said assessment. The suit was in conformity to the General Statutes of 1894 of Minnesota, which, in sections 5918 *et seq.*, permitted an action to be brought against all or one or more of the next of kin of a deceased person, by the creditor of an estate, to recover the distributive shares received out of such estate, or so much thereof as might be necessary to satisfy a debt of the intestate or of his estate. Service was had only upon the widow and one of the children. A general demurrer to the complaint was filed and overruled, and the order so overruling the demurrer was, upon appeal, affirmed by the Supreme Court of the State. 70 Minn. 519. Thereafter the demurring defendants answered setting forth in substance their non-liability to pay said assessment under the statute of the United States governing the winding up of insolvent national banking associations. A motion for judgment upon the pleadings was thereupon made and granted, and judgment was entered in favor of the receiver against Louise M. Matteson, and Charles D. Matteson, and each of them, in the sum of one thousand dollars with interest and costs. On appeal to the Supreme Court of the State of Minnesota, that court affirmed the judgment. 75 N. W. Rep. 1041. A writ of error was allowed, and the judgment of affirmance is now here for review.

*Mr. Edmund S. Durment* and *Mr. Albert R. Moore* for plaintiffs in error.

*Mr. Frank B. Kellogg*, *Mr. Daniel W. Lawler*, *Mr. George R. O'Reilly* and *Mr. Fitzhugh Burns* for defendant in error.

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

The questions arising on this record involve a consideration of sections 5918 *et seq.* of the General Statutes of the State of Minnesota and of the sections of the Revised Statutes of the United States which are in the margin.[1]

[1] Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and

Leaving out of view for the moment the legal effect of the allotment of the ten shares of stock to the next of kin of Matteson, let us consider what, if any, liability rested upon his estate to pay the assessment on the ten shares of stock which stood at his death in his name, and so remained up to the time of the allotment. Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders, to contribute

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transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.

* * * * * *

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 invested in such shares; except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

Sec. 5152. Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own name.

to pay debts, ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of the payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder. The principle controlling the subject was quite clearly stated by Shipman, J., in *Davis* v. *Weed*, 7 Fed. Cas. 186. There, stock of a national bank stood in the name of a person who died in January, 1871. Nearly one year afterwards, on December 12, 1871, the bank became insolvent, and more than five years thereafter several assessments were made by order of the Comptroller of the Currency, and an action was instituted against the administrator to enforce payment. Two defences were interposed by the administrator, as follows: 1, that the estate of the decedent had been settled according to law, prior to the assessments, and that as there were no assets in the hands of the administrator at the time of the demand and he had fully administered the estate and had received no assets since the demand, no judgment could be rendered against him; and, 2, that inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liability, if any, was against the administrator, who, by section 5152 of the Revised Statutes, was freed from personal liability, and was only liable to the extent of the trust estate and funds in his hands at the time of the demand.

The first contention was held untenable, upon a consideration of the statutes of Connecticut in regard to the settlement of estates, and the presentation, allowance and payment of claims against the estates of solvent deceased persons. In disposing of the second contention the court said:

"The original liability of the intestate to pay the assessments which may be ordered by the Comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud."

The question was settled in *Richmond* v. *Irons*, 121 U. S. 27, where the court said (pp. 55, 56):

"Under the national banking act the individual liability of the stockholders is an essential element of the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. *Flash* v. *Conn*, 109 U. S. 371; *Hobart* v. *Johnson*, 19 Blatchford, 359. In Massachusetts it was held, in *Grew* v. *Breed*, 10 Met.

569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."

And a similar determination as to the nature of a responsibility like the one in question has been arrived at by the state courts in decisions on kindred statutes, and, indeed, its correctness is not controverted by any authority to which we have been referred or which we have been able to examine. The accepted doctrine finds nowhere a more lucid statement than in the courts of New York. Thus, in *Bailey* v. *Hollister*, 26 N. Y. 112, judgment having been recovered against a manufacturing company upon indebtedness which arose in the years 1849, 1850, 1851, 1852 and 1853, an action was brought, after return of execution unsatisfied, to recover the same debt from the personal representatives of the estate of one Kirkpatrick, on the ground that when such indebtedness was contracted the estate of Kirkpatrick was a stockholder, and, as such, personally liable under the charter of the company. Kirkpatrick had died intestate in 1832, and the stock stood on the books of the company in his name until 1844, when it was entered in a new stock ledger in the name of the estate, which thereafter received dividends. The facts of this transfer and the payment of dividends were not, however, in the opinion of the court treated as material factors in the decision. The court, in an opinion delivered by Gould, J., said (p. 116):

"It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds not from any new contract, made by or on behalf of the estate, but is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder,

and binding his personal representatives, as it bound him, as long as the relation of stockholder existed."

And it may be added, the law presumes, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives. *Kernochan* v. *Murray*, 111 N. Y. 306.

The doctrine enunciated in *Bailey* v. *Hollister*, as above stated, was later applied in *Cochran* v. *Wiechers*, 119 N. Y. 399, 403, where the court held that liability imposed by statute upon stockholders in limited liability companies to respond for the debts of the company, "to an amount equal to the amount of stock held by them respectively," was in the nature of a contract obligation, which survived the death of the stockholder. The court, after approvingly quoting a portion of the opinion of Gould, J., above excerpted, added (p. 404):

"The liability of the estate of the deceased stockholder under the statute is so well established, upon principle and authority, that further discussion is unnecessary. *Chase* v. *Lord*, 77 N. Y. 1; *Flash* v. *Conn*, 109 U. S. 371; *Richmond* v. *Irons*, 121 U. S. 27."

The debt then being one due by the estate of Matteson, if the allotment of the shares in indivision be not considered, the question then is, taking the allotment into view, what was its effect? The argument is that the next of kin to whom the allotment was made can only be held responsible to the extent of the interest which they took in the stock, and therefore there was error committed in enforcing the whole amount of assessment against the next of kin who were served, to the extent of the distributive share of the property of the estate received by them. But this contention directly conflicts with the interpretation of the statutes of Minnesota by the court of last resort of that State in this case. It is clear that, by necessary implication, it was decided that by the statutes of Minnesota under which the allotment in indivision was made, the heirs or next of kin remained, by operation of law, to the extent to which they received the property of the estate, subject to be sued and to respond to the debts of the estate existing at the time the allotment took place. But the rights arising

from the allotment, under the statutes of Minnesota, cannot be greater than those which the statutes in question conferred. The contention, therefore, amounts to this, that in so far as the statutes of Minnesota operated in favor of the participants in the allotment the statutes are to be respected, but to the extent that they imposed obligations upon the allottees they are not bound thereby. It is argued, however, that as by the law of Minnesota the liability to be called upon to pay a debt of the estate, to the extent of the distributive share received, depended solely upon whether there was such debt existing at the time the allotment was made, and as there was no such debt in the present instance, no duty to respond arose. This is predicated upon the assumption that because the insolvency happened after the allotment, therefore there was no debt at the time of the allotment. This assumes that whether there was a debt depended upon the date of the insolvency. In effect, this is but to argue that the estate was never liable at all. Such clearly is the essence of the proposition, for if it be that whether there was a debt is to be alone ascertained by the happening of insolvency and not by referring to the date of the subscription, then where insolvency occurred after the death of the stockholder, there would be no responsibility. The unsoundness of this view has been already demonstrated. Moreover, the Supreme Court of Minnesota, in effect, in this case has held that the statute of that State making the allottees liable, each to the amount of their distributive share, for the debt of the estate embraced a contract liability, to pay an assessment, contingent on the happening of insolvency, although that event had not taken place at the time of the allotment.

The contention is next made that conceding there was a debt of the estate, and granting that the statute embraced a preëxisting contract obligation which had not ripened into an actual demand because insolvency had not taken place, nevertheless the court below erred, because by the effect of the allotment the estate had ceased to exist and all its property had passed to the allottees. This but reiterates the misconception already disposed of. Whether the effect of the allotment

was to extinguish the estate, was wholly dependent on the Minnesota law. That law, as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract, and liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question.

These considerations would dispose of the case, since they demonstrate that no substantial Federal question was involved but for the fact that it is claimed that, as under the statute of the United States each stockholder in a national bank can only be liable to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, therefore the enforcement of the liability for the whole amount against one of the allottees deprives him of the benefit of the Federal statute and involves a misconstruction of its provisions. This contention was considered and adversely decided below. It is conceded that no notice of the allotment was ever given to the bank, and that the stock in question was never registered in the name of the allottees. But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association — that is, the one in whose name stock stands on the books of the association — remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable. *Upton* v. *Tribilcock*, 92 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; *Webster* v. *Upton*, 91 U. S. 65; *Pullman* v. *Upton*, 96 U. S. 328; *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479; and *Richmond* v. *Irons*, 121 U. S. 27, 58. This principle thus settled as to the stockholders in national banks is in entire accord with the rule established by state courts in construing statutes containing substantially similar provisions. In *Shellington* v. *Howland*, 53 N. Y. 371, 376, it was said:

"There may have been a transfer by the defendant of his stock to the corporation in 1869, valid as between the parties to the transaction, and sufficient to vest the equitable title in the transferee, but the transfer was not consummated in the form required by statute, so as to affect the rights of strangers or to relieve the defendant from his legal liability to third persons for the debts of the corporation. . . . The transfer of stock, *quoad* the public, is not complete until entered on the book designated by statute. An entry upon the books of registry of stockholders is required for the protection of the company and its creditors, and each may hold the stockholders to their liability as such until they have divested themselves of the title to their shares by a completed transfer, as prescribed by law. No secret transfer will avail to release the stockholder from his obligations, or deprive the creditors of the corporation of the right to look to him as the responsible party liable for the debts of the corporation."

Indeed, this doctrine is so universally settled that it is treated as elementary. See Thompson on Corporations, sections 3283 and 3284.

True it is that exceptions have been engrafted upon this doctrine as to national bank stockholders by decisions of this court, but none of them are germane to the matter now considered. Cases enunciating certain of the exceptions referred to are cited in the following summary:

1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded and the real owner be held liable. *Germania National Bank* v. *Case*, 99 U. S. 628, 631, 632; *Bowden* v. *Johnson*, 107 U. S. 251, 261.

2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books, and extinguish the liability as stockholder of the transferrer. *Whitney* v. *Butler*, 118 U. S. 655. In the case just cited, in applying the exception, the court very carefully and accurately restated the general rule.

3. Where stock was transferred in pledge, and the pledgee

for the purpose of protecting his contract caused the stock to be put in his name on the books as pledgee, it has been held that such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable although the pledgor might continue to be so. *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606.

These and other cases unnecessary to be referred to do not impair, but, on the contrary, serve to prove the general rule. As in the case now before us the stock remained on the books in the name of Matteson, continued as a liability of the estate and was never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the Minnesota statute.

*Judgment affirmed.*

## JACKSON *v.* EMMONS.

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

No. 157. Submitted February 2, 1900. — Decided February 26, 1900.

On motion of the plaintiff made after commencement of the trial of this case, a juror was withdrawn, the remaining jurors were dismissed, and leave was given to the plaintiff to amend his declaration within a time named, and the case was continued for the term. Subsequently, on motion of the defendants' attorney, made after notice to plaintiff, the time within which the amendment could be filed was enlarged, and the plaintiff was ordered to pay the costs of the term in which the juror was withdrawn. The plaintiff declined to pay those costs and the court dismissed the case. *Held* that the trial court erred in so doing, as whatever conditions or rights the defendants were entitled to in consequence of the plaintiff's motion should have been asserted and adjudged when that motion was made.

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

*Mr. Joseph J. Waters* for plaintiff in error.

*Mr. William F. Mattingly* for defendants in error.

Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for damages. The ground of it is injuries to the wife of the plaintiff in error, and to his house by blasting rock near the latter.

The allegation is that "by such blasting" the defendant "unlawfully and forcibly, with great and dangerous violence, threw large and heavy pieces of said rocky formation from time to time into the premises . . . and near said ground occupied and held by said plaintiff under a yearly ground rent, with other rights and privileges, and against the house and habitation on said premises, which house was and is owned by said plaintiff, and was used and occupied during said period by said plaintiff and his family as a dwelling."

Damages are laid at six thousand dollars.

The defendant's plea is not guilty; and further, that the cause of action did not accrue within three years.

The case came on to trial before a jury, and the record shows that on December 8, 1897, "after a partial hearing of the case, the plaintiff by leave of the court withdraws a juror, and the remaining jurors are discharged from further consideration of the case, with leave to amend his declaration as advised within twenty days, and the case is continued for the term."

Subsequently, on motion of the attorney for the defendants, and after notice to plaintiff, the order limiting plaintiff's time to amend was rescinded, and he was given twenty days from the seventh of January, 1898, to amend his declaration, and was ordered to pay the costs of the term in which the juror was withdrawn.

On the 27th of January the plaintiff served on the defendants' attorney the following notice:

"1225 31ST STREET, *Jan.* 27, 1898.

"WM. F. MATTINGLY, Esq.,

*Atty. for Geo. E. Emmons, etc.*

"We intended in good faith to change or 'amend' our declaration in the case of Jackson *v.* Emmons and Smith, so

as to avoid unnecessary appeals, but the 'amendment' since made to the leave giving us, (at your request,) compelling us to pay unexpected costs, induces us to elect not to amend now, especially as on further investigation we are confirmed in the opinion that Jackson is the legal owner of the house he complains of as damaged; so please notice that we stand upon our declaration now as originally filed.

"Very respectfully yours,

"J. J. Waters,

"*Atty. for Robt. Jackson.*"

On March 8, 1898, the defendants gave notice that they would move "the court to dismiss the suit or to take such other action in the premises as may be lawful and proper."

And on the 25th of March the following order was made:

"The plaintiff though granted leave to amend his declaration on the 7th day of January, 1898, within twenty days, and that he pay the costs of the October term, 1897, has not so amended or paid said costs, and it appearing upon the records that the plaintiff declines to so amend, therefore the defendants move the court to dismiss this suit, which is granted; therefore it is considered that the plaintiff take nothing by suit, and that the defendants go thereof without day and recover against the plaintiff their costs of defence, to be taxed by the clerk, and have execution thereof. Penalty of bond on appeal fixed at $50.00."

On March 26, 1898, the plaintiff moved the court to vacate the order of dismissal, and supported it by an affidavit of what had transpired at the trial inducing his action of withdrawing a juror and taking the order to amend his declaration. It is also stated that "Afterwards, before plaintiff's time to amend had expired, defendants moved to compel him to pay costs of the past term, being $19.70, as given by the clerk of the court, as a condition of amending, and affiant wished time to see if his client could comply with this when required by the court, so as to avoid controversy, but, finding his client could not comply in time, as said client is very poor and a colored laborer and that it was not necessary to his

case to amend, affiant elected not to do so, and to avoid misunderstanding so informed defendant's counsel by the letter he exhibits with his motion to dismiss."

The motion to vacate the order dismissing the case was denied, and the plaintiff took an appeal to the Court of Appeals, which affirmed the ruling of the lower court, and this appeal was then taken.

The trial court erred in dismissing the case. If the original order granting leave to amend had been made conditional upon the payment of costs the plaintiff might or might not have accepted it. To decline to amend afterwards upon conditions which were not exacted or even, as far as the records show, were not contemplated, cannot be charged against him as misconduct. Indeed, there is no question of his good faith, and whatever conditions or rights the defendant was entitled to in consequence of the motion should have been asserted and adjudged when the plaintiff's motion was made. If such rights had been asserted the plaintiff would have had a choice of yielding or not yielding to them, which afterwards could not be exercised.

*We think, therefore, the judgment of the Court of Appeals should be reversed with costs, and the cause remanded with directions to reverse the judgment of the Supreme Court, and it is so ordered.*

## THE PANAMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 127. Argued November 3, 1899. — Decided February 26, 1900.

No general rule of international law exempts mail ships from capture as prize of war.

A Spanish mail steamship, carrying mail of the United States from New York to Havana at the time of the breaking out of the recent war with Spain, was not exempt from capture by the sixth clause of the President's proclamation of April 26, 1898.

At the time of the breaking out of the recent war with Spain, a Spanish mail steamship was on a voyage from New York to Havana, carrying a general cargo, passengers and mails, and having mounted on board two breech-loading Hontoria guns of nine centimetre bore, and one Maxim rapid-firing gun, and having also on board twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. Her armament had been put on board more than a year before, for her own defence, as required by her owner's mail contract with the Spanish Government, which also provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel, and, in these and other provisions, contemplated her use for hostile purposes in time of war. *Held*, that she was not exempt from capture as prize of war by the fourth clause of the President's proclamation of April 26, 1898.

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

*Mr. J. Parker Kirlin* for appellant.

*Mr. Assistant Attorney General Hoyt* for appellees. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, of counsel for the captors, were on his brief.

*Mr. George A. King* and *Mr. William B. King*, solicitors for certain captors, filed a brief on their behalf.

Mr. Justice Gray delivered the opinion of the court.

This was a libel for the condemnation of the steamship Panama as prize of war, and was heard in the District Court upon the libel, the claim of the master in behalf of the owner of the vessel, and the depositions *in preparatorio* of her master, her supercargo, and her chief engineer, which showed the following state of facts:

The Panama was a steamship of 1432 tons register; was owned by the Compania Transatlantica, a corporation of Barcelona in Spain; sailed under the Spanish flag; had a commission as a royal mail ship from the Government of Spain; carried a crew of 71 men all told, who had been shipped at different times at Havana; and her usual course of voyage included the ports of New York and Havana, and Progreso, Vera Cruz and other Mexican ports, with general cargoes, passengers and mails.

Opinion of the Court.

Her last voyage began in Havana, for a round trip by way of New York, and was to have ended in Vera Cruz. She sailed from New York at half past two o'clock in the afternoon of April 20, 1898, with a clearance from the custom-house at that port for Havana, Progreso, and Vera Cruz, having on board the United States mails, 29 passengers (all Spaniards except one Frenchman) and a general cargo, the produce or manufacture of the United States, shipped at New York, and to be delivered, at the risk of the shippers, to consignees at those ports. She pursued the usual course of ships bound southward along the coast until she passed Alligator Reef light on the coast of Florida, and then bore away for Havana, and sighted the Cuban coast on the morning of April 25; and on that day, when about twenty-five miles from Havana, was captured by the United States ship of war Mangrove, and was sent in charge of a prize crew into Key West. She had no military or naval officer on board, made no resistance to the capture, and delivered all her papers and mails to the prize master.

There were mounted on board the Panama, at the time of her capture, five guns: Two breech-loading Hontoria 9 centimetre guns, one on each side of the ship, with 30 rounds of shot for each; one Maxim rapid-firing gun, on the bridge, with ammunition; and two signal guns, one on each side of the pilot house, with ammunition. She also had on board about twenty Remington rifles, and ten Mauser rifles, with ammunition for each, and about thirty or forty cutlasses. The cannon had been put on board about three years before, and the small arms and ammunition had been on board a year or more. She was so armed in accordance with a contract with the Spanish Government, which required all the mail steamships of the company to be armed, and article 26 of which was as follows: "Every ship shall take on board, for her own defence, the following armament: Two Hontoria 9 centimetre guns, with powder and ammunition for 30 shots for each piece; twenty Remington rifles, with 100 rounds apiece, and bayonet or sword-bayonet; and twenty cutlasses."

The master of the Panama moved the court to allow further

proof upon the matters set forth in two test affidavits, filed by leave of the court, in which he testified more distinctly that the mounted guns and small arms which the Panama carried had not been shipped for the purpose of war, or in expectation of hostilities between the Spanish Government and the United States, but were taken on board pursuant to the requirements of that contract; and also testified that the Spanish Government had never taken possession of the Panama under the terms of the contract; and that until the capture he and his officers were ignorant of the existence of the war between Spain and the United States, and of any blockade of the port of Havana. And he asked leave to submit to the court the whole contract, as contained in a printed book, which was in the chart room of the Panama, and in the custody of the prize master, and which has since been sent up to this court as one of the exhibits in the cause.

By that contract, concluded between the Spanish Government and the Compania Transatlantica on November 18, 1886, and drawn up and printed in Spanish, the company bound itself to establish and to maintain for twenty years various lines of mail steamships, one of which included Havana, New York and other ports of the United States and of Mexico; and the Spanish Government agreed to pay certain subsidies to this company, and not to subsidize other steamship lines between the same points. Among the provisions of the contract, besides article 26, above quoted, were the following:

By article 25, new ships of the West Indian line must be of iron, or of the material which experience may prove to be the best; must have double-bottomed hulls, divided into watertight compartments, with all the latest improvements known to the art of naval construction; and "their deck and sides shall have the necessary strength to support the artillery that they are to mount." All the ships of that line must have a capacity for 500 enlisted men on the orlop deck, and a convenient place for them on the main deck. The company, when beginning to build a new ship, shall submit to the Minister of the Colonies her plans as prepared for commercial and postal service; "the Minister shall cause to be studied the measures

that should be taken looking to the rapid mounting in time of war of pieces of artillery on board of said vessel; and may compel the company to do such strengthening of the hull as he may deem necessary for the possible mounting of that artillery; said strengthening shall not be required for a greater number than six pieces whose weight and whose force of recoil do not exceed those of a piece of fourteen centimetres." The plans of ships already built shall be submitted to the Minister of Marine, in order that he may cause to be studied the measures necessary to adapt them to war service; and any changes that he may deem necessary or possible for that end shall be made by the company. But in both old and new ships the changes proposed by the Ministry must be such as not to prejudice the commercial purposes of the vessels.

By article 35, the vessels, with their engines, armaments and other appurtenances, must be constantly maintained in good condition for service.

By article 41, the officers and crews of the vessels, and, as far as possible, the engineers, shall be Spaniards.

By article 49, the company may employ its vessels in the transportation of all classes of passengers and merchandise, and engage in all commercial operations that will not prejudice the services that it must render to the State.

By article 60, when by order of the Government munitions of war shall be taken on board, the company may require that it shall be done in the manner and with the precautions necessary to avoid explosions and disasters.

By article 64, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's ships, the Government may take possession of them with their equipment and supplies, having a valuation of the whole made by a commission composed of two persons selected by the Government, two by the company, and a fifth person chosen by those four; at the termination of the war, the vessels with their equipment are to be returned to the company, and the Government is to pay to the company an indemnity for any diminution in their value, according to the opinion of the commission, and is also, for

the time it has the vessels in its service, to pay five per cent on the valuation aforesaid. By article 66, at the end of the war, the Government may relieve the company of the performance of the contract if the casualties of the war have disabled it from continuing the service. And by article 67, in extraordinary political circumstances, and though there be no naval war, the Government may charter one or more of the company's vessels, and in that event shall pay an indemnity estimated by the aforesaid commission.

The District Court denied the motion of the master to take further proof; restored parts of the cargo to claimants thereof; gave claimants of other parts of the cargo leave to introduce further proof; and entered a final decree of condemnation and sale of the Panama and the rest of her cargo, upon the ground that she was enemy's property, and was upon the high seas at the time of the President's proclamation exempting certain vessels from arrest. 87 Fed. Rep. 927. The court also, on the application of the commodore commanding at Key West, and on the recommendation of the prize commissioners, ordered all the mounted guns and the ammunition therefor to be appraised by two officers of the Navy, and delivered to the commodore for the use of the Navy Department. The master of the Panama appealed to this court from the decree condemning the vessel.

The recent war with Spain, as declared by the act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared, among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall

apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port, not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to be restored to her owner, but without damages or costs.

That case would be decisive of this one, but for the mails and the arms carried by the Panama, and the contract with the Spanish Government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar con-

ventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton, (8th ed.) pp. 659–661, Dana's note; Calvo, (5th ed.) §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in § 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

The provision of the sixth clause of the President's proclamation of April 26, 1898, relating to interference with the voyages of mail steamships, appears by the context to apply to neutral vessels only, and not to restrict in any degree the authority of the United States, or of their naval officers, to search and seize vessels carrying the mails between the United States and the enemy's country. Nor can the authority to do so, in time of war, be affected by the facts that before the war a collector of customs had granted a clearance, and a postmaster had put mails on board, for a port which was not then, but has since become, enemy's country. Moreover, at the time of the capture of the Panama, this proclamation had not been

issued. Without an express order of the Government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall. 28, 61.

The mere fact, therefore, that the Panama was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the Panama came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

On the part of the claimant, it was argued that the arms which the Panama carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband," as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the Panama carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she cannot be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances.

The claimant much relied on a case decided in 1800 by the French Council of Prizes, in accordance with the opinion and

report of Portalis, himself a high authority. Wheaton, (8th ed.) p. 460; De Boeck, § 81. In the case referred to, an American vessel, carrying ten cannon of various sizes, together with muskets and munitions of war, had been captured by French frigates; and had been condemned by two inferior French tribunals, upon the ground that she was armed for war, and had no commission or authority from her own government. The claimants contended that their ship, being bound for India, was armed for her own defence, and that the munitions of war, the muskets and the cannon that composed her armament did not exceed what was usual in like cases for long voyages. Upon this point, Portalis, acting as commissioner of the French government, reported his conclusion on the question of armament as follows: "For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded." The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51; *S. C.* 2 Cranch, 96–98, and note.

But in that case the only question at issue was whether a neutral merchant vessel, carrying arms solely for her own defence, was liable to capture for want of a commission as a vessel of war or privateer. That the capture took place while there

was no state of war between France and the United States is shown by her being treated, throughout the case, as a neutral vessel; if she had been enemy's property, she would have been lawful prize, even if she had a commission, or if she were unarmed. She was not enemy's property, nor in the enemy's possession, nor bound to a port of the enemy; nor had her owner made any contract with the enemy by which the enemy was, or would be, under any circumstances, entitled to take and use her, either for war, or for any other purpose.

Generally speaking, arms and ammunition are contraband of war. In *The Peterhoff*, 5 Wall. 28, Chief Justice Chase, delivering the judgment of this court, said: "The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." And it was adjudged that so much of the cargo of the Peterhoff, as consisted of artillery harness, artillery boots, and army shoes and blankets, came fairly under the description of goods primarily and ordinarily used for military purposes in time of war; and, being destined directly for the use of the rebel military service, came within the second, if not within the first class of goods contraband of war. 5 Wall. 58.

Yet it must be admitted that arms and ammunition are not contraband of war, when taken and kept on board a merchant

vessel as part of her equipment, and solely for her defence against "enemies, pirates and assailing thieves," according to the ancient phrase still retained in policies of marine insurance. Pratt, in his essay on the Law of Contraband of War, speaking of the class of "articles which are of direct use in war," says: "With respect to these no questions can arise. On proof of the use of the article being solely or particularly applicable to hostile purposes, the conveyance of it to the enemy would amount to such a direct interposition in the war as necessarily to entail the confiscation of the property." But he afterwards adds this qualification: "But even in the case of articles of direct use in war, an exception is always made in favor of such a quantity of them as may be supposed to be necessary for the use or defence of the ship." And again, speaking of "warlike stores," he says: "These are, from their very nature, evidently contraband; but every vessel is, of course, allowed to carry such a quantity as may be necessary for purposes of defence; this provision is expressly introduced in many treaties." Pratt, Contraband of War, xxii, xxv, xl. And at pages 239, 244, 245 of his appendix he quotes express provisions to that effect in the treaties between Great Britain and Russia in 1766, 1797 and 1801. See also *Cases of Dutch and Spanish Ships*, 6 C. Rob. 48; *The Happy Couple*, Stewart Adm. (Nova Scotia) 65, 69; Madison, quoted in 3 Whart. Int. Law Dig. § 368, p. 313.

But the fact that arms carried by a merchant vessel were originally taken on board for her own defence is not conclusive as to her character. This is clearly shown by the case of *The Amelia*, (1801) reported by the name of *Talbot* v. *Seeman*, 1 Cranch, 1. In that case, during the naval warfare between the United States and France near the end of the last century, a neutral merchant vessel, having eight iron cannon and eight wooden guns mounted on board, and a cargo of merchandise, sailed from Calcutta for Hamburg, both being neutral ports; and before reaching her destination was captured by a French cruiser, and put by her captors, with the cannon still on board, in charge of a French prize crew, with directions to take her into a French port for adjudication as prize; and on her way

thither was recaptured by a United States ship of war. The recapture was held to be lawful, and to entitle the recaptors to salvage before restoring the vessel to her neutral owner, because, as Chief Justice Marshall said, "The Amelia was an armed vessel commanded and manned by Frenchmen," "she was an armed vessel under French authority, and in a condition to annoy the American commerce." 1 Cranch, 32. And in *The Charming Betsy*, (1804) 2 Cranch, 64, that case was expressly approved, as a precedent to be followed under similar circumstances; but was held to be inapplicable where the arms on board at the time of the recapture were but a single musket and a small amount of powder and ball. 2 Cranch, 121. Notwithstanding that the Amelia was a neutral vessel, with an armament originally taken on board for defence only, and therefore, while in the possession of her neutral owner, would not (according to the French case above cited) have been liable to capture as an armed vessel, yet, after she had been taken possession of by the enemy, with the same armament still on board, and thus was in a condition to be used by the enemy for hostile purposes, the fact that the original purpose of the armament was purely defensive did not prevent her from being considered as an armed vessel of the enemy.

While the authorities above referred to present principles and analogies worthy of consideration in the case at bar, they furnish no conclusive rule to govern its determination. The decision of this case must depend upon its own facts, and upon the true construction of the President's proclamation.

As to the facts, there is no serious dispute. The matters stated in the test affidavits upon which the motion for further proof was based add nothing of importance to the facts disclosed by the testimony *in preparatorio*, and by the mail contract between her owner and the Spanish Government, which forms part of the ship's papers.

The Panama was a steamship of 1432 tons register, carrying a crew of 71 men all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the Government of Spain, and plying from and to New York and Havana and various Mexican ports, with

general cargoes, passengers and mails. At the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Hontoria guns of nine centimetre bore, one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish Government, (made more than eleven years before, and still in force,) which specifically required every mail steamship of the company to "take on board, for her own defence," such an armament, with the exception of the Maxim gun and the Mauser rifles.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the Government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The Panama was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms, (either as part of her equipment, or as cargo,) would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but

from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government."

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

Statement of the Case.

The result is, that the Panama was lawfully captured and condemned, and that the decree of the District Court must be *Affirmed.*

Mr. Justice Peckham dissented.

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## WEYERHAUESER *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 128. Argued and submitted January 30, 1900. — Decided February 26, 1900.

The provision in the statute of Minnesota for 1893, c. 151, authorizing the Governor of the State when it is made to appear that there has been a gross undervaluation of taxable property by the assessors for any county in the State, to appoint a board to revalue and reassess it, which board shall, after due examination, prepare a list of all such undervalued property, of the year or years in which it was so underassessed, the amount of the assessment and the actual and true value thereof for which it should have been so assessed, does no violation to the Fourteenth Amendment to the Constitution of the United States, and does not deprive the owner of lands, so reassessed at an advanced value, of his lands without due process of law.

This writ of error brings up for review a judgment of the Supreme Court of Minnesota affirming the judgment of the district court of Itasca County, assessing certain taxes for the years 1888 to 1893, inclusive, on the lands of the plaintiff in error.

The law upon which the proceedings in taxation were based, statutes of Minnesota of 1893, c. 151, omitting parts not material to the pending controversy, is as follows:

"Whenever it shall be made to appear to the governor of this State by a complaint in writing and under oath, or by the finding of any court, the legislature or any committee thereof, that for any reason any considerable amount of property in any county in this State . . . is assessed . . . has been grossly undervalued by the assessor or other county officials, whether such valuation and assessment has or has not been reviewed or acted upon by the county board of equaliza-

tion of any such county, he shall forthwith appoint in writing some competent citizen of this State, not a resident of such county, to ascertain the character, location, value and ownership of the real and personal property in any such county so . . . underassessed or undervalued, who shall forthwith proceed to examine and report upon the subject, and prepare a list or lists thereof in duplicate, showing therein the character, location, ownership and valuation of all such property, with the year or years for which the same or any part thereof has been . . . undervalued; said list shall also show therein opposite each tract, piece or parcel of land or personal property . . . underassessed for any year or years thereupon, in which the same was undervalued or underassessed, with the amount of such assessment, the actual and true value thereof at the time and for which the same was subject to and should have been assessed, together with the difference between the assessed and actual value thereof as so found. One of which duplicate reports or lists shall be by him filed with the county auditor of such county on or before the first day of January in the year in which any such assessment is to be made, and the other of said lists shall be by him filed within the same time with the state auditor."

It is provided in other sections of the law that the county auditor shall enter the lists on the assessment books, and that the assessor shall assess the property at its true value corresponding with the lists, and the auditor shall proceed as under the general law.

The taxes which are in controversy were assessed under this law, and proceedings were instituted for their recovery in accordance with the usual practice in collecting taxes against lands in Minnesota.

The plaintiffs in error claimed in their answer that the law of the State and the proceedings under it were repugnant to the Constitution of the United States, in that they impaired the obligation of the contracts made by plaintiffs in error with their grantors, deprived them of their property without due process of law, and denied them the equal protection of the laws.

Statement of the Case.

The facts were stipulated as follows:

"It is hereby stipulated between the parties to the above-entitled action that the following are, and may be considered by the court, as facts in said matter:

"That the defendants above named are the owners of the lands described in their answer in this proceeding; that the defendants became the owners of such lands on September 18, 1893; that in each of the years 1888, 1889, 1890, 1891, 1892, 1893 and 1894, taxes were assessed upon all said lands by the proper officials pursuant to the provisions of chapter XI, General Statutes of 1878, and the amendments thereto, and that such taxes for each of said years were, before the same became delinquent, paid by the defendants and their predecessors in estate; that the taxes sought to be recovered against said lands in this proceeding are claimed to be due by reason of an assessment made pursuant to the provisions of chapter 151, General Laws 1893, upon the ground that said lands in said prior assessment proceedings had been grossly undervalued.

"That prior to January 1, A.D. 1894, it was made to appear to the Governor of this State, by duly verified complaint, that a considerable amount of property in said county of Itasca had been grossly undervalued in the tax proceedings for the years from 1888 to 1893, inclusive; that thereupon and forthwith the said Governor did, in writing, appoint a competent citizen of this State, not a resident of said county, to ascertain the character, location, value and ownership of the real and personal property in said county so omitted, underassessed or undervalued, to wit, one J. S. Dedon; that thereupon the said Dedon did forthwith proceed to examine and report upon the subject, and did prepare a duplicate list of such lands as he determined had been so underassessed or undervalued, in the manner and form as prescribed in section one of said chapter 151, General Laws 1893; that thereafter, and prior to January 1, A.D. 1894, the said duplicate lists were filed with the state auditor and with the county auditor of said Itasca County; that thereafter the county auditor and county assessor of said Itasca County took the proceedings in regard to said lands described in said lists, which are prescribed in section two of said chapter 151.

Statement of the Case.

"That the said lands so owned by these defendants were returned as undervalued lands for each of said years from 1888 to 1893, inclusive, and were entered by the county auditor upon the real estate assessment books for the year 1894, and were assessed by the assessor of said Itasca County at the respective values shown by said lists, and were also entered by the county auditor upon the assessment and tax books for each of said years from 1888 to 1893, inclusive, and were assessed by him at the valuation and amounts as shown by said lists to have been omitted or undervalued, and arrearages of taxes by reason of said increased valuation were extended upon said assessment books, and the taxes claimed in this proceeding are the proper amount of taxes claimed in this proceeding, which would be due against said lands on account of said increased valuation if such tax were legal and valid and could be collected in this proceeding.

"That no notice of any of said proceedings by any of said persons in making said reassessment or revaluation of said lands, or in extending said taxes against said lands, was ever given, by publication or otherwise, to these defendants."

The trial court found in accordance with the stipulation, and further found as a conclusion of law that the proceedings for levying and assessing the taxes were in accordance with the provisions of chapter 151, General Laws of 1893, but that the said law and the proceedings therein provided were unconstitutional, and the taxes, therefore, not a legal charge against the lands.

The judgment was reversed by the Supreme Court and the taxes sustained. 68 Minnesota, 353.

The court in its opinion confined its consideration to the validity of the law under the constitution of the State, and did not pass upon the claim that it was also in violation of the Constitution of the United States. After the judgment was entered in compliance with its mandate by the district court the case was again certified to the Supreme Court in accordance with the practice of the State.

The certificate recited the facts which have already been set out, and "that the points raised by the defendants [plain-

tiffs in error] herein are as follows, to wit: 1. Is chapter 151, General Laws of 1893, of the State of Minnesota, and the assessment of taxes attempted to be made thereunder in this proceeding, constitutional and legal? 2. In particular, is said chapter 151 and the assessment of taxes attempted to be made in pursuance thereof in this proceeding, in violation of article fourteen of the amendments to the Constitution of the United States, providing that no State shall deprive any person of his property without due process of law, or deny to any person within its jurisdiction equal protection of the laws?"

The Supreme Court affirmed the judgment. 72 Minnesota, 519.

*Mr. George Welwood Murray* for plaintiffs in error. *Mr. Moses E. Clapp* and *Mr. John B. Atwater* were with him on the brief.

*Mr. W. B. Douglas* and *Mr. C. W. Somerby*, for defendant in error, submitted on their brief.

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

The procedure under the statute is as follows: A complaint to the Governor of the State that a considerable amount of property has been grossly undervalued by the assessor or other county officials.

The appointment by the Governor of a competent person to examine and report, and if he find undervalued property to prepare a list in duplicate showing its character, location, ownership and valuation, one of which lists shall be filed with the county auditor.

The entry of the list on the assessment books by the auditor.

The assessment of the property at its value corresponding to the list.

Proceedings by the county auditor as under the general law.

Opinion of the Court.

This procedure was exactly followed, and it is stipulated that "the taxes claimed in this proceeding are the proper amount of taxes due against said lands on account of said increased valuation. . . ." In other words, the lands have not been made to bear a greater burden than they would and should have borne if they had been originally assessed at their true valuation. It is, however, claimed that the increased taxation is illegal because the law authorizing it offends the Fourteenth Amendment of the Constitution of the United States.

The grounds of the contention are that the former assessments constituted judicial judgments, and hence to commit to the executive the power of setting them aside or to set them aside without notice or opportunity to be heard is not due process of law. And further, that the statute deprives the plaintiffs in error of the equal protection of the laws, in that it gives to owners of similar real estate an opportunity to contest the absolute assessed valuation of their property and to plaintiffs in error only the opportunity to contest the gross overvaluation; and that if the State knew of fraud in the assessments it is estopped to assert it against an innocent party, which plaintiffs in error are claimed to be, and as the statute ignores this doctrine of estoppel, it does not provide due process.

Conceding, *arguendo*, that the former assessments were judicial judgments, the argument based on their immunity from executive power or attack is not supported by the statute. It does not commit to the Governor control over them, and it does give opportunity to be heard. The Governor only starts the inquiry upon which the reassessment may be based, and the statute directs the proceedings in an orderly course of inquiry, report, entry upon the assessment books, assessment by the assessor and an action for the collection of the taxes levied in the regular judicial tribunals.

The complaint of plaintiffs in error seems to be that a hearing before the Governor was not provided. If the basis of this is that the owner of property must have notice of every step in taxation proceedings, we agree with the Supreme Court of the State that it is untenable. *Pittsburg &c. Railway* v. *Board*

*of Public Works*, 172 U. S. 32; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526. If the basis of the complaint is that the Governor acts judicially and plaintiffs in error were entitled to have notice, and be heard before he rendered judgment, it is also untenable. The Governor does not act judicially — he determines nothing but that a complaint has been made in writing and under oath, or that it has been found by a court, or the legislature or any committee thereof, that a considerable amount of property in a county of the State has been grossly undervalued. If the perception of the fact of a complaint or a finding of a court or legislature is a judgment in the sense urged, every act of government is a judgment, and all of its exercises could be stopped, upon the reasoning of plaintiffs in error, by perpetual hearings. But supposing the Governor's act is a judgment, it ends with the appointment of an examiner. What is substantial comes afterwards, and if against what may be detrimental in that the landowner can be heard, he is afforded due process within the rule announced by the authorities, *supra*.

That the landowner is provided with an opportunity to be heard is decided by the Supreme Court of the State. In the opinion in the case at bar the court said, quoting from *Redwood* v. *Winona & St. Peter Land Co.*, 40 Minnesota, 512, 518:

"Within 20 days after the last publication of the delinquent list any person may by answer interpose any defence or objection he may have to the tax. He may set up as a defence that the tax is void for want of authority to levy it, or that it was partially, unfairly or unequally assessed. *Comm'rs of St. Louis Co.* v. *Nettleton*, 22 Minnesota, 356. He may set up as a defence *pro tanto* that a part of a tax has not been remitted, as required by some statute. *Comm'rs of Houston Co.* v. *Jessup*, Id. 552. That the land is exempt, or that the tax has been paid. *County of Chicago* v. *St. Paul & Duluth R. Co.*, 27 Minnesota, 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist or any omissions in the proceedings prior to filing the list, resulting to his

prejudice. *County of Olmsted* v. *Barber*, 31 Minnesota, 256. The filing of the list is the institution of an action against each tract of land described in it for the recovery of the taxes appearing in the list against such tract and tenders an issue on every fact necessary to the validity of such taxes. *Chauncey* v. *Wass*, 35 Minnesota, 1. The only limitation or restriction upon the defences or objections which may be interposed is that contained in section 79, to the effect that if a party interposes as a defence an omission of any of the things provided by law in relation to the assessment or levy of a tax or of anything required by an officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed. This relates not to want of authority to levy the tax, but to some omission to do or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid. *Comm'rs of St. Louis Co.* v. *Nettleton*, *supra*. And certainly, in justice or reason, a party cannot complain that when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

This court in *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, quoted the above extract as establishing that the property owner was afforded a hearing by the laws of the State, and declared the rule that the Constitution of the United States was satisfied if an opportunity be given to question the validity or amount of the tax "either before that amount is determined or in subsequent proceedings for its collection." And referring to the difference in the manner of assessment and the successive opportunities for review which were given to the property owner in one case and not in the other, said: But there is nothing in the difference to affect the constitutional rights of a party. The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same. *Kentucky Railroad Tax cases*, 115 U. S. 321, 337; *Pittsburgh, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421. The latter cases of *State* v. *Lakeside Land Co.*, 71 Minnesota, 283, and *State* v. *West*

*Duluth Land Co.*, 78 N. W. Rep. 115, cited by the plaintiffs in error, do not militate against the rule in any way substantial to the pending controversy.

The special objections of plaintiffs in error therefore cannot be sustained, nor the broader one that the first assessments are final against any power of review or addition by the legislature. We held in the *Winona Case*, *supra*, that the legislature had power to provide for the assessment of property which had escaped taxation in prior years and, as we have seen, a special manner of assessment was sustained. We agree with the Supreme Court of the State that a gross undervaluation of property is within the principle applicable to an entire omission of property. If it were otherwise the power and duty of the legislature to impose taxes and to equalize their burdens would be defeated by the fraud of public officers, perhaps induced by the very property owners who afterwards claim its illegal advantage.

If an officer omits to assess property or grossly undervalues it he violates his duty, and the property and its owners escape their just share of the public burdens. In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, we held that against an excessive valuation of property its owner had a remedy in equity to prevent the collection of the illegal excess. It would be very strange if the State, against a gross undervaluation of property, could not in the exercise of its sovereignty give itself a remedy for the illegal deficiency. And this is the effect of the statute. It "merely sets in motion new proceedings to collect the balance of the State's claim, and there is no constitutional objection in the way of doing this," as the Supreme Court of the State said in its opinion.

The other objections to the statute do not demand an extended consideration. That it deprives plaintiffs in error of the equal protection of the laws is based on the absence of a provision for notice in the progress of the proceedings, and is answered by the *Winona case*, *supra*.

The fourth contention, that the State is estopped to assert fraud in the former assessment, if we should concede that it has any basis in law, lacks an essential basis of fact.

Statement of the Case.

The plaintiffs in error purchased after the enactment of the statute, and the record affords no presumptions of ignorance or innocence. If plaintiffs had been attentive to the assessment of the land its gross undervaluation could not have escaped their notice. Besides, whether a party in a case has been given or refused the benefit of the law of estoppel involves no Federal question.

*Judgment affirmed.*

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## WHITMAN *v.* OXFORD NATIONAL BANK.

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

No. 27. Argued March 8, 9, 1899. — Decided March 5, 1900.

The liability imposed upon stockholders in corporations by the provision in the constitution of the State of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes" and by the statutes of that State which are referred to in the opinion of the court in this case, though statutory in origin, is contractual in its nature; and an action on this liability, not being one to enforce a penal statute of Kansas, but only to secure a private remedy, can be maintained in any court of competent jurisdiction, whether Federal or state.

This was an action brought in the Circuit Court of the United States for the Southern District of New York, by the National Bank of Oxford, a national banking association, incorporated and established under the laws of the United States, and doing business at Oxford in the State of Pennsylvania, against George L. Whitman, a citizen of the State of New York, asserting his liability, under the provisions of the constitution and laws of the State of Kansas, for a debt of more than $2000 due to the plaintiff from the Arkansas City Investment Company, a corporation of the State of Kansas, in which the defendant was a stockholder.

The constitution of the State of Kansas of 1859 provided, in article 12, section 2, as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The General Statutes of 1868 of that State, chapter 23, contained the following provisions:

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"Sec. 40 (as amended in 1883). Laws 1883, c. 46, p. 88. A corporation is dissolved — first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation now so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business."

"Sec. 44. If any corporation, created under this or any general statute of this State, except railway or charitable or relig-

ious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The complaint alleged, and the plaintiff at the trial introduced evidence of, the following facts: The Kansas corporation was duly formed under the general laws of the State of Kansas in 1886, for the purpose of a general banking and real estate business; had its only place of business at Arkansas City in that State; was not a railway, religious or charitable corporation; and had a capital of $200,000, divided into 2000 shares of $100 each, of which the defendant, from the time of the formation of the corporation, and ever after, owned one half. In December, 1890, that corporation made a general assignment for the benefit of its creditors, and from that time wholly suspended business. About four months before its failure, it indorsed and guaranteed for value two promissory notes, together amounting to $4875, which were discounted by the plaintiff. In 1895 the plaintiff brought an action to recover the unpaid balance of those notes, in a district court of the county of Cowley and State of Kansas, against the corporation, and, after its general appearance and subsequent default, recovered judgment against it for the sum of $3449; an execution thereon against the corporation was issued to the sheriff of the county, who returned it wholly unsatisfied, because he could not find any property on which to make a

levy; and the corporation had in fact no assets of any kind.

The defendant moved the Circuit Court of the United States to direct a verdict in his favor, upon the ground that it had no jurisdiction to enforce a statutory remedy of the State of Kansas. The court denied the motion, directed a verdict for the plaintiff, overruled a motion for a new trial, and entered a final judgment for the plaintiff. 76 Fed. Rep. 697. That judgment was affirmed by the Circuit Court of Appeals. 51 U. S. App. 536. The defendant thereupon applied for and obtained this writ of certiorari. 168 U. S. 710.

*Mr. William G. Choate* for Whitman. *Mr. Joseph H. Choate* and *Mr. William G. Wilson* were on his brief.

*Mr. William B. Hornblower* and *Mr. Howard A. Taylor* for the Oxford Bank.

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

By section 1 of Article 12 of the constitution of Kansas a certain definite liability is cast upon each stockholder in other than railway, religious and charitable corporations. This liability is for the dues of the corporation and to an amount equal to the stock owned by him. The word "dues" is one of general significance, and includes all contractual obligations. Whether broad enough to include liabilities for torts, either before or after judgment, is not a question before us, and upon it we express no opinion. The words, "shall be secured," are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the constitution is self-executing. *Willis* v. *Mabon*, 48 Minnesota, 140. The discretion of the legislature extends beyond this, as indicated by the clause "and such other means as shall be provided by law." A failure of the legislature to create courts or prescribe modes of procedure may, it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the legislature

prescribing the mode of its enforcement. This is the obvious meaning of the constitutional provision. "The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." Lamar, Justice, in *Lake County* v. *Rollins*, 130 U. S. 662, 671.

But this constitutional provision does not stand alone. The legislature of Kansas has acted on the subject-matter, and the constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other.

In section 32 of chapter 23 of the General Statutes of that State, passed before the organization of the corporation referred to, the legislature prescribed the mode of enforcing this constitutional liability, and if such were needed declared to what extent it could be enforced. It may be either by motion in a case in which judgment has been rendered against the corporation and execution thereon returned unsatisfied, or by a direct action by the plaintiff in such judgment. Neither remedy can be made effectual in the courts of Kansas against a stockholder unless by due service of process he is brought within the jurisdiction of such courts. *Wilson* v. *Seligman*, 144 U. S. 41; *Howell* v. *Manglesdorf*, 33 Kansas, 194, 199.

Whatever else may be said about the remedy it is direct, certain and available to every creditor of a corporation, and leaves to the stockholders the adjustment between themselves of their respective individual shares of the corporate obligations. In view of the present tendency to carry on business through corporate instrumentalities and the freedom from personal liability which attends ordinary corporate action, it cannot be said that this limited additional remedy is open to judicial condemnation.

The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a part-

nership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute.

*Flash* v. *Conn*, 109 U. S. 371, is much in point. In that case a corporation was organized in the State of New York, under an act of legislature, which contained this provision:

"Sec. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

An action was brought in Florida against one of the stockholders, and on error to this court it was held that the stockholder was liable, the court saying (p. 377):

"We think the liability imposed by section 10 is a liability arising upon contract. The stockholders of the company are by that section made severally and individually liable, within certain limits, to the creditors of the company for its debts and contracts. Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded."

And again, after noticing the rulings of the Court of Appeals of the State of New York (p. 379):

"If this were a case arising in the State of New York we should therefore follow the construction put upon the statute by the courts of that State. The circumstance that the case comes here from the State of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty.

"The right of the plaintiffs to sue upon this liability in any court having jurisdiction of the subject-matter and the parties is, therefore, clear. *Dennick* v. *Railroad Co.*, 103 U. S. 11."

And finally, in reference to the objection that the action was one at law against a single stockholder instead of in equity against all (p. 380):

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can. Such actions are maintained without objection in the courts of New York, under section 10 of the statute relied on in this case. *Shillington* v. *Howland*, 53 N. Y. 371; *Weeks* v. *Suydam*, 64 N. Y. 173; *Handy* v. *Draper*, 89 N. Y. 334; *Rocky Mountain Nat. Bank* v. *Bliss*, 89 N. Y. 338."

In *Richmond* v. *Irons*, 121 U. S. 27, in which the question presented was whether the individual liability of a stockholder in a national bank survived as against his administrator, it was said (p. 55):

"Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily

entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising under these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder."

In *Concord First National Bank* v. *Hawkins*, 174 U. S. 364, 372, in which one national bank was sought to be charged as stockholder in another national bank, was this declaration:

"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."

Similar are the views entertained by the Supreme Court of Kansas.

In *Abbey* v. *Dry Goods Co.*, 44 Kansas, 415, 418, we find this statement:

"The nature of this liability is peculiar; it seems to have been created for the exclusive benefit of corporate creditors; the liability rests upon the stockholders of a corporation to respond to the creditors, for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves, in their own right and for their own benefit."

And again, in *Plumb* v. *Bank of Enterprise*, 48 Kansas, 484, 486:

"Under our constitution and statutes, the individual liability stands as a sort of surety for the corporate liability, and creditors of the corporation are supposed to contract with reference to the individual responsibility of the stockholders."

In *Achenbach* v. *Pomeroy Coal Co.*, 2 Kansas Ct. App. 357, 359, is this language:

"The liability of a stockholder in an insolvent corporation is of the nature of a liability on contract, and survives against the legal representatives of a deceased stockholder."

And while the word "statutory" is sometimes found in the opinions of that court as descriptive of the stockholder's liability, evidently the word is so used to indicate the origin rather than the nature of the liability. Thus, in *Howell* v. *Manglesdorf*, 33 Kansas, 194, it was said (p. 199):

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Obviously this recognizes the contractual nature of the obligation as well as its statutory origin. Again, in *Pierce* v. *Security Company*, 60 Kansas, 164, it was held that a stockholder, sued by a judgment creditor of the corporation, might set off against that claim the indebtedness of the corporation to him, accruing before he became liable as stockholder, the court saying (p. 166):

"Where the statute creates a liability against stockholders which is personal and several, and actionable by any creditor against any stockholder, it is generally held that a stockholder may in such a proceeding brought against himself set off debts due to him from the company."

Thus, while the statutory origin of the obligation is asserted, its contractual nature is recognized in that the right of set-off is affirmed.

That an action upon this liability is not one to enforce a penal statute of Kansas but only to secure a private remedy is not open to question since the decision in *Huntington* v. *Attrill*, 146 U. S. 657.

And as this liability is one which is contractual in its nature, it is also clear that an action therefor can be maintained in any court of competent jurisdiction. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Huntington* v. *Attrill*, 146 U. S. 657.

Syllabus.

Similar views have been expressed by the highest courts of several States in like actions based upon the same Kansas constitutional and statutory provisions. *Ferguson* v. *Sherman*, 116 California, 169; *Bell* v. *Farwell*, 176 Illinois, 489; *Hancock National Bank* v. *Ellis*, 172 Mass. 39; *Western National Bank* v. *Lawrence*, 117 Michigan, 669; *Guerney* v. *Moore*, 131 Missouri, 650. See also *Paine* v. *Stewart*, 33 Connecticut, 516; *Cushing* v. *Perot*, 175 Penn. St. 66; *Rhodes* v. *United States National Bank*, (U. S. Ct. Ap. 7th Cir.) 24 U. S. App. 607; *Bank of North America* v. *Rindge*, (U. S. Cir. Ct. S. Dist. Cal.) 57 Fed. Rep. 279; *McVickar* v. *Jones*, (Cir. Ct. Dist. N. H.) 70 Fed. Rep. 754; *Mechanics' Savings Bank* v. *Fidelity Insurance Company*, (Cir. Ct. E. Dist. Penn.) 87 Fed. Rep. 113; *Dexter* v. *Edmands*, (Cir. Ct. Mass.) 89 Fed. Rep. 467; *Brown* v. *Trail*, (Cir. Ct. Dist. Md.) 89 Fed. Rep. 641.

We see no error in the judgment of the Circuit Court of Appeals, and it is, therefore,

*Affirmed.*

Mr. Justice Peckham dissented.

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## THE BENITO ESTENGER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 192. Argued January 11, 12, 1900. — Decided March 5, 1900.

The general rule is that in time of war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership.

By the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences.

Provisions are not, in general, deemed contraband; but they may become so if destined for the army or navy of the enemy, or his ports of naval or military equipment.

In dealing with a vessel asserted to be an enemy vessel, the fact of trade with the enemy in supplies necessary for the enemy's forces is of decisive importance.

Statement of the Case.

Individual acts of friendship cannot change political status where there is no open adherence to the opposite cause and former allegiance remains apparently unchanged.

A consul has no authority by reason of his official station to grant exemption from capture to an enemy vessel; and this vessel was not entitled to protection by reason of any engagement with the United States.

In cases of peculiar hardship, or calling for liberal treatment, it is not for the courts, but for another department of the Government, to extend such amelioration as the particular instance may demand.

Transfers of vessels *flagrante bello* cannot be sustained if subjected to any condition by which the vendor retains an interest in the vessel or its profits, a control over it, or a right to its restoration at the close of the war.

The burden of proof in respect of the validity of such transfers is on the claimant, and the court holds as to the transfer in this case that the requirements of the law of prize were not satisfied by the proofs.

The Benito Estenger was captured by the U. S. S. Hornet on June 27, 1898, off Cape Cruz on the south side of the island of Cuba, and was brought into the port of Key West and duly libelled on July 2. The depositions *in preparatorio* of Badamero Perez, Edwin Cole and Enrique de Messa were taken, and thereafter and on July 27 a claim was interposed by Perez as master of the steamer on behalf of Arthur Elliott Beattie, a British subject, as owner, supported by test affidavits of himself and de Messa. The cause was preliminarily heard on the libel, the depositions *in preparatorio* and the test affidavits, and sixty days given for further proofs. Accordingly the depositions of the claimant and sundry others were taken on behalf of the claimant, and the testimony of the consul of the United States at Kingston on behalf of the captor. The cause coming on for final hearing, the court entered a decree December 7, 1898, condemning the vessel as lawful prize as enemy property, and ordering her to be sold in accordance with law. Claimant thereupon appealed, and assigned errors to the effect in substance that the court erred in failing to hold that the Benito Estenger was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain; and also in holding that the Benito Estenger was lawful prize of war, inasmuch as she was engaged on a voyage in

Counsel for Parties.

behalf of the local Cuban junta in Kingston, allies of the United States, and when captured was in the service of the United States, and employed in friendly offices to the forces of the United States. The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa and Company, subjects of Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and, on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, cornmeal and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock A.M., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect of the alleged Cuban sympathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which preceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all the circumstances of the case.

*Mr. Harrington Putnam* for claimant.

*Mr. Assistant Attorney General Hoyt* for the United States. *Mr. Joseph K. McCammon* and *Mr. James H. Hayden*, counsel for captors, were on his brief.

Opinion of the Court.

*Mr. George A. King* and *Mr. William B. King* filed a brief on behalf of captors.

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

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. *Prize cases*, 2 Black, 635, 674; *The Sally*, 8 Cranch, 382, 384; *Jecker* v. *Montgomery*, 18 How. 110; *The Peterhoff*, 5 Wall. 28; *The Flying Scud*, 6 Wall. 263.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo. She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of eleven hundred barrels of flour.

Manzanillo was a city of several thousand inhabitants and the first important place on the south Cuban coast between

Santiago and Cienfuegos, lying inside the bay formed by the promontory which Cape Cruz terminates, and about sixty miles northeast of the cape. Cape Cruz is about due north from Montego Bay on the northwestern shore of Jamaica, and about seventy-five miles distant, while Kingston is on the southeastern coast of Jamaica. The record lacks evidence of the condition of affairs there at that time, but official reports leave no doubt that it was defended by several vessels of war and by shore batteries, and was occupied by some thousands of Spanish soldiers. On the 6th of April, 1898, the Secretary of the Navy had instructed Admiral Sampson, among other things, that the Department desired, "That in case of war, you will maintain a strict blockade of Cuba, particularly the ports of Havana, Matanzas, and, if possible, Santiago de Cuba, Manzanillo and Cienfuegos." Manzanillo was the terminus of a cable which connected with Santa Cruz, Trinidad, Cienfuegos and Havana, and was subsequently cut by the forces of the United States, in order to check the inland traffic with Manzanillo and to prevent the calling of reënforcements to resist the capture of that place. And it appeared that Admiral Sampson had been for some weeks endeavoring to stop blockade running on the south coast of Cuba, and that a large vessel with a heavy battery was stationed at Cape Cruz. Manzanillo was not declared blockaded, however, until the proclamation of June 27, 1898; but the consul of the United States at Kingston had warned Messa and Beattie that a blockade in fact existed. The claimant testified that the vessel was chartered by Flouriache, a Cuban merchant, and that the cargo was consigned to Bauriedel and Company, at Manzanillo. The deposition of neither of these was taken. According to the explicit testimony of the consul, he was informed by both the claimant and his brother that the flour was transferred by Bauriedel and Company, through a communicating way from their warehouse to the Spanish government warehouse, immediately upon its delivery; and no evidence to contradict this was introduced.

The instructions of the Navy Department to "Blockading Vessels and Cruisers," in the late war, included among articles

conditionally contraband, "Provisions, when destined for an enemy's ship or ships, or for a place that is besieged."

In *The Commercen*, 1 Wheat. 382, 388, Mr. Justice Story said: "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. . . . If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."

In *The Jonge Margaretha*, 1 C. Rob. 189, 193, Sir William Scott discussed this question, and, after referring to many instances, concluded: "And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it."

But while alluding to this subject by way of illustration we do not feel called on to consider under what particular circumstances, generally speaking, provisions may be held contraband of war. It is enough that in dealing with a vessel adjudicated to have been an enemy vessel, the fact of trade with the enemy, especially in supplies necessary for the enemy's forces, is of well nigh decisive importance.

In reply it is suggested that this cargo was intended for the Cuban insurgents, and a quotation is made from a letter of the consul to the effect that he had been "told privately by the president of the local junta, who has performed valuable services for me, that the proceeds of this cargo are to be forwarded to the Cuban government and troops through the Cuban agent at Manzanillo." The suggestion derives no support from the record, and the facts remain that the provisions were delivered to the Spanish government, and that the trade to this Spanish stronghold constituted, under the laws of war, illicit intercourse with the enemy.

This brings us to consider the contention that Messa had

rendered important services to the United States; that he was the friend and not the enemy of this Government, and that there was an agreement between him and the United States consul which operated to protect the vessel from capture. But Messa's status was that of an enemy, as already stated, and this must be held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war. The legal conclusion was not affected by the fact that Messa had, in cultivating friendly relations with the consul, given the latter an old Government plan of the province of Santiago and an especially prepared chart of the harbor. Thus displaying his amicable inclinations, he endeavored to obtain from the consul a letter of protection for the voyage he was about to undertake, but this the consul declined to furnish, and informed him at the same time that Manzanillo was blockaded, and that the contemplated venture would be at his own risk.

Nevertheless, the consul agreed to write the Admiral, and did write him June 23, that Messa offered to give certain information that might be valuable, and that he proposed to be off Cape Cruz on June 30, when he could be picked up there and taken to the Admiral if desired; but the consul said: "You quite understand that in dealing with those people, one is always more or less liable to imposition. I therefore make no recommendation of Messa to you." There was nothing to show that the voyage was undertaken on the strength of this letter or that it in any way contributed to the capture, nor that the Admiral intended to avail himself of the suggestion in regard to Messa.

The claimant asserted and the consul denied that protection to the voyage was extended by the latter. But we do not go at length into this matter because we think that no engagement with the United States nor any particular service to the United States was made out in that connection, and so far as appears the vessel was captured in the ordinary course of cruising duty at a time and under circumstances when her liability was not to be denied. Moreover, a United States

consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation. This was so held by Judge Mc Caleb in *Rogers* v. *The Amado*, Newberry, 400, in which he quotes the language of Sir William Scott in *The Hope*, 1 Dodson, 226, 229: "To exempt the property of enemies from the effect of hostilities, is a very high act of sovereign authority; if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed *mandatories*, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. '*Ei rei non præponitur;*' and therefore his acts relating to it are not binding."

In *The Joseph*, 8 Cranch, 451, the vessel was condemned for trading with the enemy, and it was held that she was not excused by the necessity of obtaining funds to pay the expenses of the ship, nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States. The court said that these considerations, "if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

This is equally true of the case before us, for even if the circumstances may have justified liberal treatment, that cannot be permitted to influence our decision. It belongs to another department of the Government to extend such amelioration as appears to be demanded in particular instances.

Neither the case of *Les Cinq Frères*, 4 Lebau's Nouveau Code des Prises, 63, nor that of *The Maria*, 6 C. Rob. 201, cited by counsel, is in point. In the former, the Committee of Public Safety in the year three of the French calendar of the Revolution decreed the condemnation of Les Cinq Frères as an enemy's vessel, and of her cargo although belonging to Frenchmen, but further decreed restitution of the cargo or its

value, as matter of grace, in consideration of services rendered by the claimants in furnishing provisions to the Republic, adding that this should not be drawn into a precedent. The latter simply involved the interpretation of an indulgence specifically granted by the British government.

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for $40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager.

It appeared that Beattie applied to the customs and shipping office in Jamaica for a British register, lodged with him the bill of sale, and made a declaration of ownership before him as registrar of shipping, which documents were filed on June 9 and 14 respectively, and were in conformity with the requirements of British law. The depositions of the ship broker and his employés put the price at nine thousand pounds, and showed their belief that the sale was *bona fide*, founded on what passed between Messa and Beattie. They did not know what arrangements were made for the payment of the price or how or in what shape the purchase money was paid. The accountant stated that after the sale Beattie went on board and took possession of the vessel, and informed the officers in charge that he had become the owner, gave orders regarding her, and informed witness that he had given Messa the position as supercargo.

There was considerable confusion on the point as to who was master of the vessel after the transfer. Perez testified that he was, and as master he interposed the claim on behalf of Beattie. He also swore that Mr. Beattie "informed him

that he could remain as master, but it would be necessary for him to put an English subject on board as first officer or second captain, in conformity with the British law." Cole, a British subject, asserted that he was master, and Beattie stated that he appointed him such with Perez as mate and pilot, while Messa said that Perez was master and that he, Messa, was supercargo. Perez had been the captain of the ship and remained on her, and conceding that Cole was placed on board in the capacity of captain, the inference is not unreasonable that this was for appearances only.

Beattie testified that he was a member of the firm of Beattie and Company, composed of himself and his brothers, all British subjects, and interested in lands, sugar estates, mines and forests in the district of Manzanillo; that he had resided there for some years, returning to his parents' home in England for several months at a time; that he concluded the purchase of the Benito Estenger from Messa on June 9, 1898; that she left Jamaica on her last voyage on June 23, bound for Manzanillo, and chartered by Flouriache, a Cuban merchant, carrying a cargo of food stuffs sent for the purpose of trade; that he bought the vessel for nine thousand pounds; but he declined to state of what the payment or payments of the purchase money consisted, although saying that the sale was *bona fide*.

The consul testified that claimant, in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel.

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr.

Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;" says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law, (4th ed.) 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral

claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

*The Sechs Geschwistern*, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship, asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred, must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether."

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the Eastern

District of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 13 Fed. Cases, 168.

So in *The Baltica*, Spinks Prize Cases, 264, several vessels had been sold by a father, an enemy, to his son, a neutral, immediately before the war, and only paid for in part, the remainder to be paid out of the future earnings thereof, and the Baltica, which was one of them, was condemned on the ground of a continuance of the enemy's interest.

In *The Soglasie*, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality, — evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In *The Ernst Merck*, Spinks Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We

all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also *The Jenny*, 5 Wall. 183; *The Amiable Isabella*, 6 Wheat. 1; *The Lilla*, 2 Cliff. 169; Story's Prize Courts, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

*Decree affirmed.*

MR. JUSTICE SHIRAS, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM dissented.

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## MAXWELL *v.* DOW.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 384. Argued December 4, 1899. — Decided February 26, 1900.

The decision in *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law" in the Fourteenth Amendment to the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, has been often affirmed, and is now reaffirmed and applied to this case.

The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government.

The trial of a person accused as a criminal by a jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction do not abridge his privileges and immunities under the Constitution as a citizen of the United States and do not deprive him of his liberty without due process of law.

Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are proper to be determined by the citizens of each State for themselves, and do not come within the Fourteenth Amendment to the Constitution so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and the equal protection of the laws is secured to them.

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

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

*Mr. Alexander C. Bishop* for defendant in error. *Mr. William A. Lee* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the State of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the Supreme Court of the State for a writ of *habeas corpus*, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful, because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under article 5 of the amendments to the Constitution of the United States, and also violated section 1 of article 14 of those amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under article 6, and also violated section 1 of article 14 of such amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, in violation of section 1 of article 14, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

Opinion of the Court.

The Supreme Court of the State, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison, to undergo the remainder of his sentence, and he then sued out a writ of error and brought the case here.

The questions to be determined in this court are, (1) as to the validity, with reference to the Federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors.

We think the various questions raised by the plaintiff in error have in substance, though not all in terms, been decided by this court in the cases to which attention will be called. The principles which have been announced in those cases clearly prove the validity of the clauses in the constitution of Utah which are herein attacked as in violation of the Constitution of the United States. It will, therefore, be necessary in this case to do but little else than call attention to the former decisions of this court, and thereby furnish a conclusive answer to the contentions of plaintiff in error.

The proceeding by information and also the trial by a jury, composed of eight jurors, were both provided for by the state constitution.

Section 13, article 1, of the constitution of Utah provides:

"Offences heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it."

Section 10, article 1, of that constitution is as follows:

"In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of infe-

rior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of *Hurtado* v. *California*, 110 U. S. 516. The case has since been frequently approved. *Hallinger* v. *Davis*, 146 U. S. 314, 322; *McNulty* v. *California*, 149 U. S. 645; *Hodgson* v. *Vermont*, 168 U. S. 262, 272; *Holden* v. *Hardy*, 169 U. S. 366, 384; *Brown* v. *New Jersey*, 175 U. S. 172, 176; *Bolln* v. *Nebraska*, 176 U. S. 83.

But the plaintiff in error contends that the *Hurtado case* did not decide the question whether the state law violated that clause in the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Although the opinion is mainly devoted to an inquiry whether the California law was a violation of the "due process clause" of the above-mentioned amendment, yet the matter in issue in the case was as to the validity of the state law, and the court held it valid. It was alleged by the counsel for the plaintiff in error, before the court which passed sentence, that the proceeding was in conflict with the Fifth and the Fourteenth Amendments, and those grounds were before this court. The Fifth Amendment was referred to in the opinion delivered in this court, and it was held not to have been violated by the state law, although that amendment provides for an indictment by a grand jury. This decision could not have been arrived at if a citizen of the United States were entitled, by virtue of that clause of the Fourteenth Amendment relating to the privileges and immunities of citizens of the United States, to claim in a state court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the

Fifth Amendment. Yet this amendment was held in the *Hurtado case* not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the States themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the Federal Government. By holding that the conviction upon an information was valid, the court necessarily held that an indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges or immunities of a citizen of the United States which a State was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case.

Under these circumstances it may not be improper to inquire as to the validity of a conviction in a state court, for an infamous crime, upon an information filed by the proper officer under the authority of the constitution and laws of the State wherein the crime was committed and the conviction took place; confining the inquiry to the question of the effect of the provision in the Fourteenth Amendment prohibiting the States from making or enforcing any law which abridges the privileges or immunities of citizens of the United States. To the other objection, that a conviction upon an information deprives a person of his liberty without due process of law, the *Hurtado case* is, as we have said, a complete and conclusive answer.

The inquiry may be pursued in connection with that in regard to the validity of the provision in the state constitution for a trial before a jury to be composed of but eight jurors in criminal cases which are not capital. One of the objections to this provision is that its enforcement has abridged the privileges and immunities of the plaintiff in error as a citizen of the United States; the other objection being that a

conviction thus obtained has resulted in depriving the plaintiff in error of his liberty without due process of law. Postponing an inquiry in regard to this last objection until we have examined the other, we proceed to inquire what are the privileges and immunities of a citizen of the United States which no State can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343, 349. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. *American Publishing Company* v. *Fisher*, 166 U. S. 464; *Springville* v. *Thomas*, 166 U. S. 707.

It would seem to be quite plain that the provision in the Utah constitution for a jury of eight jurors in all state criminal trials, for other than capital offences, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the States. In order to limit the powers which it was feared might be claimed or exercised by the Federal Government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several States by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the General Government, and were not intended to and did not have any effect upon the powers of the respective States. This has

been many times decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. *Spies* v. *Illinois*, 123 U. S. 131, 166; *Holden* v. *Hardy*, 169 U. S. 366, 382; *Brown* v. *New Jersey*, 175 U. S. 172, 174.

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the States cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the *Spies case*, 123 U. S. 131, 151; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the *Slaughter-house cases*, 16 Wall. 36, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular State, was treated by Mr. Justice Miller in delivering the opinion of the court. He stated that the argument in favor of the plaintiffs, claiming that the ordinance of the city of New Orleans was invalid, rested wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the Fourteenth Amendment are the same as to citizens of the United States and citizens of the several States. This he showed to be not well founded; that there was a citizenship of the United States and a citizenship of the States, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of the citizen of the United States that were placed by the amendment under the protection of the Federal Constitution, and that the privileges and immunities of a citizen of a State, whatever they might be, were not

intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested.

He then proceeded to inquire as to the meaning of the words "privileges and immunities" as used in the amendment, and said that the first occurrence of the phrase in our constitutional history is found to be in the fourth article of the old confederation, in which it was declared "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." A provision corresponding to this, he found in the Constitution of the United States in section 2 of the fourth article, wherein it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." What those privileges were is not defined in the Constitution, but the justice said there could be but little question that the purpose of both those provisions was the same, and that the privileges and immunities intended were the same in each. He then referred to the case of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania, in 1823, 4 Washington C. C. 371, where the question of the meaning of this clause in the Constitution was raised. Answering the question, what were the privileges and immunities of citizens of the several States, Mr. Justice Washington said in that case:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign

What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; . . . The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Having shown that prior to the Fourteenth Amendment the legislation under review would have been regarded as relating to the privileges or immunities of citizens of the State, with which the United States had no concern, Justice Miller continued:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any

of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of power heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these Governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

If the rights granted by the Louisiana legislature did not infringe upon the privileges or immunities of citizens of the United States, the question arose as to what such privileges were, and in enumerating some of them, without assuming to state them all, it was said that a citizen of the United States, as such, had the right to come to the seat of government to assert claims or transact business, to seek the protection of the government or to share its offices; he had the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several States; to de-

mand the care and protection of the General Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government; the right, with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of *habeas corpus*, and to use the navigable waters of the United States, however they may penetrate the territory of the several States; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any State in the Union by a *bona fide* residence therein, with the same rights as other citizens of that State; and the rights secured to him by the Thirteenth and Fifteenth amendments to the Constitution. A right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the State and not covered by the amendment.

Other objections to the judgment were fully examined, and the result was reached that the legislation of the State of Louisiana complained of violated no provision of the Constitution of the United States.

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a State against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws, has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the Fourteenth Amendment of which it treats.

The definition of the words "privileges and immunities," as given by Mr. Justice Washington, was adopted in substance in *Paul* v. *Virginia*, 8 Wall. 168, 180, and in *Ward* v. *Maryland*, 12 Wall. 418, 430. These rights, it is said in the *Slaughter-house cases*, have always been held to be the class of

rights which the State Governments were created to establish and secure.

In the same volume as the *Slaughter-house cases* is that of *Bradwell* v. *The State*, 16 Wall. 130, where it is held that the right to practice law in the courts of a State is not a privilege or immunity of a citizen of the United States, within the meaning of the Fourteenth Amendment. And in *Minor* v. *Happersett*, 21 Wall. 162, it was held that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and although a woman was in one sense a citizen of the United States, yet she did not obtain the right of suffrage by the adoption of that amendment. The right to vote is a most important one in our form of government, yet it is not given by the amendment.

In speaking of the meaning of the phrase "privileges and immunities of citizens of the several States," under section second, article fourth, of the Constitution, it was said by the present Chief Justice, in *Cole* v. *Cunningham*, 133 U. S. 107, that the intention was "to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

And in *Blake* v. *McClung*, 172 U. S. 239, 248, various cases are cited regarding the meaning of the words "privileges and immunities," under the fourth article of the Constitution, in not one of which is there any mention made of the right claimed in this case, as one of the privileges or immunities of citizens in the several States.

These cases show the meaning which the courts have attached to the expression, as used in the fourth article of the Constitution, and the argument is not labored which gives the same meaning to it when used in the Fourteenth Amendment.

That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to every

one, white or black, that comes within its provisions. But, as said in the *Slaughter-house cases*, the protection of the citizen in his rights as a citizen of the State still remains with the State. This principle is again announced in the decision in *United States* v. *Cruikshank*, 92 U. S. 542, wherein it is said that sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States. But if all these rights are included in the phrase "privileges and immunities" of citizens of the United States, which the States by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the State in regard to them has been entirely destroyed, and the *Slaughter-house cases*, and *United States* v. *Cruikshank* are all wrong, and should be overruled.

It was said in *Minor* v. *Happersett*, *supra*, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in *In re Kemmler*, 136 U. S. 436, 448, it was stated by the present Chief Justice that —

"The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542; *Slaughter-house cases*, 16 Wall. 36."

In Cooley's Constitutional Limitations, (4th ed. p. 497, marginal page 397,) the author says:

"Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same State are not subject to."

There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a state court for a state offence and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury. And yet if these were such privileges and immunities, they would be among the first that would occur to any one when enumerating or defining them. Nor would these rights come under the description given by the Chief Justice in the *Kemmler case*, *supra*. Such privileges or immunities do not arise out of the nature or essential character of the National Government.

In *Walker* v. *Sauvinet*, 92 U. S. 90, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. The action was tried without a jury by virtue of an act of the legislature of the State of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"By article 7 of the amendments it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards* v. *Elliott*, 21 Wall.

532, 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land — that is to say, with the Constitution and laws of the United States made in pursuance thereof — or with any treaty made under the authority of the United States."

This case shows that the Fourteenth Amendment in forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to

certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.

So it was held in the oyster planting case, *McCready* v. *Virginia*, 94 U. S. 391, that the right which the people of that State acquired to appropriate its tide waters and the beds therein for taking and cultivating fish, was but a regulation of the use, by the people, of their common property, and the right thus acquired did not come from their citizenship alone, but from their citizenship and property combined. It was, therefore, a property right and not a mere privilege or immunity of citizenship, and, for that reason, the citizen of one State was not invested by the Constitution of the United States with any interest in the common property of the citizens of another State.

This was a decision under another section of the Constitution (section second of article fourth) from the one under discussion, and it gives to the citizens of each State all privileges and immunities of citizens of the several States, but it is cited for the purpose of showing that where the privilege or immunity does not rest alone upon citizenship, a citizen of another State does not participate therein.

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where every one has the same as against the Federal Government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The *Sauvinet case* is an authority in favor of the contention that the amendment

does not preclude the States by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of *Kennard* v. *Louisiana*, 92 U. S. 480, although that case was decided with special reference to the "due process of law" clause.

In *Kemmler's case*, 136 U. S. 436, it was stated that it was not contended and could not be that the Eighth Amendment to the Federal Constitution was intended to apply to the States. This was said long after the adoption of the Fourteenth Amendment, and also subsequent to the making of the claim that by its adoption the limitations of the preceding amendments had been altered and enlarged so as in effect to make them applicable to proceedings in the state courts.

In *Presser* v. *Illinois*, 116 U. S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the National Government, the States could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government.

In *O'Neil* v. *Vermont*, 144 U. S. 323, 332, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the States.

In *Thorington* v. *Montgomery*, 147 U. S. 490, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of Federal power, and has no application to the States.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the

powers of the Federal Government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

It has been held that the last clause of the Seventh Amendment, which provides 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, is not confined to trials by jury in Federal courts, but applies equally to a cause tried before a jury in a state court and brought thence before a Federal court. *The Justices* v. *Murray*, 9 Wall. 274; *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Capital Traction Company* v. *Hof*, 174 U. S. 1. But these decisions only carry out the idea that the amendment is a restraint upon Federal power, and not upon the power of the State, inasmuch as they declare that the clause restricts the right of the Federal courts to reëxamine the facts found by a jury in a state court, as well as in a Federal one.

In *Missouri* v. *Lewis*, 101 U. S. 22, it was held that the clause of the Fourteenth Amendment, which prohibits a State from denying to any person the equal protection of the laws, did not thereby prohibit the State from prescribing the jurisdiction of its several courts either as to their territorial limits or the subject-matter, or amount or finality of their respective judgments or decrees; that a State might establish one system of law in one portion of its territory and another system in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws in the same district, nor deprive him of his rights without due process of law. In the course of the opinion, which was delivered by Mr. Justice Bradley, he said:

"We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for

all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its

discretion, provide for these various exigencies. If a Mexican State should be acquired by treaty and added to an adjoining State or part of a State in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard for the welfare of all classes within the particular territory or jurisdiction."

Although this case was principally discussed under that clause of the Fourteenth Amendment which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws, yet the application of the amendment with regard to the privileges or immunities of citizens of the United States was also referred to, and if it had been supposed that it secured to a citizen of the United States, when proceeded against under state authority, all the privileges and immunities set forth in the first eight amendments to the Federal Constitution, Mr. Justice Bradley could not, in the course of his opinion in the case, have said that a trial by jury might exist as a right in one State and not exist in another. Trial by jury would in such case have been protected under the Fourteenth Amendment, because it was granted to all persons by article six in all criminal prosecutions in the Federal courts, and by article seven in civil actions at common law, where the value in controversy should exceed twenty dollars. On the contrary, it was stated that great diversity in these respects might exist in two States separated only by an imaginary line, on one side of which there might be a right of trial by jury, and on the other side no such right. Each State, it was said, prescribes its own modes of judicial procedure. The decision of this case was by a unanimous court, and the remarks of the justice are wholly irreconcilable with the existence of a right of trial by jury in a state court which was guaranteed and protected by the Fourteenth Amendment, notwithstanding the

denial of such right by and under the constitution and laws of the State.

The principle to be deduced from these various cases is that the rights claimed by the plaintiff in error rest with the state governments, and are not protected by the particular clause of the amendment under discussion. What protection may be afforded the individual against state legislation or the procedure in state courts or tribunals under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of, the privileges or immunities of citizens of the United States.

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by the States, were included those set forth in the first eight amendments to the Constitution, and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important

as explanatory of the grounds upon which the members voted in adopting it. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 318; *Dunlap* v. *United States*, 173 U. S. 65, 75.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah constitution and legislation.

The remaining question is, whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the State deprives him of life, liberty or property, without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado case*, *supra*. The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of rea-

soning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado case* was decided are to be found gathered in *Hodgson* v. *Vermont*, 168 U. S. 262; *Holden* v. *Hardy*, 169 U. S. 366, 384; *Brown* v. *New Jersey*, 175 U. S. 172; *Bolln* v. *Nebraska*, 176 U. S. 83.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado case* is a trial by jury mentioned as a necessary part of such process.

In *In re Converse*, 137 U. S. 624, it was stated that the Fourteenth Amendment was not designed to interfere with the power of a State to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a State in administering process provided by the law of the State.

In *Caldwell* v. *Texas*, 137 U. S. 692, it was held that no State can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

In *Leeper* v. *Texas*, 139 U. S. 462, 467, it was said "that by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Hurtado* v. *California*, 110 U. S. 516, 535, and cases cited." See also for statement

as to due process of law the cases of *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701, 707.

The clause has been held to extend to a proceeding conducted to judgment in a state court under a valid statute of the State, if such judgment resulted in the taking of private property for public use, without compensation made or secured to the owner, under the conditions mentioned in the cases herewith cited. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226; *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557.

It has also been held not to impair the police power of a State. *Barbier* v. *Connolly*, 113 U. S. 27.

It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462. It is emphatically the case of the people by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the

amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown* v. *New Jersey*, 175 U. S. 172, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

Judged by the various cases in this court we think there is no error in this record, and the judgment of the Supreme Court of Utah must, therefore, be

*Affirmed.*

Mr. Justice Harlan, dissenting.

Under an information filed against him in one of the courts of the State of Utah, Maxwell, the plaintiff in error, a citizen of the United States, was convicted of the crime of robbery, and having been tried by a jury consisting of eight persons was found guilty and sentenced to confinement in the penitentiary for the term of eighteen years.

He insists that his imprisonment is in violation of the Constitution of the United States in that he was proceeded against by information — not by indictment or presentment of a grand

jury — and was tried for an infamous crime by a jury composed of less than twelve persons.

By its opinion and judgment just rendered this court holds that neither the prosecution by information nor the trial by eight jurors was in violation of the Constitution of the United States.

Upon the first point I do not care to say anything. For, in *Hurtado* v. *California*, 110 U. S. 516, this court held that a state enactment authorizing the prosecution by information for the crime of murder in the first degree — the penalty for such crime being death — was not in violation of the Constitution of the United States. The principles there announced have been reaffirmed in later cases. In the *Hurtado case* I dissented from the opinion and judgment of the court and stated fully the reasons why, in my judgment, no civil tribunal or court, Federal or state, could legally try a citizen of the United States for an infamous crime otherwise than on the indictment or presentment of a grand jury. I adhere to the views then expressed, but further discussion of the question decided seems unnecessary.

The remaining question in the present case is whether the trial of the accused by eight jurors is forbidden by the Constitution of the United States.

The Fourteenth Amendment, after declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," nor "shall any State deprive any person of life, liberty or property without due process of law."

What are the privileges and immunities of "citizens of the United States"? Without attempting to enumerate them, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair.

When the Constitution was adopted by the Convention of

1787 and placed before the people for their acceptance or rejection, many wise statesmen whose patriotism no one then questioned or now questions earnestly objected to its acceptance upon the ground that it did not contain a Bill of Rights guarding the fundamental guarantees of life, liberty and property against the unwarranted exercise of power by the National Government. But the friends of the Constitution, believing that the failure to accept it would destroy all hope for permanent union among the people of the original States, and following the advice of Washington who was the leader of the constitutional forces, met this objection by showing that when the Constitution had been accepted by the requisite number of States and thereby become the supreme law of the land, such amendments could be adopted as would relieve the apprehensions of those who deemed it necessary, by express provisions, to guard against the infringement by the agencies of the General Government of any of the essential rights of American freemen. This view prevailed, and the implied pledge thus given was carried out by the first Congress, which promptly adopted and submitted to the people of the several States the first ten amendments. These amendments have ever since been regarded as the National Bill of Rights.

Let us look at some of those amendments. It is declared by the First, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances;" by the Third, "no soldier shall in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law;" by the Fourth, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;" by the Fifth, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation;" by the Sixth, "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence;" and by the Eighth, "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It seems to me that the privileges and immunities enumerated in these amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to themselves and their posterity, the political community known as the People of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified — the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty — could never be impaired or destroyed by the National Government.

Now, the original Constitution declared that "the trial of all crimes, except in cases of impeachment, shall be by jury." This was supplemented by the Sixth Amendment, declaring that in all criminal prosecutions the accused should enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime was committed. And

we have held that the jury here referred to was a common law jury consisting of neither more or less than twelve persons, whose unanimous verdict was necessary to acquit or convict the accused; that a jury of less number was not admissible in any criminal trial in the District of Columbia or in a Territory of the United States, or in any prosecution of a criminal character in a court of the United States or in any court organized under the authority of the United States. *Callan* v. *Wilson*, 127 U. S. 540; *Thompson* v. *Utah*, 170 U. S. 343. We have often adjudged that the declaration in Magna Charta that the King would not pass upon any freeman, nor condemn him, "but by the lawful judgment of his peers," referred to a jury of twelve persons.

It is not difficult to understand why the fathers intrenched the right of trial by jury in the supreme law of the land. They regarded the recognition and exercise of that right as vital to the protection of liberty against arbitrary power. Mr. Hallam in his Constitutional History of England, after observing that liberty had been the slow fruit of ages, said that as early as the reign of Henry VII one of the essential checks upon royal power was that "the fact of guilt or innocence on a criminal charge was determined in a public court, and in the county where the offence was alleged to have occurred, by a jury of twelve men, from whose unanimous verdict no appeal could be made." And it is an interesting fact that the first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths." The value of that institution was recognized by the patriotic men of the Revolutionary period when in the Declaration of Independence they complained that the King of Great Britain had deprived the people of the Colonies in many cases of the benefits of trial by jury. Referring to the provisions of the Federal Constitution relating to the personal security of citizens of the United States, Kent says they "must be regarded as fundamental in every State, for the colonies were parties to the national declaration of rights in 1774, in which the trial by

jury, and the other rights and liberties of English subjects were peremptorily claimed as their undoubted inheritance and birthright." Upon this general subject Mr. Justice Story in his Commentaries on the Constitution has said: "It was under the consciousness of the full possession of the rights, liberties and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them. And for the most part they thus succeeded in obtaining a real and effective Magna Charta of their liberties. The trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country." 1 Story's Const. § 165. Again, the same eminent jurist says: "It seems hardly necessary in this place to expatiate upon the antiquity or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta, in which it is declared, *nullus homo capiatur, nec imprisonetur, aut exuletur, aut aliquo modo destruatur, &c.; nisi per legale judicium parium suorum, vel per legem terræ;* no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, etc., but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called, in the quaint language of former times, a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the State. When our more immediate ancestors removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms. The great object of a trial by jury

in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former." 2 Story's Const. § 1779. Blackstone has said: "A celebrated French writer, who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury." 2 Bl. Com. 379. In a recent American work on trial by jury the author well says: "The English colonists settled here with a deep-rooted regard for this right. It had been, no doubt, to them in the mother country a valuable protection. They brought it with them and established it as one of their dearest privileges, and in every enumeration of their rights and immunities it takes a conspicuous place." Again, the same author: "Ever since Magna Charta, the right to a trial by jury has been esteemed a peculiarly dear and inestimable privilege by the English race; and whether in a strictly historical view the right was defined or secured by that instrument or not, it was nevertheless invariably appealed to and implicitly relied on as unalterably and inviolably securing the right among other valuable privileges guaranteed therein. During long centuries, when popular rights were overborne by prerogative or despotism, those who claimed and were denied the right to such a trial, founded their demand on the guarantee of the Great Charter, and solemnly protested against its violation when the privilege was denied them; and whenever an invasion or violation of individual rights was threatened, the security afforded by this guarantee was relied on as an effectual safeguard either to repel the attack or nullify its effect." Proffat on Jury Trials, §§ 81, 82. And this court has declared that "the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 433, 446.

Notwithstanding this history of the incorporation into the

Constitution of the United States of the provision relating to trial by jury, it is now adjudged that immunity from trial for crime except by a jury of twelve jurors is not an immunity belonging to citizens of the United States within the meaning of the Fourteenth Amendment.

It does not solve the question before us to say that the first ten amendments had reference only to the powers of the National Government and not to the powers of the States. For if prior to the adoption of the Fourteenth Amendment it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime in any court organized or existing under National authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime, particularly for an infamous crime, by eight jurors, when that amendment expressly declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"? It does not meet the case to say that a trial by eight jurors is as much a trial by jury as if there were twelve jurors; for if a citizen charged with crime can be subjected to trial by a less number of jurors than that prescribed by the Constitution, the number may be reduced to three. Indeed, under the interpretation now given to the amendment, it will, I think, be impossible to escape the conclusion that a State may abolish trial by jury altogether in a criminal case, however grave the offence charged, and authorize the trial of a case of felony before a single judge. I cannot assent to this interpretation, because it is opposed to the plain words of the Constitution, and defeats the manifest object of the Fourteenth Amendment.

I am of opinion that under the original Constitution and the Sixth Amendment, it is one of the privileges and immunities of citizens of the United States that when charged with crime they shall be tried only by a jury composed of twelve persons; consequently, a state statute authorizing the trial by a jury of eight persons of a citizen of the United States, charged with crime, is void under the Fourteenth Amendment declaring that no State shall make or enforce any law that

"shall abridge the privileges or immunities of citizens of the United States."

I am also of opinion that the trial of the accused for the crime charged against him by a jury of eight persons was not consistent with the "due process of law" prescribed by the Fourteenth Amendment. Referring to the words in the Fifth Amendment, that "no person shall be deprived of life, liberty or property without due process of law," this court said in *Murray's Lessee* v. *Hoboken*, 18 How. 272, 276–7: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It was manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors*, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

No one, I think, can produce any authority to show that according to the "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors," the trial of one accused of felony otherwise than by a jury of twelve, or wholly without a jury, was consistent with "due process of law." If the original Constitution had not contained a specific prohibition of trials for crime otherwise than by a jury, the requirement of due process of law in the Fifth Amendment would have stood in the way of any act of Congress authorizing criminal trials in the

Federal courts in any mode except by a common law jury. When therefore the Fourteenth Amendment forbade the deprivation by any State of life, liberty or property without due process of law, the intention was to prevent any State from infringing the guarantees for the protection of life and liberty that had already been guarded against infringement by the National Government.

This interpretation of the Fourteenth Amendment finds support in some of the decisions of this court. In addition to the clause forbidding the deprivation of property "without due process of law," there is in the Fifth Amendment a clause specifically declaring "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment does not in terms refer to the taking of private property for public use, yet we have held that the requirement of "due process of law" *in that amendment* forbids the taking of private property for public use without making or securing just compensation. *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 233, 241; *Norwood* v. *Baker*, 172 U. S. 269, 277.

If then the "due process of law" required by the Fourteenth Amendment does not allow a State to take private property without just compensation, but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the settled usages and the modes of proceeding authorized at the time the Constitution was adopted and which was expressly forbidden in the National Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.

If the court had not ruled otherwise, I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no State should make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, the people of the United States put upon the States the same restrictions that had been imposed upon the National Government in respect as well of the privileges and immunities of citizens of the United States as of

the protection of the fundamental rights of life, liberty and property.

The decision to-day rendered is very far reaching in its consequences. I take it no one doubts that the great men who laid the foundations of our Government regarded the preservation of the privileges and immunities specified in the first ten amendments as vital to the personal security of American citizens. To say of any people that they do not enjoy those privileges and immunities is to say that they do not enjoy real freedom. But suppose a State should prohibit the free exercise of religion; or abridge the freedom of speech or of the press; or forbid its people from peaceably assembling to petition the government for a redress of grievances; or authorize soldiers in time of peace to be quartered in any house without the consent of the owner; or permit the persons, houses, papers and effects of the citizen to be subjected to unreasonable searches and seizures under warrants not issued upon probable cause nor supported by oath or affirmation, nor describing the place to be searched and the persons or things to be seized; or allow a person to be twice put in jeopardy of life or limb; or compel the accused to be a witness against himself; or deny to the accused the right to be informed of the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, or to have the assistance of counsel; or require excessive bail; or inflict cruel and unusual punishment. These or any of these things being done by a State, this court, according to the reasoning and legal effect of the opinion just delivered, would be bound to say that the privileges and immunities specified were not privileges and immunities of citizens of the United States within the meaning of the Fourteenth Amendment, and that citizens of the United States affected by the action of the State could not invoke the protection of that amendment or of any other provision of the National Constitution. Suppose the State of Utah should amend its constitution and make the Mormon religion the established religion of the State, to be supported by taxation on all the people of Utah. Could its right to do

so, as far as the Constitution of the United States is concerned, be gainsayed under the principles of the opinion just delivered? If such an amendment were alleged to be invalid under the National Constitution, could not the opinion herein be cited as showing that the right to the free exercise of religion was not a privilege of a "citizen of the United States" within the meaning of the Fourteenth Amendment? Suppose, again, a State should prescribe as a punishment for crime burning at the stake or putting out the eyes of the accused. Would this court have any alternative under the decision just rendered but to say that the immunity from cruel and unusual punishments recognized in the Eighth Amendment as belonging to every citizen of the United States was not an immunity of a citizen within the meaning of the Fourteenth Amendment and was not protected by that amendment against impairment by the State? The privileges and immunities specified in the first ten amendments as belonging to the people of the United States are equally protected by the Constitution. No judicial tribunal has authority to say that some of them may be abridged by the States while others may not be abridged. If a State can take from the citizen charged with crime the right to be tried by a jury of twelve persons, it can, so far as the Constitution of the United States is concerned, take away the remaining privileges and immunities specified in the National Bill of Rights. There is no middle position, unless it be assumed to be one of the functions of the judiciary by an interpretation of the Constitution to mitigate or defeat what its members may deem the erroneous or unwise action of the people in adopting the Fourteenth Amendment. The court cannot properly say that the Constitution of the United States does not protect the citizen when charged with crime in a state court against trial otherwise than by a jury of twelve persons, but does protect him against cruel and unusual punishment, or against being put twice in jeopardy of life or limb for the same offence, or against being compelled to testify against himself in a criminal prosecution, or in freedom of speech or in the free exercise of religion. The right to be tried when charged with crime by a jury of twelve persons

is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments originally limited only the powers of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the States.

If it be said that there need be no apprehension that any State will strike down the guarantees of life and liberty which are found in the National Bill of Rights, the answer is that the plaintiff in error is now in the penitentiary of Utah as the result of a mode of trial that would not have been tolerated in England at the time American independence was achieved, nor even now, and would have caused the rejection of the Constitution by every one of the original States if it had been sanctioned by any provision in that instrument when it was laid before the people for acceptance or rejection. Liberty, it has been well said, depends not so much upon the absence of actual oppression as on the existence of constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decisions. On the contrary, speaking by Mr. Justice Bradley, we have declared in *Boyd* v. *United States*, 116 U. S. 616, 636, that "it is the duty of the courts to be watchful for the constitutional rights of the citizen." If some of the guarantees of life, liberty and property which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freemen.

I dissent from the opinion and judgment of the court.

Counsel for Parties.

## ALDRICH *v.* CHEMICAL NATIONAL BANK.

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

No. 58. Argued October 20, 1899. — Decided March 5, 1900.

H., as vice president of a Cincinnati bank, made application to a New York bank for a loan of $300,000. The request was granted and that amount was placed to the credit of the Cincinnati bank upon the books of the New York bank. Immediately thereafter H. fraudulently caused himself to be personally credited upon the books of his own bank with a like sum of $300,000. The action of H. in negotiating the above loan with the New York bank was unauthorized by the board of directors of the Cincinnati bank, but after the arrangement had been made that bank drew out by check the money that had been placed to its credit by the New York bank and used the same in discharging its valid obligations. *Held*, that by so using the money obtained from the New York bank by H. in his capacity of vice president, the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The fraud perpetrated by H. upon his own bank in having himself personally credited upon its books with the amount of the loan, was a matter with which the New York bank had no connection, and its right to recover could not be affected thereby. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H. who assumed to represent it.

There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others without incurring liability for so doing.

This case and *Western National Bank* v. *Armstrong*, 152 U. S. 346, distinguished.

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

*Mr. Francis F. Oldham* and *Mr. John W. Herron* for appellant.

*Mr. George H. Yeaman* and *Mr. William Worthington* for appellee. *Mr. George C. Kobbé* was on their brief.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This litigation has extended over many years and the case as now presented will be best understood if a statement be made showing the proceedings in the Circuit Court and Circuit Court of Appeals.

In its bill in this case the Chemical National Bank alleged that on the 2d day of March, 1887, it loaned to the Fidelity National Bank the sum of $300,000 which the latter bank promised to repay on demand with interest from the date of the loan and at the same time delivered as collateral security therefor a certificate of deposit for the above amount together with sundry promissory notes.

The certificate referred to was in the following form: "Certificate of Deposit. This certificate is not subject to check, but must be presented to draw the money. No. 345. The Fidelity National Bank. Cincinnati, Feb. 28, 1887. E. L. Harper has deposited in this bank three hundred thousand dollars ($300,000), payable to the order of himself on return of this certificate in current funds. $300,000. Ammi Baldwin, Cashier. Indorsed: 'E. L. Harper.'"

It was alleged that the signature of Baldwin as cashier was used as the signature of the bank by its authority.

The bill then stated that on May 21, 1887, the Chemical Bank at the request of the Fidelity Bank returned some of the notes delivered as collateral security and received in substitution therefor other notes. The latter notes were described in a schedule attached to the bill, and it was alleged that the bank was still the owner and holder of them, except three executed by J. W. Wilshire for $25,000 each which had been paid at maturity by John V. Lewis, the indorser thereof, the money so paid being held in lieu of the notes delivered as collateral security for the loan.

After setting forth the appointment on the 21st day of June, 1887, of Armstrong as receiver of the Fidelity Bank as well as the subsequent proceedings by which on the 12th day of July, 1887, that corporation was dissolved, the bill alleged that the Fidelity Bank never repaid the loan nor any

part thereof; that the Chemical Bank presented to the receiver proof of its claim and requested him to submit it to the Comptroller of the Currency in order that a dividend might be paid to it from the assets of the bank equal in ratio to the dividends paid to other creditors, and that it might thereafter receive further dividends until its claim was paid; but that the Comptroller and the receiver had refused to allow it to be enrolled as a creditor.

The receiver without explicitly responding to the allegations of the bill as to the making of the loan said that he was unable to state whether or not the plaintiff loaned to the Fidelity Bank the sum of $300,000. In an amended answer he specifically denied that the Chemical Bank loaned to the Fidelity Bank the sum named, or that any such loan was made by the former to the latter on the faith and credit of the alleged certificate of deposit or that such certificate was executed and delivered by the cashier of the Fidelity Bank as its act and by its authority.

The answer averred that on the second day of March, 1887, and prior thereto Harper was the vice president of the Fidelity Bank and engaged in speculations in which he used its funds; that in the use of those funds he was assisted by Baldwin, but that such use was not known to the other directors of the bank, was not authorized by it, and was a fraudulent and illegal appropriation of its funds for the personal use of Harper; that a paper was signed by Baldwin, as cashier of the Fidelity Bank, which was believed to be the same paper alleged to be a certificate of deposit of the Fidelity Bank; that such certificate was not entered upon the books of the bank nor taken from the book from which, if regular, it should have been taken; that its execution was unknown to the other officers of the bank and was unauthorized by it; and that no consideration was received for it by the Fidelity Bank from Harper or from any other person nor was money deposited in the bank as the basis of the certificate.

Continuing, the defendant averred that the certificate of deposit and the promissory notes described in the bill were forwarded to the Chemical Bank by Harper, and the sum of

$300,000 was received by him from that bank; that he represented to the officers of the Fidelity Bank that the money was received from a loan made to him and by his direction was credited on his personal account, and was thereupon drawn out and used for his individual purposes, and that the other officers of the bank had no knowledge that the facts were otherwise than as represented by him. It was also averred that a large portion of the promissory notes delivered as collateral security for the loan were the personal property of Harper in which the Fidelity Bank had no interest.

The answer, after reciting the fact of the payment by the indorser Lewis of the three notes made by Wilshire for $25,000 each, alleged that the fourth note of Wilshire for the same amount, also indorsed by Lewis, was not presented for payment by plaintiff at maturity, in consequence whereof that note was not paid and the indorser was discharged. It was also averred that the Chemical Bank credited the payment of the above three sums of $25,000 upon the alleged loan of $300,000, reporting the same to the defendant as payments on that account, and treated them in all respects as proper credits on such loan. Payment of certain other notes since the bringing of the action was also alleged to have been made to the Chemical Bank.

The defendant therefore claimed that the Fidelity Bank was not liable to the Chemical Bank for the amount of the loan, but if it were otherwise adjudged, the defendant asked that all payments made to the plaintiff upon the collateral paper forwarded by Harper as security for the loan should be credited thereon; that the above note of Wilshire, indorsed by Lewis, not having been paid in consequence of plaintiff's neglect to present the same for payment, should be also credited; that the balance of the collateral paper should first be exhausted and the proceeds credited; and that the plaintiff should be permitted to prove only the amount found due after such credits had been made.

To the answer as amended the plaintiff filed a general replication.

In deciding the case the Circuit Court among other things

said: "Conceding that the transaction of the $300,000 loan was fraudulent as between E. L. Harper and the Fidelity Bank and that he appropriated the entire proceeds to his individual use, the claim of the Chemical Bank, which dealt in good faith in the transaction and was innocent of any knowledge or participation in the fraud, is not affected thereby. The negotiation of the loan was within the authority of Harper as vice president of the Fidelity Bank, and if he used that authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer from the consequences, and not the bank that made the loan and advanced the money, under the representation and in the belief that it was conducting a fair, legitimate business transaction with the Fidelity Bank." But the court held that all collections made prior to the filing of the claim upon the collaterals held by the Chemical Bank as security for the loan should be deducted therefrom. 50 Fed. Rep. 798, 802.

From this decision both parties appealed to the Circuit Court of Appeals. That court reversed the decree, holding upon an extended review by Judge Taft of the adjudged cases that creditors of an insolvent national bank could not be required *in proving their claims* to allow credit for any collections made after the declared insolvency of the bank from collateral securities held by them. 16 U. S. App. 465; 59 Fed. Rep. 372.

The Chemical Bank filed a petition for rehearing upon the ground that the court had erred in fixing the amount of interest to be allowed the bank on the dividends declared.

While that petition was under consideration by the Circuit Court of Appeals, this court decided the case of *Western National Bank* v. *Armstrong*, 152 U. S. 346, which related to a transaction between that bank and Harper. Thereupon the receiver filed a petition for rehearing, upon the question as to the validity of the loan involved in the present suit.

The above petitions for rehearing having been granted, the cause was again heard in the Circuit Court of Appeals and it was there decided that under the special facts disclosed by the evidence, and in view of the decision in *Western National Bank* v. *Armstrong*, the parties should be allowed an oppor-

tunity to introduce further evidence "upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the loan." The former order of the court was therefore modified, and the decree of the Circuit Court was reversed and the cause remanded, with leave to the parties to adduce such additional evidence. 31 U. S. App. 75, 83; 65 Fed. Rep. 573, 577.

The cause was again heard in the Circuit Court, which said: "Upon the evidence, the finding of this court is that the power of the Fidelity Bank to borrow money by conducting such a transaction as is involved in this case is established, and that the same is legitimately within the business of banking under the National Bank Act." It found for the Chemical Bank on the issue defined in the mandate of the appellate court. 76 Fed. Rep. 339, 345, 347. The decree was in these words: "And the court being now fully advised, finds that the Fidelity National Bank upon the second day of March, 1887, borrowed from the complainant the sum of $300,000, and that on the 21st day of June, 1887, when the Fidelity National Bank was declared insolvent, there was due from the Fidelity National Bank to the complainant the said sum of $305,450; that dividends have been declared from the assets of the Fidelity National Bank to the creditors thereof at the dates and for the rates per centum, as follows, that is to say: October 31, 1887, the first dividend of 25 per centum; June 15, 1889, the second dividend of 10 per centum; June 30, 1890, the third dividend of 10 per centum; August 5, 1891, the fourth dividend of 5 per centum; August 15, 1894, the fifth dividend of 8 per centum. The court further finds that upon the 25th day of April, 1890, the defendant rejected the claim aforesaid of the complainant, which had been theretofore presented to him; and that after the previous decree of this court upon, to wit, the 25th day of July, 1892, said defendant paid to said complainant the sum of $100,000 upon account of the sum which might be due to the complainant pursuant to the provisions for that purpose made in the decree of this court, entered in this cause on the 8th day of July, 1892. The court finds that there is now due this 21st day of October, 1896, to the complainant

from the defendant the sum of $117,749.78, being the dividends aggregating 58 per centum heretofore declared from the assets of the Fidelity National Bank, computed upon the amount of the complainant's claim as herein allowed, with interest on those of said dividends which were declared prior to April 25, 1890, from said last-named day, and with interest upon those thereafter declared from the dates of their declaration, respectively, after crediting the said payment of $100,000, upon the 25th day of July, 1892, the computation being made upon the principle ordinarily applied in partial payments. It is therefore ordered, adjudged and decreed that the defendant pay to the complainant the said sum of $117,749.78, with interest thereon from said 21st day of October, 1896, and that hereafter, while any balance remains due the complainant upon said loan, said defendant pay to complainant dividends, calculated upon said sum of $305,450, like to those paid to other creditors of the Fidelity National Bank."

The receiver appealed from this decree, and the Circuit Court of Appeals affirmed the decree of the court below. The opinion of that court states fully the grounds upon which it held the case not to come within the rule announced in *Western National Bank* v. *Armstrong*, 54 U. S. App. 462; 83 Fed. Rep. 556.

From that decree the receiver has appealed to this court — the present appellant having succeeded Armstrong.

The principal contention of the appellant is that under the principles announced in *Western National Bank* v. *Armstrong* the Fidelity National Bank incurred no liability on account of the money obtained from the Chemical National Bank. But the appellee insists that the language of this court in that case, so far as it relates to the power of a national bank as incidental to its business to borrow money was much broader than was necessary for the determination of the issues then before the court, and if interpreted as is done by the appellant is in conflict with the adjudged cases, inconsistent with sound principle, and should be modified.

In the last-named case the Western National Bank of New York alleged that the Fidelity Bank was indebted to

it on account of a loan made May 28, 1887, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf," and which loan, it was further alleged, was secured by collateral, signed by one Gahr and indorsed by Harper, and by the indorsement and delivery to the Western Bank by Harper of certificates for 1600 shares of the capital stock of the Fidelity Bank. It was also alleged that the collateral was without value and that the stock was wholly invalid and void. The Fidelity Bank denied that the Western Bank made any loan to it, or that it had any connection with or interest in the transaction referred to in the bill. The pleadings and evidence raised the question whether Harper, in his transactions with the New York bank, could legally bind the Fidelity Bank of which he was vice president. This court said: "It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice president and managing officer, and that by 'managing officer' he meant that Harper was

the 'general manager of the business of the bank.' No such officer as that of 'general manager' is known or named in the National Bank Acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the National Bank Act (Rev. Stat. § 5136, par. 7): A national bank can 'exercise by its board of directors, or duly authorized officers or 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 debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of *First Nat. Bank of Charlotte* v. *Exchange Nat. Bank of Baltimore*, 92 U. S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted.' These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting

for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially anthorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown."

In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan. If the present case depended upon that question it might be necessary to consider whether the language in *Western National Bank* v. *Armstrong* required modification.

It may be well, however, to observe that this court in *Auten* v. *United States Bank of N. Y.*, 174 U. S. 125, 141, 143, held that the borrowing of money was not out of the usual course of banking business. We said: "A power so useful cannot be said to be illegitimate, and declared as 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 important also to observe that the court said that *Western National Bank* v. *Armstrong* was not to be regarded as an adjudication to the contrary.

We may further observe that the last-named case differs from the present case in many important particulars.

In *Western National Bank* v. *Armstrong* the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice president. This court took care in that case to say that it did "not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In the present case it appears that the following letter, under date of February 28, 1887, and signed by E. L. Harper as vice president of the Fidelity Bank, was addressed to the cashier of the Chemical Bank: "Enclosed herewith we hand you for credit our certificate of deposit No. 345 for $300,000, with bills as collateral, as follows: [Here was given a list of twenty-seven notes]. We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate." This letter having been received by the Chemical Bank, its cashier wrote to the cashier of the Fidelity Bank under date of March 2, 1887: "Your favor of the 28th inst. has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to the rate of interest when the loan is paid." Before this last letter could have reached Cincinnati the bookkeeper of the Fidelity Bank, acting under instructions from Harper, credited him personally on the books of that bank with $300,000. But the credit of $300,000 given to the Fidelity Bank on the books of the Chemical Bank remained unaltered, and that amount was drawn from the latter bank in the ordinary course of business on the authorized checks of the Fidelity Bank and went to discharge its legal obligations. And it may be added that the Fidelity Bank had notice of the above credit in its favor; for besides other evidence, it was shown that in the monthly statement sent by the Chemical Bank to the Fidelity Bank covering the transactions of March, 1887, there appeared under the date of March 2d a credit to the Fidelity Bank as follows: "Tem. loan, $300,000."

We have then a case in which a national bank having used in its business money which its vice president obtained as a loan to it from another national bank denies all liability to

account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defence be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of the adjudged cases. We proceed to the examination of those cases.

In *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 644, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase.

In *Marsh* v. *Fulton County*, 10 Wall. 676, 684, it was held that "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation."

In *United States* v. *State Bank*, 96 U. S. 30, 36, which were actions brought in the Court of Claims against the United States to recover the amount of certain gold certificates deposited in the subtreasury at Boston and forwarded, after being cancelled, to the Treasurer of the United States, and in which transactions fraud was imputed to the cashier of the subtreasury at Boston, this court said: "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in nowise involved. . . . Surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the

nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal."

The rule was illustrated in *Louisiana* v. *Wood*, 102 U. S. 294, which was an action against a municipal corporation to compel it to repay money received and paid into its treasury on account of bonds sold by it but which it had issued without authority of law. This court held that the law implied from what was done a contract that the city would return the money paid to it by mistake. To the same effect is *Chapman* v. *Douglas County*, 107 U. S. 348, 355 *et seq.*

In *Parkersburg* v. *Brown*, 106 U. S. 487, 503, it appeared that the city of Parkersburg, West Virginia, pursuant to an act of the legislature of that State, issued its bonds to be loaned to persons engaged in manufacturing and to be secured by deed of trust or mortgage on real estate. The bonds were held to be void under the principles announced in *Loan Association* v. *Topeka*, 20 Wall. 655, and the question arose whether the city was bound to account for the property conveyed to it in trust to secure bonds so issued and loaned to persons engaged in manufacturing. This court said: "Notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that claim does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received

property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.) 181; *Morville* v. *American Tract Society*, 123 Mass. 129; *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 275, and cases there cited."

In *Read* v. *Plattsmouth*, 107 U. S. 568, 575, where the question was as to the validity of bonds issued by a municipal corporation, the court said: "In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept and used immediately arose."

A case aptly illustrating the principle adverted to is *Logan County Bank* v. *Townsend*, 139 U. S. 67, 74, 78. The facts in that case were these: Townsend, it was alleged, sold to the Logan County National Bank, through its cashier, bonds of a railroad corporation in consideration of a named sum and the agreement of the bank that it would, upon his demand, replace the bonds to him at the same price or less. The bank refused to comply with the agreement to replace the bonds, and Townsend sued to recover from it the damages sustained by him, to wit, the difference between the price paid by the bank and the value of the bonds. The bank, in its defence, denied that it had any connection with the transaction between Townsend and its cashier otherwise than that the latter having deposited the proceeds in the bank it had paid them to the plaintiff. Its principal defence was that the cashier as such had no authority to make the contract set out, and that the defendant had itself no right, power or authority to make it. Taking it to be true, as found by the jury, that the alleged agreement was made by the cashier for the bank and not upon his individual account, and assuming from the record

that the bank held the bonds at the time Townsend sued, this court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff on demand, the question would still remain whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. It would seem, upon defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without authority to make. True it is not under a duty to surrender possession until reimbursed the full amount due it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power under the statute to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract — and we are assuming, for the purposes of this case, that it may be — it is bound upon demand, accompanied by a tender of the price paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act." Again: "Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is, that if the bank had no authority to purchase the bonds in question, it is yet not exempt, by reason of anything

in the national banking act, from liability to the plaintiff for the difference between the price it paid for them and their value at the time it refused, upon plaintiff's demand, to comply with the contract made by it for their purchase and held on to the bonds."

In *Central Transportation Company* v. *Pullman's Car Company*, 139 U. S. 24, 60, which involved the validity of a certain contract whereby one corporation leased and transferred all its cars, contract rights and personal property to another corporation, and which lease was held to be void, this court said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." This principle was recognized and enforced in *Pullman's Car Company* v. *Transportation Company*, 171 U. S. 138, 151, in which it was said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

In *Dittey* v. *Dominion National Bank of Bristol*, 43 U. S. App. 613, 615, which was an action against a receiver of a national bank to recover the amount of a loan made by its president without the knowledge of the directors and for which he gave the note of the bank — the object of the transaction being to cover up certain frauds of the president — the court, speaking by Judge Taft, said: "In our opinion, even if the president may not have had authority to effect the loan, yet when he, in order to conceal his previous embezzlement,

deposited the sum to the credit of the Citizens' Bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman as its president had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion Bank. We think the same principle applicable in this case which was applied in the case of *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the annual settlement of one company he drew checks of the other and deposited them to the credit of the one company in the bank. The question was whether the company whose bank account had been swelled by the checks of the other was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take and hold it with the burden of his knowledge. So in this case the bank, having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do not see that the circumstance in one case that the treasurer stole the money and in the other that the president obtained it on the false representation that he was authorized to borrow it for his bank makes any reasonable distinction between the two cases."

In *Perkins* v. *Boothby*, 71 Maine, 91, 97, the question was as to the liability of a joint stock company on account of notes given by its agent for money loaned and which was appropriated to the payment of the company's debts. The directors had no knowledge of the loan or the appropriation of the money, unless knowledge could be implied from the fact that those acts were done by the agent. The defence was that the agent's want of authority to effect the loan relieved the com-

pany from responsibility not only on the notes but for any claim under the common counts for money had and received. After observing that although the directors upon receiving notice of the acts of the agent in terms repudiated them, yet after knowledge of the facts retained the benefit of the loans effected and used the money in discharge of valid claims against the company which would have been in force except for the unauthorized acts of the agent, the court said: "'If liable in one case why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.' Green's Brice's Ultra Vires, 618. The question whether upon reason and authority the application of this principle should be extended to municipal corporations, or whether, on the contrary, the purposes for which such bodies are organized, the limited powers conferred upon them, as well as considerations of public policy and safety, may remove them from such liability, is one of great importance. It does not arise in this case."

In *Bank of Lakin* v. *National Bank*, 57 Kansas, 183, a bank was held liable for the amount of certain notes executed in its name by its cashier without its authority, but the proceeds of which were received by the bank, the court saying that "a principal cannot receive the benefits of a transaction and at the same time deny the authority of the agent by whom it was consummated."

Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the

latter bank having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true as contended that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice president, the Chemical Bank credited the Fidelity Bank on its books with the sum of $300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank by its check upon the Chemical Bank had drawn the whole $300,000 at one time and now had the money in its possession unused? It would not be allowed to hold the money even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit money obtained by one of its officers from another bank under the pretence of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appro-

priate and use the money or property of others for its benefit without liability for so doing. If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former on the books of the latter with $300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage and from which it should not be permitted to derive profit to the prejudice of the other bank. So if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defence is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor.

The fact that after the Fidelity Bank had been credited on the books of the Chemical Bank with the $300,000, Harper fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank had no connection and cannot affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank and was by it used in meeting its current obligations. The dishonesty of Harper in his management of the affairs of the Fidelity Bank did not discharge that bank from the obligation under which it came by using in its business the money obtained by its vice president under the guise of a loan to the bank.

It is no defence to the claim of the Chemical Bank to say that the directors of the Fidelity Bank were unaware of the fraudulent acts of Harper. We do not rest our conclusion in the present case upon any question as to diligence or want of diligence upon the part of directors. We rest it upon the fact and the implied obligation arising therefrom that the Fidelity Bank used in its business and for its benefit the money which the Chemical Bank placed to its credit in consequence of a loan negotiated by Harper, who assumed to represent it.

Independently therefore of any question as to the scope of the power of a national bank to borrow money to be used in its business, we hold that the Fidelity Bank became liable to the Chemical Bank by using the money obtained from the latter, under the arrangement made by Harper in his capacity as vice president; consequently, the decree recognizing the claim, of the Chemical Bank for the amount of the loan of March, 1887, was right.

2. It is assigned for error that the collections from collaterals securing the alleged loan prior to the declaration of dividends by the receiver were not deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical Bank, and that the Chemical Bank was not required first to exhaust its collateral security and apply the proceeds on its claim before proving it against the receiver for dividends.

This assignment of error was prepared by counsel prior to the decision of this court in *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131, 135, 146, 147, in which case this court said that the inquiry on the merits was whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full. It was held that in the distribution of insolvent estates, "the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto,

though the receiver may redeem or be subrogated as circumstances may require." "When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

3. It is also insisted that the Chemical Bank should have been required to deduct from its claim the amount, principal and interest, of the note for $25,000 indorsed by J. V. Lewis, who, it is alleged, was released because of its failure to take the steps required by the rules of commercial law in order to charge him as indorser. Upon this point the Circuit Court of Appeals, upon the first hearing of this case, said: "Our conclusion upon this main question in the case makes it unnecessary for us to consider the other questions discussed by counsel, which were material only in view of the position taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether it could not properly be charged with the note for $25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collaterals, including as such the note just referred to, will fall far short of paying the $300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case." 16 U. S. App. 465, 539; 59 Fed. Rep. 372, 382. We concur in that view.

Having noticed all the questions that require consideration, the decree below is

*Affirmed.*

# HANCOCK NATIONAL BANK *v.* FARNUM.

ERROR TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

No. 89. Argued December 21, 1899. — Decided March 12, 1900.

A plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, can maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock. *Whitman* v. *Oxford National Bank*, *ante*, 563, followed to this point.

The action of the Supreme Court of Rhode Island in failing to recognize such right in the plaintiff in error can be revised by proceeding in error in this court.

The judgment rendered in the Kansas court is in that State conclusive against the corporation, as well as binding upon the stockholder, and, under the Constitution and laws of the United States it should have the like force and effect in other States when attempted to be enforced in their courts.

The facts of this case are these: The plaintiff in error, plaintiff below, a creditor of the Commonwealth Loan & Trust Company, a corporation duly organized under the laws of the State of Kansas, recovered a judgment on December 8, 1893, in the Circuit Court of the United States for the District of Kansas against the corporation for the sum of $16,136.76, debt, and $28.45 costs of suit. Thereafter, on April 27, 1894, an execution was issued on the judgment, and after due search and diligence no property of the corporation could be found to be taken in satisfaction thereof, and it was returned wholly unsatisfied. The corporation was not a railway, religious or charitable corporation. The defendant is a stockholder in that corporation, holding ten shares of the capital stock of the par value of $100 each, and appearing as such stockholder on the books of the corporation. Setting forth these facts with further detail of the provisions of the Kansas constitution and statutes, the plaintiff filed its declaration in the Common Pleas Division of the Supreme Court of Rhode Island to recover a judgment for a sum equal to the amount of defendant's stock. To this declaration a demurrer was filed

and sustained and judgment entered for the defendant, 20 R. I. 466, to reverse which judgment the plaintiff sued out this writ of error.

*Mr. William Reed Bigelow* for plaintiff in error. *Mr. H. J. Jaquith*, *Mr. William J. Cronin* and *Mr. John E. Conley* were on his brief.

*Mr. Walter F. Angell* for defendant in error. *Mr. Stephen O. Edwards*, *Mr. Seeber Edwards* and *Mr. Albert Gerald* were on his brief.

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

This case brings to our consideration the same constitutional and statutory provisions of the State of Kansas which were before us in *Whitman* v. *Oxford National Bank*, *ante*, 563. In that case we decided that a plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, could maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock. It is unnecessary to rediscuss the questions there considered.

It remains to be determined whether the action of the Supreme Court of Rhode Island in failing to recognize the right which, in the case just referred to, we have held that the plaintiff possessed, is one which can be revised by this proceeding in error. In order to give this court jurisdiction of a case decided in the courts of a State there must be some question arising under the Constitution of the United States; some alleged denial of a right or immunity secured by that Constitution. The plaintiff says that the decision of the Supreme Court of Rhode Island denied it a right given by section 1, article 4, of the Constitution of the United States, which reads: "Full faith and credit shall be given in each

State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof," and the following statute passed in pursuance thereof, to wit, Revised Statutes, section 905:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The plaintiff's contention that these Federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear. It may examine and inquire whether any right secured by these provisions was denied by the state court, though if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling as a question of general law.

The Constitution declares that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that Congress may not only prescribe the mode of authentication but also the effect thereof. Section 905 prescribes such mode, and adds that the "records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Such is the Congressional decla-

ration of the effect to be given to the records and judicial proceedings of one State in the courts of every other State. In other words, the local effect must be recognized everywhere through the United States.

What then is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas. The law and usage in Kansas, prescribed by its legislature and enforced in its courts, make such a judgment not only conclusive as to the liability of the corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it. *Ball* v. *Reese*, 58 Kansas, 614. In that case it was said, correcting an inference which was sought to be drawn from language in the case of *Howell* v. *Manglesdorf*, 33 Kansas, 194, in respect to the effect of a judgment against a corporation (pp. 617, 618):

"The general holding in this court has been that a judgment is final and conclusive between the parties and their privies; and we think it must be held that every stockholder in a corporation is so far privy in interest in an action against the corporation that he is bound by the judgment against it. In the absence of fraud and collusion, the judgment must be held to be final and conclusive against the stockholder if the court rendering it has final jurisdiction. As the judgment was valid, the court committed error in allowing the defendant to go

behind it and contest matters which were conclusively settled by the judgment against the corporation."

This representative character of the corporation has been affirmed by this court in several cases. In *Hawkins* v. *Glenn*, 131 U. S. 319, it was held that "in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack." This was a case in which an assessment ordered by a court which had jurisdiction of the corporation was held binding upon stockholders residing in another State; and in the opinion, on page 329, it was said by Chief Justice Fuller:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

See also *Glenn* v. *Liggett*, 135 U. S. 533; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337.

Now, as the judgment rendered in the Kansas court is in that State not only conclusive against the corporation but also binding upon the stockholder, it must, in order to have the same force and effect in other States of the Union, be adjudged in their courts to be binding upon him, and the only defences which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the act of Congress be secured.

In *Crapo* v. *Kelly*, 16 Wall. 610, 619, referring to the statute of Congress respecting the authentication of records, it was said:

"Under this statute it has been held in this court, from an early day, that the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission

as a record. It is held that the same effect is to be given to the record in the courts of the State where produced, as in the courts of the State from which it is taken."

The fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial; for, as said in *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 147, citing *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135; *Embry* v. *Palmer*, 107 U. S. 3:

"It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority."

See also *Metcalf* v. *Watertown*, 153 U. S. 671–676; *Pittsburgh, Cincinnati &c. Railway* v. *Long Island Loan & Trust Co.*, 172 U. S. 493.

We are of the opinion, therefore, that the Supreme Court of Rhode Island has failed to give to the judgment in the Circuit Court of the United States for the District of Kansas that force and effect which it has within the limits of the State of Kansas, and that the failure so to do is an error available in this court.

*The judgment of the Supreme Court of Rhode Island must, therefore, be reversed, and the case remanded for further proceedings not inconsistent with the views herein expressed.*

Mr. Justice Peckham dissented.

# ILLINOIS CENTRAL RAILROAD COMPANY *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 114. Argued January 24, 25, 1900. — Decided March 12, 1900.

The charter of the Illinois Central Railroad Company authorized it to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages for the . . . complete operation of said road;" and granted to it "all such lands, waters, materials and privileges belonging to the State." A subsequent ordinance of the city of Chicago, passed in pursuance of authority granted by the legislature, forbade the driving or placing of any piles, stone, timbers or other obstruction in the harbor of the city, without the permission of the commissioner of public works. *Held:* that a Federal question was presented whether this ordinance impaired or interfered with the charter of the railroad company.

*Held* further, that, under its charter, the railroad company had no right to take possession of lands submerged beneath the waters of Lake Michigan. *Held*, also, that the "waters" granted to the railroad company in the second part of the granting clause, were restricted to the "streams" mentioned in the first part, and did not include the waters of Lake Michigan.

Under another section of the charter, providing that the corporation should not locate its track within any city without the consent of the common council, *held*, that this proviso was not confined to the main track of the road, but included its depots, engine houses and necessary track approaches to the same.

This restriction was not limited to the city as bounded at the date of the charter, but applied also to territory subsequently included within the city limits.

This was a bill in equity instituted by the Illinois Central Railroad Company in the Superior Court of Cook County, to obtain an injunction restraining the city of Chicago from interfering with the exercise of the right of the railroad company to fill in, for railroad purposes, certain lands submerged by the shallow waters of Lake Michigan in front of property owned by the railroad company, in fee, and situated between Twenty-fifth and Twenty-seventh streets in said city. The purpose of the railroad company in reclaiming the land was to erect thereon an engine house and locomotive stalls necessary to the operation of the road.

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The case was heard upon bill, answer, cross bill and demurrer to cross bill, in which were set forth substantially the following facts, as recited in the opinion of the Supreme Court, 173 Illinois, 471:

By an act of Congress approved September 20, 1850, 9 Stat. 466, c. 61, "the right of way through the public lands was granted to the State of Illinois for the construction of the railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another via the town of Galena, in said State, to Dubuque, in the State of Iowa, with the right, also, to take the necessary lands, waters and materials of earth, stones, timber, etc., for the construction" of the railroad. The act also granted to the State of Illinois, for the purpose of aiding and making the railroad and branches above named, every alternate section of land designated by even numbers, for six sections in width, on each side of the railroad and branches. By the act it was further provided that the railroad and branches should be and forever remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

The company was created, organized under and now exists, by virtue of an act of the legislature of the State of Illinois approved February 10, 1851, entitled "An act to incorporate the Illinois Central Railroad Company," Private Laws of 1851, p. 61, and by its charter it was authorized to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rail, from the southern terminus of the Illinois and Michigan Canal, to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same into Chicago, on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi River opposite the town of Dubuque, in the State of Iowa. By section 3 of its charter it was provided as follows: "The said corporation shall have right

of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporation,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided; . . . *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

The bill also avers that the company constructed its line of railroad within the then limits of the city of Chicago in the year 1852, and completed its railroad between the *termini* named in its charter, in the State of Illinois, in the year 1857; that the total number of miles of its railroad in the State, upon completion, was 706; that at the time of the construction of its railroad, in 1852, into the city of Chicago, the southern limits and boundary of the city extended only to Twenty-second street; that in 1852 it constructed its line of railroad immediately along the shore and partly over the shallow waters of Lake Michigan from Fifty-first street to Twenty-second street, then the southern boundary of the city, and that its railroad was constructed into the city of Chicago through the waters of Lake Michigan, pursuant to an

ordinance of the city; that its railroad within the limits of the city was constructed on piling set in the open waters of Lake Michigan east of the shore; that between Park Row and Randolph street the distances in a direct east and west line between the shore line and the inner or west line of the piling on which the railroad of the company was constructed through the open waters of Lake Michigan varied from 5 feet at Park Row to 310 feet at Madison street, and that the depth of the water along the line of piling between the points above named varied from $2\frac{1}{2}$ to $9\frac{1}{2}$ feet; that the company now owns or controls by lease, and is now operating under one management, the whole of the trunk line as one continuous line from New Orleans, through the States of Louisiana, Mississippi, Tennessee, Kentucky and Illinois, into the city of Chicago; that it controls, by lease or otherwise, under the same management, many other lateral lines in the States above named, and also in the States of Wisconsin, Iowa, Minnesota and Dakota, which connect with and are tributary to the parent line of the company; that the number of miles now owned or controlled by the company under one management exceeds 4600.

It is further alleged in the bill that the city of Chicago is the business centre of the various lines which constitute the system owned by the company; that the business carried on over the terminal tracks and facilities of the company within the present limits of the city of Chicago is so great and so constantly increasing that the whole of its right of way and lands contiguous thereto, within said limits, are used to their utmost capacity as yards, shops, depot grounds, side tracks, switching tracks, storage tracks, delivery tracks, team tracks and other structures, all of which are absolutely necessary as terminal facilities to enable the company to carry on and conduct its business as a common carrier of freight and passengers, and that all the tracks, structures and appliances of its terminal facilities are necessary and essential to enable the company to carry on its business; that the business of the company as a common carrier greatly increases from year to year, and that it has so continued to increase that its terminal

facilities in the city are not wholly adequate for the purposes and uses prescribed and intended by its charter. The bill sets out in detail its business and its increase from year to year, and alleges that its terminal facilities in the city of Chicago have been found to be wholly inadequate to enable the company to carry on its business; that in order to meet the increased business necessities and requirements of the company it is absolutely necessary that the company should construct, operate and use an engine house 316 feet in diameter, and containing forty stalls, together with a machine shop, turn table, coal chute and other structures; that it has no engine house whatever at which it is practicable for its engines to be overhauled and fitted for operation; that it has no land whatever unoccupied by other necessary tracks and structures, which is either sufficient in dimensions or suitably located, upon which to locate and construct an engine house of the necessary dimensions and capacity, with the necessary appurtenances thereto, required and necessary for the business of the company, and that in order to build such engine house and the appurtenances it is necessary to construct the same upon land covered by the shallow waters of Lake Michigan, at a point between Fifty-first street and Eighteenth street.

It is also set up in the bill that, in 1852, at the time of the construction of the road within the city of Chicago, it purchased certain lands lying between Twenty-fifth and Twenty-seventh streets, bordering on the shore of Lake Michigan; that in the deeds the shore of Lake Michigan was designated as the east boundary line thereof, and that the company, as owner, was vested with all the riparian rights and privileges incident to the ownership in fee of the shore land; that in the year 1882 it constructed a breakwater or bulkhead in the shallow waters of Lake Michigan, the same being located and constructed in front of the land which the company purchased in 1852, above referred to, the east and west line of the breakwater on the north extending from a point on the shore continuous with the northern boundary of the land conveyed to the company in 1852, and extending to a point 200 feet easterly from the shore line, running thence southerly

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a distance of 781 feet, and thence westerly to the shore line, a distance of 325 feet; that the breakwater built by the company in 1882 was constructed on two rows of piling driven into the bed of Lake Michigan, and the space between the rows of piling was filled in with stone, in order to strengthen the breakwater and enable it to withstand the force of Lake Michigan during periods of storm; that all the shore land embraced within the lines of the breakwater now is, and ever since the year 1852 has been, owned in fee simple by the company, and that it is entitled to all the riparian rights and privileges incident to the ownership in fee of the shore land; that the superficial area of the land covered by the shallow waters of Lake Michigan lying within the lines of the breakwater and the shore line of Lake Michigan is 195,200 square feet, or 4.48 acres; that the superficial area of the ground necessary for the construction of the engine house, machine shop, coal chute and other necessary structures appurtenant thereto is 168,426.9 square feet, or 3.86 acres.

The bill further states that in the year 1894 a part of the breakwater referred to as having been constructed by it in the year 1882 was destroyed by a storm on Lake Michigan; that it being necessary, to enable the company to carry on and conduct its business, that an engine house of sufficient capacity to meet its necessary requirements and demands in conducting its business and to accomplish the objects for which the company was chartered, be constructed and erected at a reasonably suitable and proper location, and it being necessary that such engine house should be erected and constructed upon the lands submerged by the shallow waters of Lake Michigan lying in front of land on the shore of Lake Michigan owned in fee simple by the company, the company caused plans to be made, as before stated, for an engine house 316 feet in diameter, and containing forty stalls or compartments, and under the power, authority and right given and vested in the company by its charter, and in the exercise of its rights as riparian owner, it elected and determined to locate and construct said engine house on land submerged by the shallow waters of Lake Michigan lying within the limits of

the breakwater, and to repair the breakwater and fill in the submerged lands lying within the limits of the breakwater, for the purpose of constructing thereon said engine house and the necessary appurtenances thereto; that the breakwater does not in any way interfere with the navigation of Lake Michigan; that the Secretary of War gave his consent to the repair of the breakwater; that the commissioner of public works of the city of Chicago also gave his consent to the repair; that the company placed upon the ground large quantities of material for repairing the breakwater, the filling in of the lands covered by the shallow waters of Lake Michigan embraced within the lines thereof, and for the construction of the engine house and appurtenances thereto on the lands to be filled in; that it repaired the breakwater by driving two rows of piling, and filled in a large part of the space between the exterior and interior line of piling with stone, for the purpose of enabling the breakwater to withstand the force of Lake Michigan; that the company was prevented by the police force of the city of Chicago, acting under the orders and direction of the mayor, from completing the work; that the city of Chicago, without right or authority, interferes with and prevents the company from filling in the lands within the lines of such breakwater.

The answer of the city set up its charter and authority under an act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of cities and villages (approved April 10, 1872, in force July 1, 1872)," and the several acts amendatory thereof and supplementary thereto, and that, among other things, it was "empowered to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof, and that all the acts and doings complained of as done and per-

formed by this defendant, its officers, agents and employés, have been done strictly in the line of its duty in that behalf for the purpose of protecting its own rights and the rights of the public generally, in the premises, so as to prevent obstructions in the harbor and the seizure and appropriation by the complainant of the bed and navigable waters of the said lake;" and also pleaded the decision of this court in *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387, as *res judicata* of all the questions in controversy. The cross bill prayed a counter injunction against any interference by the railroad company.

Upon a hearing upon these pleadings the Superior Court denied the injunction demanded by the railroad company and dismissed its bill. On appeal the Supreme Court affirmed this decree. 173 Illinois, 471. Whereupon the railroad company sued out a writ of error from this court.

*Mr. William D. Guthrie* for plaintiff in error. *Mr. Benjamin F. Ayer* and *Mr. James Fentress* were on his brief.

*Mr. Granville W. Browning* for defendant in error. *Mr. Charles M. Walker* was on his brief.

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

The Supreme Court of Illinois disposed of this case upon two grounds: (1) That the power given by the charter of the Illinois Central Railroad Company of February 10, 1851, to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages for the . . . complete operation of said road," and the grant to said corporation of "all such lands, waters, materials and privileges belonging to the State," did not include lands covered by the waters of Lake Michigan. (2) That, even if the grant were broad enough to include the waters of the lake, it did not follow that the railroad company would have the right, at any time it might see proper, to take and appropriate to itself any of the lands cov-

ered by such waters, provided only that the navigation of the lake was not interferred with.

1. The ultimate jurisdiction of this court is invoked by the allegation of the bill that the above provision of the railway's charter was and is an irrevocable contract between the State of Illinois and the complainant, conferring upon it "a vested and continuing right to use the shallow waters and submerged lands of Lake Michigan for such purposes, when such use is reasonably necessary for the business of your orator; provided, that the same does not interfere with the navigation of the lake, having reference to the manner in which commerce is conducted thereon"; and that "any law of the State of Illinois, or any judgment, decree or decision of any court or tribunal thereof, which denies or in any way impairs its right to use the submerged land of Lake Michigan for the purpose of constructing and using engine houses, shops and other buildings thereon, etc., impairs the obligation of the contract created by said charter," etc.

The answer of the city avers that, under an act of the General Assembly of the State, approved April 10, 1872, it was empowered "to regulate and control the use of public landing places for docks and levees; to control and regulate the anchorage, moorage and landing of all water crafts and their cargoes; to make regulations in regard to the use of harbors, and to appoint harbor masters and define their duties, and that in the exercise of such power this defendant has, through its police power, prevented the said complainant hitherto from filling up the said lake and intruding upon the navigable waters thereof;" and that the city was also empowered to regulate its police, and pass and enforce all necessary police ordinances; and that in pursuance of this authority the city council made and established an ordinance (793) that "no person or persons shall drive or place or cause to be driven or placed any pile or piles, stone, timbers earth or other obstruction in the harbor of the city without the permission of the commissioner of public works," etc.

This was the only authority claimed in the answer, but as all this legislation was subsequent to the charter of the railroad

company, the city now sets up in support of its motion to dismiss for want of a Federal question that it was provided in section eight of the railroad's charter of 1851, that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of such city," and that this section operates as a restriction upon the power of the railroad to locate its track, or other structures, depots, engine houses or otherwise, over any lands contiguous to the city under Lake Michigan, or any other public property over which the police power of the city extends.

It is also insisted that the city had, in 1851, even greater powers over the submerged lands on its lake front under its charter than it has now; but the only support for this contention lies in an amended charter of the city of Chicago, passed February 14, 1851, four days *after* the charter of the Illinois Central Railroad Company was adopted. As this was a subsequent act, it is impossible to argue from it that the police power of the city at the date of the charter was as ample as that conferred by the act of April 10, 1872, set up in the answer. The extract to which attention is called by counsel, from the opinion of the Supreme Court of Illinois in *Illinois Central Railroad* v. *Rucker*, 14 Illinois, 353, 356, to the effect that under the charter of the city of Chicago the common council was empowered to regulate, control and protect the bed and waters of the lake as a part of the city of Chicago, may have been, and probably was, based upon the act of February 14, 1851, and, in any event, is too indefinite to be made the basis of any adjudication as to the power of the common council.

We have examined the first charter of the city of Chicago, adopted March 14, 1837, and the amendments thereto, down to the charter of February 14, 1851, and find nothing prior to the last-mentioned date defining the powers of the common council over the waters of Lake Michigan adjacent to the city, or anything from which it can be argued that the authority of the common council, with respect to the harbor and adjacent waters, was as ample as that conferred by the acts of the Gen-

eral Assembly subsequent to the chartering of the railroad company.

The question then is reduced to this: Giving to the charter of the railroad company the broadest construction claimed by it (and, in determining the existence of a Federal question, we are bound to do this), may it not be reasonably insisted that, under the act of 1872 and ordinance No. 793, that "no person or persons shall drive or place or cause to be driven or placed any pile or piles, stone, timbers, earth or other obstruction in the harbor of the city without the permission of the commissioner of public works," the right of the railroad company "to enter upon and take possession of and use all and singular lands, streams and materials of every kind for the complete operation of the road," is impaired? We think it may. Without determining the effect of such ordinance, the question whether it impairs the charter of the company, giving to that charter a broad construction, is fairly open to contention. *Bacon* v. *Texas*, 163 U. S. 207, 216; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 5, 10. The claim is certainly not a frivolous one. In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit. Said Chief Justice Chase in *Millingar* v. *Hartupee*, 6 Wall. 258, 261, speaking of the validity of an authority exercised under the United States: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. . . . If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist." So in *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, we held that the bare averment of a Federal question is not always sufficient; that such aver-

ment must not be wholly without foundation, since if it were otherwise a Federal question might be set up in almost every case, and the jurisdiction of this court invoked simply for the purpose of delay.

But as we are of opinion that the Federal question in this case was properly set up in the record, and is not destitute of merit, the motion to dismiss must be denied.

2. Upon the merits, the case turns upon the proper construction of the charter of the Illinois Central Railroad Company, granted by the General Assembly, February 10, 1851. As was said in the case of *Walsh* v. *Columbus, Hocking Valley & Athens Railroad Company*, *ante*, 469, and the prior cases therein cited, whenever a contract created by a state statute is alleged to have been impaired by subsequent legislation, it is for this court to determine the proper construction of such statute, as well as the question whether the subsequent legislation has impaired it.

The sections of the charter upon which the railroad company relies for taking possession of this property, so far as the same are pertinent to this case, are as follows:

"Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; *may enter upon and take possession of and use all and singular any lands, streams and material of every kind, for the location of depots and stopping stages*, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. *All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes;* but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November fifth,

one thousand eight hundred and forty-nine; and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided; . . . *Provided*, that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams."

"Sec. 8. . . . Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city."

"Sec. 10. Said corporation may construct their said road and branches over or across any stream of water, watercourse, road, highway, railroad or canal, which the route of its road shall intersect, but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness. . . ."

"Sec. 15. . . . *Third.* — That said company shall proceed to locate, survey and lay out, construct and complete said road and branches, through the entire length thereof, . . . with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan. That the central road or main track shall be completed, with at least one line of rails, or single track, with the necessary turnouts, stations, equipments and furnishings, within four years from the date of the execution of said deed of trust, and the branches within six years from the said date."

The position of the railroad company under these sections, presupposing as it does a vested, continuing and irrevocable right for all time, to use such of the shallow waters and submerged lands of Lake Michigan as it may now or hereafter find to be necessary to the proper and complete operation of its road, and a surrender by the city of all power of interference, is certainly a somewhat startling one. It is no matter of surprise that the magnitude of the claim should have at once aroused the authorities of the city to inquire into its soundness.

Under the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk*, 162 Illinois, 138, 146, "the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds title in trust in its sovereign capacity, for the people of the entire State." Such was also the ruling of this court in a case between the same parties, *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, affirming *Illinois* v. *Illinois Central Railroad*, 33 Fed. Rep. 730. This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371.

But we are now asked to say that, not the State, but a railway company, is vested with a power which, in the course of time and in the increasing magnitude of its business, may enable it to do, by indirection or piecemeal, what it has been held the State could not do directly — take the whole water front of the city to the limit of navigation for the operation of the road, and that, too, without the consent and against the protest of the city. If such authority be possible, it should be granted in the clearest and most unmistakable language.

But on examining section three of the charter — the source of this almost unlimited power — we find that, so far from its being conferred in precise and definite words, the implication is clearly against the power claimed. In fact, it is only by a strained and unnatural construction that any intention on the part of the legislature to abdicate its authority over the submerged lands of Lake Michigan can be raised.

Referring to the particular language of the grant in that section, it is manifest that such authority must arise either from the right given "to enter upon and take possession of and use all and singular any *lands*, *streams* and materials of every kind," etc., or from the grant of "all *such lands*, *waters*, materials and privileges belonging to the State."

We do not question the general principle that the word "lands" includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Regina* v. *Leeds & Liverpool Co.*, 7 Ad. & El. 671, 685: "Lands are not the less land for being covered with water." See also *Brocket* v. *Ohio &c. Railroad*, 14 Penn. St. 241; *Beckman* v. *Kreamer*, 43 Illinois, 447; *Hooker* v. *Cummings*, 20 Johns. 90; *State* v. *Pottmeyer*, 33 Indiana, 402; *Rex* v. *Wharton*, Cas. Temp. Holt, 499; *S. C.* 12 Mod. 510; *Buckingham* v. *Smith*, 10 Ohio, 288; *Mill River Woollen Mfg. Co.* v. *Smith*, 34 Connecticut, 462; *Waters* v. *Lilley*, 4 Pick. 199; *Washington Ice Co.* v. *Shortall*, 101 Illinois, 46.

But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the State does not pass title to submerged lands below high water mark; *Pollard* v. *Hagan*, 3 How. 212; *Goodtitle* v. *Kibbe*, 9 How. 471; *United States* v. *Pacheco*, 2 Wall. 587; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Hardin* v. *Jordan*, 140 U. S. 371, 381; *Shively* v. *Bowlby*, 152 U. S. 1, 13; and that this principle also applies to the Great Lakes. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Seaman* v. *Smith*, 24 Illinois, 521; *People* v. *Kirk*, 162 Illinois, 138, 146; *Revell* v. *The People*, 177 Illinois, 468, 479.

It is true, as was said by the court in *Shively* v. *Bowlby*, 152 U. S. 1, 13, that if either the language of the grant or long usage under it clearly indicates an intention that waters submerged by the sea shall be included, it is within the power of the sovereign to grant them. But we know of nothing in the way of constant usage with regard to these submerged waters which lends support to the argument of the railroad company that this case is within the exception and not within the general principle of *Shively* v. *Bowlby*. To make usage significant of the proper interpretation of the grant, it should

appear that it was a usage for the railroad company to appropriate such lands without the express consent of the city, but with its silent acquiescence. Undoubtedly such usage might be inferred from repeated appropriations by the railroad without objection from the city authorities. But the facts seem to be that, wherever the railroad has taken such lands, it has done so with the express consent or subsequent ratification of the State or city. Thus the railroad originally entered the city under an ordinance adopted June 14, 1852, giving it the right "to enter said city at or near the intersection of its southern boundary with Lake Michigan, and following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section 15, and continue northerly across the open space in front of said section 15 to such grounds as the said company may acquire between the north line of Randolph street and the Chicago River, . . . upon which said ground shall be located the depot of said railroad," and express permission was given in section three of this ordinance to extend the railroad company's works and "fill out into the lake to a point on the southern pier not less than four hundred feet west from the present east end of the same."

In *Illinois Central Railroad* v. *Rucker*, 14 Illinois, 353, it was held that the company had the right *by its charter* to locate its road over these premises, *the city having consented to such location.* That was an application by the railroad company for the condemnation of certain lands along the water front. The petitioner alleged that the railroad had been located and was to be constructed in the waters of the lake, along the margin, in front of the premises of the land owners, and partly over the same. One of the defences was that the corporation had no power to locate its road in the waters of Lake Michigan, and that the premises in question were a part of the harbor of Chicago and an encroachment thereon. Counsel for the road took the position that the State had, by the express words of the charter, given to the company authority to locate its road in the waters of the lake. The opinion

is very brief, and the report of the case unsatisfactory, but the court did hold that the company had the right by its charter to locate the road over the premises in question, the city having assented. In the case under consideration the Supreme Court took the view that the controversy in that case concerned only the 200 feet strip for the location of the main track; that no question was raised or decided in regard to the right of the railroad company to go beyond the 200 feet right of way, and take submerged lands for an engine house or other purposes named in the charter. This is entirely true; at the same time it is difficult to see wherein authority to take this 200 feet strip is distinguishable from an authority to take such other submerged lands as are necessary for the complete operation of the road. It is highly probable that, if the case had been presented in the light of subsequent authorities, a different conclusion might have been reached. It is sufficient to say of the *Rucker case*, however, that the city was no party to the litigation, having expressly consented to the location of the main track, and that it is in no sense estopped by the adjudication. It was entirely competent for the Supreme Court in the instant case to take a different view of the law.

It would appear that, prior to 1869, other encroachments had been made upon these submerged lands, and upon April 16, 1869, the General Assembly by an act condoned these encroachments, and declared that the right of the company "under the grant from the State in its charter . . . and under and by virtue of its *appropriation*, *occupancy*, *use and control* . . . in and to the lands submerged," was confirmed, a procedure which seems to have been quite unnecessary upon the present theory of the railroad company that it has a perpetual right under its charter to take such submerged lands as were necessary for its complete operation. *McAuley* v. *Columbus, Chicago &c. Central Railway*, 83 Illinois, 352.

The position here taken, that the grant of the railroad company did not include the submerged lands along the lake shore, is not in conflict with the New York cases, which related

to submerged lands admittedly belonging to private parties. In the principal case, *In the Matter of New York &c. Railroad Companies*, 77 N. Y. 248, the proceeding was for the condemnation of lands in the city of New York, along the Hudson River, a large portion of which was under water. It was held that, so far as they belonged to private parties, they might be condemned, but so far as the lands formed a part of the streets and avenues of the city, the company could not acquire title to them, for the reason that they belonged to the city and were for the benefit of the public, citing *People* v. *Kerr*, 27 N. Y. 188. It was also held that, so far as respected the lands of private parties, the fact that they were submerged made no difference. In *Staten Island Rapid Transit Co.*, 103 N. Y. 251, it appeared that the statute authorizing the formation of railroad corporations empowered them to acquire lands, under the right of eminent domain, not only from individuals, but also from the State: but, as observed by the court in the opinion, all questions as to the right of a railroad company to acquire lands under navigable waters, as against the State, were excluded from the controversy. In the case of *Kerr* v. *West Shore Railroad*, 127 N. Y. 269, it was held that proceedings taken by the company to acquire a right of way across plaintiff's lands were effectual to vest in the company whatever title plaintiff had in the upland or in the land under the waters of the river, but it was said in the opinion to be familiar law that the shores of navigable rivers and streams, and the lands under the waters thereof, belong to the State, and may be appropriated by the State to all municipal purposes.

The grant of "waters" in the second sentence of section three is, as shown by the context, still less decisive of an intent on the part of the legislature to make a general grant of the waters of Lake Michigan. By the first sentence of this section power is given to the corporation to appropriate land not exceeding two hundred feet in width through its entire length, and "to enter upon and take possession of and use all and singular any lands, *streams* and materials of every kind for the location of depots and stopping places,

etc., . . . for the complete operation of said road;" and by the second sentence "all such lands, *waters*, materials and privileges, belonging to the State, are hereby granted to said corporation for the said purposes, . . . provided that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said *streams*." Obviously the words "such waters" in the second sentence is limited to the "streams" specified in the first sentence, and power was given to the railroad company to take possession of such streams for the purpose of constructing bridges, dams, embankments, excavations, station grounds, etc., upon the theory that the navigable streams of the State could not be bridged, diverted or encroached upon, except with the express authority of the State. The object of the section was evidently to confer such authority, subject, of course, to the navigation laws of the United States. *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683; *Illinois River &c. Packet Co.* v. *Peoria Bridge Asso.*, 38 Illinois, 467; *Chicago* v. *McGinn*, 51 Illinois, 266.

The word "streams" was evidently used to denote running waters, and is wholly inapplicable to a body of water like Lake Michigan. *Trustees of Schools* v. *Schroll*, 120 Illinois, 509. That this was the intention of the legislature is also evident from the proviso of the section "that nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." The use of this word "streams" was not only intended to differentiate the waters of rivers from the waters of the lake, but also has its bearing as tending to show that the word "land" was used in the sense of dry lands, or upland, as distinguished from submerged land. It is incredible that, if the General Assembly had intended to authorize the company to take possession of submerged lands, as it found it necessary or convenient so to do, it would not have employed more explicit language to that effect.

3. But even if the grant were as broad as claimed, and gave the company a right to take parcels of submerged land, as it became necessary for its railroad purposes, we are yet con-

strained to hold that it could not do so without the consent of the common council. The eighth section of the charter provides that "nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city." We see nothing in the act from which an intention can be inferred to confine this proviso to the main track of the road, and agree with the Supreme Court of Illinois that it included its depots, engine houses and the necessary track approaches to the same. Such seems to have been the practical construction placed upon it by the city and the railroad company. If the position of the company, that it applies only to the main track, were sound, it would be possible for it, upon establishing the necessity for additional facilities, to locate these engine houses and work shops in localities where they would be an intolerable nuisance to the inhabitants; or perhaps miles distant from the main line to which approaches would become necessary by tracks laid through populous portions of the city, regardless of the wishes of its constituted authorities.

It is also insisted by the company that this restriction applies only to the city as bounded in 1851, at the date of the charter, and that as the southern limit of the city at that time was Twenty-second street, no such consent is now necessary to be obtained, though the boundaries of the city have long since been extended to a point below the land proposed to be taken. Had the company signified a desire to take possession of these lands before the limits of the city had been extended, it is possible that it might claim a vested right to do so, though the boundaries were subsequently enlarged; but the object of the provision was evidently for the protection of cities in general, and not for the protection of cities as they existed at the date of the charter. The road, as originally constructed, ran through an almost uninhabited country, and yet a country which gave promise of a large population and of great cities being built up along the line of the road; and it is highly improbable that the growth of the State should not have been foreseen and contemplated in this legislation. Indeed, it is impossible to suppose that the legislature intended

that the road, so far as it passed through existing cities, all then insignificant, should be subject to the will of the common council, but so far as it passed through cities that might arise in the future, or existing cities whose boundaries would shortly be enlarged, it abdicated such power.

The case of *Regina* v. *Cottle*, 3 Eng. L. & E. 474, is pertinent in this connection. A turnpike act, passed in 1840, and which was to be in force for thirty-one years, provided that it should not be lawful to continue or erect any turnpike gate across the roads in the town of Taunton, or in any other town through or into which the roads might pass or be made. It was held that the prohibition extended to the erection of a gate within the limits of a town as it existed at any time during the operation of the act, and not merely at the time when the act passed. Said Lord Campbell: "We think the legislature contemplated the probable increase of Taunton within a period longer than that generally assigned for a generation of the human race, and intended that its inhabitants, as it increased, should be exempt from the annoyance of a turnpike gate cutting off the free intercourse between neighbors in the same street. . . . This construction is fortified by the reference 'to any other town through or into which the said roads may pass,' meant, probably, to protect the inhabitants of any new town which might spring up within the district while the act should be in force."

The case of *The People* v. *Deehan*, 153 N. Y. 528, is also apposite in this connection. In that case a grant by the town authorities to an incorporated gas company of a power to lay conductors "for conducting gas in and through the public streets and highways of said town," without any express limitation, was held not to be restricted to existing streets and highways, but to be construed as extending to such as were subsequently enlarged, changed or opened. In delivering the opinion the court observed: "When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may

be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity, or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose and duration."

There is nothing in these cases in conflict with those of *Chope* v. *Detroit & Howell Plank Road Co.*, 37 Michigan, 195, and *Detroit* v. *Detroit & Howell Plank Road Co.*, 43 Michigan, 140, in both of which it was held that a toll gate, lawfully erected upon land which was subsequently taken into the city, could not be declared a nuisance by reason of the extension of the boundaries, and that the same could not be abated without a violation of the Constitution.

In the case under consideration, however, no invasion of the right of property is contemplated. The subjection of the railroad company to the will of the common council deprived the company of nothing it before possessed, but limited the exercise of a right which had not yet become vested and was still subject to the police power. The question is really one of the intention of the General Assembly in incorporating this provision into the charter of the company, and in view of the need of some control of this kind and the condition of the country at the time the charter was adopted, we can have no doubt whatever that the assent of the common council was intended to be required as a permanent condition. Especially is this so in view of the insistence of the railroad company that the power to appropriate these submerged lands is a continuing one. In such case the condition upon which the power should be exercised, namely, the consent of the common council, should also be construed as continuous. In other words, the railroad company cannot assert the power and in the same breath repudiate the condition.

In conclusion, we are of opinion that the decree of the Supreme Court of Illinois was clearly right, and it is therefore

*Affirmed.*

Counsel for Parties.

## HUNTINGTON *v.* LAIDLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 105. Argued January 18, 19, 1900. — Decided March 19, 1900.

In order to maintain a direct appeal to this court from the Circuit Court of the United States under the act of March 3, 1891, c. 517, § 5, as to the jurisdiction of the court below, the record must distinctly and unequivocally show that that court sends up for consideration a single and definite question of its jurisdiction; but this may appear either by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of that court.

A certificate of a question of jurisdiction of the Circuit Court of the United States, under the act of March 3, 1891, c. 517, § 5, may be made by the District Judge, even if the decree was rendered by the Circuit Judge.

The question whether proceedings concerning the legal or equitable title to land, begun and concluded in the courts of a State, before the commencement of a suit in the Circuit Court of the United States to charge the land with a trust, afford a defence to this suit, is not a question affecting the jurisdiction of that court, but a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction; and if that court, of its own motion, and without hearing the parties on the question of its jurisdiction, enters a final decree dismissing the suit under the act of March 3, 1875, c. 137, § 5, upon the ground that by reason of the proceedings in the courts of the State the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, and an appeal is taken to this court upon the question of jurisdiction only, under the act of March 3, 1891, c. 517, § 5, the decree must be reversed and the cause remanded for further proceedings

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

*Mr. Maxwell Evarts* for appellant. *Mr. F. B. Enslow* was on his brief.

*Mr. Z. T. Vinson* and *Mr. Holmes Conrad* for appellees. *Mr. W. R. Thompson* and *Mr. W. K. Cowden* were on the brief.

*Mr. J. F. Brown* and *Mr. W. S. Laidley* filed a brief for appellees.

Opinion of the Court.

Mr. Justice Gray delivered the opinion of the court.

This is a direct appeal to this court, under the act of March 3, 1891, c. 517, § 5, from a decree of the Circuit Court of the United States for the District of West Virginia, dismissing for want of jurisdiction a bill in equity filed by Collis P. Huntington, a citizen of New York, as special receiver of the Central Land Company of West Virginia, a corporation of West Virginia, against John B. Laidley, a citizen of West Virginia, and against citizens of other States, to charge a tract of 240 acres of land in that State with a trust.

The question of jurisdiction, and the aspect in which it was presented to the court below, will be best understood by first giving an outline of the undisputed facts, and of the proceedings in this case, as gathered from the voluminous record transmitted to this court.

On February 25, 1870, Sarah H. G. Pennybacker, a married woman, owning a tract of land of 240 acres in West Virginia, executed with her husband a deed thereof, with a separate acknowledgment by each, to Huntington, who on October 16, 1871, conveyed his title therein to the Central Land Company; and that company afterwards, and before April, 1882, sold parts of the tract to one Remley and to other persons. The sufficiency of Mrs. Pennybacker's acknowledgment was doubted; and on January 26, 1882, she, having become a widow, executed and acknowledged, in due form of law, a deed of the tract to Laidley. All those deeds were duly recorded.

In April, 1882, Laidley brought, in the circuit court of Cabell county in the State of West Virginia, an action of ejectment against the Central Land Company to recover the tract of land; and a verdict and judgment obtained by the Central Land Company in that action were in November, 1887, set aside and reversed by the Supreme Court of Appeals of West Virginia, and a new trial ordered, upon the ground that Mrs. Pennybacker's acknowledgment to her first deed was defective. 30 West Virginia, 505.

The Central Land Company filed in the county court in June, 1887, a bill in equity, and in March, 1888, an amended bill, against Laidley, Huntington, Mrs. Pennybacker and the several grantees of the Central Land Company, alleging that Laidley obtained his deed from Mrs. Pennybacker by fraud, and held the land in trust for the Central Land Company, and should be restrained from proceeding with the action at law. The county court dismissed that bill, and its decree was affirmed in February, 1889, by the Supreme Court of Appeals. 32 West Virginia, 134.

In September, 1890, the action of ejectment of Laidley against the Central Land Company (proceedings in which had been stayed to await the decision in the equity suit) was tried again in the county court, and a verdict and judgment returned for Laidley. A petition for a writ of error to review that judgment was afterwards denied by the Supreme Court of Appeals; and on March 26, 1891, the county court issued a writ of possession in favor of Laidley. A writ of error from this court to the Supreme Court of Appeals was sued out by the Central Land Company on July 7, 1891, and was dismissed by this court for want of jurisdiction on June 3, 1895. 159 U. S. 103.

In November, 1883, Laidley brought in the county court separate actions of ejectment against Remley and the other persons who had taken deeds from the Central Land Company of parts of the tract of 240 acres. In each of those actions, the defendant filed a claim for improvements, and Laidley (pursuant to the provisions of the Code of West Virginia of 1891, c. 91, §§ 10–13) elected to allow the improvements, and on September 10, 1890, took judgment for the value of the lot recovered, with an order for its sale, instead of a judgment for the possession of the land, and for the transfer of the title. On December 15, 1890, the court appointed special commissioners to make the sales. On October 21, 1897, the court substituted, instead of those commissioners, William R. Thompson, and he advertised the lots for sale.

Meanwhile, on November 11, 1890, Huntington and others,

stockholders in the Central Land Company, had filed in the Circuit Court of the United States a bill in equity against the company to wind up its affairs, because its charter was about to expire; and on the same day the court appointed Frank B. Enslow temporary receiver to take possession of all its property. On December 16, 1890, Enslow reported to the court that he had taken possession of all the property of the company, including the tract of 240 acres; and the court appointed Huntington special receiver, and directed Enslow to turn over all its property to him, which was accordingly done.

On February 28, 1891, Huntington, as such special receiver, filed in the Circuit Court of the United States against Laidley, and against sundry persons claiming under grants from him, the bill in the present case, which set forth the conveyances from Mrs. Pennybacker to Huntington, from him to the Central Land Company, from that company to Remley and others, from Mrs. Pennybacker to Laidley, and from him to the other defendants, and the appointment of Huntington as receiver; alleged that the deed from Mrs. Pennybacker to Huntington was duly acknowledged by her, and was valid; and that Laidley's acts, in obtaining the later deed from her to himself, and in conveying parts of the land to other persons, were in fraud of the rights of the Central Land Company, and created a cloud upon the title of that company and of those claiming under it; and prayed for an injunction against the defendants from interfering with the plaintiff's possession of the tract of 240 acres, and from doing any act tending to affect his title, or to cast a cloud upon it, and from proceeding to enforce any claim to, or taking possession of, or making any sales of, any of the lots sold by the Central Land Company; and further prayed that the deed from Mrs. Pennybacker to Laidley, and his deeds to the other defendants, be declared void. On the filing of the bill, a temporary injunction was issued as prayed for.

On January 12, 1892, a demurrer by Laidley to this bill, and a motion by him to dissolve the injunction, were both overruled.

On January 26, 1894, the plaintiff filed an amended bill in this cause, repeating the allegations and prayers of the original bill; and further alleging that, by reason of certain facts fully and specifically set forth, and alleged to have been discovered by the plaintiff since he filed the original bill, the acts of Laidley in procuring the deed to himself from Mrs. Pennybacker were done while he stood in a confidential relation to Huntington, and were fraudulent as against Huntington and the Central Land Company; and also alleging that, if the legal title passed to Laidley by his deed from Mrs. Pennybacker, he and his grantees held the legal title in trust for the plaintiff and the grantees of the Central Land Company; and therefore praying that the defendants might be decreed to convey the lands, so held by them respectively, to Huntington as receiver of the Central Land Company, and to the grantees of that company.

On February 26, 1896, Laidley and the other defendants filed a plea and answer, in which they denied the allegations of the bill; set up by way of estoppel the judgments in the state courts in favor of Laidley and against the Central Land Company, in the action of ejectment, and in the suit in equity, between them; and claimed to be allowed the amounts awarded to Laidley in his actions of ejectment against Remley and others.

On December 26, 1896, the plaintiff was allowed to further amend his bill in particulars which need not be stated; and the defendants filed the same plea and answer to the bill as so amended.

On July 12, 1897, the court, upon a hearing of the parties, adjudged that "said plea of *res adjudicata*" be overruled; and gave the defendants leave to answer the bill; and denied motions of the defendants to dissolve the injunction, and to remove Huntington from the office of receiver.

On July 13, 1897, Laidley filed another plea and answer, setting up, in different form, substantially the same defences as in the former plea and answer. On September 4, 1897, the other defendants filed an answer to that bill; and the plaintiff obtained an order on Laidley, returnable January 10, 1898, to show cause why his new plea and answer should not be stricken

from the files as irregular. On October 4, 1897, the plaintiff filed a general replication to the answer of the other defendants.

On December 17, 1897, Huntington, as plaintiff in the case at bar, filed a petition in the Circuit Court of the United States for a rule against Laidley and against his attorneys, Z. T. Vinson and William R. Thompson, to show cause why they should not be fined and attached for contempt in violating the injunction granted by that court in February, 1891, by undertaking to sell the lots described in Laidley's actions of ejectment against Remley and others. On December 20, 1897, Laidley and Thompson filed answers to this rule, and annexed thereto as exhibits copies of the proceedings in those actions of ejectment.

On December 20, 1897, on motion of the plaintiff, the court extended the time for taking the testimony in the cause until ninety days after the hearing on the motion to strike out Laidley's plea and answer.

On March 3, 1898, the rule for an attachment for contempt was argued. On June 25, 1898, the court entered an order discharging that rule, because, as the order stated, the court found that the circuit court of Cabell county, West Virginia, had taken jurisdiction of the parties and the subject-matter, prior to the institution of this suit, and the cause was still pending in that court, and therefore the Circuit Court of the United States had no jurisdiction to grant the injunction restraining the sale of the property under decrees of the state court.

On the same day, and without any further hearing in the cause, the court, of its own motion, entered a final decree, as follows: "This cause having come on this 25th day of June, 1898, to be considered by this court upon a petition filed by the complainant herein on the 17th day of December, 1897, praying that a rule be issued requiring that John B. Laidley, one of the defendants herein, and his attorneys, Z. T. Vinson and W. R. Thompson, should appear and show cause why they should not be fined and attached for contempt for violating the injunction order heretofore entered in the above entitled cause, and upon the answer and exhibits attached thereto of the said

defendant, John B. Laidley, to said petition, and upon the answers and exhibits attached thereto of his attorneys, Z. T. Vinson and W. R. Thompson, thereto, and upon the bill and the answers to said bill; and the court having considered the matter, and having duly examined the bill and amended bills herein, and the answers of the defendant and the exhibits attached thereto, and the records in the ejectment suits in the circuit court of Cabell county, in which John B. Laidley was plaintiff and the Central Land Company of West Virginia and others were defendants, and the record in the chancery cause in the circuit court of Cabell county, in which the Central Land Company of West Virginia was plaintiff and John B. Laidley and others were defendants, which said records in said state court actions were not disputed or denied by the complainant; and it appearing from such examination to the satisfaction of this court, upon consideration thereof, that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, because of the pendency in the state court, prior to the commencement of this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, which was begun in the circuit court of Cabell county, West Virginia, on the first Monday of April, 1882, and of the other actions in ejectment brought in said state court by the said John B. Laidley as plaintiff in relation to the property in question in this suit, prior to the commencement of this cause, and of the chancery cause in said state court in which the Central Land Company of West Virginia was plaintiff and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause; and this court being therefore, for the aforesaid reason, of the opinion that it is required to dismiss this suit by the fifth section of the act of Congress, approved March 3, 1875, and entitled 'An act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts, and for other purposes,' it is now therefore, on this court's own motion, adjudged and decreed that this suit and the bill and amended bills therein be, and

they hereby are, dismissed and stricken from the docket of this court, without costs."

On the same day, the following proceedings took place, and were filed in the Circuit Court of the United States, namely: The plaintiff presented a petition for an appeal from that decree to this court, under the act of March 3, 1891, c. 517, § 5, alleging that he was aggrieved by the final decree by which the Circuit Court of the United States, notwithstanding that it had the first actual physical possession of the land involved in this cause, dismissed the suit on the ground that it had no jurisdiction thereof, because of the pendency of the suits in the state court, begun prior to the commencement of this cause. And the District Judge signed an order "that the appeal be allowed as prayed for;" approved an appeal bond; and signed a citation to the appellees, as well as a certificate in these terms: "A final decree having been entered herein on the 25th day of June, 1898, dismissing this suit and the bill and amended bills therein: Now therefore this court, in pursuance of the second paragraph of the fifth section of the act of Congress, approved March 3, 1891, and entitled 'An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' hereby certifies to the Supreme Court of the United States for decision the question of the jurisdiction alone of this court over this cause, as follows: Is this court without jurisdiction of this cause, because of the pendency in the state court, prior to the commencement of this suit, of the action of ejectment in which John B. Laidley was plaintiff and the Central Land Company of West Virginia was defendant, which was begun in the circuit court of Cabell county, West Virginia, on the first Monday in April, 1882, and of the other actions in ejectment brought prior to this cause in said state court by the said John B. Laidley as plaintiff, in relation to the property in question in this suit, and of the chancery cause in which the Central Land Company of West Virginia was complainant and John B. Laidley and others were defendants, which was brought in said state court prior to the commencement of this cause?"

The appeal in this case is taken under that clause of the act of March 3, 1891, c. 517, § 5, which provides that appeals or writs of error may be taken from the Circuit Court of the United States directly to this court "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." 26 Stat. 827.

The appellees have moved to dismiss the appeal, upon the ground that the decree of dismissal involved the consideration and determination of the legal effect and conclusiveness of the several judgments and decrees of the state courts, and therefore the appeal should have been to the Circuit Court of Appeals, and not to this court; and upon the further ground that the District Judge could not certify a question decided by the Circuit Judge, or allow an appeal from his decree.

In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways; by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below. *Maynard* v. *Hecht*, 151 U. S. 324; *In re Lehigh Co.*, 156 U. S. 322; *Shields* v. *Coleman*, 157 U. S. 168; *Interior Construction Co.* v. *Gibney*, 160 U. S. 217; *Van Wagenen* v. *Sewall*, 160 U. S. 369; *Chappell* v. *United States*, 160 U. S. 499; *Davis* v. *Geissler*, 162 U. S. 290. In the case at the bar it appears in both ways.

The final decree of the Circuit Court of the United States recited that, at the hearing upon the petition for a rule for an attachment for contempt, the court examined the bill and amended bills and the answers thereto, and the undisputed records of the suits in the state court; and that from such examination it appeared to the satisfaction of the court that this suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, because of the pendency of those suits in the state court, and for that reason the court was of opinion that it was required by section 5 of the act of March 3, 1875, c. 137, to dismiss the suit;

and it was therefore, upon the court's own motion, adjudged and decreed that the suit be dismissed. The act of March 3, 1875, c. 137, § 5, referred to in that decree, provides that if in any suit commenced in a Circuit Court of the United States, it appear to the satisfaction of that court, at any time after the suit is brought, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," that court shall dismiss the suit. 18 Stat. 472. And such dismissal for want of jurisdiction is reviewable by this court under the act of March 3, 1891, c. 517, § 5. *Wetmore* v. *Rymer*, 169 U. S. 115. The final decree, therefore, clearly shows that the question decided below was a specific question of jurisdiction only. This dismissal of the suit for want of jurisdiction was the only ground assigned for the appeal; and the appeal was allowed "as prayed for."

The same question is also distinctly stated in the certificate made and filed by the District Judge on the same day on which the final decree was entered, and on which he allowed the appeal and signed the citation. It does not appear from the record, and is immaterial, whether the final decree was rendered by the Circuit Judge or by the District Judge. The District Judge was a judge of the Circuit Court of the United States, and as such had authority to allow the appeal and to sign the citation, even if the decree was rendered by the Circuit Judge. Rev. Stat. §§ 999, 1012; *Rodd* v. *Heartt*, 17 Wall. 354. We can have no doubt that the District Judge, who as a judge of the Circuit Court lawfully allowed the appeal and signed the citation, was authorized also to certify to this court the question of jurisdiction determined by that decree.

The question of jurisdiction then, appearing by the decree itself and by the order allowing the appeal therefrom, as well as by the distinct and contemporaneous certificate, to have been the only question on which the decree below was based, is rightly before this court for determination.

The condition of the cause, at the time when the Circuit Court of the United States entered a final decree dismissing it for want of jurisdiction, was as follows: An injunction

had been granted upon the filing of the bill. The court had overruled a demurrer to the bill, as well as a plea of all the defendants setting up the judgments in the state courts as *res adjudicata;* and had given leave to the defendants to answer the bill. Thereupon the defendant Laidley filed a plea and answer setting up substantially the same defences as before; and the plaintiff obtained an order to show cause why this plea and answer should not be stricken out as irregular. The other defendants answered the bill, and the plaintiff filed a general replication to their answer. The court extended the time for taking testimony in the cause until ninety days after hearing the motion to strike out Laidley's plea and answer. That motion was never heard; the time allowed for taking testimony had not expired; and the cause was not heard, or ready to be heard, as between the plaintiff and any of the defendants, except upon a rule (which had been obtained by the plaintiff and argued by both parties) for an attachment against Laidley and his attorneys for contempt in violating the injunction previously granted. Yet the court not only discharged the rule for an attachment for contempt, but at the same time, of its own motion, and without any further hearing of the cause, or of any matter therein, entered the final decree dismissing the suit for want of jurisdiction. This action of the court was irregular. The defendant, as the case stood, was not entitled to present any objection to the jurisdiction of the court over the principal cause; and the plaintiff was entitled to be heard upon any such objection taken by the court of its own motion. *Hartog* v. *Memory*, 116 U. S. 588; *Morris* v. *Gilmer*, 129 U. S. 315, 327; *Wetmore* v. *Rymer*, 169 U. S. 115, 122, 123.

Independently of that consideration, the decree dismissing this suit for want of jurisdiction was erroneous. It may be that the order discharging the rule for an attachment for a contempt in violating the injunction by proceedings under orders of the state court was correct. Rev. Stat. § 720; *Diggs* v. *Wolcott*, 4 Cranch, 179; *Riggs* v. *Johnson County*, 6 Wall. 166, 195; *Central Bank* v. *Stevens*, 169 U. S. 432, 460. But it by no means follows that the Circuit Court of the United

States had no jurisdiction to entertain this suit for any purpose.

Before the commencement of the present suit, all the proceedings between Laidley and the Central Land Company in the state court, which affected the whole tract of 240 acres, had been brought to an end — Laidley's action of ejectment against the Central Land Company, by a judgment and a writ of possession in Laidley's favor; and the Central Land Company's bill to restrain Laidley from proceeding with that action, by a decree dismissing the bill. And Laidley's proceedings in ejectment in the state court against Remley and others concerned only the legal title in parts of the tract of 240 acres.

The present suit seeks to charge the whole tract with a trust in favor of the plaintiff as receiver of the Central Land Company. Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defence — either by way of *res adjudicata*, or because of any control acquired by the state court over the subject-matter — to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The Circuit Court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case.

In any aspect of the case, the decree of the Circuit Court of the United States, dismissing the suit for want of jurisdiction, must be reversed, and the cause remanded to that court for further proceedings therein.

The case of *Blythe* v. *Hinckley*, 173 U. S. 501, cited by the appellees, has no tendency to support the opposite conclusion. In that case, this court dismissed the appeal, because the decree below was not founded solely upon a want of jurisdiction in the Circuit Court of the United States, but also upon the

grounds that the plaintiff's remedy was at law and not in equity, and that certain judgments of the state courts could not be reviewed on the reasons put forward. And of the last ground this court, speaking by the Chief Justice, said that it "was not in itself a decision of want of jurisdiction because the Circuit Court was a Federal court, but a decision that the Circuit Court was unable to grant relief because of the judgments rendered by those other courts.' 173 U. S. 507.

*Decree reversed, and cause remanded for further proceedings.*

Mr. Justice Brewer dissenting.

I dissent from the opinion and judgment in this case. In a purely technical sense it may not be open to criticism. But when, as disclosed, it appears that in the state courts by final determinations, beyond any opportunity of review, the legal and equitable title to the tract in controversy has been adjudged to be in Laidley, (even if there be question of the correctness of those decisions,) it seems to me that under the act of March 3, 1875, referred to in the opinion of the majority, the Federal court not only may rightfully but also should hold that whatever may be the state of the pleadings the litigation in that court must stop. Of course, everybody knows that when there has been in separate actions in courts of law and equity final determination as to both the legal and equitable title there is no excuse for further litigation, and I think that we sacrifice substance to form when we hold that the Federal court should not, when these facts are disclosed, act promptly, but must wait until the issues presented by pleadings have been attempted to be supported by testimony and the case is ready for final hearing. *Interest reipublicæ ut sit finis litium.*

# DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

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No. 110. COUNTY OF COCONINO *v.* COUNTY OF YAVAPAI. Appeal from the Supreme Court of the Territory of Arizona. Argued for appellant January 22, 1900. Decided January 29, 1900. *Per Curiam.* Decree affirmed with costs on the authority of *Utter* v. *Franklin*, 172 U. S. 416. *Mr. Edward M. Doe* for the appellant. No appearance for the appellee.

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No. 117. DREYER *v.* PEASE, SHERIFF, and No. 118, BERGER *v.* PEASE, SHERIFF. Appeals from the Circuit Court of the United States for the Northern District of Illinois. Submitted January 25, 1900. Decided January 29, 1900. *Per Curiam.* Final orders affirmed with costs on the authority of *Markuson* v. *Boucher*, 175 U. S. 184; *Baker* v. *Grice*, 169 U. S. 284; *Tinsley* v. *Anderson*, 171 U. S. 101, and cases cited. *Mr. Levy Mayer* for the appellants. *Mr. Charles S. Deneen* for the defendant in error.

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No. 120. KITTANING COAL COMPANY *v.* ZABRISKIE. Appeal from the Circuit Court of the United States for the Eastern District of New York. Argued January 26, 1900. Decided January 29, 1900. *Per Curiam.* Dismissed for the want of jurisdiction on the authority of *Smith* v. *McKay*, 116 U. S. 355; *Blythe* v. *Hinckley*, 173 U. S. 501. *Mr. John B. Uhle* for the appellant. *Mr. Henry Crofut White* and *Mr. Henry P. Wells* for the appellees.

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No. 191. FARMERS' NATIONAL BANK OF ARKANSAS CITY, KANSAS, *v.* ROBINSON, RECEIVER. Error to the Supreme Court of the State of Kansas. Submitted February 26, 1900. De-

cided March 5, 1900. *Per Curiam.* Judgment affirmed with costs on the authority of *Conde* v. *York*, 168 U. S. 642; *Leyson* v. *Davis*, 170 U. S. 36. *Mr. John C. Pollock* in support of motions to dismiss or affirm. No one opposing.

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## *Decisions on Petitions for Writs of Certiorari.*

No. 325. NEW YORK LIFE INSURANCE COMPANY *v.* DINGLEY, ADMINISTRATOR. Ninth Circuit. Denied January 15, 1900. *Mr. E. J. McCutchen*, *Mr. Charles Page*, *Mr. G. W. Hubbell*, *Mr. Geo. H. Durham* and *Mr. F. D. McKenney* for petitioner. *Mr. Henry P. Blair* opposing.

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No. 463. MECHANICS' SAVINGS BANK *v.* FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, ADMINISTRATOR. Third Circuit. Denied January 15, 1900. *Mr. Russell Duane* for petitioner.

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No. 440. BOWEN *v.* NEEDLES NATIONAL BANK. Ninth Circuit. Denied January 15, 1900. *Mr. Walter S. Carter* for petitioner. *Mr. Henry C. Dillon* opposing.

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No. 484. TURRET STEAM SHIPPING COMPANY, LIMITED, *v.* HALL. First Circuit. Granted January 15, 1900. *Mr. J. Parker Kirlin* for petitioner. *Mr. Charles Theo. Russell* and *Mr. Arthur H. Russell* opposing.

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No. 485. FARMERS' LOAN AND TRUST COMPANY *v.* WHITEHEAD. Eighth Circuit. Denied January 15, 1900. *Mr. Herbert B. Turner*, *Mr. E. O. Wolcott* and *Mr. J. F. Vaile* for petitioners. *Mr. John F. Shafroth* opposing.

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No. 494. MCCORD LUMBER COMPANY *v.* DOYLE. Eighth Circuit. Denied January 22, 1900. *Mr. A. L. Sanborn* for petitioner. *Mr. Thomas J. Davis* opposing.

Decisions announced without Opinions.

No. 311. WILLIS & BROTHER *v.* RICE. Fifth Circuit. Denied January 29, 1900. *Mr. Eugene Williams* and *Mr. George Clark* for petitioner. *Mr. John G. Winter* opposing.

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No. 500. TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY *v.* CONTINENTAL TRUST COMPANY OF NEW YORK. Sixth Circuit. Denied January 29, 1900. *Mr. James D. Springer* and *Mr. John Ford* for petitioner. *Mr. E. C. Henderson*, *Mr. Willard Parker Butler* and *Mr. Henry Crawford* opposing.

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No. 501. ROSE *v.* CONTINENTAL TRUST COMPANY OF NEW YORK. Sixth Circuit. Denied January 29, 1900. *Mr. John S. Miller* for petitioner. *Mr. E. C. Henderson*, *Mr. Willard Parker Butler* and *Mr. Henry Crawford* opposing.

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No. 502. CENTRAL TRUST COMPANY OF NEW YORK *v.* DENVER & RIO GRANDE RAILROAD COMPANY. Eighth Circuit. Denied January 29, 1900. *Mr. Henry T. Rogers*, *Mr. L. M. Cuthbert* and *Mr. A. H. Joline* for petitioners.

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No. 452. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* SEARS, EXECUTRIX. No. 453. SAME *v.* HILL ET AL. No. 454. SAME *v.* COHEN, and No. 455. SAME *v.* ALLEN, ADMINISTRATOR. Ninth Circuit. Granted February 5, 1900. *Mr. Edward Lyman Short*, *Mr. Julien T. Davies*, *Mr. John B. Allen*, *Mr. F. D. McKenney* and *Mr. R. C. Strudwick* for petitioner. *Mr. Stanton Warburton* opposing.

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No. 155. DENNEHY & COMPANY *v.* MCNALTA, RECEIVER. Seventh Circuit. Denied February 5, 1900. *Mr. M. Salomon* for petitioner.

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No. 516. PEOPLE OF ILLINOIS EX REL. HUNT, ATTORNEY GENERAL, *v.* ILLINOIS CENTRAL RAILROAD COMPANY. Seventh

Circuit. Denied February 26, 1900. *Mr. E. C. Akin* and *Mr. John H. Hamline* for petitioner. *Mr. John N. Jewett* opposing.

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No. 513. CARTER *v.* ROBERTS. Second Circuit. Denied February 26, 1900. (Mr. Justice McKenna took no part in the consideration and disposition of this application.) *Mr. Abram J. Rose* and *Mr. Laflin Kellogg* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

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No. 515. LAMPORT AND HOLT *v.* KING. Second Circuit. Denied February 26, 1900. *Mr. Frank D. Sturges* for petitioner. *Mr. William C. Beecher* opposing.

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No. 519. PETERS *v.* UNITED STATES. Ninth Circuit. Denied March 5, 1900. *Mr. W. H. Pritchard* and *Mr. Frederic D. McKenney* for petitioner. *Mr. Attorney General* and *Mr. Solicitor General* opposing.

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No. 509. INTERNATIONAL NAVIGATION COMPANY *v.* FARR & BAILEY MANUFACTURING COMPANY. Third Circuit. Granted March 5, 1900. *Mr. J. Rodman Paul* for petitioner. *Mr. Horace L. Cheyney* and *Mr. John F. Lewis* opposing.

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No. 510. MAYNARD, ATTORNEY GENERAL, *v.* GRANITE STATE PROVIDENT ASSOCIATION. Sixth Circuit. Granted March 5, 1900. *Mr. Fred. A. Maynard* for petitioner. *Mr. Moses Taggart* opposing.

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No. 533. BAKER *v.* CUMMINGS. Court of Appeals of the District of Columbia. Granted March 5, 1900. *Mr. Clarence A. Brandenburg* for petitioner.

Decisions announced without Opinions.

No. 523. McMaster, Administrator, *v.* New York Life Insurance Company. Eighth Circuit. Granted March 12, 1900. *Mr. Henry J. Taylor* for petitioner. *Mr. Frederic D. McKenney*, *Mr. G. W. Hubbell* and *Mr. W. E. Odell* opposing.

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No. 548. Bethlehem Iron Company *v.* Weiss. Third Circuit. Denied March 12, 1900. *Mr. Frank P. Prichard* and *Mr. John G. Johnson* for petitioner. *Mr. George Demming* opposing *pro hac vice.*

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No. 486. Oregon Railroad & Navigation Company *v.* Balfour. Ninth Circuit. Denied March 19, 1900. *Mr. A. B. Browne* and *Mr. W. W. Cotton* for petitioner. *Mr. William A. Maury*, *Mr. Geo. H. Williams* and *Mr. C. E. S. Wood* opposing.

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No. 539. Westinghouse Air Brake Company *v.* New York Air Brake Company et al. Second Circuit. Denied March 19, 1900. *Mr. Thomas B. Reed*, *Mr. F. H. Betts* and *Mr. George H. Christy* for petitioner. *Mr. Frederick P. Fish*, *Mr. John C. Spooner* and *Mr. Charles Neane* opposing.

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No. 538. Hamilton *v.* Fowler. Sixth Circuit. Denied March 19, 1900. *Mr. William M. Randolph* and *Mr. Thomas B. Turley* for petitioner.

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No. 526. Landon *v.* Bulkley. Second Circuit. Denied March 19, 1900. *Mr. Edward Winslow Paige* for petitioner. *Mr. John E. Parsons*, *Mr. C. N. Bovee*, *Jr.*, and *Mr. James L. Bishop* opposing.

# INDEX.

## ADMIRALTY.


1. The question in this case is as to the adequacy of the proof offered on behalf of the Government and the captors to show that the Newfoundland was trying to violate the blockade of Havana, and the court is of opinion that it does not attain to that degree which affords a reasonable assurance of the justice of the sentence of forfeiture in the court below — that it raises doubts and suspicions and makes probable cause for the capture of the ship and justification of her captors, but not forfeiture. *The Newfoundland*, 97.
2. It appearing in this case that both the charterer and the vessel had been previously engaged in bringing away refugees from Cuba, and were chargeable with notice of the military and naval operations against that island, that such facts were of common knowledge at the port from which she sailed, and that intercourse with Cuban ports was dangerous; and it appearing from a preponderance of evidence that both the charterer and master of the vessel had knowledge of the blockade: *held*, that the vessel was properly condemned. *The Adula*, 361.
3. If an examination of the ship's papers and the testimony of the crew, taken *in preparatorio*, make a case for condemnation, an order for further proof is only made where the interests of justice clearly require it: *held*, in this case that there was no error in denying the motion of the claimant for further proof. *Ib.*
4. No general rule of international law exempts mail ships from capture as prize of war. *The Panama*, 535.
5. A Spanish mail steamship, carrying mail of the United States from New York to Havana at the time of the breaking out of the recent war with Spain, was not exempt from capture by the sixth clause of the President's proclamation of April 26, 1898. *Ib.*
6. At the time of the breaking out of the recent war with Spain, a Spanish mail steamship was on a voyage from New York to Havana, carrying a general cargo, passengers and mails, and having mounted on board two breech-loading Hontoria guns of nine centimetre bore, and one Maxim rapid-firing gun, and having also on board twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns

and rifles, and thirty or forty cutlasses. Her armament had been put on board more than a year before, for her own defence, as required by her owner's mail contract with the Spanish Government, which also provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel, and, in these and other provisions, contemplated her use for hostile purposes in time of war. *Held*, that she was not exempt from capture as prize of war by the fourth clause of the President's proclamation of April 26, 1898. *Ib.*

7. The general rule is that in time of war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. *The Benito Estenger*, 568.
8. By the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. *Ib.*
9. Provisions are not, in general, deemed contraband; but they may become so if destined for the army or navy of the enemy, or his ports of naval or military equipment. *Ib.*
10. In dealing with a vessel asserted to be an enemy vessel, the fact of trade with the enemy in supplies necessary for the enemy's forces is of decisive importance. *Ib.*
11. Individual acts of friendship cannot change political status where there is no open adherence to the opposite cause and former allegiance remains apparently unchanged. *Ib.*
12. A consul has no authority by reason of his official station to grant exemption from capture to an enemy vessel; and this vessel was not entitled to protection by reason of any engagement with the United States. *Ib.*
13. In cases of peculiar hardship, or calling for liberal treatment, it is not for the courts, but for another department of the Government, to extend such amelioration as the particular instance may demand. *Ib.*
14. Transfers of vessels *flagrante bello* cannot be sustained if subjected to any condition by which the vendor retains an interest in the vessel or its profits, a control over it, or a right to its restoration at the close of the war. *Ib.*
15. The burden of proof in respect of the validity of such transfers is on the claimant, and the court holds as to the transfer in this case that requirements of the law of prize were not satisfied by the proofs. *Ib.*

*See* BLOCKADE.

## BLOCKADE.

1. A legal blockade may be established by a naval officer acting upon his own discretion, or under direction of superiors, without governmental notification. *The Adula*, 361.

2. In view of the operations being carried on for the purpose of destroying or capturing the Spanish fleet at Santiago de Cuba, and the reduction of that place, it was competent for the Admiral commanding the squadron to establish a blockade there, and at Guantanamo, as an adjunct to such operations, and such blockade was valid as against all vessels having notice thereof. *Ib.*
3. It appearing that Guantanamo was eighteen miles from the mouth of Guantanamo Bay and was still occupied by the enemy, *held*, that although the American troops occupied the mouth of the bay, the blockade was still operative as to vessels bound to the city of Guantanamo. *Ib.*
4. The legal effect of a lawful and sufficient blockade is a closing of the port, and an interdiction of the entrance of all vessels of whatever nationality or business. *Ib.*
5. The sailing of a vessel with a premeditated intent to violate a blockade, is *ipso facto* a violation of the blockade, and renders her subject to capture from the moment she leaves the port of departure. *Ib.*
6. If a master has actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries. *Ib.*
7. If a neutral vessel be chartered to an enemy, she becomes to a certain extent and *pro hac vice* an enemy's vessel, and a notice to her charterer of the existence of a blockade is a notice to the vessel. *Ib.*

CANALS.

*See* PUBLIC LAND, 11–14.

CASES AFFIRMED OR FOLLOWED.

1. The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company*, 176 U. S. 28; *Wilcox* v. *Eastern Oregon Land Company*, 51.
2. The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company*, 172 U. S. 28, and *Wilcox* v. *Eastern Oregon Land Co.*, Same, 51; *Messinger* v. *Eastern Oregon Land Company*, 58.
3. The reasons for refusing, at October Term, 1898, to dismiss this case on the ground that the appeal to this court was not taken in time, are the same as those set forth in *Allen* v. *Southern Pacific Railroad*, 173 U. S. 479; *Holt* v. *Indiana Manufacturing Co.*, 68.
4. *Walsh* v. *Columbus, Hocking Valley & Athens Railroad Co.*, 176 U. S. 469, followed. *Vought* v. *Columbus, Hocking Valley &c. Railroad Co.*, 481; *Wright* v. *Same*, 481.
5. *Hurtado* v. *California*, 110 U. S. 516, affirmed and followed. *Maxwell* v. *Dow*, 581.

*See* CONSTITUTIONAL LAW, B, 18;
JURISDICTION, C, 3;
RAILROAD, 11.

CASES DISTINGUISHED.

This case and *Western National Bank* v. *Armstrong*, 152 U. S. 346, distinguished. *Aldrich* v. *Chemical National Bank*, 618.

CHINESE IMMIGRANTS.

Under the act of July 5, 1884, c. 220, 23 Stat. 115, construed in connection with the treaty with China of November 17, 1880, 22 Stat. 826, the wives and minor children of Chinese merchants domiciled in this country may enter the United States without certificates. *United States* v. *Mrs. Gue Lim*, 459.

COMMUNITY PROPERTY.

The statute of Washington Territory of November 14, 1879, providing that one-half of the community property of husband and wife should be subject to the testamentary disposition of the husband or wife, subject respectively to the community debts, and, in default of such testamentary disposition that the share of deceased husband or wife should descend to his or her issue, or, if there was no such issue, should pass to the survivor, does no violation to the Constitution of the United States when applied to such community property held under the statute of that Territory of November 14, 1873, which provided that property acquired after marriage by either husband or wife, except such as might be acquired by gift, bequest, devise or descent, should be common property, of which the husband should have the entire management and control, with the like absolute power of disposition as of his own separate estate. *Warburton* v. *White*, 484.

CONSTITUTIONAL LAW.

A. Constitution of the United States.

1. The bill of complaint on the part of Louisiana against Texas, alleged that the State of Texas had granted to its Governor and its health officer extensive powers over the establishment and maintenance of quarantines over infectious or contagious diseases; that this power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas which were rivals of New Orleans; and it prayed for a decree that "neither the State of Texas, nor her Governor, nor her health officer, have the right, under the cover of an exercise of police or quarantine powers, to declare and enforce against interstate commerce, between the State of Louisiana, or any part thereof, and the State of Texas, an absolute embargo, prohibiting the movement and conduct of said commerce, or to make, declare and enforce against places infected with yellow fever or other infectious diseases in the State of Louisiana discriminative quarantine rules or regulations, affecting interstate commerce between the State of Louisi-

ana, or any part thereof, and the State of Texas, different from and more burdensome than the quarantine rules and regulations affecting interstate or foreign commerce between the State of Texas and other States and countries infected with yellow fever and other infectious diseases;" and the bill asked for an injunction, restraining the Texas officials from enforcing the Texas laws in the manner in which they were enforced. *Held:* (1) That in order to maintain jurisdiction of the bill it must appear that the controversy to be determined was a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in vindication of the grievances of particular individuals; (2) that the gravamen of this bill was not a special and peculiar injury, such as would sustain an action by a private person, but that the State of Louisiana presented herself in the attitude of *parens patriæ*, trustee, guardian or representative of all her citizens; (3) that the bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution; (4) that the court was unable to hold that the bill could be maintained as presenting a case of controversy between a State and citizens of another State; (5) that the bill could not be maintained as against the health officer alone, on the theory that his conduct was in violation of or in excess of a valid law of the State. MR. JUSTICE WHITE concurred in the result, MR. JUSTICE HARLAN concurred in the result, but dissented from some of the propositions contained in the opinion of the court: as did also MR. JUSTICE BROWN. *Louisiana* v. *Texas*, 1.

2. The decision in *Blake* v. *McClung*, 172 U. S. 239, referred to; and it is held that the judgment now under review was not in conformity with the opinion and mandate in that case — the court adjudging, as it had adjudged in the previous case, that when the general property and assets of a private corporation, lawfully doing business in a State, are in the course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand *in all respects* upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union. *Blake* v. *McClung*, 59.

3. A law of Nebraska permitting the prosecution of felonies by information is not in violation of the Constitution of the United States. *Bolln* v. *Nebraska*, 83.

4. Whatever be the limitations upon the power of a territorial government, it becomes entitled, upon the admission of such Territory as a State, to all the rights of dominion and sovereignty belonging to the original States, and stands upon an equal footing with them in all respects. *Ib.*

5. An objection that a defendant was denied due process of law in being refused a jury trial upon a plea in abatement, cannot be raised here, when no violation of the Fourteenth Amendment was set up until after the cause had been decided by the Supreme Court of the State. *Ib.*

6. The provision in section 1 of chapter 74 of the Laws of Kansas of 1891, authorizing certain first-class cities to take in described tracts of land in territory adjoining or touching the city limits and make them a part of the city by ordinance, and providing that "nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation" does not conflict with the provisions of the Constitution of the United States, when exercised by such a city to take in lands belonging to a railroad company which are not used for agricultural purposes, but are occupied by the company for railroad purposes. *Clark* v. *Kansas City*, 114.

7. The power of Congress to pass laws for the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned. *United States* v. *Bellingham Bay Boom Co.*, 211.

8. When the Attorney General acts under the authority conferred by the river and harbor act of September 19, 1890, c. 907, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by statute, and the court has jurisdiction, and it is its duty to decide whether the existing obstruction is or is not affirmatively authorized by law. *Ib.*

9. In such inquiry the court is bound to decide whether the boom, as existing is authorized by any law of the State, when such law is claimed to be a justification for its creation or continuance. *Ib.*

10. There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law. *Ib.*

11. The constitutional provision that full faith and credit shall be given in each State to the judicial proceedings in other States, does not preclude inquiry into the jurisdiction of the court, in which the judgment is rendered, over the subject-matter or the parties affected by it, or into the facts necessary to give such jurisdiction. *Thormann* v. *Frame*, 350.

12. The provision in the statute of Minnesota for 1893, c. 151, authorizing the Governor of the State when it is made to appear that there has been a gross undervaluation of taxable property by the assessors for any county in the State, to appoint a board to revalue and reassess it, which board shall, after due examination prepare a list of all such undervalued property, of the year or years in which it was so underassessed, the amount of the assessment and the actual and true value thereof for which it should have been so assessed, does no violation to the Four-

teenth Amendment to the Constitution of the United States, and does not deprive the owner of lands, so reassessed at an advanced value, of his lands without due process of law. *Weyerhaueser* v. *Minnesota*, 550.

13. The liability imposed upon stockholders in corporations by the provision in the constitution of the State of Kansas that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes" and by the statutes of that State which are referred to in the opinion of the court in this case, though statutory in origin, is contractual in its nature; and an action on this liability, not being one to enforce a penal statute of Kansas, but only to secure a private remedy, can be maintained in any court of competent jurisdiction, whether Federal or state. *Whitman* v. *Oxford National Bank*, 559.
14. The decision in *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law" in the Fourteenth Amendment to the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, has been often affirmed, and is now reaffirmed and applied to this case. *Maxwell* v. *Dow*, 581.
15. The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government. *Ib.*
16. The trial of a person accused as a criminal by a jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction do not abridge his privileges and immunities under the Constitution as a citizen of the United States and do not deprive him of his liberty without due process of law. *Ib.*
17. Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are proper to be determined by the citizens of each State for themselves, and do not come within the Fourteenth Amendment to the Constitution so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and the equal protection of the laws is secured to them. *Ib.*
18. A plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, can maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defend-

ant's stock. *Whitman* v. *Oxford National Bank, ante*, 559, followed to this point. *Hancock National Bank* v. *Farnum*, 640.

19. The action of the Supreme Court of Rhode Island in failing to recognize such right in the plaintiff in error can be revised by proceeding in error in this court. *Ib.*

20. The judgment rendered in the Kansas court is in that State conclusive against the corporation, as well as binding upon the stockholder, and, under the Constitution and laws of the United States when attempted to be enforced in their courts. *Ib.*

*See* INJUNCTION, 1; NON-RESIDENTS, &c., 3; LOG BOOMING, 2 to 7; PUBLIC LAND, 11; RAILROAD, 12, 13, 14.

B. CONSTITUTION OF STATES.

*See* CONSTITUTIONAL LAW, A, 1, 13, 17.

CONTRACT.

*ee* PUBLIC LAND, 11; RAILROAD, 15.

CONTRIBUTORY NEGLIGENCE.

*See* RAILROAD, 6.

CORPORATION.

*See* MORTGAGE.

COURT AND JURY.

*See* RAILROAD, 2, 4, 6.

CRIMINAL LAW.

*See* CONSTITUTIONAL LAW, A, 3, 14, 15, 16, 17.

CUSTOMS DUTIES.

1. The seizure of importations of teas purchased after the approval of the act of March 2, 1897, c. 358, entitled "An act to prevent the importation of impure and unwholesome tea," and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, could inflict no other injury than what it must be assumed was anticipated, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the conse-

quences on the ground of the invalidity of the law. *Cruickshank* v. *Bidwell*, 73.

2. Tapioca flour is not a preparation fit for use as starch, and under the tariff act of October 1, 1890, c. 1244, paragraph 720, is entitled to free entry. *Chew Hing Lung* v. *Wise*, 156.
3. The designation of an article, *eo nomine*, either for duty or as exempt from duty, must prevail over words of a general description which might otherwise include the article specially designated. *Ib.*

DISTRICT OF COLUMBIA.

1. A judgment of the Court of Claims, under the act of June 16, 1880, c. 243, in favor of the claimant, against the District of Columbia, upon a certificate of the board of audit of the District, in an action commenced in 1880, is not affected by the provision in the act of July 5, 1884, c. 227, forbidding the payment of such certificates, not presented for payment within one year from the date of the passage of the latter act. *Roberts* v. *United States*, 221.
2. The evident purpose of the act of August 13, 1894, c. 279, was to give the balance of interest upon the certificates between 3.65 and 6 per cent to the original holders of the certificates, or their assignees, the interest upon which had been paid only at the former rate. *Ib.*
3. The right of the relator as assignee having been admitted, it is no longer open to inquiry. *Ib.*
4. If a public officer of the United States refuses to perform a mere ministerial duty, imposed upon him by law, mandamus will lie to compel him to do his duty. *Ib.*
5. In this case, as the duty of the Treasurer of the United States to pay the money in question was ministerial in its nature, and should have been performed by him on demand; mandamus was the proper remedy for failure to do so. *Ib.*

EVIDENCE.

*See* MEXICAN GRANT, 2, 3, 4, 5.

EXECUTOR AND ADMINISTRATOR.

1. The bare appointment of an executor or administrator of a deceased person by the courts of one State cannot be held, on principle or authority, to foreclose inquiry as to the domicil of the deceased in the courts of another State. *Thormann* v. *Frame*, 350.
2. The general rule is that administration may be granted in any State or Territory where unadministered personal property of a deceased person is found, or real property subject to the claim of any creditor of the deceased. *Ib.*

## FRAUD.

*See* MORTGAGE.

## HUSBAND AND WIFE.

*See* COMMUNITY PROPERTY.

## ILLINOIS CENTRAL RAILROAD.

1. The charter of the Illinois Central Railroad Company authorized it to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages for the . . . complete operation of said road;" and granted to it "all such lands, waters, materials and privileges belonging to the State." A subsequent ordinance of the city of Chicago, passed in pursuance of authority granted by the legislature, forbade the driving or placing of any piles, stone, timbers or other obstruction in the harbor of the city, without the permission of the commissioner of public works. *Held:* that a Federal question was presented whether this ordinance impaired or interfered with the charter of the railroad company. *Held* further, that, under its charter, the railroad company had no right to take possession of lands submerged beneath the waters of Lake Michigan. *Held*, also, that the "waters" granted to the railroad company in the second part of the granting clause, were restricted to the "streams" mentioned in the first part, and did not include the waters of Lake Michigan. *Illinois Central Railroad Company* v. *Chicago*, 646.
2. Under another section of the charter, providing that the corporation should not locate its track within any city without the consent of the common council, *held*, that this proviso was not confined to the main track of the road, but included its depots, engine houses and necessary track approaches to the same. *Ib.*
3. This restriction was not limited to the city as bounded at the date of the charter, but applied also to territory subsequently included within the city limits. *Ib.*

## INJUNCTION.

1. The mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction; and in this case the averments of the complainants' bill did not justify such an interference with executive action. *Cruickshank* v. *Bidwell*, 73.
2. This case comes within the provision of Rev. Stat. § 720 to the effect that no writ of injunction shall be granted by a court of the United States to stay proceedings in any court of a State except in matters of bankruptcy. *United States* v. *Parkhurst-Davis Mercantile Co.*, 317.

## INTERSTATE COMMERCE.

*See* LOG BOOMING, 7.

## JURISDICTION.

### A. GENERALLY.

*See* RAILROAD, 14.

### B. JURISDICTION OF THE SUPREME COURT.

1. The plaintiff in error executed and delivered to the defendant in error a bond for $4900 (with a mortgage of real estate in Illinois to secure it), payable "in gold coin of the United States of America of the present standard weight and fineness." Default being made, the defendant in error brought suit to foreclose the mortgage, praying judgment according to the bond and mortgage. The plaintiff in error demurred, alleging that the matters and things set out in the bill were contrary to public policy and void, because it was not lawful for the parties to make any money but gold and silver a money tender in payment of the debt, and for other reasons set forth in the statement of the case, below. This was overruled, and, as no further answer was made, the trial court held that the debt and interest, etc., were due amounting to the sum of $5350.76 and decreed that if the sum due was not paid within five days, the mortgaged real estate should be sold. This decree was sustained by the Appellate Court, whose judgment was sustained by the Supreme Court of the State. *Held*, that the state Circuit Court, having simply held plaintiffs in error to respond in lawful money, and entered its decree accordingly, and the Supreme Court having decided that plaintiffs in error could not complain of that decree, because not prejudiced thereby, this was not a decision against any right secured by the Constitution or laws of the United States specially set up or claimed by plaintiffs in error in those courts. *Rae* v. *Homestead Loan and Guarantee Co.*, 121.
2. As the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both courts below dealt with the case on that assumption, this court has jurisdiction to review the judgment of the Circuit Court of Appeals. *Florida Central & Pennsylvania Railroad Co.* v. *Bell*, 321.
3. In order to maintain a direct appeal to this court from the Circuit Court of the United States under the act of March 3, 1891, c. 517, § 5, as to the jurisdiction of the court below, the record must distinctly and unequivocally show that that court sends up for consideration a single and definite question of its jurisdiction; but this may appear either by the terms of the decree appealed from and of the order allowing the appeal, or by a separate certificate of that court. *Huntington* v. *Laidley*, 668.

4. A certificate of a question of jurisdiction of the Circuit Court of the United States, under the act of March 3, 1891, c. 517, § 5, may be made by the District Judge, even if the decree was rendered by the Circuit Judge. *Ib.*

5. The question whether proceedings concerning the legal or equitable title to land, begun and concluded in the courts of a State, before the commencement of a suit in the Circuit Court of the United States to charge the land with a trust, afford a defence to this suit, is not a question affecting the jurisdiction of that court, but a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction; and if that court, of its own motion, and without hearing the parties on the question of its jurisdiction, enters a final decree dismissing the suit under the act of March 3, 1875, c. 137, § 5, upon the ground that by reason of the proceedings in the courts of the State the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, and an appeal is taken to this court upon the question of jurisdiction only, under the act of March 3, 1891, c. 517, § 5, the decree must be reversed and the cause remanded for further proceedings. *Ib.*

## JURISDICTION OF CIRCUIT COURTS.

1. The complaint of the Manufacturing Company that the assessment upon it of the taxes complained of was illegal, because in effect levied on patents or patent rights, did not involve the construction, or the validity, or the infringement of the patents referred to, or any other question under the patent laws, and was not therefore a suit arising under the patent laws, and the Circuit Court had no jurisdiction of it on that ground. *Holt* v. *Indiana Manufacturing Company*, 68.

2. The provisions in Rev. Stat. § 629, clauses 9 and 16, § 563, and § 1979 brought forward from the act of April 20, 1871, c. 22, refer to civil rights only, and are inapplicable here. *Ib.*

3. Following *United States* v. *Sayward*, 160 U. S. 493, and *Fishback* v. *Western Union Tel. Co.*, 161 U. S. 96, the court holds that the sum of $2000 named in § 1 of the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, was jurisdictional, and following *The Paquete Habana*, 175 U. S. 677, it holds that this is not affected by the fact that the operation of the act of March 3, 1891, c. 517, was to do away with any pecuniary limitation on appeals directly from the Circuit Court to this court. *Ib.*

4. The warrants and orders sued on in this case were payable to the order of Matthew Carr, deceased, who was a citizen of the State of Louisiana. They were assets of his estate, and the plaintiff in error acquired title to them through a judicial sale made by the sheriff of the parish of Concordia on the 22d day of May, 1868, under authority of an order of the probate court of said parish having the administration of said

estate. The plaintiff in the suit was, at the date of his said purchase, and at the date of filing his original petition herein, a citizen of the State of Louisiana. *Held*, that the plaintiff came within the restriction of § 1 of the act of March 3, 1875: "Nor shall any Circuit or District Court having cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in said court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange," and that the Circuit Court below correctly held that jurisdiction could not be sustained. *Glass* v. *Concordia Parish Police Jury*, 207.

5. As the plaintiffs, some of whom were citizens of Florida, and some of whom were citizens of Texas, elected to assert a joint claim to land in Florida in dispute in this case, which was commenced before the Circuit Court of the United States for the Southern District of Florida, and carried by appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and as they recovered a joint judgment for their undivided interests therein, and as the plaintiffs' declaration disclosed no Federal question, the principles settled in the cases cited by the court in its opinion apply, and compel a dismissal of the suit for want of jurisdiction in the Circuit Court. *Florida Central & Peninsular Railroad Co.* v. *Bell*, 321.

*See* CONSTITUTIONAL LAW, A, 13.

## LOG BOOMING.

1. The provision in § 2400 of the statutes of Minnesota of 1894, requiring each surveyor general to survey all logs and timbers running out of any boom now chartered or which may hereafter be chartered by law in his district, refers to corporations organized under a general law, as well as to those whose organization is provided for by special act. *Lindsay & Phelps Company* v. *Mullen*, 126.
2. The business of booming logs on the waters of streams running through the forests of the West is a lawful business, and the Minnesota Boom Company was a lawfully organized corporation for the purpose of doing such lawful business. *Ib.*
3. The statute of Minnesota requiring all logs running out of a boom to be surveyed, inspected and scaled, is compulsory, and such legislation was within the power of the State. *Ib.*
4. The scale bills in this case were certified as required by the laws of the State, and, being so certified, were competent evidence; and, when taken in connection with other evidence, supported the finding of the court that the work was done as alleged. *Ib.*
5. A record in the books of the surveyor general is not preliminary to a right to a lien for such work. *Ib.*
6. The logs of one party passing the boom can be subjected to a lien for surveying and scaling not only his own logs, but also for surveying

and scaling the logs of other parties, as any log owner may send his logs down the river without the use of the boom, taking proper care of them, and if he uses the boom he takes it subject to the conditions prescribed by the legislature. *Ib.*

7. The improvement made in the Mississippi River by the construction of the boom and its works, and the exaction of reasonable charges for the use of such works, including fees of state officials for surveying and scaling, if done under state authority, cannot be considered in any just sense a burden upon interstate commerce. *Ib.*

*See* CONSTITUTIONAL LAW, A, 7–10.

MANDAMUS.

*See* DISTRICT OF COLUMBIA, 4, 5.

MEXICAN GRANT.

1. In the hearing of an application for confirmation of an alleged Mexican grant the law casts primarily upon the applicant the duty of tendering such proof as to the existence, regularity and archive record of the grant, as well as his connection with it, such as possession, ownership and other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from the claimant to the United States. *United States* v. *Ortiz*, 422.
2. The surveyor general had authority to make a supplementary investigation, and the supplementary proceedings were properly admitted in evidence. *Ib.*
3. The special qualifications of the witness Tipton, resulting from his great familiarity with the signatures of Armijo and Vigil, qualified him to testify as an expert as to the genuineness of the signatures upon the alleged grant which were claimed to be theirs. *Ib.*
4. Genuine signatures of Armijo and of Vigil, shown to have come from the archives, were properly received in evidence as standards of comparison with the signatures offered to prove the alleged grant. *Ib.*
5. Enlarged photographs of such original signatures were also properly received. *Ib.*
6. After an extended examination of the testimony, the court holds that it is unnecessary to examine or decide upon the questions made as to the form of the alleged grant and other questions, and refrains from expressing an opinion upon all, and holds that the court below erred in confirming the grant. *Ib.*

MORTGAGE.

1 A mortgage, given to secure a large number of bonds, provided that the bonds should become payable if any execution should be sued out against the property of the company, and such company should not

forthwith pay the same. A bondholder brought suit before a justice of the peace upon six coupons. The defendant company consented to a judgment and to the issue of an execution; and upon the same day the trustees gave notice that, by reason of such execution having been unpaid, they declared the principal and interest upon all the bonds to be immediately payable; and at once took possession of the property. *Held:* That, while these proceedings were taken by connivance and consent of the parties, they were not conclusive in a legal sense, as the debt was honestly due and the plaintiff entitled to the judgment. *Held, also:* That while the judgment was obtained for the obvious purpose of enabling the trustees to declare the mortgage to be due, the court would not inquire into the motives of the parties. *Dickerman* v. *Northern Trust Company*, 181.

2. Where a bill is filed to foreclose a mortgage, and the answer admits the bonds secured by such mortgage to have been issued, it is not necessary that the bonds should be put in evidence before a decree of foreclosure and sale. *Ib.*
3. Bonds payable "to the bearer, or, when registered, to the registered owner thereof," and declared to be due on or before a certain date, are negotiable, though redeemable by instalments determined by annual drawings.
4. That the mortgagor corporation may have been organized for the purpose of creating a trust or unlawful combination in restraint of trade, is no defence to the mortgage. *Ib.*
5. The fact that such corporation was organized in pursuance of a fraudulent scheme to defraud certain stockholders who had contributed their properties to the capital stock of the corporation, is no defence to a foreclosure of the mortgage, so far, at least, as the bonds were held by parties innocent of the fraud. *Ib.*
6. Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the shareholders, and are precluded from taking a secret advantage of other shareholders. *Ib.*

*See* RAILROAD, 8, 9, 10.

## NATIONAL BANK.

1. As a general rule, the legal owner of stock in a national banking association — that is, the one in whose name stock stands on the books of the association — remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, although the registered owner may have made a transfer to another person, unless it had been accompanied by a transfer on the books of registry of the association, such registered owner remains liable for contributions in case of the insolvency of the bank. *Matteson* v. *Dent*, 521.

2. The exceptions to this general rule so far as established by decisions of this court are: (1) That where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner be held liable; (2) that where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, those acts will operate a transfer on the books, and extinguish the liability, as stockholder, of the transferrer; (3) where stock was transferred in pledge, and the pledgee for the purpose of protecting his contract caused the stock to be put in his name as pledgee, and a registry did not amount to a transfer to the pledgee as owner. *Ib.*

3. H., as vice president of a Cincinnati bank, made application to a New York bank for a loan of $300,000. The request was granted and that amount was placed to the credit of the Cincinnati bank upon the books of the New York bank. Immediately thereafter H. fraudulently caused himself to be personally credited upon the books of his own bank with a like sum of $300,000. The action of H. in negotiating the above loan with the New York bank was unauthorized by the board of directors of the Cincinnati bank, but after the arrangement had been made that bank drew out by check the money that had been placed to its credit by the New York bank and used the same in discharging its valid obligations. *Held*, that by so using the money obtained from the New York bank by H. in his capacity of vice president, the Cincinnati bank became bound to account for the same as for money had and received, and could not escape liability to the New York bank upon the mere ground, supposing it to be true, that it was not permitted by its charter to borrow money. The fraud perpetrated by H. upon his own bank in having himself personally credited upon its books with the amount of the loan, was a matter with which the New York bank had no connection, and its right to recover could not be affected thereby. The liability of the Cincinnati bank rested upon the fact, and the implied obligation arising therefrom, that that bank used in its business and for its benefit the money which the other bank placed to its credit in consequence of the loan negotiated by H. who assumed to represent it. *Aldrich* v. *Chemical Bank*, 618.

4. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others without incurring liability for so doing. *Ib.*

*See* CONSTITUTIONAL LAW, A, 13.

## NON-RESIDENTS — SERVICE OF PROCESS UPON.

1. A state statute authorizing service of process by publication or otherwise upon absent and non-resident defendants, has no application to suits *in personam;* but is a sufficient authority for the institution of suits *in rem*, where, under recognized principles of law, such suits

may be instituted against non-resident defendants. *Roller* v. *Holly*, 398.

2. Where a statute specifies certain classes of cases which may be brought against non-residents, such specification operates as a restriction and limitation upon the power of the court; but where the power is a general one it is, as respects suits *in rem*, subject to no limitation. *Ib.*
3. Where service of process was made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, it is held that such notice was not a reasonable one, was not "due process of law" within the Fourteenth Amendment to the Constitution of the United States, and that a judgment obtained upon such notice was not binding upon the defendant. *Ib.*

PRACTICE.

1. The decree heretofore entered in this case is vacated, and a new decree is entered *nunc pro tunc* as of March 13, 1899, affirming the decree of the Circuit Court of Appeals in all respects. *New Orleans* v. *Warner*, 92.
2. Clerks of the Circuit Court of Appeals, having prepared the records on which causes are heard therein for the printer, indexed, and supervised the printing of the same, and distributed the printed copies thereof, and been paid therefor, may certify one of such copies for use on application to this court for certiorari. *Toledo, St. Louis &c. Railroad* v. *Continental Trust Co.*, 219.
3. The reproduction of transcripts, in manuscript or in print, under such circumstances, is not required. *Ib.*
4. On motion of the plaintiff made after commencement of the trial of this case, a juror was withdrawn, the remaining jurors were dismissed, and leave was given to the plaintiff to amend his declaration within a time named, and the case was continued for the term. Subsequently, on motion of the defendants' attorney, made after notice to plaintiff, the time within which the amendment could be filed was enlarged, and the plaintiff was ordered to pay the costs of the term in which the juror was withdrawn. The plaintiff declined to pay those costs and the court dismissed the case. *Held*, that the trial court erred in so doing, as whatever conditions or rights the defendants were entitled to in consequence of the plaintiff's motion should have been asserted and adjudged when that motion was made. *Jackson* v. *Emmons*, 532.

*See* RAILROAD, 1.

PRIZE CASES.

*See* ADMIRALTY.

PUBLIC LAND.

1. By the act of July 2, 1864, 13 Stat. 365, c. 217, Congress granted lands to the Northern Pacific Railroad Company to aid in the construction

of a railroad and telegraph line from a point on Lake Superior in Wisconsin or Minnesota to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon. The grant was of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." In March, 1865, the president of that company filed in the Land Department a map which if of value for any purpose was only a map of "general route," not one of definite location between Wallula and Portland. That map was not accepted. By act of July 25, 1866, 14 Stat. 239, c. 242, Congress made a grant of land in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of that grant as to the part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands here in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon and California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the President, and at the time this suit was begun was being operated and had been continuously operated by that company. The Oregon Company filed its map of definite location in 1870, and it was accepted by the Land Department. By the act of September 29, 1890, 26 Stat. 496, c. 1040, all lands theretofore granted to any State or corporation to aid in the construction of a railroad opposite to or coterminous with the portion of any such railroad not then completed and in operation, for the construction of which such lands were granted, were forfeited to the United States. There never was any withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was there any definite location or construction of its road opposite to the lands in suit. *Held*, (1) That

nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad. (2) That as the grant contained in the act did not include any lands that had been reserved, sold, granted or otherwise appropriated at the time the line of the Northern Pacific Railroad was "definitely fixed;" as the route of the Northern Pacific Railroad had not been definitely fixed at the time the act of July 25, 1866, was passed, or when the line of the Oregon Company was definitely located; as the lands in dispute are within the limits of the grant contained in the act of 1866; as the route of the Oregon Railroad was definitely fixed, at least when the map showing that route was accepted by the Secretary of the Interior on the 29th day of January, 1870,— the Northern Pacific Railroad Company having done nothing prior to the latter date except to file the Perham map of 1865; and as prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there is no escape from the conclusion that these lands were lawfully earned by the Oregon Company and were rightfully patented to it. Of course, if the route of the Northern Pacific road had been definitely located before the act of 1890 was passed, and had embraced the lands in dispute, different questions would have been presented. *United States* v. *Oregon & California Railroad Company*, 28.

2. The grant of public land made to the State of Alabama by the act of June 3, 1856, c. 41, to aid in the construction of railroads, to be subject to the disposal of the legislature for the purposes named in the act and no other, with a provision that if any of said roads were not completed within ten years the lands remaining unsold should revert to the United States, was a grant *in præsenti;* the condition so expressed was a condition subsequent; and the rights and powers of the State continued until the grant should be directly forfeited by judicial or legislative proceedings. *United States* v. *Tennessee & Coosa Railroad Co.*, 242.

3. The provision in the act of September 29, 1890, c. 1040, that "there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation, to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain," did not operate upon lands opposite completed roads, and such lands were not thereby forfeited or resumed. *Ib.*

4. The allegation that the sale to Carlisle was without consideration and colorable was not sustained by the evidence. *Ib.*

5. Although the bill was framed to secure a forfeiture of the entire grant, that does not preclude a forfeiture for a part of it. *Ib.*

6. Decisions of the land department in contest cases on questions of fact are conclusive. *Moss* v. *Dowman*, 413.

7. Dowman went upon the public land in controversy, then unoccupied, on the 19th September, 1890, built a cabin and continued to live there. November 18, 1890, he made a formal homestead entry in the local land office, and after five years of continued occupancy and proof of the same he received a patent. On May 7, 1890, one Doran made a homestead entry of the same land without occupying it, which he subsequently relinquished, Moss paying him $1000 therefor, and thereupon Moss on the 24th of October, 1890, filed that relinquishment in the local land office, and made a homestead entry in her own name. April 22, 1891, she appeared on the land, commenced the construction of a house, and occupied it when finished. A contest between the two as to which had the right to acquire title was finally settled by the Secretary of the Interior in favor of Dowman. *Held*, that the decision of the Secretary was correct. *Ib.*

8. The power to review and set aside the action of local land officers exists in the general land department. *Guaranty Savings Bank* v. *Bladow*, 448.

9. When an entry is cancelled, after due notice to the entryman, and after a hearing in the case, it is conclusive against him everywhere, upon all questions of fact; and it cannot be regarded as a mere nullity, when set up against his mortgagee, even though such mortgagee had no notice of the proceeding to cancel the certificate. *Ib.*

10. Such an entry does not transfer the title to the land, but simply furnishes *prima facie* evidence of an equitable claim for a patent, and the use of the certificate for that purpose is subject to be destroyed by its official cancellation. *Ib.*

11. By an act of Congress passed in 1828, a large quantity of land was granted to the State of Ohio for the construction of canals. The act provided that such canals "when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States." The grant was accepted by the State; but in 1894, the state legislature authorized the abandonment of certain canals, which had been constructed under the act of Congress, and the leasing of the same to a railroad company. *Held*, that there was reason to claim that the act of 1894 impaired the obligation of the previous contract between the state and the Federal Government, and that a Federal question was thereby raised. *Held*, further, that in accepting the Congressional land grant of 1828, there was no undertaking on the part of the State to maintain the canals as such in perpetuity, and that the Government was only entitled to their free use as long as they were kept up as public highways, and that the act of the legislature of Ohio, authorizing their abandonment as canals and leasing them to a railway company, did no violence to the contract clause of the Constitution. *Held*, further, that a private property owner was no party to

the contract between the state and the Federal Government, and stood in no position to take advantage of a default of the State in respect to its contract. His rights were entirely subsidiary to those of the Government, and if the latter chose to acquiesce in the abandonment of the canals, he had no right to complain. *Walsh* v. *Columbus, Hocking Valley and Athens Railroad Co.*, 469.

*See* MEXICAN GRANT.

## RAILROAD.

1. The State of South Dakota having passed an act providing for the appointment of a board of railroad commissioners, and authorizing that board to make a schedule of reasonable maximum fares and charges for the transportation of passengers, freight and cars on the railroads within the State, provided that the maximum charge for the carriage of passengers on roads of the standard gauge should not be greater than three cents per mile; and that board having acted in accordance with the statute, and having published its schedule of maximum charges, the Chicago, Milwaukee and St. Paul Railway Company filed the bill in this case in the Circuit Court of the United States for the District of South Dakota, seeking to restrain the enforcement of the schedule. The railroad commissioners answered fully, and testimony was taken before an examiner upon the issues made by the pleadings. This testimony was reported without findings of fact or conclusion of law. The case went to hearing. The Judge, without the aid of a master, examined the pleadings and the mass of proof. He made findings of fact and conclusions of law; delivered an opinion; and rendered a decree dismissing the bill. This court is of opinion: (1) That neither the findings made by the court, nor such facts as are stated in its opinion, are sufficient to warrant a conclusion upon the question whether the rates prescribed by the defendants were unreasonable or not, and that the process by which the court came to its conclusion is not one which can be relied upon; (2) that there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined; (3) that the better practice would be to refer the testimony, when taken, to the most competent and reliable master, general or special, that can be found, to make all needed computations, and find fully the facts; so that this court, if it should be called upon to examine the testimony, may have the benefit of the services of such master. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Tompkins*, 167.
2. Under a regulation requiring railroad tracks running through the streets of a city to be fenced, whenever the grade is "approximately even" with the adjacent surface of the streets, it is proper for the

jury to say whether a track elevated two feet two inches above the surface of the street, is within the regulation. *Baltimore & Potomac Railroad* v. *Cumberland*, 232.

3. Where the declaration averred that there was "no light" upon the engine to indicate its approach, and the proof was that an insufficient light was carried, it was held that there was no material variance. *Ib.*
4. Where the regulation required that "a headlight, or other equivalent reflecting lantern," should be carried upon a train to indicate its approach, it is for the jury to say whether an ordinary hand-lantern is a substantial compliance with the regulation. *Ib.*
5. In determining the existence of contributory negligence, the plaintiff is not liable for faults which arise from inherent mental or physical defects, or want of capacity to appreciate what is and what is not negligence. He is only responsible for the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. *Ib.*
6. While under the circumstances of this case the court might have held the plaintiff liable for contributory negligence, if he had been a man of mature age and average intelligence, as he was a boy of twelve years of age, it was held that the question was properly submitted to the jury. *Ib.*
7. A person crossing the track of a railroad company in the streets of a city for the more convenient performance of his duties is not *ipso facto* a trespasser. *Ib.*
8. In a decree for the foreclosure and sale of a railroad property under a mortgage, power was reserved by the court to compel the purchaser to pay any and all receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage debts or entitled to preference in payment out of the proceeds of sale. *Held*, that the rights of creditors whose claims had been filed were not affected by the sale of the property or by the fact of its transfer to the purchaser; nor did the reservation in the order of sale prevent the purchaser from contesting upon their merits any claims allowed after the purchase under the decree of sale. *Southern Railway Co.* v. *Carnegie Steel Co.*, 257.
9. A railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; that, within this rule, a debt not contracted upon the personal credit of the company, but in order to keep the railroad itself in condition to be used with reasonable safety for the transportation of persons and property, and with the expectation of the parties that it was to be met out of the current receipts of the company, may be treated as a current debt; that whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other cir-

cumstances attending the transaction; and that when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the funds thus improperly diverted from their primary use. *Ib.*

10. A general, unsecured creditor of an insolvent railroad corporation in the hands of a receiver is not entitled to priority over mortgage creditors in the distribution of net earnings simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and the benefit of the mortgage securities. Before such a creditor is accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad company, it should reasonably appear, from all the circumstances, that the debt was one to be fairly regarded as part of the operating expenses of the railroad incurred in the ordinary course of business and to be met out of current receipts. *Ib.*
11. The principles announced in *Southern Railway Co.* v. *Carnegie Steel Co.*, *ante*, 257, reaffirmed; but the claims filed in this suit were held not to be current receipts of an insolvent railroad company in the hands of a receiver in preference to the claims of mortgage creditors. *Lackawanna Iron & Coal Co.* v. *Farmers' Loan & Trust Co.*, 298.
12. While the legislative power to amend or repeal a statute cannot be availed of to take away property already acquired, or to deprive a corporation of fruits of contracts lawfully made already reduced to possession, the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and, when unexecuted, cannot be held to be in itself a vested right surviving the existence of the franchise, or an authorized circumscription of its scope. *Adirondack Railway Co.* v. *New York State*, 335.
13. The highest court of the State of New York having held that there is no property in a naked railroad route in that State which the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are by appropriate legislation authorized to act, this court accepts the views of that court, and thinks that the proceedings on the part of the State which are complained of in this case, impaired the obligation of no contract between it and the railway company. *Ib.*
14. The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the Government; and this must obviously be so when the State takes for its own purposes. *Ib.*
15. The railway company, being engaged as a common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which

contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. Voigt made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to his application, was employed by the express company under a contract in writing signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. *Held*, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood*, 17 Wall. 357; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the ben-

efit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy. *Baltimore & Ohio Southwestern Railway Co.* v. *Voigt*, 498.

16. The charter of the Illinois Central Railroad Company authorized it to "enter upon and take possession of and use all and singular any lands, streams and materials of every kind for the location of depots and stopping stages for the . . . complete operation of said road;" and granted to it "all such lands, waters, materials and privileges belonging to the State." A subsequent ordinance of the city of Chicago, passed in pursuance of authority granted by the legislature, forbade the driving or placing of any piles, stones, timber or other obstruction in the harbor of the city, without the permission of the commissioner of public works. *Held*, that a Federal question was presented whether this ordinance impaired or interfered with the charter of the railroad company. *Held*, further, that, under its charter, the railroad company had no right to take possession of lands submerged beneath the waters of Lake Michigan. *Held*, also, that the "waters" granted to the railroad company in the second part of the granting clause, were restricted to the "streams" mentioned in the first part, and did not include the waters of Lake Michigan. *Illinois Central Railroad Co.* v. *Chicago*, 646.
17. Under another section of the charter, providing that the corporation should not locate its tracks within any city without the consent of the common council, *held*, that this proviso was not confined to the main track of the road, but includes its depots, engine houses and necessary track approaches to the same. *Ib.*
18. This restriction was not limited to the city as bounded at the date of the charter, but applied also to territory subsequently included within the city limits. *Ib.*

*See* PUBLIC LAND, 1.

## SALARY.

Extra compensation received by a District Judge for holding court outside of his own district is no part of his official salary, or recoverable as such under the provisions of the retiring act. *Benedict* v. *United States*, 357.

## STATUTE.

### A. STATUTES OF THE UNITED STATES.

*See* CHINESE IMMIGRANTS;
CONSTITUTIONAL LAW, 8;
CUSTOMS DUTIES, 1, 2;
DISTRICT OF COLUMBIA, 1, 2;
JURISDICTION, B, 3, 4, 5;
INJUNCTION, 2;
JURISDICTION, C, 2, 3, 4;
PUBLIC LAND, 1, 2, 3, 11.

B. STATUTES OF STATES AND TERRITORIES.

*Illinois.* *See* ILLINOIS CENTRAL RAILROAD.
*Kansas.* *See* CONSTITUTIONAL LAW, 3.
*Minnesota.* *See* CONSTITUTIONAL LAW, 12; LOG BOOMING.
*Nebraska.* *See* CONSTITUTIONAL LAW, 3.
*South Dakota.* *See* RAILROAD, 1.
*Washington.* *See* COMMUNITY PROPERTY.

## SUITS BETWEEN STATES.

*See* CONSTITUTIONAL LAW, 1.

## TERRITORY.

*See* CONSTITUTIONAL LAW, 4.